IN RE ZAKAI F.*
(AC 41531)

DiPentima, C. J., and Alvord and Bear, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court denying her motion for the reinstatement of guardianship of her minor son, Z. The mother voluntarily had agreed to relinquish temporary guardianship of Z to his maternal aunt, the petitioner. Subsequently, when the mother requested that the petitioner return Z to her care, the petitioner did not respond and, instead, filed a petition for the custody and guardianship of Z in the Probate Court, which issued an

* 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.

order vesting the petitioner with temporary custody of Z. Thereafter, the matter was transferred from the Probate Court to the Superior Court, where the parties entered into a stipulated agreement that, inter alia, transferred guardianship of Z to the petitioner. Subsequently, the trial court denied the mother's motion to reinstate her guardianship rights to Z and granted the motion filed by the guardian ad litem to suspend overnight visitation. Specifically, the court found that, even though the mother was capable of adequately providing for Z and there had never been a judicial adjudication of neglect or abuse of Z, reinstatement of the mother's guardianship rights was not in Z's best interests. On appeal, the mother claimed, inter alia, that the trial court violated her fundamental right to the care and custody of Z under the United States constitution by denying her motion for the reinstatement of guardianship without a showing that she was unfit, and without a finding by clear and convincing evidence that Z would be at a substantial risk of physical or emotional harm if the guardianship of him by the petitioner were terminated. *Held*:

1. The respondent mother's claim on appeal that the trial court violated her fundamental right to the care and custody of Z was not properly preserved, the mother having failed to object to the trial court's application of the best interest of the child or fair preponderance of the evidence standards; the mother's constitutional claims on appeal, that it was the court's sole reliance on the best interest of the child standard that violated her fundamental parental rights, and that the court should have required the petitioner to prove physical and emotional harm to Z by clear and convincing evidence in order to defeat the asserted presumption that the mother, as a fit parent, would act in the best interest of Z, were not distinctly raised before the court, where the mother merely requested that the court apply the presumption that reinstatement of her guardianship was in Z's best interest.
2. The respondent mother's unpreserved claims that the trial court failed to apply the constitutional presumption that she, as a fit parent, would act in the best interest of Z, and that the court's failure to apply the clear and convincing evidence standard, which she claimed should apply in reinstatement of guardianship cases concerning a fit parent, violated her constitutional rights to the care and custody of Z, failed under the third prong of *State* v. *Golding* (213 Conn. 233), as the alleged constitutional violation did not exist; the trial court properly determined that the petitioner and Z had presented evidence, including evidence that Z felt unsafe and insecure when he was with the mother for overnight visitation, which rebutted the presumption that it was in Z's best interest to be returned to the mother's care, and the trial court, in determining Z's best interests, properly applied the fair preponderance of the evidence standard required by our statutes, rules of practice, and the precedent of our Supreme Court, which had previously concluded that the fair preponderance of the evidence standard satisfied the constitutional minimum of fundamental fairness in third-party custody disputes.

3. The trial court did not abuse its discretion in finding that it was in Z's best interest to remain in the care, custody, and guardianship of the petitioner, as the court properly considered evidence presented by the petitioner and Z rebutting the presumption that reunification with the respondent mother was in Z's best interest.

Argued September 7—officially released October 30, 2018**

Procedural History

Petition by the maternal aunt for the custody and guardianship of the respondent mother's minor child, brought to the Probate Court for the district of Derby, which issued an order vesting the petitioner with temporary custody of the child; thereafter, the matter was transferred to the Superior Court in the judicial district of Ansonia-Milford, where the respondent filed a motion to vacate the order of temporary custody; subsequently, the matter was transferred to the Superior Court in the judicial district of New Haven, Juvenile Matters, where the parties entered into a stipulated agreement that, inter alia, transferred guardianship of the child to the petitioner; thereafter, the court, *Conway*, *J.*, denied the respondent's motion to reinstate her guardianship rights to the child, granted the motion filed by the guardian ad litem to suspend overnight visitation, and rendered judgment thereon, from which the respondent appealed to this court. *Affirmed.*

Benjamin M. Wattenmaker, assigned counsel, for the appellant (respondent mother).

Albert J. Oneto IV, assigned counsel, for the appellee (petitioner).

David B. Rozwaski, for the minor child.

Louise Truax and *Leslie Jennings-Lax* filed a brief for the American Academy of Matrimonial Lawyers, Connecticut Chapter, as amicus curiae.

** October 30, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

BEAR, J. The respondent mother, Kristi F., appeals from the judgment of the trial court denying her motion for reinstatement of guardianship of her minor son, Zakai F. The respondent claims that the court violated her fundamental right to the care and custody of Zakai under the United States constitution by denying her motion (1) without a showing that she was unfit, and (2) without a finding by clear and convincing evidence that Zakai would be at a substantial risk of physical or emotional harm if the current guardianship of him by his aunt, the respondent's sister, were terminated. The respondent additionally claims that the court abused its discretion in concluding that her reinstatement as guardian was not in Zakai's best interest. We disagree with the respondent's claims and, accordingly, affirm the judgment of the court.

The record reveals the following facts and procedural history. In approximately July, 2013, the respondent voluntarily agreed to relinquish, and the Probate Court therefore ordered, temporary guardianship of Zakai to the petitioner, Nikki F., who is the respondent's sister and Zakai's maternal aunt. The parties agreed that Zakai would be cared for temporarily by the petitioner while the respondent pursued employment opportunities, secured funds to obtain appropriate housing, and obtained a reliable vehicle. The respondent reassumed guardianship and care of Zakai in late January or early February, 2014. Shortly after returning to the respondent's care, Zakai was physically assaulted and seriously injured by the respondent's live-in boyfriend, Montreal C., while the respondent was at work.[1] Both the respondent and Montreal C. were criminally

[1] The respondent's counsel, in her argument to the trial court after the hearing on the respondent's motion to transfer guardianship, stated that "[t]he whole ordeal began when Zakai suffered a terrible beating at the hands of [Montreal C.]."

charged after the assault. The charges against the respondent were ultimately dropped, but the charges against Montreal C. continued to be prosecuted.[2]

Because of the respondent's work commitments and Zakai's emotional and physical state following Montreal C.'s assault,[3] the respondent agreed that Zakai again would stay temporarily with the petitioner.[4] Approximately four or five days after Zakai was placed in the petitioner's care, the respondent requested that the petitioner again return Zakai to her care. The petitioner did not respond to the respondent's request, but instead, on February 18, 2014, filed a petition for custody and guardianship in the Probate Court for the district of Derby, which issued an ex parte order vesting her with temporary custody of Zakai.

On July 9, 2014, the respondent filed a motion in the Probate Court for transfer of the case to the Superior Court. On July 16, 2014, the motion was granted and the case was transferred to the family division of the Superior Court in Milford. On August 1, 2014, the respondent filed a motion to vacate the Probate Court order granting the petitioner temporary custody of Zakai. On September 29, 2014, by agreement of the parties, the court ordered that (1) a guardian ad litem be appointed for Zakai; (2) the respondent continue to engage in anger management counseling, therapy, and

[2] In late 2014, the respondent gave birth to her and Montreal C.'s daughter, Zariah. The respondent did not cease contact with Montreal C. until March, 2016, approximately two years after he assaulted Zakai. A major impetus behind the respondent severing contact with Montreal C. was her desire to reunify with Zakai.

[3] From April, 2014, to present, Zakai has been engaged in individual therapy sessions as a result of his exhibited trauma like behaviors following the February, 2014 assault.

[4] Zakai has remained in the continuous care and custody of the petitioner since early February, 2014, a period now in excess of four years. Conversely, the respondent and Zakai have not constituted an intact family since early February, 2014.

parenting classes; and (3) the respondent be afforded supervised visitation with Zakai at a location other than the home of the petitioner up to twice a week, subject to the requirements that the length of visitation be determined by the petitioner, visitation occur only at sites acceptable to the petitioner, and only persons acceptable to the petitioner be present during visitation.

In the fall of 2014, the respondent was arrested after an incident in a public park involving the petitioner and a maternal uncle of Zakai, and she was charged with threatening and breach of peace. A criminal protective order was issued barring any contact between the respondent and the petitioner, but reserving for the family division of the Superior Court the issue of the appropriateness of the respondent's continued contact with Zakai.[5] On April 6, 2015, the court granted the petitioner's motion to have the case transferred to the juvenile division of the Superior Court in New Haven.

On June 18, 2015, the court, *Conway*, *J.*, ordered the Commissioner of Children and Families (commissioner) to conduct a guardianship study. The guardian ad litem moved for a court ordered psychological evaluation of the parties, and that motion was granted on December 29, 2015.

A hearing on the respondent's 2014 motion to vacate the order of temporary custody and her motion to transfer guardianship of Zakai to her was scheduled on September 21 and 22, 2016. On September 21, 2016, however, the court accepted and approved an agreement resolving all outstanding issues. Pursuant to this agreement, the court transferred guardianship of Zakai to the petitioner, ordered unsupervised daytime visits between the respondent and Zakai, and ordered

[5] In early 2015, the respondent arranged, because of the criminal protective order, for a professional visitation agency to supervise her visits with Zakai.

that, until the protective order was resolved or modified, the petitioner would have a third party present in her home while exchanging custody of Zakai with the respondent. The stipulation also required that any further expansions of the visitation schedule, including overnight visits, would be arranged through family therapy.

On June 27, 2017, the respondent filed another motion to reinstate her guardianship rights to Zakai. Subsequently, the court again ordered the commissioner to conduct and complete a guardianship study pursuant to General Statutes § 46b-129 (n). The respondent subsequently filed a motion for overnight visitation on November 3, 2017, which was heard with her motion for reinstatement of guardianship. The hearing on the motions took place on December 5, 11, and 12, 2017. On December 12, 2017, the court elected to hold in abeyance any definitive ruling on the motion to reinstate the respondent's guardianship rights and instead ordered that Zakai immediately commence overnight visits with the respondent. The court further ordered that the respondent exclusively was to care for Zakai during the overnight visits and that there was to be no contact between Zakai and any unrelated male adults.

On February 2, 2018, the guardian ad litem moved that the court suspend overnight visitation, alleging that the respondent had violated the court's December 12, 2017 order by having an unrelated male stay at her home while Zakai was there. On February 15, 2018, the court reconvened the proceedings to hear testimony and receive other evidence regarding the guardian ad litem's motion on behalf of Zakai to suspend overnight visitation and the respondent's June, 2017 motion to reinstate her guardianship rights. The court heard additional testimony from numerous witnesses on February 15, February 28, and March 1, 2018.

On March 1, 2018, the court issued its memorandum of decision denying the respondent's motion for reinstatement of her guardianship rights and granting the guardian ad litem's motion on behalf of Zakai to suspend overnight visitation. The court found that, despite the fact that there had never been a judicial adjudication of neglect or abuse of Zakai, reinstatement of the respondent's guardianship rights pursuant to General Statutes § 45a-611 (b) was not in Zakai's best interest. The court stated that the respondent had demonstrated that as of March 1, 2018, she was capable of adequately providing for Zakai, that they shared a loving parent-child like bond, and that the respondent and Zakai enjoyed quality time together when Zakai felt he was in a safe environment. The court, however, weighed these findings against testimony and evidence regarding Zakai's emotional and physical debilitation before and after overnight visits with the respondent, and his need for permanency. Specifically, the court credited the testimony of Zakai's first grade teacher, Zakai's therapist, and the petitioner rather than that of the respondent.

The court ultimately found that, "[g]iven the totality of the circumstances in [Zakai's] life, the degree of early childhood trauma he has already experienced, the length of time (four years) he has spent in [the petitioner's] care, his [attention deficit hyperactivity disorder] diagnosis and his behavioral and emotional issues, and the lack of safety and security [he] feels (after three years of working on the [mother-child] bond), to abruptly remove [Zakai] from [the petitioner's] care and home, particularly given his behaviors since December of 2017, would be cruel, inflict devastating loss and pain on Zakai, and likely exacerbate rather than ameliorate [Zakai's] alarming behaviors." The court concluded that, based on a fair preponderance of the evidence, it was not in Zakai's best interest to return to the respondent's care. This appeal followed.

I

A

The respondent claims that the court violated her fundamental right to the care and custody of Zakai under the United States constitution by denying her motion for reinstatement of guardianship (1) without a showing that she was unfit, and (2) without a finding by clear and convincing evidence that Zakai would be at a substantial risk of physical or emotional harm if the current guardianship of him by the petitioner were terminated. The respondent argues that, as applied to the respondent, § 45a-611 violates her fundamental liberty interest in the care and custody of her son. The petitioner counters that the respondent's constitutional arguments were not preserved, the respondent's arguments are not reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), and that the court did not abuse its discretion in determining that reinstatement of guardianship in the respondent was not in Zakai's best interest.

We begin by looking, pursuant to Practice Book § 60-5,[6] to the record to determine whether the respondent's claims were properly raised before the trial court. "[B]ecause our review is limited to matters in the record, we . . . will not address issues not decided by the trial court." (Internal quotation marks omitted.) *Burnham* v. *Karl & Gelb, P.C.*, 252 Conn. 153, 171, 745 A.2d 178 (2000). "[T]he sine qua non of preservation is fair notice to the trial court . . . ." (Citation omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753–54, 66 A.3d 869 (2013). "[T]he determination of whether a claim has

[6] Practice Book § 60-5 provides in relevant part that "[an appellate] court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court."

been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." Id., 754.

The following additional procedural history is relevant to this issue. During oral argument to the court on December 12, 2017, concerning the respondent's motions for overnight visitation and reinstatement of guardianship, the respondent's counsel made the following statements referencing the best interest of the child standard in the context of the requested transfer of guardianship:

"[The Respondent's Counsel]: [I]n . . . Connecticut, the law [set forth in Practice Book §] 35a-20 . . . requires proof by [a] fair preponderance of the evidence that the circumstances that [led] to the original transfer of guardianship . . . no longer exist. And then, secondly, that it's in the best interest of the child for guardianship to be returned to the parent.

* * *

"So, now we turn to the best interest argument. [The respondent] has an appropriate home. She earns a living and is able to provide for her family. She has a happy, healthy, three year old child, who has absolutely no [Department of Children and Families (department)] involvement. She's long free of the criminal justice system. And even according to [the department] there are no safety concerns. The previous safety concerns that [the department] had, you heard testimony that she believed that she doesn't have those anymore. Zakai expresses to [the respondent] that he wants to be home with her. So, if everything weighs heavily towards reunification, what's left to talk about [is] best interest."

The respondent's § 45a-611 constitutional claim, raised for the first time on appeal, is based, in part, on

the court's March, 2018 finding that she had rehabilitated and had become able to care for and support Zakai: "After having carefully consider[ed] the testimony and evidence from the December, 2017 through March 1, 2018 court proceedings, the court finds the reasons and events that prompted the agreed to 2016 transfer of guardianship have been sufficiently ameliorated. [The respondent] is capable of providing Zakai with appropriate housing, nutrition and clothing, and she is capable of meeting his educational, medical and physical safety needs. [The respondent] and Zakai share a loving parent-child like bond, and when [Zakai] feels he is in a safe environment, [the respondent] and [Zakai] enjoy quality time together." (Footnote omitted.) In arguing that the petitioner had to prove, and the court had to find, that the respondent was an unfit parent in order to avoid the return of Zakai to her guardianship, the respondent's attorney has directed this court, inter alia, to *Santosky* v. *Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), which provided that "[t]he 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 . . . ." The respondent also cited additional case law for the proposition that there is a presumption that it is in the best interest of the child to be with his natural parent.[7]

[7] The presumption referred to by the respondent is viewed by courts in the context of the rights of the child and the duty of the state. Connecticut balances the constitutional rights of parents against its duty and responsibility to protect and ensure the health, safety, welfare, and rights of children. See, e.g., *In re Stephen M.*, 109 Conn. App. 644, 646, 953 A.2d 668 (2008); see also *Dutkiewicz* v. *Dutkiewicz*, 289 Conn. 362, 378 n.11, 957 A.2d 821 (2008). Our Supreme Court has rejected a similar constitutional challenge to § 46b-129 (b), a statute similar to § 45a-611. See *In re Juvenile Appeal (83-CD)*, 189 Conn. 276, 282–84, 293, 455 A.2d 1313 (1983). Our Supreme Court also has recognized that the fair preponderance standard of proof is constitutionally permissible in custody and neglect proceedings because "the child's welfare and safety represents a strong countervailing interest in relative equipoise with the liberty interest of the parent." *Fish* v. *Fish*, 285 Conn. 24, 73–74, 939 A.2d 1040 (2008).

The respondent asserts that many of these same claims were also made to the court during her closing argument on February 28, 2018. Despite the respondent's assertions to the contrary, however, the constitutional claim she now raises on appeal was not distinctly raised before the court. In her argument to the court, the respondent requested that the court apply the presumption that reinstatement of her guardianship was in Zakai's best interest.[8] On appeal, however, the respondent now claims that it was the court's *sole* reliance on the best interest of the child standard that violated her fundamental parental rights. She also claims that the court should have required the petitioner to prove physical and emotional harm to Zakai by clear and convincing evidence in order to defeat the asserted presumption.

The respondent in effect now argues that because she was found to be a fit parent at the time of trial, her history as a parent who for an extended period of time was unable to provide a safe and secure home for Zakai should be ignored. The court, however, did not ignore, but instead listed in its December 12, 2017 ruling at least some of the respondent's essentially undisputed, more serious parental failings that had caused physical and emotional harm to Zakai. The court found: "Clearly, up until the last year and a half, [the respondent] has struggled to achieve and sustain a lifestyle conducive to having Zakai return to her care. It took her a long time, and some would argue too long, to disengage from [Montreal C.]. . . . [O]ne of the remaining obstacles, that needs to be navigated now, is whether the [respondent's choices] and who she allows Zakai to be cared

[8] In determining what was in Zakai's best interest, the court viewed the facts of this case in the context of "the child's interest in sustained growth, development, well-being, and in the continuity and stability of [his] environment." (Internal quotation marks omitted.) *In re Brianna C.*, 98 Conn. App. 797, 804, 912 A.2d 505 (2006).

for and to have contact with are sound and safe choices. [The] court knows that there is no one in this courtroom today, [and] no one more so than [the petitioner and the respondent], that want Zakai to be placed in physical or emotional jeopardy. The terrible, heartbreaking death of [the respondent's] eldest infant daughter, who died while [the respondent] left the daughter in the child's father's care, and then subsequently, Zakai's beating by [Montreal C.], again a caregiver chosen by the mother . . . . These traumatic, tragic events occurred due in large part to choices and exercises in judgment by [the respondent]. Zakai cannot afford to have history repeat itself."

Nowhere in the court proceedings did the respondent claim that application of the best interest of the child standard conflicted with the constitutional presumption that she is a fit parent. In the court proceedings, she made the factual argument that, because she had rehabilitated, it was in Zakai's best interest to be returned to her guardianship. "[A] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one. . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party." (Citation omitted; internal quotation marks omitted.) *Albemarle Weston Street, LLC* v. *Hartford*, 104 Conn. App. 701, 709–10, 936 A.2d 656 (2007). Additionally, the respondent did not raise any challenge to the fair preponderance standard of proof utilized by the court.[9] Because the respondent did not object to

[9] In oral argument before the trial court concerning the respondent's motion for reinstatement of guardianship, the respondent declared that the fair preponderance of the evidence standard, as required by Practice Book § 35a-20 (d), applied to this matter. In its memorandum of decision, the court determined that § 45a-611 (b) governed the proceeding. During oral argument on appeal, the respondent agreed that § 45a-611 (b), Practice Book § 35a-20 (d), and § 46b-129 (n) all set forth the same requirement that there is no further cause for the removal of parental guardianship, e.g., that the

the court's application of the best interest of the child or fair preponderance of the evidence standards, we conclude that the respondent's claim on appeal was not preserved.

B

The respondent requests that, in the event we conclude that her claim is not preserved, we nevertheless review it pursuant to the four part test set forth in *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel R.*, supra, 317 Conn. 781. Under *Golding*, the respondent "can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40, as modified by *In re Yasiel R.*, supra, 781. "The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim." (Internal quotation marks omitted.) *State* v. *Britton*, 283 Conn. 598, 615, 929 A.2d 312 (2007). As such, we must address whether the respondent has sufficiently satisfied her burden under the first two *Golding* prongs before we can turn to the merits of her claim on appeal.

"The [respondent] bears the responsibility for providing a record that is adequate for review of [her] claim

parent has been rehabilitated, and that reinstatement is in the best interest of the child. As such, the respondent appears to have conceded that the fair preponderance of the evidence standard is required under § 45a-611 (b). Accordingly, the trial court properly utilized the fair preponderance of the evidence standard when it determined that § 45a-611 (b) applied.

of constitutional error. If the facts revealed by the record are insufficient, unclear or unambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the [respondent's] claim." *State* v. *Golding*, supra, 213 Conn. 240. "To determine whether the record is adequate to ascertain whether a constitutional violation occurred, we must consider the respondent's alleged claim of impropriety and whether it requires any factual predicates." *In re Azareon Y.*, 309 Conn. 626, 636, 72 A.3d 1074 (2013). In other words, because the respondent claims her fundamental rights as a parent were violated by the court's sole reliance on the best interest of the child standard in denying her motion to reinstate her guardianship rights, the record must adequately reflect that the respondent is not an unfit parent. It is clear from the record that there was never a judicial finding of neglect or abuse as to Zakai by the Probate Court, the family division of the Superior Court, or the juvenile division of the Superior Court, that the petitioner's guardianship of Zakai was with the respondent's consent, and that the respondent was a rehabilitated parent at the time of the filing of her motion. Furthermore, the record includes a thorough memorandum of decision from the court, in addition to transcripts of the entire trial and the exhibits submitted at trial. Accordingly, we conclude that the record is adequate to review the respondent's claim of error. As such, the first *Golding* prong is satisfied.

"The [respondent] also bears the responsibility of demonstrating that [her] claim is indeed a violation of a fundamental constitutional right." *State* v. *Golding*, supra, 213 Conn. 240. A parent's interest in the care, custody, and control of his or her children has been recognized as "perhaps the oldest of the fundamental liberty interests recognized by [the United States

Supreme] Court." *Troxel* v. *Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); see also *Roth* v. *Weston*, 259 Conn. 202, 216, 789 A.2d 431 (2002). The respondent claims this constitutional right has been violated. As such, the respondent also satisfies the second *Golding* prong.

Because we have determined that the respondent has satisfied the first two *Golding* prongs, we turn now to the third prong, namely, whether there has been a constitutional violation that deprived the respondent of a fair trial. See *State* v. *Golding*, supra, 213 Conn. 241. The respondent appears to raise two arguments in regard to her claim of a constitutional violation. We address each argument in turn.

First, the respondent argues that the trial court failed to apply the constitutional presumption that she, as a fit parent, will act in the best interest of Zakai. "While the rights of parents qua parents to the custody of their children is an important principle that has constitutional dimensions . . . we recognize that even parental rights are not absolute." (Citations omitted.) *In re Juvenile Appeal (Anonymous)*, 177 Conn. 648, 661, 420 A.2d 875 (1979). Although we are cognizant of the respondent's claim that she, having never been adjudicated as an unfit parent, was entitled to a presumption that she would act in Zakai's best interest, such a presumption is not absolute, but may instead be rebutted by contradictory evidence of Zakai's best interest. In the context of child custody disputes, "[i]t is well established as a general rule that the welfare and best interests of the child are controlling elements in the determination of all disputes . . . and the statutes recognizing a right to the custody of the child in either the father or mother must stand aside where the recognition of such a right would materially interfere with the paramount right of the child to have its welfare considered and conserved by the court. The welfare of the child under the above

rule may require that its custody be denied the parent and awarded to others." (Internal quotation marks omitted.) *In re Appeal of Kindis*, 162 Conn. 239, 242–43, 294 A.2d 316 (1972).

In *In re Juvenile Appeal (Anonymous)*, our Supreme Court considered an appeal where the child had developed a parent-child relationship with her foster parents. "Balancing all of the evidence presented to it, the Juvenile Court concluded that during the period of separation between the child and her natural mother there had developed between the child and her foster parents a matured parent-child relationship. Recognizing that cause for commitment no longer existed from the time the petition for revocation was brought, the court nevertheless concluded that separation of the child from her foster family at that time would be contrary to her best interests, and consequently denied the plaintiff's petition for revocation. . . . Clearly the burden is upon the person applying for the revocation of commitment to allege and prove that cause for commitment no longer exists. Once that has been established, as in this case, the inquiry becomes whether a continuation of the commitment will nevertheless serve the child's best interests. On this point, when it is a natural parent who has moved to revoke commitment, the state must prove that it would not be in the best interests of the child to be returned to his or her natural parent. While it is certainly true, as we have held, that parents have no natural right to the custody of their children that can prevail over a disposition [a]ffecting the child's best interests; [id., 243]; *In re Appeal of Dattilo*, 136 Conn. 488, 495–96, 72 A.2d 50 (1950); parents are entitled to the presumption, absent a continuing cause for commitment, that revocation will be in the child's best interests unless the state can prove otherwise." (Citation omitted; emphasis omitted; footnotes omitted.) *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 658–60.

In the present case, the court properly considered evidence from both the petitioner and Zakai, through their attorney and guardian ad litem, rebutting the presumption that reunification with the respondent was in Zakai's best interest. The court recognized that the respondent had taken important steps in establishing herself as a fit parent and noted that her accomplishments toward this endeavor "factored heavily" in its December, 2017 order to commence overnight visits. The court found, however, that overnight visitation had subjected Zakai to "unjustifiable and debilitating emotional stress." Zakai's ability to live with the respondent was "hampered by the reality that Zakai does not feel safe and secure in [the respondent's] care." The court credited testimony from Zakai's first grade teacher and therapist in considering the deterioration in Zakai's mental and emotional state because of the overnight visitation. "[B]y increasing Zakai's time in [the respondent's] care and having overnights in [her] home, Zakai feels less safe." The court found important Zakai's need for stability, and his strong desire to know his one "forever" home. (Internal quotation marks omitted.) Thus, because the court properly determined that the petitioner and Zakai rebutted the constitutional presumption that it was in Zakai's best interest to be returned to the respondent's care, the respondent has failed to satisfy the third *Golding* prong as to the constitutional presumption that because she was a fit parent, the best interest standard required that Zakai be returned to her.

Second, the respondent argues that the "clear and convincing" evidence standard, as articulated by our Supreme Court in *Roth* v. *Weston*, supra, 259 Conn. 232, should apply in reinstatement of guardianship cases concerning a fit parent, and that the trial court's failure to do so violated her constitutional rights to the care and custody of Zakai. Our Supreme Court has noted

that "the third prong of *Golding* does not require that there be existing Connecticut precedent already recognizing a constitutional right. Instead, a party satisfies the third prong of *Golding* if he or she makes a showing sufficient to establish a constitutional violation." *In re Yasiel R.*, supra, 317 Conn. 780–81. The question at issue in *In re Yasiel R.* was whether the due process clause of the fourteenth amendment to the United States constitution required that a trial court canvass a parent about his or her decision not to contest exhibits presented against him or her in a parental termination proceeding and to waive his or her right to present a case at trial, a question that had not yet been addressed by our Supreme Court. See id., 781–82.

Similarly, the respondent in the present case raises an argument that conflicts with current statutory and Practice Book provisions and precedent, namely, whether the due process clause of the fourteenth amendment to the United States constitution requires that "when a fit parent . . . seeks to reinstate her guardianship rights in her child, and the guardianship in a third party was established with her consent, the guardian bears the burden of proof to establish by clear and convincing evidence that returning the child to the parent would cause the child to suffer immediate and substantial harm." In making this assertion, the respondent points to the trial court's refusal to reinstate her guardianship rights solely on the basis of the finding that reinstatement was not in Zakai's best interest.

To determine whether the respondent has satisfied the third *Golding* prong as to this argument, we find it helpful to review precedent concerning the legal standards applied in proceedings involving the termination of parental rights and third-party visitation and custody disputes. Before beginning this analysis, however, we find it important to note that, despite underlying similarities, the respondent's claims in the present case are

still markedly different from cases involving the state or other third-party actors attempting to infringe on the fundamental rights of a fit, custodial parent in visitation or custody proceedings. The respondent's claims in the present case involve the reinstatement of guardianship rights where the respondent voluntarily consented to guardianship in a third party, and where the respondent and Zakai have not been an intact family for more than four years.

In her brief, the respondent claims that the clear and convincing evidence standard "is consistent with our Supreme Court's holdings in *Roth* and *Fish* [v. *Fish*, 285 Conn. 24, 939 A.2d 1040 (2008)], which h[e]ld that a third party who seeks to infringe the fundamental rights of a fit parent must prove immediate and substantial harm to the child." The respondent, however, fails to acknowledge the distinction that our Supreme Court has recognized between third-party custody and visitation cases. In *Roth*, the grandmother and the aunt of two minor children brought an action against the children's father seeking third-party visitation rights. *Roth* v. *Weston*, supra, 259 Conn. 204. Our Supreme Court ultimately held "that a nonparent petitioning for visitation pursuant to [General Statutes] § 46b-59 must prove the requisite relationship and harm . . . by clear and convincing evidence." Id., 232.

In *Fish*, which involved a third-party custody petition pursuant to General Statutes § 46b-56b, our Supreme Court held that "third party custody petitions challenge the liberty interest of a parent in a way that is fundamentally different from visitation petitions and that the judicial gloss [our Supreme Court] placed on the visitation statute in *Roth* should not be applied to § 46b-56b because it does not give adequate consideration to the welfare of the child, whose relationship with the parent

is at issue in a custody proceeding because of its allegedly harmful effects. This is not the case in a visitation proceeding, in which the child's relationship with the parent has not been placed in issue. The constitutional question in a [third-party] custody proceeding therefore must be framed and resolved in a manner that respects parental rights but that also takes the child's welfare more directly into account." *Fish* v. *Fish*, supra, 285 Conn. 55–56.

Furthermore, in *Fish*, our Supreme Court determined that, contrary to *Roth*, the clear and convincing standard was not constitutionally required under the test set forth by the United States Supreme Court in *Santosky* v. *Kramer*, supra, 455 U.S. 753. *Fish* v. *Fish*, supra, 285 Conn. 66–67. That test provided that "the Court must examine a State's chosen standard [for child custody disputes] to determine whether it satisfies the constitutional minimum of fundamental fairness." (Internal quotation marks omitted.) *Santosky* v. *Kramer*, supra, 756 n.8. Our Supreme Court, therefore, concluded that the fair preponderance of the evidence standard satisfied the constitutional minimum of fundamental fairness in third-party custody disputes. See *Fish* v. *Fish*, supra, 66–67.

Additionally, both *Roth* and *Fish* involved situations in which the rights of custodial parents were challenged by third parties.[10] In contrast, the respondent's argument concerning the proper burden of proof in the present case appears more analogous to the argument in *In re Juvenile Appeal (Anonymous)*, in which our

[10] Our Supreme Court noted in *Fish* that its decision did "not address situations in which the state seeks temporary custody of the child; see General Statutes § 46b-129; or removal of the child from the custody of the child's parents. See General Statutes § 45a-610." *Fish* v. *Fish*, supra, 285 Conn. 27 n.1.

Supreme Court addressed the due process rights of *noncustodial* parents seeking return of custody of a child. In that case, the court laid out four factors to be considered in determining whether the state has met its burden of showing that a return of custody to a natural parent will be detrimental to the child: "(1) the length of [the child's] stay with [the] foster parents; (2) the nature of [the child's] relationship to [the] foster parents; (3) the degree of contact maintained with the natural parent; and (4) the nature of [the child's] relationship to [the] natural parent." *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 663. In considering these factors, the court afforded great weight to psychological testimony from professionals in determining the emotional state of the child. See id., 667. Our Supreme Court ultimately determined that, "[a]lthough neither the Juvenile Court nor the Superior Court spoke expressly in terms of placing on the state the burden of proving that revocation of commitment would not be in the child's best interests, we cannot say in view of all the evidence that the findings and conclusions of either court are inconsistent with a finding that the state in fact met that burden." Id., 667–68.

The court in the present case similarly determined from the record that Zakai felt unsafe and insecure when he was with the respondent for overnight visitation and that, in the roughly four and one-half years he had been in the petitioner's care, the petitioner had become a mother figure to him. The court also afforded great weight to the testimony of Zakai's first grade teacher and therapist in determining Zakai's mental and emotional state after such overnight visitation.

In terms of establishing the proper burden of proof, our statutes, Practice Book provisions, and Supreme Court precedent recognize that proof by a fair prepon-

derance of the evidence is the applicable standard to be applied in transfer of guardianship proceedings.[11] The best interests of the child requirement is also set forth in § 46b-129 (j) (3), Practice Book § 35a-20 (d),[12]

[11] General Statutes § 46b-129 (j) (3), for example, provides in relevant part: "If the court determines that the commitment should be revoked and the child's . . . legal guardianship . . . should vest in someone other than the respondent parent, parents or former guardian . . . there shall be a rebuttable presumption that an award of legal guardianship . . . upon revocation to . . . any caregiver or person or who is, pursuant to an order of the court, the temporary custodian of the child . . . at the time of the revocation . . . shall be in the best interests of the child . . . and that such caregiver is a suitable and worthy person to assume legal guardianship . . . upon revocation . . . . The presumption may be rebutted by a preponderance of the evidence that an award of legal guardianship . . . to . . . such caregiver would not be in the child's . . . best interests and such caregiver is not a suitable and worthy person. . . ."

Our Supreme Court used the fair preponderance of the evidence standard in reviewing a testamentary designation of a guardian: "We do conclude, however, that the fact that the [testamentary guardians] suffered such trauma, and that it affected them so significantly that they felt that they could not assume guardianship of Joshua S., demonstrates, by a fair preponderance of the evidence, that it would be damaging, injurious or harmful and, therefore, detrimental to Joshua S. to be placed with the [testamentary guardians], thereby rebutting the presumption favoring the testamentary guardians." *In re Joshua S.*, 260 Conn. 182, 208, 796 A.2d 1141 (2002).

Additionally, Practice Book § 35a-12A (b) provides in pertinent part: "In cases in which a motion for transfer of guardianship seeks to vest guardianship of a child or youth in any relative who is the licensed foster parent for such child or youth, or who is, pursuant to an order of the court, the temporary custodian of the child or youth at the time of the motion, the moving party has the burden of proof that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interests of the child. In such cases, there shall be a rebuttable presumption that the award of legal guardianship to that relative shall be in the best interests of the child or youth and that such relative is a suitable and worthy person to assume legal guardianship. The presumption may be rebutted by a preponderance of the evidence that an award of legal guardianship to such relative would not be in the child's or youth's best interests and such relative is not a suitable and worthy person. . . ."

[12] Practice Book § 35a-20 (d) provides in relevant part: "The party seeking reinstatement of guardianship has the burden of proof to establish that cause for transfer of guardianship to another person or agency no longer exists. The judicial authority shall then determine if reinstatement of guardianship is in the child's or youth's best interest."

and § 45a-611 (b).[13] Accordingly, the trial court correctly applied the fair preponderance standard instead of the clear and convincing evidence standard.[14]

Because the trial court applied the fair preponderance of the evidence standard required by our statutes, Practice Book provisions, and Supreme Court precedent in determining Zakai's best interest, we find that the respondent has failed to prove any constitutional violation in satisfaction of the third *Golding* prong. Accordingly, we reject her constitutional claim.

II

The respondent's nonconstitutional best interest claim is that the court abused its discretion in concluding that her reinstatement as guardian was not in Zakai's best interest. Her argument that it was in Zakai's best interest to return to her care, custody, and guardianship was based on the facts as she saw them. After our careful review of the record, we conclude that the court did not abuse its discretion in finding that the best interest of Zakai was to remain with the petitioner. See *In re Diamond J.*, 121 Conn. App. 392, 397, 996 A.2d 296 (pursuant to Practice Book § 35a-16, "[m]otions to modify dispositions are dispositional in nature based on the prior adjudication, and the judicial authority shall determine whether a modification is in the best interests of the child or youth upon a fair preponderance of the evidence . . . ."), cert. denied, 297 Conn. 927, 998 A.2d 1193 (2010).

[13] General Statutes § 45a-611 (b) provides in relevant part: "If the court determines that the factors which resulted in the removal of the parent have been resolved satisfactorily, the court may remove the guardian and reinstate the parent as guardian of the person of the minor, if it determines that it is in the best interests of the minor to do so. . . ."

[14] We also note that because our decision does not involve the permanent termination of the respondent's parental rights to Zakai, but rather is focused on a determination of whether Zakai is ready to be reunited with the respondent, a preponderance of the evidence standard is the more appropriate burden of proof.

We are mindful of our limited standard of review. "To determine whether a custodial placement is in the best interest of the child, the court uses its broad discretion to choose a place that will foster the child's interest in sustained growth, development, well-being, and in the continuity and stability of its environment. . . . We have stated that when making the determination of what is in the best interest of the child, [t]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . *A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference.* . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Emphasis in original; internal quotation marks omitted.) *In re Patricia C.*, 93 Conn. App. 25, 32–33, 887 A.2d 929, cert. denied, 277 Conn. 931, 896 A.2d 101 (2006). Furthermore, we note that "[g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . *We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached.* . . . [O]n review by this court every reasonable presumption is made in favor of the trial court's ruling." (Emphasis in original; internal quotation marks omitted.) Id., 36.

Because we have already found that the court properly considered evidence presented by the petitioner and Zakai, through their attorney and guardian ad litem, rebutting the presumption that reunification with the respondent was in Zakai's best interest; see part I of this opinion; it follows that the court did not abuse its

discretion in finding that it was in Zakai's best interest to remain in the care, custody, and guardianship of the petitioner.

The judgment is affirmed.

In this opinion the other judges concurred.

DEUTSCHE BANK NATIONAL TRUST COMPANY *v.* DAWN FRITZELL ET AL.
(AC 38555)

DiPentima, C. J., and Alvord and Bear, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant. The trial court granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon. Notice of the filing of the plaintiff's motion for a judgment of strict foreclosure and the court's judgment of strict foreclosure were sent to an address that the defendant had provided on an appearance form he filed with the clerk's office. Because no party exercised its right to redemption, title to the property subject to the foreclosure vested in the plaintiff. Thereafter, the defendant filed a motion to open the judgment and extend the law days, claiming that he did not receive notice of the plaintiff's motion for a judgment of strict foreclosure or of the court's judgment because he no longer lived at the address that he had provided on the appearance form. The defendant did not file a new appearance form reflecting his change of address. The trial court denied the defendant's motion to open, finding that the defendant received the process he was due because the plaintiff and the court properly sent notice to the address provided by the defendant. On the defendant's appeal to this court, *held* that because notices of the plaintiff's motion and the court's judgment were sent to the address that the defendant provided on his appearance form, the trial court properly concluded that the defendant received the notice he was due, and, consequently, title to the subject property vested absolutely in the plaintiff following the passing of the law days; accordingly, the defendant's motion to open was moot when it was filed approximately two months after the vesting of title, as there was no practical relief that the trial court could have granted the defendant at that time, and, therefore, the court should have dismissed the motion to open as moot instead of denying it.

Argued September 7—officially released November 6, 2018

Procedural History

Action to foreclose a mortgage on certain of the defendant's real property, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Maronich, J.*, granted the plaintiff's motion for summary judgment as to liability; thereafter, the court, *Ecker, J.*, granted the plaintiff's second motion for judgment of strict foreclosure and rendered judgment thereon; subsequently, the court, *Ecker, J.*, denied the defendant's motion to open the judgment, and the defendant appealed to this court. *Improper form of judgment; judgment directed.*

Clifford D. Fritzell, III, self-represented, the appellant (defendant).

Victoria L. Forcella, with whom, on the brief, was *S. Bruce Fair*, for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant, Clifford D. Fritzell, III,[1] appeals from the trial court's denial of his motion to open the judgment of strict foreclosure rendered in favor of the plaintiff, Deutsche Bank National Trust Company.[2] On appeal, the defendant claims that the trial court (1) erroneously denied his motion to open (2) erred by failing to vacate its order setting the law days for February 17 and 18, 2015 (3) improperly placed the burden on him to demonstrate lack of notice of the plaintiff's motion for judgment of strict foreclosure and (4) erred by penalizing him for being a former attorney. The first two claims involve the defendant's central argument that, contrary to the conclusion of the trial

[1] Dawn Fritzell and Hospital of Saint Raphael were named as defendants in this action, but they are not participating in this appeal. Therefore, all references in this opinion to the defendant are to Clifford D. Fritzell, III.

[2] The plaintiff is acting as trustee for New Century Home Equity Loan Trust 2005-2.

court, notice of the plaintiff's motion for judgment of strict foreclosure and the court's judgment of foreclosure sent to the address the defendant had provided on his appearance form did not sufficiently notify him of the proceedings against him. We agree with the court that the defendant received the notice to which he was entitled, but conclude that because there was no practical relief available to the defendant, the court should have dismissed the motion to open instead of denying it.

The following facts and procedural history are relevant to our resolution of the defendant's claims on appeal. In August, 2011, the plaintiff commenced the underlying action to foreclose a mortgage on certain real property located at 282 North High Street in East Haven. The plaintiff filed a motion for judgment of strict foreclosure on December 13, 2011, which was granted on January 3, 2012. According to the defendant, service of process and notice of the judgment were mistakenly sent to the address of the defendant's father, who shares the same name as the defendant. The defendant represents that he subsequently learned of the foreclosure action and judgment from his father. The defendant filed a motion to open the judgment on February 21, 2012. This motion was heard and granted on March 12, 2012.

On March 12, 2012, the defendant filed an appearance with the court, providing his address as 131 Mulberry Point Road in Guilford. On March 26, the defendant filed a motion to dismiss the action, arguing that he was not served at his address. On April 10, the plaintiff filed an objection to the defendant's motion to dismiss, arguing, inter alia, that the defendant received actual notice. On April 11, the plaintiff filed a motion to cite in the defendant, stating that the defendant may not have been properly served. The court granted the motion to cite in the defendant on April 26, and the summons and complaint were served on the defendant

at 131 Mulberry Point Road in Guilford. On April 30, the court denied the defendant's motion to dismiss.[3]

On February 1, 2013, the plaintiff filed a motion for summary judgment as to liability, which was granted on April 22, 2013. On December 12, 2014, the plaintiff filed a second motion for judgment of strict foreclosure. On January 6, 2015, the court granted the plaintiff's motion and rendered a judgment of strict foreclosure, setting the law days for February 17 and 18, 2015. On February 19, 2015, because no party exercised its right to redemption, title to the property subject to the foreclosure vested in the plaintiff.

Notice of both the filing of the plaintiff's motion for judgment of strict foreclosure and the court's judgment were sent to 131 Mulberry Point Road in Guilford, the address that the defendant had provided on the appearance form he filed with the clerk of court. The defendant represents, however, that he no longer lived at 131 Mulberry Point Road in Guilford. The defendant provided that, in August, 2013, he had moved to the property subject to the foreclosure, located at 282 North High Street in East Haven. He did not file a new appearance form reflecting this change of address.

The defendant claims that he became aware of the judgment of strict foreclosure in March, 2015, through his wife, who "perus[ed] the case activity periodically." On April 7, the defendant filed a motion to open the judgment and extend the law days. On May 26, the trial court, *Ecker*, *J.*, held a hearing on the defendant's motion to open the judgment. During the hearing, the defendant claimed that he did not receive notice of the plaintiff's motion for judgment of strict foreclosure or notice of the court's judgment of strict foreclosure. In addition, he argued that if he had received notice, he could have transferred the mortgage to his wife. The

[3] The defendant does not challenge service of process on appeal.

plaintiff argued that its pleadings, as certified in the certification page, and the court's notice were sent to the defendant's address of record with the court at the time. In response, the defendant argued that he had been sending the plaintiff correspondence from an address in Old Saybrook, and therefore, the plaintiff knew that the defendant was living at a different address than the address he provided on his appearance form.

At the conclusion of the hearing, the court issued an oral ruling denying the defendant's motion. The court found that the defendant received the process he was due. It explained that, because the defendant filed an appearance with the court, providing his address as 131 Mulberry Point Road in Guilford, the plaintiff and the court were entitled to rely on it. At the hearing, when discussing that the defendant should have filed an updated appearance form indicating his new address, the court stated: "[Y]ou're a lawyer, you should know better." The court concluded that, because notices of the plaintiff's motion and the court's judgment were sent to the address the defendant provided, the defendant received sufficient notification of the proceedings. This appeal followed.

The plaintiff asserts that this court should dismiss this appeal for mootness because the defendant no longer has any legal interest in the property. The crux of the claim is that title in the plaintiff became absolute following the passing of the law days without redemption by any defendant, and that date having passed before the defendant filed his motion to open, the defendant can no longer be provided with practical relief.[4]

[4] The plaintiff claims that title to the property in question became absolute in the plaintiff approximately two months before the defendant filed his motion to open, which precludes resorting to General Statutes § 49-15 (a). Section 49-15 (a) (1) provides, in relevant part, that "no [judgment of strict foreclosure] shall be opened after the title has become absolute in any encumbrancer . . . ."

Section 49-15 (a) (1) also provides, in relevant part, that "[a]ny judgment foreclosing the title to real estate by strict foreclosure may, at the discretion

Highgate Condominium Assn., Inc. v. *Miller*, 129 Conn. App. 429, 434–35, 21 A.3d 853 (2011) ("It is a general rule that a judgment of strict foreclosure ordinarily cannot be opened after the law day has passed . . . . Once title has vested, no practical relief is available." [Internal quotation marks omitted]).

"Because [m]ootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for [it] to resolve . . . ordinarily, we would be required to address that issue first, before considering the merits of [an] appeal. This is so because [i]t is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." (Citation omitted; internal quotation marks omitted.) *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 575, 953 A.2d 868 (2008).

In this case, however, as in *Argent Mortgage Co., LLC*,[5] the issue of mootness is "inextricably intertwined"; id.; with the issue raised by the defendant on appeal, namely, whether the trial court improperly

of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and *for cause shown*, be opened and modified. . . ." (Emphasis added). One of the defendant's claims on appeal is that the court improperly placed the burden on him to demonstrate lack of notice of the plaintiff's motion for judgment of strict foreclosure. This claim is without merit. "Cause" under § 49-15 means good cause, and the movant bears the burden of establishing it. *Connecticut National Bank* v. *Zuckerman*, 29 Conn. App. 541, 546, 616 A.2d 814 (1992) ("[i]t was the defendants' burden to establish the existence of good cause to be entitled to an opening of the judgment pursuant to General Statutes § 49-15"). Thus, the court properly placed the burden on the defendant—the movant—to establish the existence of good cause, namely, his claim of insufficient notice.

[5] Although the defendant's claim here involves defective notice of the foreclosure judgment, and not defective service of process as in *Argent Mortgage Co., LLC*, the rationale of that case applies by analogy to this appeal.

denied his motion to open despite his claim that he did not receive notice of the judgment and therefore could not exercise his right of redemption. In other words, our determination of whether the defendant can be granted any practical relief depends on whether the defendant was given the notice to which he was entitled when judgment was entered against him, or whether the judgment violated the defendant's right to due process. We therefore turn to that issue.

The defendant claims that the court should have opened the judgment of strict foreclosure because he did not receive sufficient notice of the judgment and, therefore, could not exercise his right of redemption.[6] He argues that the notice provided was insufficient to satisfy due process. We disagree.

"[D]ue process does not require that a property owner receive actual notice" of an action before being deprived of his or her property. *Cornelius* v. *Rosario*, 138 Conn. App. 1, 14, 51 A.3d 1144, cert. denied, 307 Conn. 934, 56 A.3d 713 (2012), cert. denied sub nom. *Cornelius* v. *Nelson*, U.S. , 134 S. Ct. 386, 187 L. Ed. 2d 28 (2013). "Rather, we have stated that due process requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Internal quotation marks omitted.) Id.

[6] The defendant also claims that "[t]he court erred when it identified an appearance form on file that was clearly no longer accurate with regards to the defendant's address and penalized him because he was a former attorney." The defendant bases this claim on the court's statement that "you're a lawyer, you should know better," when it told the defendant that he should have filed an updated appearance form with his new address. From the record, it is clear that the court did not deny the defendant's motion on the basis of the defendant being a former attorney. Rather, the court found that the defendant received sufficient notice of the court's judgment because notice was sent to the address the defendant provided on his appearance form. In addition, the defendant cites no authority for the proposition that this single remark amounts to error.

The defendant was entitled to notice of the plaintiff's motion for judgment of strict foreclosure as well as notice of the court's judgment.[7] The defendant does not challenge the fact that notices of both the motion and judgment were sent to the address he provided on his appearance form.[8] The appearance form filed by the defendant contained the following notice to self-represented parties: "A self-represented party is a person who represents himself or herself. If you are a self-represented party and you filed an appearance before and you have since changed your address, you must let the court and all attorneys and self-represented parties of record know that you have changed your address by checking the box below . . . I am filing this appearance to let the court and all attorneys and self-represented parties of record know that I have changed my address. My new address is below." Thus, the form explicitly informs the filer of his or her obligation to give notice of each new address.

[7] Practice Book § 10-12 (a) provides in relevant part that "[i]t is the responsibility of counsel or a self-represented party filing the same to serve on each other party who has appeared one copy of every pleading subsequent to the original complaint, every written motion other than one in which an order is sought ex parte . . . ." Practice Book § 10-13 further provides in relevant part that "[s]ervice upon the attorney or upon a self-represented party . . . may be by delivering a copy or by mailing it to the last known address of the attorney or party." Regarding notice of judgment, Practice Book § 7-5 provides in relevant part that "[t]he clerk shall give notice, by mail or electronic delivery, to the attorneys of record and self-represented parties . . . of all judgments, nonsuits, defaults, decisions, orders and rulings unless made in their presence." In addition, JDNO notice is used to indicate that notice of a decision or order has been sent by the clerk's office to all parties of record and raises a presumption that notice was sent and received in the absence of a finding to the contrary. *McTiernan* v. *McTiernan*, 164 Conn. App. 805, 808 n.2, 138 A.3d 935 (2016).

[8] Practice Book § 3-3 (a) explains that an appearance includes the mailing address of the party for whom the appearance is being filed. Practice Book § 3-7 (b), governing the consequences of filing an appearance, provides in relevant part: "After the filing of an appearance, the attorney or self-represented party shall receive copies of all notices required to be given to parties by statute or by these rules."

Sending notice to the defendant's address as listed on his appearance form provided the defendant with the process that he was due. Although the defendant claims that he did not receive actual notice of the judgment until after the passing of the law days, the notices sent in compliance with the rules of practice reasonably were calculated to notify the defendant of the action, which is what due process requires. See *Cornelius* v. *Rosario*, supra, 138 Conn. App. 14.

The defendant filed an appearance providing his address as 131 Mulberry Point Road in Guilford, the address to which the notice was sent.[9] The defendant himself concedes that "[t]he purpose of [the appearance form] is to make the other parties aware of how to contact . . . one another." Here, by filing the appearance and providing 131 Mulberry Point Road in Guilford as his address, the defendant was notifying the court and the plaintiff that he wanted to be contacted at that address.[10] See Practice Book § 3-7 (b). Thus, notices

[9] The defendant contends that he should have received notice at the property subject to the foreclosure, located at 282 North High Street in East Haven. He did not file an appearance form providing this address, however, until April 1, 2015—almost two months *after* the law days passed and less than a week before he filed his motion to open.

[10] As the court pointed out at the hearing on the defendant's motion to open, the plaintiff and the court are not only permitted, but *required* to use the address on the appearance form. In *Branford* v. *Van Eck*, 86 Conn. App. 441, 445, 861 A.2d 560 (2004), cert. denied, 272 Conn. 922, 867 A.2d 839 (2005), the defendant filed a self-represented appearance in which he gave an address to which all pleadings were to be sent. The plaintiff in that case failed to mail several pleadings to that address, instead sending them to the property subject to the foreclosure and another address it found for the defendant. Id., 444. On appeal, this court concluded that the trial court correctly denied the plaintiff's motion to default the defendant due to the plaintiff's failure to certify service to the defendant at his address of record. Id., 445. The court further stated that it did "not condone the actions of the plaintiff's counsel" in electing to mail pleadings to the subject property and a putative address rather than to his address of record. Id. Overall, the court in *Branford* emphasizes the importance of sending notice to the address of record in accordance with a party's appearance form.

sent to that address reasonably were calculated to notify the defendant of the action, and therefore the court did not deprive the defendant of due process.

In summary, because notices of the plaintiff's motion and the court's judgment were sent to the address that the defendant provided on his appearance form, the court properly concluded that the defendant received the notice he was due. Consequently, title to the 282 North High Street property vested absolutely in the plaintiff on February 19, 2015, following the passing of the law days. In light of that fact, the defendant's motion to open was moot when it was filed on April 7, 2015, approximately two months after the vesting of title, because there was no practical relief that the trial court could have granted the defendant at that time. See *Argent Mortgage Co., LLC* v. *Huertas*, supra, 288 Conn. 581–582 (after title had vested absolutely in plaintiff, court should have dismissed, rather than denied, late motion to open); see also *Citigroup Global Markets Realty Corp.* v. *Christiansen*, 163 Conn. App. 635, 640, 137 A.3d 76 (2016) (same). Accordingly, instead of denying the defendant's motion to open, the trial court should have dismissed it as moot.

The form of the judgment is improper, the judgment is reversed and the case is remanded with direction to dismiss the defendant's motion to open the judgment of strict foreclosure as moot.

In this opinion the other judges concurred.

RICARDO R. *v.* COMMISSIONER OF CORRECTION* (AC 39578)

DiPentima, C. J., and Keller and Pellegrino, Js.

Syllabus

The petitioner, who previously had been convicted of one count of risk of injury to a child and two counts of sexual assault in the first degree, sought a writ of habeas corpus, claiming, inter alia, ineffective assistance of trial counsel. Specifically, the petitioner claimed, inter alia, that his trial counsel rendered ineffective assistance by failing to adequately cross-examine the state's expert witness and to consult with and present testimony of a forensic psychologist. The habeas court rendered judgment denying the amended habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held:*

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to show that his claim was debatable among jurists of reason, that a court could have resolved the issue in a different manner, or that the question was adequate to deserve encouragement to proceed further.
2. The habeas court properly determined that the petitioner was not denied his right to effective assistance of counsel:

   a. Trial counsel's decision not to retain or to consult with an expert witness in preparation for cross-examination of the state's expert witness did not result in deficient performance, as counsel's decision was supported by legitimate and reasonable strategies, and was made in the exercise of reasonable professional judgment; moreover, trial counsel's cross-examination of the state's expert witness was not deficient, as he elicited testimony consistent with a legitimate trial strategy, and the petitioner failed to show how counsel's line of questioning fell outside the range of competence displayed by lawyers with ordinary training and skill in criminal law.

   b. The petitioner could not prevail on his claim that his trial counsel was deficient in failing to present expert testmiony in support of an alternative innocent explantation for the allegations of sexual abuse against the petitioner; trial counsel's decision not to retain or consult with an expert was supported by legitimate and reasonable strategies for doing so, the innocent explanations that the petitioner wanted his trial counsel to put forth were matters of common sense that did not

* 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 identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

mandate the use of an expert witness, and although trial counsel did not present those theories in the exact manner that the petitioner now preferred, trial counsel clearly elicited testimony consistent with those theories by calling into question the veracity of the allegations against the petitioner, who failed to demonstrate how counsel was deficient in failing to introduce those theories through expert testimony.

Argued September 6—officially released November 6, 2018

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Fuger*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Vishal K. Garg, for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Richard Colangelo, Jr.*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

KELLER, J. The petitioner, Ricardo R., appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) erred by failing to conclude that his criminal trial counsel provided ineffective assistance.[1] We disagree, and, accordingly, dismiss the appeal.

[1] The petitioner also claims that the habeas court failed to address or make factual findings with respect to his allegation that trial counsel failed to retain an expert to prepare for cross-examination of the state's expert, Larry Rosenberg, a psychologist, making the record inadequate for this court's review of his ineffective assistance of counsel claim.

As explained in this opinion, the petitioner is appealing from a judgment by the habeas court denying his petition for certification to appeal. After the petitioner filed the present appeal, the petitioner filed a motion for articulation on May 8, 2017, arguing that the habeas court failed to address whether an expert could have assisted counsel with preparing the cross-

On direct appeal from the petitioner's underlying conviction, our Supreme Court set forth the following relevant facts that the jury reasonably could have found. "When S was approximately four months old, her mother, F, began a relationship with the [petitioner]. In 1996, when S was five years old, the [petitioner] and F moved into an apartment together. S grew up thinking of the [petitioner] as her father, and called him 'Papi,' which means 'dad' in Spanish. The [petitioner] and F subsequently had two children together, S's two half sisters, G and M. The [petitioner] also had fathered two

examination of Rosenberg. Pursuant to General Statutes § 52-470 (g) and Practice Book § 80-1, because Judge Fuger, who presided over the habeas trial, retired effective February 7, 2017, the motion was directed to Judge Bright who denied the motion after finding that it could not be addressed on the merits. See *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 806 n.1, A.3d (2018). The petitioner asserts that because he is unable to supplement the inadequate record due to the retirement of Judge Fuger, this court should reverse the habeas court's decision and remand the case for a new habeas trial.

The petitioner argues that *Claude* v. *Claude*, 143 Conn. App. 307, 68 A.3d 1204 (2013), demands that a new habeas trial be granted. As we recently explained, though, *Claude* presented "the unique situation in which the trial court failed to provide this court with *any* articulation of its decision, even after being ordered to do so. . . . As it was impossible to divine the basis for the court's decision from its 'postcard order,' and because the plaintiff could not be faulted for the inadequate record, we remanded the case for a new hearing." (Citations omitted; emphasis added.) *Grover* v. *Commissioner of Correction*, supra, 183 Conn. App. 806 n.1 (declining to grant petitioner's request for new habeas trial). While the "unique circumstances" in *Claude* demanded that a new hearing be granted; *Claude* v. *Claude*, supra, 143 Conn. App. 312; the facts of this case do not demand such relief.

We recognize that a trial court must provide a reviewing court with the "necessary factual and legal conclusions" for review to be proper; *State* v. *Payne*, 121 Conn. App. 308, 314, 996 A.2d 302, cert. denied, 297 Conn. 919, 996 A.2d 1193 (2010); however, explanations of those conclusions need not be to the point of pedantry. Although the habeas court did not explicitly address whether the petitioner's trial counsel had performed deficiently for not consulting with an expert in preparation of the cross-examination of Rosenberg, it is clear that the habeas court implicitly rejected this claim when it determined that counsel had made a sound, strategic decision not to hire an expert for the petitioner's criminal trial. Accordingly, we conclude that Judge Fuger's unavailability is of no moment because the record is sufficient for us to reach the merits of this particular allegation.

children with his former girlfriend, J: a daughter, A, who was one year older than S, and a son, R. A and R lived with J, but they often stayed with S's family and the siblings saw each other at least every weekend.

"When F was away or at work, the [petitioner] watched the children. During that time, the [petitioner] engaged in a number of behaviors that made S feel uncomfortable, such as walking around the house naked. The [petitioner] also watched pornographic media while the children were home, and did not turn it off when they walked into the room while he was watching it. On one occasion, when S was in the third or fourth grade, the [petitioner] showed S a homemade videotape of himself and F engaged in various sexual acts. At times, the [petitioner] grabbed S's hand and placed it on his crotch, over his clothing. S was afraid of the [petitioner] because he hit her, particularly when he was drunk, and sometimes with a closed fist. On occasions, S also witnessed the [petitioner] hitting and punching F. A testified at the [petitioner's] trial, describing the effect that the [petitioner's] physical abuse had on the children's behavior: '[I]t seemed like we were always trying everything in our power to just do what he wanted so that we didn't have to get disciplined in that way.'

"One particular day, the [petitioner] made S and A play a 'modeling game.' During the game, the [petitioner] waited in the living room, while the children went into the bedroom where they had a box of costumes—dresses. They changed into the costumes, and, wearing no underwear as the [petitioner] had instructed, walked into the living room one at a time to be 'judged' by the [petitioner]. The [petitioner] told them that he would pay money to whoever walked best like a model. When S came into the living room, the [petitioner] had S lie down on the couch, and he placed his hands under her dress, rubbing her vaginal area

with his hands, telling her not to worry, because he had done the same thing to A. On two or three occasions after that, the [petitioner] made S play the modeling game without A. He warned S that if she told anyone what had happened, everyone would blame her and hate her for it.

"In 2001, F left the [petitioner] and moved into her mother's home with her three daughters. The [petitioner] moved into a studio apartment in a neighboring town, where F allowed S and her sisters to continue visiting and staying with him. During this time period, the [petitioner] continued periodically to grab S surreptitiously. On one occasion, when S was in the fifth grade, A and S, who had been playing outside, went inside to take a shower together. While they were in the shower, the [petitioner] walked into the bathroom, removed his clothes and got into the shower with the girls. He 'bathed' them, touching their private areas with his hands and made them do the same to him. At that time, S told no one what was transpiring between her and the [petitioner].

"In 2002, when S was approximately eleven or twelve years old, the [petitioner] and F reconciled and moved back in together. The [petitioner's] physical abuse of S continued, and the sexual abuse escalated significantly. The [petitioner] continued to touch S inappropriately, sometimes using his fingers to penetrate her vaginally. The [petitioner] also made S masturbate him with her hands and forced her to give and receive oral sex, striking her if she refused or tried to stop him. In December, 2002, S reported to a teacher at her school that the [petitioner] had hit her. As a result, S and her two sisters were removed from the home and placed with Kids In Crisis.[2] After one month, G and M were returned to the

[2] Our Supreme Court explained that Kids In Crisis "is an organization that provides crisis counseling and temporary shelter for children." *State* v. *Ricardo R.*, 305 Conn. 581, 586 n.5, 46 A.3d 139 (2012).

family home, while S was placed with her grandparents. Some time thereafter, when S assured officials that everything was 'okay' at home, she was returned to F and the [petitioner]. At that point, S did not tell F that the [petitioner] was sexually abusing her, nor did she report any sexual abuse to social workers with the department of children and families, who now visited the home. When S returned home, the [petitioner] initially refrained from abusing her. Once the social workers ceased monitoring the home, however, he resumed his physical and sexual abuse of S.

"In February, 2004, F once again broke off her relationship with the [petitioner], and she and the children moved out. Soon thereafter, A filed a complaint alleging that the [petitioner] had physically abused her, exposed the children to pornography, and made A and S shower with him and play the 'modeling game.' When the officials who were investigating the complaint questioned S concerning A's allegations, she confirmed that the [petitioner] had showered with A and S, and played the modeling game with them, but she did not discuss the sexual aspects of either incident, and she denied that the [petitioner] had touched her inappropriately in either instance. S did not tell investigators about the additional times that the [petitioner] had played the modeling game with her alone, and when investigators asked her if the [petitioner] had sexually assaulted her, she told them that he had not. After A filed her complaint, F did not allow the [petitioner] to see S, and F subsequently broke off contact with him.

"S first told F about the sexual abuse in June, 2007, and F reported the sexual abuse to the Greenwich police the next day. The state subsequently charged the [petitioner] in a substitute information with one count of risk of injury to a child in violation of [General Statutes] § 53-21 (a) (2), and two counts of sexual assault in the first degree in violation of [General Statutes] § 53a-70

(a) (1) and (2). The jury found the [petitioner] guilty on all counts. On January 7, 2010, the trial court sentenced the [petitioner] to twenty years incarceration on each count, with the sentences to run concurrently, followed by five years of special parole." (Footnotes altered or omitted.) *State* v. *Ricardo R.*, 305 Conn. 581, 584–87, 46 A.3d 139 (2012). Our Supreme Court affirmed the petitioner's conviction. Id., 594. Additional facts will be set forth as necessary.

On April 13, 2011, the petitioner, as a self-represented litigant, filed a petition for a writ of habeas corpus. On December 22, 2014, after being appointed counsel, the petitioner filed an amended petition alleging, in relevant part, that his representation by his criminal trial counsel, Attorney Wayne Keeney, was deficient because Keeney failed to adequately cross-examine, impeach, and challenge the testimony of the state's expert witness, Dr. Larry Rosenberg; that he failed to consult with and present testimony of a forensic psychologist; and that he failed to adequately present an alternative innocent explanation for the complainant's allegations of sexual abuse.[3] The petitioner's first hearing was declared a mistrial by *Oliver*, *J.*, and a new hearing on the amended petition was held by *Fuger*, *J.* The habeas court, in a sixteen page memorandum of decision, denied the petitioner's amended petition.[4] On August

[3] In the petitioner's amended petition for a writ of habeas corpus, he also claimed that his constitutional right to effective assistance of appellate counsel was violated. This claim, however, was withdrawn on November 17, 2015.

[4] At the conclusion of the habeas court's memorandum of decision, it indicated: "The petition for a writ of habeas corpus is, therefore, denied and the petition dismissed." We ascribe the court's reference to a dismissal of the petition to be a scrivener's error. The memorandum of decision explicitly states in its discussion section that the "court disagrees with the position of the petitioner and will *deny the petition* and decline to issue a writ of habeas corpus." (Emphasis added.) We find no other indication in the court's memorandum of decision that supports a conclusion that the court dismissed the petition in whole or in part. Additionally, there are no special defenses filed that would justify a dismissal of the petition.

22, 2016, the petitioner filed a petition for certification to appeal, which was later denied. That denial is the focus of this appeal.

I

The petitioner first claims that the habeas court improperly denied his petition for certification to appeal. We disagree. Our Supreme Court has made clear that an appellate court need not reach the merits of a habeas appeal following a denial of certification unless the petitioner can demonstrate that the habeas court abused its discretion in doing so. *Simms* v. *Warden*, 229 Conn. 178, 187, 640 A.2d 601 (1994). In determining whether a habeas court abused its discretion in denying certification to appeal, the petitioner must demonstrate that the issues are "debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) *Henderson* v. *Commissioner of Correction*, 181 Conn. App. 778, 794–95, 189 A.3d 135, cert. denied, 329 Conn. 911, 186 A.3d 707 (2018).

In ascertaining whether the habeas court abused its discretion in a denial of certification case, "we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed." (Internal quotation marks omitted.) *Stephen*

Accordingly, we read the habeas court's order to be solely a denial of the petitioner's petition for a writ of habeas corpus.

J. R. v. *Commissioner of Correction*, 178 Conn. App. 1, 7, 173 A.3d 984 (2017), cert. denied, 327 Conn. 995, 175 A.3d 1246 (2018).

For the reasons set forth in part II of this opinion, we conclude that the petitioner has failed to show that his claim is debatable among jurists of reason; that a court could resolve the issue in a different manner; or that the question is adequate to deserve encouragement to proceed further. We therefore conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

II

The petitioner claims that the habeas court improperly concluded that he received effective assistance of counsel. In particular, the petitioner argues that Keeney failed to "retain, consult with, [or] present testimony" of an expert witness. He argues that this failure constituted deficient performance because it resulted in trial counsel's failure to (1) "adequately cross-examine the State's expert"; and (2) "adequately develop and present an alternative innocent explanation for the complainant's allegation of abuse."[5] We do not agree.

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That

[5] To the extent that the petitioner is challenging on appeal that trial counsel failed to adequately pursue the production and disclosure of certain confidential and privileged materials, to wit, the victim's school records, or that the habeas court erred in excluding certain evidence offered by the petitioner, we deem these issues abandoned because they are inadequately briefed. *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 133, 101 A.3d 279 (explaining that issues inadequately briefed need not be reviewed by appellate court), cert. denied, 315 Conn. 901, 104 A.3d 107 (2014).

requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Vazquez* v. *Commissioner of Correction*, 128 Conn. App. 425, 430, 17 A.3d 1089, cert. denied, 301 Conn. 926, 22 A.3d 1277 (2011).

"To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law." (Internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 631, 126 A.3d 558 (2015). "We . . . are mindful that [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Hilton* v. *Commissioner of Correction*, 161 Conn. App. 58, 66–67, 127 A.3d 1011 (2015), cert. denied,

320 Conn. 921, 132 A.3d 1095 (2016); see also *Michael T.* v. *Commissioner of Correction*, supra, 319 Conn. 632.

"Similarly, the United States Supreme Court has emphasized that a reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did. . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (Internal quotation marks omitted.) *Brian S.* v. *Commissioner of Correction*, 172 Conn. App. 535, 539–40, 160 A.3d 1110, cert. denied, 326 Conn. 904, 163 A.3d 1204 (2017).

"Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Hankerson* v. *Commissioner of Correction*, 150 Conn. App. 362, 367, 90 A.3d 368, cert. denied, 314 Conn. 919, 100 A.3d 852 (2014).

A

The petitioner first argues that Keeney's performance was deficient because he failed to adequately cross-examine Rosenberg. In particular, the petitioner argues that Keeney's "inaccurate beliefs about the forensic psychology literature made it necessary for counsel to consult with a forensic mental health professional to

prepare an effective cross-examination of Dr. Rosenberg." In addition, the petitioner argues that Keeney's cross-examination of Rosenberg was deficient because he was required, but failed, to rebut misleading suggestions made by Rosenberg through cross-examination. We disagree.[6]

Our Supreme Court has declined to adopt a bright line rule that an expert witness for the defense is necessary in every sexual assault case even when it may be helpful to the defense. *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 100–101, 52 A.3d 655 (2012). In addition, this court has held in factually similar cases to the present action that the failure to retain or consult with an expert witness does not constitute deficient performance. See, e.g., *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 821, A.3d (2018); *Victor C.* v. *Commissioner of Correction*, 179 Conn. App. 706, 719–20, 180 A.3d 969 (2018) (decision not to retain expert witness was not deficient in light of counsel's experience and training with regard to defending child sexual assault cases).

[6] Accordingly, because we conclude that Keeney's performance was not deficient, we need not address the prejudice prong under *Strickland*. See *Antwon W.* v. *Commissioner of Correction*, 172 Conn. App. 843, 865, 163 A.3d 1223 (explaining that prejudice analysis is not germane to discussion when disposition of the case is resolved on performance prong), cert. denied, 326 Conn. 909, 164 A.3d 680 (2017). We note, however, that the habeas court concluded that the petitioner was not prejudiced by the trial counsel's representation of the petitioner. The habeas court found the following: "[I]t is clear that the first witness, the victim, clearly and consistently testified before this jury to all of the elements of the crimes of which the petitioner stands convicted. Trial defense counsel did make a strong effort to cross examine the victim to undermine her testimony, pointing out the delays in reporting and initial denials by the victim. Nevertheless, the victim comes across . . . as credible. . . . This habeas court is not convinced that the testimony of the forensic psychologists would [have] in any way undermined the victim's testimony. In other words, while there is some testimony and studies by psychology experts pertinent to the delayed and incremental reporting by victims of child sexual abuse that may be a great import on the field of psychology, such testimony is of limited, if any, use in a criminal trial."

With those decisions in mind, we set forth additional relevant facts necessary for the disposition of this claim. At the habeas trial, the court determined that Keeney "was fully aware of the expert hired by the state . . . understood the testimony he was expected to give, and declined to hire an expert of his own."[7] Keeney testified at the habeas trial that he did not want to call a defense expert because he did not think it would register well with the jury; Keeney believed that any expert that he called would have largely agreed with Rosenberg's testimony, which he felt would have only reinforced both Rosenberg's testimony and the victim's credibility. Accordingly, Keeney believed it was best to allow Rosenberg to testify on direct examination to the general behavioral concepts exhibited by child abuse victims, and then cross-examine him and argue during his closing argument that Rosenberg could not say that any of these things had happened in this case because he lacked knowledge of the specific facts at issue in the present case. Keeney explained that his strategy was to "point out the deficiencies in the testimony of [Rosenberg] as well as the many times the child had an opportunity to disclose the sexual activity . . . ."

Moreover, Keeney also testified that he did not want to call a defense expert to testify because he was concerned that the prosecution would then have an opportunity to cross-examine the expert by referring to the

[7] Keeney testified that he was familiar with Rosenberg and that he had "seen him testify before." He also testified that he had "discussed this testimony—this style of testimony with several of [his] colleagues who are . . . in the top tier, criminal defense attorneys in the state." Furthermore, when asked what Keeney's basis was for certain beliefs he had in regard to whether a child actually had been abused, he testified: "[b]ased on my handling of these types of cases before. I've had interaction with sexual assault experts in the past, discussed these matters with experts that I may have been considering hiring for my own cases, also observing the testimony of experts and discussing their effectiveness with other colleagues who practiced in the same strata, if you will, of criminal defense . . . ."

specific facts of the case, which he believed would be harmful to the petitioner's case. Keeney reiterated that he ran the risk of reinforcing testimony that the victim in this case already provided. The habeas court found that "Keeney did not want to hire an expert for the defense to discuss delayed and incremental reporting by child sex abuse victims, because it would necessitate informing that expert of some of the problematic specific actions of the petitioner. For instance, such an action would have necessitated highlighting the fact that his own client had entered a shower, nude, while two young females, including the victim, were showering and engaged in soaping them down." Accordingly, the habeas court concluded that Keeney's decision to forego hiring an expert was sound and strategic.

While the petitioner argues that Keeney's "inaccurate beliefs about the forensic psychology literature made it necessary for [him] to consult with a forensic mental health professional to prepare an effective cross-examination," it was incumbent upon the petitioner to overcome the presumption that, under the circumstances, his decision not to consult with an expert was done in the exercise of reasonable professional judgment. See *Brian S.* v. *Commissioner of Correction*, supra, 172 Conn. App. 540. The petitioner has failed to do so. The habeas court specifically found that Keeney "was fully aware of the expert hired by the state" and "understood the testimony he was expected to give." To the extent that the petitioner challenges this finding as clearly erroneous, the record demonstrates that Keeney testified that he observed Rosenberg testify in the past, had discussed his testimony with other colleagues in the legal community, and had previously consulted with sexual assault experts that he was considering hiring in other cases.

Additionally, the record demonstrates that Keeney's testimony at the habeas trial about his understanding

of the relevant forensic psychology concepts, such as hypersexuality and grooming behavior, that the petitioner argues was "flatly contradicted" by Rosenberg, actually was largely consistent with Rosenberg's testimony. The petitioner argues that Keeney's knowledge of these concepts was "entirely inaccurate" because he testified at the habeas trial that child victims of sexual abuse adhered to a specific behavioral profile, that a child exhibiting hypersexuality and a child's disruptive behavior at school could be useful in determining whether abuse occurred, and that grooming behaviors can be used to identify perpetrators. Although Rosenberg did testify that he was unaware of "one distinctive profile" by which to accurately identify abuse victims, he testified that hypersexuality, acting out, and grooming behavior are in fact consistent characteristics of child sexual abuse victims and their perpetrators. Based on the sound findings of the habeas court, and guided by this court's recent holdings, we conclude that under the circumstances of this case, trial counsel's decision not to retain or consult with an expert witness in preparation for cross-examination was supported by legitimate and reasonable strategies for doing so, and was made in the exercise of reasonable professional judgment.

The petitioner also argues that Keeney's cross-examination of Rosenberg was deficient because he was required, but failed, to rebut misleading suggestions made by the witness through cross-examination. This argument, however, fails to appreciate the wide array of possible strategies trial counsel is permitted to pursue during his questioning. See *Antonio A.* v. *Commissioner of Correction*, 148 Conn. App. 825, 832, 87 A.3d 600 (noting "attorney's line of questioning on examination of a witness clearly is tactical in nature"), cert. denied, 312 Conn. 901, 91 A.3d 907 (2014).

A careful review of the criminal trial transcript shows that Keeney elicited testimony consistent with a sound and legitimate trial strategy. In particular, he elicited from Rosenberg that his testimony was not based on any particular facts of the present case, that his testimony was rooted in generalities, and that a "good many of the things that [Rosenberg] described could not lead to sexual assault." Additionally, Keeney elicited from Rosenberg that he was not offering an opinion as to the credibility of the allegations in this case, in that the witness acknowledged the fact that he never interviewed S or A in the present case. Although the petitioner, with the benefit of hindsight, may now prefer that trial counsel had undermined Rosenberg's testimony and the prosecution's theories by eliciting additional information from Rosenberg, he fails to sufficiently demonstrate how the line of questioning Keeney actually pursued was not part of a sound trial strategy, or how it fell outside the range of competence displayed by lawyers with ordinary training and skill in the criminal law.[8] See *Michael T.* v. *Commissioner of Correction*, supra, 319 Conn. 632 (explaining that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way"). Accordingly, we conclude that Keeney's cross-examination of Rosenberg was not deficient.

B

The petitioner next argues that Keeney's "failure to present expert testimony in support of an alternative innocent explanation for the complainant's allegations

[8] We note that the petitioner did not call a legal expert at the habeas trial to discuss what the prevailing norms in Connecticut are with respect to consulting with or presenting testimony of a child sexual assault expert at trial. While the petitioner is correct that expert testimony is not necessarily required in every case raising a *Strickland* inquiry; *Evans* v. *Warden*, 29 Conn. App. 274, 280, 613 A.2d 327 (1992); presenting expert testimony may help a petitioner carry his burden in demonstrating deficient performance.

of abuse" constituted deficient performance. First, the petitioner argues that reasonably competent counsel would have explained that the antagonism toward the petitioner that was demonstrated by the complainant's overly anxious mother could have influenced the complainant to believe falsely that abuse occurred. Second, he argues that "reasonably competent counsel would have argued that the adolescent complainant fabricated the extent of the abuse in an attempt to deflect blame away from herself from her own behavioral and academic shortcomings." We find this argument unpersuasive.

The petitioner's argument is flawed for several reasons. First, as we concluded in part II A of this opinion, Keeney's decision not to retain or consult with an expert was supported by legitimate and reasonable strategies for doing so. Although the petitioner argues that Keeney had no strategic reason for not presenting an expert, he seems to overlook the soundness of Keeney's strategy. Keeney was reasonably concerned that presenting an expert could have reinforced both Rosenberg's testimony and the victim's credibility, and that presenting testimony from an expert would have afforded the state an opportunity to cross-examine the expert by means of the specific facts of the case, facts that were likely to be viewed as damaging to the petitioner's case. As our Supreme Court has noted, "[a]lthough an expert may have been helpful to the defense, there is always the possibility that an expert called by one party, upon cross-examination, may actually be more helpful to the other party." *Michael T.* v. *Commissioner of Correction*, supra, 307 Conn. 101.

Second, as the respondent Commissioner of Correction points out, the innocent explanations that the petitioner wanted Keeney to put forth are matters of common sense that do not mandate the use of an expert witness. While Keeney may not have presented these

theories in the exact manner that the petitioner now prefers, it does not automatically dictate a conclusion that his performance was deficient. See *Harrington* v. *Richter*, 562 U.S. 86, 106, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (explaining that "[r]are are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach"). Keeney pursued a strategy that focused largely on the victim's credibility; as he indicated, he wanted to point "out the deficiencies in the testimony of the state's expert as well as the many times the child had an opportunity to disclose the sexual activity . . . ." For example, he elicited testimony from the victim and her mother about the timing of the victim's allegations of sexual abuse, highlighting for the jury that the victim's disclosure of sexual abuse came around the time the victim had a baby and dropped out of school, and that the victim's mother thought that her daughter's life was "off track." The victim also testified that her disclosure came around the time her mother and the petitioner had broken up, and after the petitioner became involved with another woman. Keeney then elicited testimony from Rosenberg that the preponderance of false allegations made by complainants are made in situations where there is a custody dispute or visitation dispute underway between the parents or where there is an acrimonious divorce or break up.

Furthermore, Keeney underscored during closing arguments all of the opportunities the victim had to disclose these sexual abuse allegations and had not done so. He then called into question the truthfulness of the mother's testimony, highlighted that she had a "fractured relationship" with the petitioner, and suggested that she had "animosity" for him. Although Keeney may not have framed his theory and arguments to the jury in the exact manner the petitioner now desires, Keeney clearly elicited testimony consistent

with those theories by calling into question the veracity of the allegations against the petitioner. The habeas court noted that trial counsel made "a strong effort to cross examine the victim to undermine her testimony, pointing out delays in reporting and initial denials by the victim." The habeas court also found that Keeney conducted "a full cross-examination of this young victim and, while unsuccessful in convincing the jury of her mendacity, nevertheless performed admirably." We agree with the habeas court.

The petitioner was required to demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. Although the petitioner did point out these particular theories that Keeney could have pursued with a defense expert, he failed to demonstrate sufficiently how failing to introduce these theories through expert testimony made Keeney's performance unreasonable. See *Clinton S.* v. *Commissioner of Correction*, 174 Conn. App. 821, 828, 167 A.3d 389, cert. denied, 327 Conn. 927, 171 A.3d 59 (2017). Accordingly, we conclude that trial counsel's decision not to pursue these alternative theories that supported a not guilty verdict through expert testimony did not constitute deficient performance.

We therefore conclude that the petitioner has failed to show that his claim of ineffective assistance of counsel involves issues that are debatable amongst jurists of reason, that a court could resolve the issues in a different manner, or that the issues are adequate to deserve encouragement to proceed further. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to these claims.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CLEVELAND BROWN (AC 41386)

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

Syllabus

Convicted, following a jury trial, of the crimes of murder and carrying a pistol without a permit, the defendant appealed. On appeal, he claimed, for the first time, that the trial court improperly failed to ensure that the trial transcript reflected each juror's oral concurrence with the jury verdict, in violation of his state and federal constitutional due process rights. Initially, the jury had announced its verdict in the absence of the court monitor. Thereafter, the court monitor returned, and the trial court instructed the jury foreperson to reiterate the jury's verdict so that it would appear on the transcript. *Held* that the record was inadequate to review the defendant's unpreserved claim, pursuant to *State* v. *Golding*, (213 Conn. 233), that his state and federal constitutional due process rights had been violated; although the defendant argued that there was an adequate record because the transcript set forth the trial court's remarks after the portion of the proceedings in which the foreperson stated the jury's verdict at trial, defense counsel made no attempt to make a record of what transpired during the unrecorded announcement of the verdict, and without a record, this court could not establish the factual predicate necessary to review the defendant's claim of error.

Argued September 17—officially released November 6, 2018

Procedural History

Information charging the defendant with the crimes of murder, felony murder, attempt to commit robbery in the first degree, criminal possession of a firearm;, and carrying a pistol without a permit, brought to the Superior Court in the judicial district of Hartford; thereafter, the defendant elected a court trial as to the charge of criminal possession of a firearm; subsequently, the state entered a nolle persequi as to that charge; thereafter, the remaining charges were tried to the jury before *Dewey*, *J.*; verdict and judgment of guilty of murder and carrying a pistol without a permit, from which the defendant appealed. *Affirmed.*

Stephanie L. Evans, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Chris A. Pelosi*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Cleveland Brown, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a (a) and carrying a pistol without permit in violation of General Statutes § 29-35 (a). On appeal he claims that the trial court failed to ensure that the trial transcript reflected each individual juror's oral concurrence with the jury verdict. Specifically, the defendant argues that Practice Book § 42-29, which provides that "the verdict shall be . . . announced by the jury in open court," requires that all jurors orally concur with the verdict, and that the trial court's failure to ensure that this procedure was transcribed on the record violated his state and federal constitutional due process rights. In response, the state argues that the record is inadequate for review. We agree with the state that we have an inadequate record for review in the present case.[1] Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to the defendant's appeal. The defendant was tried before a jury on a four count information charging him with murder in violation of § 53a-54a (a), felony murder

[1] While the state's primary argument is that the record is inadequate for review, the state alternatively argues that there is no such federal or state constitutional right to have all jurors orally concur with the verdict or, if we review the defendant's claim on the merits, the defendant had the benefit of each juror's oral concurrence with the record. Because we find that the record is inadequate for review, we do not address the state's alternative arguments.

in violation of General Statutes § 53a-54c, attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a), and carrying a pistol without a permit in violation of § 29-35 (a).[2] The jury initially announced its verdict in the absence of the court monitor and, therefore, it was not transcribed. Once the court monitor was present, the court instructed the jury foreperson to reiterate the verdict. The following colloquy took place:

"The Court: Are you ready. All right. I'm going to note for the record that the verdict was already announced by the jurors. Unfortunately, the monitor was not here—was not called. So for the record all of the juror's names were called out. All of the jurors indicated they are present. The only portion that you're going to reread is the actual verdict itself the questions. All right. If the foreperson could please stand. Thank you. All right. Do it again.

"The Clerk: Madam Foreperson, has the jury reached a verdict in the case of the state of Connecticut versus Cleveland Brown, docket number HHD-CR14-0676472T, please answer yes or no.

"Madam Foreperson: Yes.

"The Clerk: Will defendant, Cleveland Brown, please rise and remain standing.

"Madam Foreperson, in the first count charging the defendant with the crime of murder in violation of Connecticut General Statutes § 53a-54a (a), do you find the defendant guilty or not guilty.

"Madam Foreperson: Guilty.

[2] The state's long form information also charged the defendant with criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). The defendant elected a court trial as to that charge, and the state subsequently entered a nolle.

"The Clerk: In count two, charging the defendant with the crime of felony murder in violation of Connecticut General Statutes § 53a-54c, do you find the defendant guilty or not guilty?

"Madam Foreperson: Not guilty.

"The Clerk: In count three charging the defendant with the crime of attempted robbery in the first degree in violation of Connecticut General [Statutes] §§ 53a-49a (2) [and] 53a-134a, do you find the defendant guilty or not guilty?

"Madam Foreperson: Not guilty.

"The Clerk: In count four charging the defendant with the crime of pistol without a permit in violation of Connecticut General [Statutes] § 29-35 (a), do you find the defendant guilty or not guilty?

"Madam Foreperson: Guilty.

"The Court: The verdict was ordered recorded. The verdict was repeated. All of the jurors concurred in the verdict. Thank you. The sentencing date was set for—

"[Defense Counsel]: The twelfth.

"The Court: —May 12th. With that now is there anything further from counsel?

"[The Prosecutor]: How to address bond after or now, Your Honor?

"The Court: Afterwards. I'm going to have the jurors and the alternates if you can just go into the jury room for just a few minutes. We'll take just a few minutes.

"[Defense Counsel]: For the record, Your Honor, I do concur that all of the jurors did nod[3] affirmatively—

[3] Although the transcript reads "not," the defendant's brief acknowledged that the word "not" should read "nod." Additionally, on February 28, 2018, this court granted the state permission to file a late motion for rectification of the record, claiming that the word "not" should read "nod." On March 5, 2018, the trial court issued a memorandum of decision granting the state's motion for rectification, in which it ordered that page 83 of the trial tran-

"The Court: Thank you. If you can just wait in the jury room. I'll be right there. Okay?"

The court sentenced the defendant to a total effective term of fifty years incarceration. This appeal followed.

The defendant claims for the first time on appeal that the court erred because it did not take steps to ensure that each individual member of the jury announced the jury verdict on the record. The defendant nevertheless asks us to review his claim under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989). Under *Golding*, when a defendant raises a claim of constitutional error for the first time on appeal, the claim is reviewable only if the defendant satisfies all of the following conditions: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [defendant] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Internal quotation marks omitted.) *In re Yasiel R.*, 317 Conn. 773, 779–81, 120 A.3d 1188 (reviewing standard set forth in *State* v. *Golding*, supra, 233, and modifying third prong). When raising a claim for the first time on appeal, the defendant "bears the responsibility for providing a record that is adequate . . . . If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, [this court] will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim." *State* v. *Golding*, supra, 240.

Here, the defendant claims that the record is adequate for review under the first prong of *Golding* because the

script, lines 12–14, should read as follows: "[Defense Counsel]: For the record, Your Honor, I do concur that all of the jurors did nod affirmatively—"

transcript sets forth the trial court's remarks after the portion of the proceedings in which the foreperson stated the jury's verdict. In response, the state contends that the defendant did not provide an adequate record for review because he did not attempt to supplement or reconstruct the record so as to fill in the gap that occurred in the transcript when the jury initially announced its verdict in the absence of the court monitor. We agree with the state.

In the present case, we do not have a record of the jury's initial announcement of its verdict because the court monitor was not present for that part of the proceedings. The record available to us reveals that when the court monitor returned, the court instructed the jury foreperson to reiterate the jury's verdict so that it would appear on the transcript. The court reiterated each charge, and the jury foreperson announced the jury's verdict accordingly. Subsequently, defense counsel noted on the record that each member of the jury nodded in agreement with the verdict.[4]

At trial defense counsel made no attempt to make a record of what transpired during the unrecorded announcement of the verdict. Without a record, we cannot establish the factual predicate necessary to review the defendant's claim of error and, therefore, cannot discern whether a colorable claim exists. See Practice Book § 66-5; see also *State* v. *Benitez*, 122 Conn. App. 608, 613–14, 998 A.2d 844 (2010) (holding that although record was adequate for review, defendant's claim failed under *Golding*'s third prong because "[t]he defendant did not avail himself of his right to seek rectification of the record"); *State* v. *Vines*, 71 Conn. App. 751, 761–62, 804 A.2d 877 (2002) (declining

[4] The record is not clear as to whether defense counsel concurred that the jury nodded in agreement during the unrecorded announcement of the verdict, during the recorded announcement of the verdict, or both.

to review defendant's claim when defendant did not satisfy his burden to create record detailing events that gave rise to his claim of error), aff'd, 268 Conn. 239, 842 A.2d 1086 (2004). Accordingly, we decline to review the defendant's claim.

The judgment is affirmed.

In this opinion the other judges concurred.

JULIE BECUE *v.* MARK BECUE
(AC 38994)

Alvord, Prescott and Pellegrino, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from certain postjudgment orders of the trial court. He claimed, inter alia, that the trial court improperly determined the amount of his child support, arrearage, and expense obligations. The plaintiff cross appealed, claiming that the trial court erred when it denied her motion for contempt in which she alleged that the defendant improperly engaged in self-help by repeatedly modifying or withholding his child support payments. *Held*:

1. The trial court abused its discretion when it declined to find the defendant in contempt for engaging in self-help; the evidence clearly demonstrated that the defendant stopped paying child support in January, 2012, did not resume any type of child support payment for an entire year despite new gainful employment and, thereafter, changed the amount he decided to pay, and it was undeniable that the defendant made those modifications to his court-ordered child support without the court's permission, chose not to comply with the court's child support order and, thus, wilfully engaged in self-help in breach of that order.

2. The trial court properly determined the defendant's child support, arrearage, and expense obligations: contrary to the defendant's contention, the trial court's net income findings had an evidentiary basis in the record, the defendant did not explain how the court's use of Judicial Branch software to assist with calculations was extra-evidentiary, provided the data being input was based on the evidence or matters for which the court properly took judicial notice, and all of the named documents on which the court stated it relied, as well as many other financial documents, were contained in the record; moreover, the defendant's claim that the court failed to give consideration to his request for a deviation from the presumptive amount of child support failed, as

the record established that the court considered the defendant's request for a deviation and stated on the record that if it found any merit to the defendant's request it would permit further argument on it, and the trial court's response to the defendant's motion for reargument on his request for a deviation was appropriate in that the court considered the issues raised and submitted a corrected memorandum of decision in which it determined that it would be equitable and appropriate not to deviate from the child support guidelines, which was not an abuse of discretion, as the dissolution court did not make a finding on the record that the application of the guidelines would be inequitable or inappropriate at the time it rendered judgment incorporating the parties' dissolution agreement, and in the absence of such a finding, the trial court had the discretion to consider the question of a modification of child support anew in accordance with the guidelines, and found a substantial change in circumstances such that a deviation from the guidelines would have been inappropriate and inequitable and would have left the plaintiff with insufficient funds to meet the needs of the parties' children.

3. The defendant's claim that the trial court abused its discretion in ordering him to pay $50,000 in attorney's fees to the plaintiff lacked merit; the parties' dissolution agreement provided for the payment of attorney's fees in the event a breach occurred, and the court's finding that the defendant had breached a provision of the agreement regarding child support when he reduced his child support payments unilaterally without court intervention was amply supported by the evidence in the record.

4. The trial court did not abuse its discretion when it declined to hold the plaintiff in contempt for allegedly violating the parties' dissolution agreement; the court specifically found that the paragraph at issue involving the filing of tax returns was ambiguous, and that the defendant had failed to prove by clear and convincing evidence that the plaintiff wilfully violated the provision, as the court found that to the extent the plaintiff may have breached the agreement, her breach was not wilful but was based on a good faith misunderstanding of the ambiguous provision.

5. The trial court did not abuse its discretion when it held the defendant in contempt for failing to make certain child support payments; the record was clear that the orders that the defendant violated were clear and unambiguous and amply supported the trial court's finding that the defendant's failure to abide by the court's order was wilful, as it was undisputed that the defendant failed to pay any amount of child support from May through August, 2015, and as a result of the defendant's unilateral decision to stop paying child support during that time, it was not an abuse of discretion for the court to find the defendant in wilful contempt.

Argued May 29—officially released November 6, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Stanley Novack*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Shay, J.*, granted the plaintiff's motion for order and motions for attorney's fees, denied the plaintiff's motions for contempt, granted the defendant's motion for modification, and denied the defendant's motions for contempt, motions for attorney's fees, motions for order, and motions to compel; subsequently, the court, *Hon. Michael E. Shay*, judge trial referee, issued a corrected memorandum of decision, and the defendant appealed and the plaintiff cross appealed to this court; thereafter, the court, *Hon. Michael E. Shay*, judge trial referee, granted the defendant's motion for articulation. *Reversed in part*; *further proceedings*.

John H. Van Lenten, for the appellant-cross appellee (defendant).

Richard W. Callahan, for the appellee-cross appellant (plaintiff).

Opinion

PELLEGRINO, J. In this postdissolution matter, the defendant, Mark Becue, appeals from the judgment of the trial court, resolving several of the parties' postjudgment motions. The defendant claims that the court improperly: (1) determined the amount of his child support and his arrearage obligations due to four specific errors; (2) ordered him to pay $50,000 toward the attorney's fees of the plaintiff, Julie Becue; (3) declined to hold the plaintiff in contempt; and (4) held him in contempt for failing to make certain child support payments. The plaintiff, Julie Becue, cross appeals from

the court's judgment. Specifically, she claims that the court erred when it denied her motion for contempt, number 157, in which she alleged that the defendant improperly had engaged in self-help by repeatedly modifying or withholding his child support payments. We disagree with all of the defendant's claims, and we agree with the claim raised in the plaintiff's cross appeal. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

The following procedural history, although complicated, is relevant. The court dissolved the parties' marriage on March 16, 2010. At that time, the parties had three minor children, the oldest of whom was eleven. The court found that the parties' marriage had broken down irretrievably, and it accepted, as fair and equitable, the parties' written separation agreement and parenting plan (agreement), which the court incorporated by reference into the dissolution judgment. The agreement provided that the parties would share joint legal and physical custody of their minor children and that the defendant would pay to the plaintiff $260 per week in child support, which the court recognized was a deviation from the presumptive amount of $451 as calculated using the child support guidelines.[1] The court also found that this deviation would not negatively impact the children.[2]

Approximately two years later, the parties began to file a seemingly endless stream of motions. On February

[1] Paragraph 5.1 of the agreement provides in relevant part that "the Husband shall during his lifetime pay the Wife the sum of $260.00 per week as and for child support pursuant to the child support guidelines [provided he is employed at the rate of Two Hundred and Five Thousand ($205,000.00) Dollars per year.] The Husband's obligation with respect to each child shall terminate when the child attains age eighteen . . . ."

[2] Although the dissolution court found that the parties' agreement was fair and equitable, the record contains no indication that the court also made a finding that the application of the guidelines would be inequitable or inappropriate.

2, 2012, the plaintiff filed a postjudgment motion for contempt, number 157, alleging that, as of January 1, 2012, the defendant had failed to comply with the court's order that he pay $260 per week in child support. The plaintiff also filed a motion for attorney's fees, number 158, on the same date.

On February 7, 2012, the defendant filed a motion for modification, number 159.01, on the ground that there had been a substantial change in circumstances. He alleged that he no longer was employed at the rate of $205,000 per year, and, in accordance with paragraph 5.1 of the parties' agreement; see footnote 1 of this opinion; he, therefore, was not required to pay child support. The defendant also sought, inter alia, to have the plaintiff pay child support to him.[3]

On April 5, 2012, the defendant filed a motion for contempt, number 166, on the ground that the plaintiff had violated the parenting plan contained in the parties' agreement, and, on April 17, 2012, he filed a motion, number 169, for attorney's fees. On July 19, 2012, the defendant filed three additional motions for contempt, numbers 181, 182, and 183, on the ground that the plaintiff had violated the parenting plan contained in the parties' agreement, and that she had failed to provide an itemized accounting. On August 3, 2012, the defendant filed another motion for contempt, number 190, on the ground that the plaintiff was in violation of the

[3] On February 9, 2012, the plaintiff filed another motion for contempt and a motion for counsel fees, and, on April 4, 2012, she filed a motion seeking the appointment of counsel for the minor children. On April 5, 2012, the defendant filed a motion requesting that the court order the plaintiff to undergo a psychological examination. On April 9, 2012, the plaintiff filed a motion for modification of legal and physical custody of the minor children. Most of these motions were marked off between April and June, 2012. On April 23, 2012, however, the parties did enter into a stipulated agreement regarding the appointment of counsel for the minor children, wherein they agreed to share the cost. There is no indication in the record, however, that counsel appeared on behalf of the children.

parenting plan. Also on August 3, 2012, the plaintiff filed a motion for contempt, number 188, on the ground that the defendant had failed to comply with discovery, and a motion for order, number 189, requesting that the court set the percentages that the parties must pay for the children's summer camp.

On January 25, 2013, the defendant filed a motion for order, number 193, requesting that the court grant to him the final authority on all major decisions affecting the minor children. On April 30, 2013, the defendant filed three additional motions for order, numbers 194, 195, and 196, requesting that the court order the plaintiff to sign authorizations for the defendant to obtain several years of her federal and state tax returns. On May 31, 2013, the defendant filed another motion for contempt, number 197, on the ground that the plaintiff again had violated the parenting plan contained in the parties' agreement.[4] On November 18, 2013, the defendant filed a motion for order, number 200, requesting that the court direct the plaintiff to comply with various provisions of the parties' agreement regarding health insurance for the children.[5] On December 9, 2013, the defendant filed another motion for contempt and motion to compel, numbers 201 and 202, regarding the plaintiff's tax returns. On December 31, 2013, the plaintiff filed a motion for contempt, number 203, regarding the defendant's child support obligation.[6]

[4] Page two of this motion, which contains the grounds thereof, is missing from the trial court file. The plaintiff, however, has included a copy of all three pages of the motion in the appendix to her appellate brief.

[5] This motion is docketed as a motion for contempt. The motion itself, however, is titled as a motion for order, and the defendant did not request in this motion that the plaintiff be found in contempt. Rather, he requested that the court order her to comply with the parties' agreement.

[6] The parties filed several additional motions throughout 2013, 2014, and 2015, some of which were heard and decided at various times, and some of which were marked off. These additional motions are not relevant to our analysis of the issues presented in this appeal or cross appeal.

On December 29, 2014, and January 5, 2015, the defendant filed two more motions for contempt, numbers 213 and 214, the first alleging that the plaintiff was in violation of the parenting plan set forth in the parties' agreement, and the second alleging that the plaintiff was in violation of an aspect of the agreement concerning her tax returns, and a motion to compel, number 215. On January 26, 2015, the plaintiff filed a motion for attorney's fees,[7] number 216, and, on April 27, 2015, the defendant filed a motion for attorney's fees, number 223.

Following a four day hearing involving more than twenty motions, and the submission of proposed orders and financial affidavits by each of the parties, the court, on August 27, 2015, issued a memorandum of decision. Shortly after the court rendered judgment, the plaintiff filed a motion to reargue/reconsider, asking the court to correct certain findings and mathematical calculations contained in the original memorandum of decision. The court granted that motion and, on February 23, 2016, issued some corrections to its August 27, 2015 memorandum of decision. Taking into consideration the original and the corrected memoranda of decision, the court made the following rulings on the relevant motions of the parties.

Regarding the plaintiff's postjudgment motion for contempt, number 157, her motion for attorney's fees, number 158, and the defendant's motion for modification, number 159.01, the court denied the motion for contempt, granted the motion for attorney's fees, and granted the motion for modification. The court found that the defendant's position that, on the basis of paragraph 5.1 of the parties' agreement, he could reduce his child support unilaterally, without court intervention,

[7] This motion is titled a motion for fees. On the docket sheet, however, it is listed as a motion for order postjudgment.

if his earnings were less than $205,000 per year, was "completely unreasonable and without merit." Nevertheless, the court found that the defendant's unilateral actions, "under all the facts and circumstances . . . do not amount to wilful contempt in that he had, in good faith, relied upon professional assistance in the preparation of the child support guidelines worksheets that formed the basis of his modified child support payments." The court also determined that a substantial change in circumstances had arisen in that the defendant had become unemployed at the time he filed his February 7, 2012 motion for modification. After calculating the amount of support due during the various periods of changing income, the court concluded that the defendant had an arrearage, as of June 30, 2015, in the amount of $59,254. It also concluded that the defendant's share of support for the parties' minor children, as of June 30, 2015, was $539 per week. Additionally, the court also concluded that the plaintiff was entitled to reasonable attorney's fees because the defendant had breached the agreement of the parties.

Regarding the defendant's April 5, 2012 motion for contempt, number 166, and his motion for attorney's fees, number 169, the court denied both motions, finding that the defendant had not met his burden of proof on the contempt allegation.

Regarding the defendant's motions for contempt, numbers 181, 182, and 183, and the plaintiff's motion for contempt, number 188, the court denied those motions, finding that any violation of the parenting plan by the plaintiff was de minimus, and that each of the parties had failed to establish contumacious behavior on the part of the other party.

Regarding the plaintiff's motion for order, number 189, requesting that the court set the percentages that the parties must pay for summer camp, the court found

that the parties' agreement was silent on this issue and that the children would be best served if each party contributed to the activities on a predetermined basis such as they do for reasonable medical expenses.

Regarding the defendant's motions for contempt, numbers 190 and 213, alleging that the plaintiff was in violation of the parenting plan, the court found that the defendant had failed to meet his burden of proof and that the plaintiff had attempted to address these issues with the defendant, but that the defendant had failed to respond in a good faith manner.

Regarding the defendant's motion for order, number 193, requesting that the court grant to him final authority on all major decisions affecting the minor children, the court found that giving the defendant such authority would not be in the best interest of the children because the defendant had "exhibited a pattern of rigidity, close-mindedness, and vindictiveness in his dealings with the [plaintiff] . . . ."

Regarding the defendant's motions for order, numbers 194, 195, and 196, requesting that the court order the plaintiff to sign authorizations for the defendant to obtain several years of her federal and state tax returns, the court denied those motions, concluding that, although the evidence supported a finding that the plaintiff inadvertently overpaid her taxes, the order requested by the defendant was unnecessary and unwarranted.

Regarding the defendant's motion for contempt, number 197, again alleging that the plaintiff violated the parenting plan, the court denied this motion concluding that the "testimony and evidence clearly support a finding that the [plaintiff] has not interfered with the exercise of the [defendant's] parenting rights . . . [that] the [defendant's] position is supported by neither law nor

logic nor the facts . . . and [t]hat the [defendant's] claim is both mean-spirited and without merit . . . ."

Regarding the defendant's motion for order, number 200, requesting that the court direct the plaintiff to comply with various provisions of the parties' agreement regarding health insurance for the children, the court found that the basis of the defendant's motion did not involve any alleged failure by the plaintiff to maintain the children on her health insurance, but, rather, that it was about the defendant wanting control of the plaintiff's health savings debit card. The court found the defendant's position on this issue both "far-fetched" and "unsupportable by law." As to the plaintiff's motion for contempt, number 203, the court determined that the plaintiff had withdrawn this motion.

Regarding the defendant's motions for contempt and to compel, numbers 201, 202, 214, and 215, alleging that the plaintiff was in violation of an aspect of the agreement concerning her tax returns, the court found that the defendant had failed to meet his burden of proof.

Regarding the plaintiff's motion for attorney's fees, number 216, and the defendant's motion for attorney's fees, number 223, the court found that the plaintiff was entitled to reasonable attorney's fees due to the defendant's breach of the parties' agreement, but that the defendant was not entitled to attorney's fees.

This appeal followed. Additional facts will be set forth as necessary. We first consider the plaintiff's cross appeal, followed by each of the issues raised by the defendant in his appeal.

I

THE PLAINTIFF'S CROSS APPEAL

The plaintiff claims in her cross appeal that the court erred when it declined to hold the defendant in contempt for engaging in self-help by repeatedly modifying

his child support payments without an order of the court. She argues that the evidence demonstrates that the defendant wilfully violated the child support order on multiple occasions and that there is nothing in the record to support the court's conclusion that the defendant's repeated self-help should be excused because of a good faith dispute or a misunderstanding. On the basis of the evidence and the court's factual findings, we agree.

The record reveals that at the time of the dissolution in March, 2010, the defendant had received an offer of employment with a salary of $205,000, but he had not yet started his new job. Initially, the defendant met his child support obligation of $260 per week, but in late 2011 he became unemployed. Thereafter, on January 1, 2012, the defendant ceased paying child support, and, on February 2, 2012, the plaintiff filed a motion for contempt and a motion for attorney's fees. The defendant, on February 7, 2012, filed a motion for modification of the child support order on the ground that his unemployment constituted a substantial change in circumstances. As set forth extensively in our overview of the procedural history of this case, many more motions were filed by both parties.

Before these motions were heard by the court, the defendant repeatedly modified or withheld his child support payments. In response to changes in his income, the defendant recalculated his child support obligation on the basis of his then present income, using a deviation factor, and he offset what he calculated he owed against what he calculated he had overpaid to the plaintiff during the early period of his unemployment.

The court explained the defendant's position as follows: "[I]f at any time he is not earning $205,000 [per] year, he has the right to arbitrarily recalculate child support on a fluctuating basis depending upon his [then]

present income." The court specifically found that the language in paragraph 5.1 was clear and unambiguous, and that the defendant's position was "both completely unreasonable and without merit." The court also found that although "the [bracketed] phrase [in the agreement] taken by itself (the brackets are in the original) would appear to support [the defendant's construction], he has taken that phrase completely out of context." Nevertheless, the court found that the defendant's unilateral modifications of his child support obligation were not wilful because "he had, in good faith, relied upon professional assistance in the preparation of the child support guidelines worksheets that formed the basis of his modified child support payments." The plaintiff claims that this was error. We agree.

"Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . A contempt judgment cannot stand when, inter alia, the order a contemnor is held to have violated is vague and indefinite, or when the contemnor, through no fault of his own, was unable to obey the court's order. . . .

"Consistent with the foregoing, when we review such a judgment, we first consider the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . .

"Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding. . . . A finding of contempt is a question of fact, and

our standard of review is to determine whether the court abused its discretion in failing to find that the actions or inactions of the [party] were in contempt of a court order. To constitute contempt, a party's conduct must be wilful. . . . Noncompliance alone will not support a judgment of contempt." (Citation omitted; internal quotation marks omitted.) *Hirschfeld* v. *Machinist*, 181 Conn. App. 309, 318–19, 186 A.3d 771, cert. denied, 329 Conn. 913, 186 A.3d 1170 (2018).

We first consider whether the order at issue is clear and unambiguous. Accordingly, we begin with the language of paragraph 5.1 of the parties' agreement, which was incorporated into the judgment of dissolution: "[T]he Husband shall during his lifetime pay the Wife the sum of $260.00 per week as and for child support pursuant to the child support guidelines [provided he is employed at the rate of Two Hundred and Five Thousand ($205,000.00) Dollars per year]. The Husband's obligation with respect to each child shall terminate when the child attains age eighteen (18), or if a child is still attending high school when he or she attains age eighteen (18)[8] and graduates high school, whichever event shall first occur." (Footnote added.)

The plaintiff argues that the trial court correctly found this provision to be clear and unambiguous in requiring the defendant to pay a weekly child support obligation of $260, based upon his anticipated annual income of $205,000. We agree. The provision clearly sets forth that the defendant, on the basis of his anticipated

[8] The trial court opined, and the parties do not disagree, that this is a typographical error and that it is should say age nineteen (19), in order to comply with General Statutes § 46b-84 (b), which provides in relevant part: "If there is an unmarried child of the marriage who has attained the age of eighteen and is a full-time high school student, the parents shall maintain the child according to their respective abilities if the child is in need of maintenance until such child completes the twelfth grade or attains the age of nineteen, whichever occurs first."

income of $205,000, will pay to the plaintiff child support in the amount of $260 per week "pursuant to the child support guidelines." There is nothing in the agreement that would permit the defendant to stop paying support or to change the amount of support, unilaterally, if his income later changed.

We next consider whether there is clear error in the court's finding that the defendant's disobedience of the court's child support order and his failure to seek a subsequent court order before repeatedly modifying his child support payments was wilful or was otherwise excused by a good faith dispute or misunderstanding. The plaintiff argues that the defendant's construction of the agreement, as one permitting him to engage in self-help whenever his income changed, specifically and pointedly was found by the court to be "both completely unreasonable and without merit." She contends that these findings demonstrate wilfulness, and that the court's later finding that the defendant's actions were not wilful is clear error. We agree.

In this case, the court specifically found that the defendant breached the order of the court. It further found that the defendant's position that he unilaterally or without leave of the court could recalculate and change or withhold his child support payments on the basis of his changing income was "both completely unreasonable and without merit." The court also explained: "While the phrase [in paragraph 5.1] taken by itself . . . would appear to support [the defendant], he has taken that phrase completely out of context. . . . [W]hen taken in context, the clear meaning of the phrase is that the initial amount of support is tied to that level of income [($205,000)], and does not preclude a modification by either party in the event of a substantial change of circumstances or substantial deviation from the child support guidelines." (Citations omitted; internal quotation marks omitted.) Despite finding that

the defendant was in breach of the court's order, that his construction of the bracketed language in that order was "completely unreasonable and without merit," and that he had taken the language out of context, the court went on to find that the defendant's "actions [did] not amount to wilful contempt in that he had, in good faith, relied upon professional assistance in the preparation of the child support guidelines worksheets that formed that basis of his modified child support payments."

That the defendant may have relied on professional financial assistance to facilitate the preparation of child support guideline worksheets in *December*, *2014*,[9] sheds no light on whether his decision to engage in self-help beginning in *January*, *2012*, was wilful or was based on a good faith dispute or misunderstanding. The professional advice sought by the defendant was limited to recalculating his child support obligation on the basis of his changes in income. There is no evidence in the record that the defendant sought appropriate legal advice regarding his right to unilaterally modify his support obligation.

In this matter, the court specifically found that the defendant's construction of the child support order was "both completely unreasonable and without merit," and that he had taken the bracketed language in that order completely out of context. We conclude that these findings evince a wilful decision by the defendant to engage in self-help, a decision that this court cannot and will

[9] The defendant testified that he hired Karlene Mitchell, a financial advisor, in late December, 2014, to assist him in recalculating his child support obligation. The defendant further testified: "My instructions to her [were] to take all of the . . . financial information on myself, and what sketchy information we had on the plaintiff, and to run child support numbers." The defendant called Mitchell to testify on his behalf, and she stated that she replicated the methodology employed by the parties in negotiating the 2010 agreement in conjunction with the software to calculate the child support guidelines for each time period where the defendant altered his child support payments.

not condone, and that the trial court's later finding that the defendant, in good faith, sought assistance in preparing new child support guidelines worksheets does not excuse his decision not to seek the guidance of the court rather than engage in self-help. See *Behrns* v. *Behrns*, 80 Conn. App. 286, 292, 835 A.2d 68 (2003) ("[W]e will not countenance one party's interpreting the term and undertaking unilateral action to the detriment of the other party. In such a circumstance, the party seeking to alter payments must seek the assistance of the court."), cert. denied, 267 Conn. 914, 840 A.2d 1173 (2004). The evidence clearly demonstrates that the defendant stopped paying child support in January, 2012, and did not resume any type of child support payment for an entire year, despite new gainful employment, that he thereafter changed whatever amount he decided to pay, apparently on the basis of some fluctuation in his income,[10] and that he did not seek advice from Mitchell, the financial advisor, until late December, 2014, nearly three years after he first engaged in self-help. Furthermore, the defendant's hiring of Mitchell to facilitate the preparation of child support guideline worksheets, even if done sooner, would not excuse his decision to engage in self-help. It is undeniable that the defendant made these modifications to his court-ordered child support without the permission of the court. There can be no dispute, our law is quite clear: "An order of the court must be obeyed until it has been modified or successfully challenged." (Internal quotation marks omitted.) *Eldridge* v. *Eldridge*, 244 Conn. 523, 530, 710 A.2d 757 (1998). Although a good faith dispute or the inability of a party to obey an order of the court; see id., 532; may be raised as a defense

[10] During the hearing on the motions, the plaintiff's attorney asked the defendant: "You didn't pay any child support for 2012, correct?" The defendant responded: "That's correct." Counsel then asked: "Then, [you] reduced [your payments] between 2013 and the present to $196, $167, $137, correct?" To which the defendant responded: "Yes."

to a contempt allegation, in this case, the evidence supports but one conclusion; the defendant chose not to comply with the court's child support order, and he wilfully engaged in self-help in breach of that order. Accordingly, we conclude that the court abused its discretion when it declined to find the defendant in contempt for engaging in self-help.

II

THE DEFENDANT'S APPEAL

In his appeal, the defendant claims that the court improperly: (1) determined his child support and his arrearage obligations; (2) ordered him to pay $50,000 toward the attorney's fees of the plaintiff; (3) declined to hold the plaintiff in contempt; and (4) held him in contempt for failing to make certain payments of child support. We consider each of these claims in turn.

A

The defendant claims that the court "improperly determined the defendant's child support, arrearage, and expense obligations." The defendant raises four specific arguments in support of his claim: (1) "The trial court's admission that it used the Family Law Software program, *combined* with its inability to articulate the figures it relied upon to arrive at the net numbers, confirms that the trial court used an improper source (post-trial, nonevidentiary tax calculations) to arrive at the net incomes"; (emphasis in original); (2) the court improperly failed to consider the defendant's request for a deviation from the presumptive amount of child support, (3) the court impermissibly modified its decision in response to the defendant's motion for reargument/reconsideration, and (4) the court abused its discretion in determining it was equitable and appropriate not to deviate from the child support guidelines.

The following additional facts inform our review of this claim and each supporting argument. In its August 27, 2015 memorandum of decision, the court made the following net income findings. For the period of March 1, 2012 through May 31, 2012 (first time period), the defendant's weekly net income was $750, and the plaintiff's weekly net income was $1304. On the basis of the parties' combined weekly net income, the court determined that the presumptive child support for the first time period was $474 per week, and that the plaintiff's share was $302 per week.

For the period of June 1, 2012 through December 31, 2012 (second time period), the defendant's weekly net income was $2981, and the plaintiff's weekly net income was $1304. On the basis of the parties' combined weekly net income of $4290 per week, the court determined that it was appropriate to deviate upward and apply 17.16 percent to the excess income over $4000 per week. See Regs., Conn. State Agencies § 46b-215a-2b (a) (2) (repealed July 1, 2015) ("[w]hen the parents' combined net weekly income exceeds [$4000], child support awards shall be determined on a case-by-case basis, and the current support prescribed at the [$4000] net weekly income level shall be the minimum presumptive amount"). After applying the upward deviation, the court calculated that the presumptive child support was $736 per week ($686 plus $50), of which the defendant's share was $512.

For the period of January 1, 2013 through June 30, 2015 (third time period), the court found that the defendant's weekly net income was $3321 and the plaintiff's was $1400. On the basis of the parties' combined weekly net income of $4720 per week, the court determined that it was appropriate to deviate upward and apply 17.16 percent to the excess net income over $4000 per week. After applying the upward deviation, the court calculated that the presumptive child support was $766

per week ($686 plus $80), of which the defendant's share was $539. On the basis of its findings and calculations, the court determined that "for the period [of] January 1, 2012 through June 30, 2015, the [defendant] owed a total of $87,693 in child support . . . that he [had] paid a total of $24,513, leaving an arrearage of $63,180, and that [his] net arrearage [was] $59,254 after applying a credit of $3926 for the [plaintiff's] arrears."

Following the defendant's appeal from the court's judgment, he filed a motion for articulation, requesting, inter alia, that the trial court articulate the following: (1) the legal and factual bases for the court's findings of the parties' net income for each of the three time periods; (2) the evidentiary sources for the court's calculations of the parties' gross incomes for each time period, including what sources of income were included or excluded; and (3) the evidentiary sources for the court's calculations of the parties' net incomes for each time period, including what amounts and sources the court did or did not deduct from the parties' gross incomes to calculate their net incomes.

On November 2, 2016, the court granted the defendant's motion for articulation and provided the following articulation: "In attempting to fully articulate this part of its decision, the court has reviewed the file, the evidence, transcripts of the hearings, its trial notes, and the child support and arrearage guidelines effective August 1, 2005. Nevertheless, the court did not save any rough calculations of income and deductions, nor has it saved any printed drafts of child support guidelines utilizing the Family Law software program [(software)]. Moreover, the court is not in a position to recreate [the] same, since the software program has been updated to reflect changes made since the effective date of the current child support guidelines and arrearage guidelines (July 1, 2015). Therefore, except as noted below, the court is not in a position to say

with any specificity the income and deductions it may have relied upon to arrive at the net number.

"Accordingly, the court hereby articulates its decision as follows:

"1. The legal basis for the court's original findings is the mandate that an order of child support be based upon the net income of the parties. . . .

"2. As to the period March 1, 2012 through May 31, 2012, the court based the plaintiff's net income of $1304 per week and the defendant's net income of $750 per week on, inter alia: (a) the plaintiff's financial affidavit (exhibit 50) dated April 25, 2012; (b) on the defendant's other income, *excluding* his income from wages as shown on line 7, and *including* his unemployment compensation of $15,570, all as shown on lines 8a, 9a, 10, 13, and 19 of his 2012 federal income tax return (form 1040) and his 2012 state of Connecticut form CT-1040 (exhibit 14); and (c) a child support guidelines worksheet prepared by the plaintiff's counsel and filed with the court at time of hearing on May 1, 2015 . . . without objection by [the] defendant's counsel, both counsel reserving the right to argue the methodology and accuracy of the calculations at the time of final argument. . . .

"3. For the period June 1, 2012 through December 31, 2012, the court based the plaintiff's net income of $1304 per week, and the defendant's net income of $2981 per week on, inter alia: (a) the plaintiff's financial affidavit (exhibit 50) dated April 25, 2012; (b) on the defendant's income, *excluding* his unemployment compensation of $15,570, all as shown on lines 8a, 9a, 10, and 13 of his 2012 federal income tax return form (1040), and his 2012 state of Connecticut form CT-1040 (exhibit 14); and (c) a child support guidelines worksheet prepared by the plaintiff's counsel and filed with the court

at time of hearing on May 1, 2015 . . . without objection by [the] defendant's counsel, both counsel reserving the right to argue the methodology and accuracy of the calculations at the time of final argument. . . .

"4. For the period January 1, 2013 through June 30, 201[5], the court based the plaintiff's net income of $1400 per week, and the defendant's net income of $3321 per week on, inter alia: (a) the plaintiff's financial affidavit . . . dated April 29, 2015; (b) the defendant's financial affidavit . . . dated April 28, 2015; (c) the defendant's 2013 [federal income] tax return (form 1040) and his 2013 state of Connecticut form CT-1040 (exhibit 36); and (d) a child support guidelines worksheet prepared by the plaintiff's counsel and filed with the court at time of hearing on May 1, 2015 . . . without objection by [the] defendant's counsel, both counsel reserving the right to argue the methodology and accuracy of the calculations at the time of final argument." (Citations omitted; emphasis in original.)

We next set forth our standard of review. "[W]e will not disturb the trial court's ruling on a motion for modification of alimony or child support unless the court has abused its discretion or reasonably could not conclude as it did, on the basis of the facts presented. . . . Furthermore, [t]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Norberg-Hurlburt* v. *Hurlburt*, 162 Conn. App. 661, 672–73, 133 A.3d 482 (2016).

We consider each of the defendant's arguments in support of his claim that the court "improperly determined the defendant's child support, arrearage, and expense obligations" in turn.

1

The defendant argues that the court improperly determined the amount of presumptive support for each time period because its net income findings had no evidentiary basis as demonstrated by the court's failure to make any explicit findings on gross income or on the specific deductions it used to calculate the parties' net incomes. More specifically, the defendant argues: "[T]he gravamen of the defendant's claim is that the trial court used posttrial, nonevidentiary tax calculations generated by the [software] for the creation of its net income figures. The trial court's admission that it used the [software], *combined* with its inability to articulate the figures it relied upon to arrive at the net numbers, confirms that the trial used an improper source (posttrial, nonevidentary tax calculation) to arrive at the net incomes." (Emphasis in original.)

Relying on *Ferraro* v. *Ferraro*, 168 Conn. App. 723, 728–33, 147 A.3d 188 (2016), the defendant contends that because the court could not recreate in its articulation its calculations regarding gross income and deductions for each of the three time periods, the court's decision must be reversed and the matter remanded for a new hearing on child support. He further argues: "Because the trial court cannot recreate any of the child support guidelines worksheet[s] for any of the three time periods, due to the software program update, it is [in]disputable that the trial court relied on posttrial calculations generated by the software program, and not exclusively on the evidence submitted by the parties at trial. If the court did not rely on posttrial calculations generated by the software program . . . the court

could have recreated the child support worksheets and identified, with specificity, the income and deductions that it relied upon to arrive at the respective parties' net income for each period. . . . Therefore, the court's findings here as to the parties' net income were likewise without evidentiary support." (Citations omitted; internal quotation marks omitted.)

The plaintiff argues that the defendant fails to provide any "analysis as to whether the evidence does, or does not, support the numbers contained within the guidelines relied upon by the trial court. The defendant simply argues that because the trial court cannot articulate how it arrived at the figures in the guidelines more than one year after its decision, this court should reverse [the judgment]. . . . Aside from the fact that there is evidence in [the] record to support the numbers in the guidelines utilized by the trial court . . . an appellate court should not reverse a child support order unless there [is] no evidence to support the calculation or it substantially deviates from the presumptive guideline without explanation . . . ." Having thoroughly reviewed the record in this case, we conclude that there is evidence to support the court's net income determinations for each of the three time periods in question. Accordingly, we find no merit in the defendant's argument.

"[T]he [child support] guidelines incorporate [our] statutory rules and contain a schedule for calculating the basic child support obligation, which is based on the number of children in the family and *the combined net weekly income* of the parents." (Emphasis added; internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 337, 152 A.3d 1230 (2016). "It is well settled that a court must base child support . . . orders on the available net income of the parties, not gross income." (Internal quotation marks omitted.) *Tuckman* v. *Tuckman*, 308 Conn. 194, 209, 61 A.3d 449 (2013). In

reviewing a decision of the trial court, "[w]e allow every reasonable presumption . . . in favor of the correctness of [the trial court's] action." (Internal quotation marks omitted.) *Valentine* v. *Valentine*, 164 Conn. App. 354, 369, 141 A.3d 884, cert. denied, 321 Conn. 917, 136 A.3d 1275 (2016).

Here, the defendant argues that "the court's findings . . . as to the parties' net income were . . . without evidentiary support," and, therefore, that the court improperly determined the amount of presumptive support for each time period. He bases this argument on the court's use of the software provided by the Judicial Branch and the fact that the court could not recreate its previously discarded worksheets using that software because it had been updated since the time of trial. Relying on *Ferraro*, the defendant contends that this proves that the court indisputably "relied on posttrial calculations generated by the software program, *and not exclusively on the evidence* submitted by the parties at trial." (Emphasis added.) The defendant does not explain how the use of the software to assist with *calculations* constitutes outside "evidence," and we conclude that the use of this software for *calculations* is no more extra-evidentiary than would be the use of a calculator, provided the data being input by the court is based on the evidence or on matters for which the court properly has taken judicial notice.

In *Ferraro*, which is the only case relied on by the defendant to support his argument, the defendant husband claimed that the court had made factual findings regarding his net income without evidentiary support. *Ferraro* v. *Ferraro*, supra, 168 Conn. App. 728. The defendant husband contended that the trial court had relied on information not found in the evidence, rather than on the parties' financial affidavits or other evidence presented at trial, to determine his net income. Id. This court stated it was "undisputed that the court relied

on the . . . worksheet [generated by the software] in determining the weekly net incomes of the parties," and that it was "evident . . . that the figures in the worksheet [did] not match the figures provided by the parties at trial." Id., 729. Although this court recognized that the trial court was permitted to take judicial notice of certain supplemental information, such as the Internal Revenue Code or tax tables, it concluded that the trial court should have notified the parties that it was doing so, and it should have given them an opportunity to be heard. Id., 731. Because the net income determination made by the trial court had *no evidentiary basis*, the defendant was entitled to a new hearing. Id., 733. After examining the record in the present case, we conclude that there is an evidentiary basis for the court's net income findings, and, therefore, *Ferraro* is distinguishable.

Here, the court explicitly found that for the first time period (from March 1, 2012 to May 31, 2012) the defendant's weekly net income was $750, and the plaintiff's weekly net income was $1304. It stated that it based those figures on documents, including the plaintiff's April 25, 2012 financial affidavit, the defendant's 2012 tax forms, and the child support guidelines worksheet prepared by the plaintiff's attorney, which was provided to the court without objection by the defendant. The defendant does not explain why or how the net income findings are incorrect or what the correct figures should be. In fact, a close reading of his appellate brief reveals no allegation that these figures are incorrect. Rather, his argument is that because the court stated that it could not recreate its worksheets because the software had been updated, then the court, necessarily, must have relied on outside evidence in determining the parties' net income. We do not agree.

All of the named documents on which the court stated it relied, as well as many other financial documents, are

contained in the record. We thoroughly have reviewed these documents and the entire evidentiary record, and, on the basis of the evidence presented at trial, we conclude that the court's findings as to net income have an evidentiary basis, as demonstrated herein.

For the first time period, the court stated that it relied on the plaintiff's financial affidavit dated April 25, 2012, the defendant's nonwage income from his 2012 federal tax return,[11] specifically, the income shown on lines 8a, 9a, 10, 13, and 19, the defendant's 2012 state tax return, and a child support guidelines worksheet prepared by the plaintiff's counsel, as well as on other documents. Line 19 of the defendant's 2012 federal tax return shows that he had income of $15,570 from unemployment. Taking the $15,570 he earned for the first five months of the year on unemployment compensation, and dividing that by twenty-two weeks (January 1 through May 31, 2012), which is his entire time period of unemployment in 2012, we arrive at an earnings from unemployment compensation of $708 per week.

In addition to his unemployment income in the first time period, line 8a of the defendant's 2012 federal tax return shows that the defendant earned $139 from interest, line 9a shows that he earned $6263 from dividends, line 10 shows $16,503 from the prior year's tax refund, and line 13 shows that he sustained a $3000 capital loss, for a total additional income of $19,905 in 2012. This additional income was earned over the course of the entire year, not just in the first time period. Taking the additional income of $19,905 and dividing that by fifty-two weeks, we compute additional earnings of $383 per week. Combining these two numbers ($708 plus $383), we arrive at the defendant's gross weekly income of $1091 for the first five months of 2012.

[11] The court specifically stated that it did not include the defendant's 2012 wages of $94,801 in its calculations for the first period because the defendant's employment did not commence until after the first period.

Line 44 of the defendant's 2012 federal tax form shows that he had a federal tax liability of $11,739, and his state tax form shows a state tax liability of $5820, which, combined, equals a 2012 tax liability of $17,559 or $338 per week. Deducting the $338 weekly tax liability for 2012 from the weekly nonwage income for 2012 of $1091, we arrive at a net weekly income of $753. Allowing for very minor rounding adjustments, this figure coincides with the finding of the trial court that the defendant's weekly net income for the first period was $750. According, we conclude that the court's finding as to the defendant's net weekly income for the first time period has an evidentiary foundation.

As to the plaintiff's net weekly income for the first time period, the court found that her weekly net income was $1304. It stated that it used, among other documents, the plaintiff's financial affidavit and her child support worksheet to arrive at this figure. The plaintiff's W-2 form for 2012 shows her gross income of $97,883. It also shows that the plaintiff paid Medicare taxes of $1419 and made mandatory pension contributions of $7083. According to the plaintiff's 2012 tax returns, she had a federal tax liability of $12,270, and a state tax liability of $4387. Using these figures, the plaintiff's 2012 net income was $72,724. However, the undisputed evidence also demonstrates that the plaintiff maintained health insurance for herself and the parties' minor children, and although that amount is not readily available for this time period, the court certainly had evidence from other years to calculate a reasonable amount for that deduction. Additionally, there was evidence that the plaintiff paid union dues every year. Using the 2013 deduction of $3000 for health insurance and $768 for union dues, the plaintiff's approximate net income for 2012 was $68,956 or $1326 per week. Allowing for reasonable differences in rounding, we conclude that the

court's weekly net income finding of $1304 for the plaintiff for the first time period has an evidentiary basis.

As to the second time period, from June 1, 2012 through December 31, 2012, the court stated that it based the plaintiff's net income of $1304 per week, and the defendant's net income of $2981 per week on documents including the plaintiff's April 25, 2012 financial affidavit, the defendant's income, as shown on lines 8a, 9a, 10, and 13 of his 2012 federal income tax return and his 2012 state tax form, *not including* the $15,570 in unemployment income received early in the year (line 19), and on the child support guidelines worksheet prepared by the plaintiff's counsel.

The defendant's income for 2012, as shown on his 2012 federal tax return, *excluding unemployment income* from line 19, as shown on the lines noted by the trial court, is: line 7, $94,801; line 8a, $139; line 9a, $6263; line 10, $16,503; and line 13, a capital loss of $3000. Because the defendant was unemployed and collecting unemployment compensation through the end of the first period, May 31, 2012, we know that his wage income of $94,801 was earned entirely during the second time period, although the additional income of $19,905, as calculated in our analysis of the first time period, was earned throughout the entire year. Taking the $94,801 and dividing it by the number of weeks from June 1 through December 31, 2012, which is thirty, we compute weekly gross wages of $3160. Adding to that the weekly additional income as set forth in our analysis of the first time period of $383 ($19,905 divided by 52 equals $383), we compute a weekly gross income of $3543 for the second time period.

Subtracting from that gross income figure of $3543, the defendant's federal and state 2012 weekly income tax liability of $338, we arrive at $3205. Because the

second time period includes wages, rather than unemployment compensation, we also must subtract the amount withheld over those thirty weeks for social security and Medicare taxes, which we find on the defendant's W-2 form, submitted into evidence as part of the defendant's exhibit 15 at trial, of $4175 and $1441, respectively, for a total of $5616 or $187 per week over the thirty weeks that he was employed in 2012. It also is undisputed that the defendant made health insurance payments when he was employed, and, although the precise amount cannot be ascertained from the record, the court reasonably could have used the figure from 2013 of $1711 per year, which equates to $33 per week. Taking the $3205 (weekly gross income minus taxes) and subtracting the additional deductions (social security and Medicare taxes, and health insurance) of $220, we arrive at a weekly net income of $2985. This weekly net income figure is $4 higher than the court's weekly net income figure for the second period of $2981 and easily can be attributed to differences in rounding. Accordingly, we conclude that the court's net income finding for the defendant for the second time period has an evidentiary basis.

As to the plaintiff's weekly net income for the second time period, the court found that her weekly net income was $1304. This is exactly the same amount as for the first time period, and our analysis of this amount remains the same. Accordingly, we conclude that the court's weekly net income findings for the plaintiff for the second time period have an evidentiary basis.

For the third time period, January 1, 2013 through June 30, 2015, the court found that the plaintiff's weekly net income was $1400 per week, and the defendant's weekly net income was $3321 per week.[12] The court

[12] In its memorandum of decision, the court stated that the defendant, in his April, 2015 financial affidavit averred that he earns $178,984 per year from employment. We are mindful that this figure is before the defendant's corporate bonus of approximately $65,000, which the defendant specifically

stated that it made these findings on the basis of documents, including the plaintiff's April 29, 2015 financial affidavit, the defendant's April 28, 2015 financial affidavit, the defendant's 2013 federal and state income tax returns, and the May 1, 2015 child support guidelines worksheet prepared by the plaintiff's counsel.

The defendant's 2013 W-2 and earnings summary forms reveal employment income of $230,186. His federal tax return reveals interest of $566, dividend income of $4835, a taxable refund of $2002, and a capital loss of $3000, for an approximate gross income of $234,589; his 2013 federal tax form also shows excess social security tax withholdings of $4453, for a gross income of $239,042. It also shows a federal tax liability of $37,922; his state tax form reveals a state tax liability of $11,291; his W-2 forms also reveal social security tax withholdings of $11,502, Medicare tax withholdings of $3317, and health insurance costs of $1711; this evidence demonstrates that the defendant's net income for 2013 was $173,299 ($239,042 minus $65,743 [$37,922 plus $11,291 plus $11,502 plus $3317 plus $1711] equals $173,299).

On his April 28, 2015 financial affidavit, the defendant certified that his gross income for 2014 was $205,805. His W-2 form shows federal income withholdings of $25,686, social security tax withholdings of $7254, Medicare tax withholdings of $2999, health insurance costs of $1361, and state tax withholdings of $12,034. On the basis of these figures, this evidence demonstrates that the defendant's approximate net income for 2014 was $156,471.[13]

listed on his financial affidavit when calculating his gross income of $4691 per week or $243,932 per annum. The court also stated that the plaintiff averred in her affidavit that her gross income from wages is $104,572. In addition, the plaintiff incorrectly added child support income from the defendant in the amount of $137 per week or $7124 per annum when she calculated her total gross income as $111,696.

[13] There is no tax return in the record for either party for 2014. Although the defendant certified on his financial affidavit that he had *gross income* for 2014 in the amount of $205,805, his W-2 and earnings summary for 2014

The defendant also certified that his then current gross income (for 2015) was $4691 per week or $243,932 annually,[14] that his weekly mandatory deductions were $1358 or $70,616 per annum, and that his then current weekly net income was $3333 or $173,316 per annum. Averaging the net income amounts from 2013 through 2015 ($173,299 plus $156,471 plus $173,316 equals $503,086; $503,086 divided by 3 equals $167,695), we arrive at an average net income of $167,695 per annum or $3225 per week, which is approximately $96 less than the court's weekly net income average of $3321. In light of the evidence that the defendant had interest and dividend income every year from 2009 through 2013, and that he consistently had overpaid his taxes,

provides that his *gross pay* was $205,805. This amount does not include any taxable interest or dividends, however. On the basis of the tax returns in the record, the trial court reasonably could have concluded that the defendant's actual gross income was higher than that which he certified. The record contains tax returns for the defendant for each year from 2009 through 2013. On those returns, the defendant showed taxable interest and dividends of: $13,285 and $7656 in 2009; $2434 and $7771 in 2010; $739 and $8027 in 2011; $139 and $6263 in 2012; and $566 and $4835 in 2013, respectively. He also showed an overpayment of his tax liabilities every year: federal overpayment of $3259, state underpayment of $365 in 2009; federal overpayment of $11,403, Connecticut state underpayment of $139, New York state overpayment of $212 in 2010; federal overpayment of $16,396, state overpayment of $3471 in 2011; federal overpayment of $9365, state overpayment of $1068 in 2012; and federal overpayment of $9576, state overpayment of $797 in 2013. On the basis of this evidence, the court reasonably could have attributed interest and dividend income to the defendant, as well as tax overpayments.

In addition to the gross wages of $205,805 listed on the defendant's W-2 form, the form also lists federal income tax withholdings of $25,686, social security tax withholdings of $7254, Medicare tax withholdings of $2999, and state income tax withholdings of $12,034 (totaling $47,973), which gives us an approximate net income of $157,832 for 2014, but which may be lower than the actual net income because it does not include taxable interest and dividend income, and it may include overpayments of federal and state income taxes.

[14] Similar to the certification of the defendant's 2014 gross income as explained in footnote 13 of this opinion, the certification of $4691 as the defendant's weekly gross income for 2015 does not include taxable interest or dividends.

we conclude that it would have been reasonable on the basis of this evidence for the court to have attributed approximately $96 per week in additional income to the defendant. See footnote 13 of this opinion. Accordingly, we conclude that there is an evidentiary basis to support the court's net income finding for the third time period.

As to the plaintiff's net weekly income for the third time period, the court found that her weekly net income was $1400. Her 2013 W-2 form shows that the plaintiff had gross earnings of $102,397, that she paid Medicare taxes of $1485, health insurance of $3000, union dues of $768, and that she made mandatory pension contributions of $7291. Her 2013 federal tax return also shows that the plaintiff had federal income tax liability of $11,984 and state tax liability of $4481. This evidence demonstrates that the plaintiff's net income for 2013 was $73,388.

On her April 29, 2015 financial affidavit, the plaintiff certified that her gross income for 2014 was $117,010, but her December, 2014 paystub shows a year to date gross income from employment of $118,510.[15] The paystub also shows Medicare taxes of $1601, health insurance of $3150, union dues of $814, mandatory pension contributions of $7094, federal income tax payments of $15,456 and state tax payments of $5516. Using the gross income from employment figure on the plaintiff's paystub, we conclude that the evidence demonstrates that the plaintiff's approximate net income for 2014 was $84,879.

The plaintiff also certified that her gross income for 2015 was $2011 per week, or $104,572 annually. She averred that she had mandatory deductions of $688 per week, or $35,776 per annum, giving her a weekly net

[15] As stated in footnote 13 of this opinion, the record does not contain a 2014 tax return for either party.

income of $1323 or $68,796 per annum for 2015. Averaging these three years of net income ($73,388 plus $84,879 plus $68,796 equals $227,063; $227,063 divided by 3 equals $75,688), we conclude that the evidence demonstrates that the plaintiff had an average annual net income for the third time period of approximately $75,688 or $1456 per week. We conclude that the difference of $56 between the court's net income finding of $1400 and our own calculation is de minimus and certainly could be attributable to rounding adjustments. Accordingly, the court's net income finding for the plaintiff for the third time period has evidentiary support.

2

The defendant also claims that the court improperly determined his child support, arrearage, and expense obligations because it failed to give consideration to his request for a deviation from the presumptive amount of child support. He argues that he presented evidence during the hearing to rebut the presumption that the application of the guidelines was equitable and appropriate in this case, but that the court failed to consider his request for a deviation. We are not persuaded.

"The legislature has enacted several statutes to assist courts in fashioning child support orders. . . . The legislature also has provided [in General Statutes § 46b-215a] for a commission to oversee the establishment of child support guidelines, which must be updated every four years, to ensure the appropriateness of child support awards . . . . The guidelines provide a schedule for calculating the basic child support obligation, which is based on the number of children in the family and the combined net weekly income of the parents. Regs., Conn. State Agencies § 46b-215a-2c (e).

"In support of the application of these guidelines, General Statutes § 46b-215b (a) provides in relevant

part: The child support and arrearage guidelines issued pursuant to [§] 46b-215a . . . shall be considered in all determinations of child support award amounts . . . . In all such determinations, there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered. A specific finding on the record that the application of the guidelines would be inequitable or inappropriate in a particular case, as determined under the deviation criteria established by the Commission for Child Support Guidelines under [§] 46b-215a, shall be required in order to rebut the presumption in such case." (Citation omitted; internal quotation marks omitted.) *Battistotti* v. *Suzanne A.*, 182 Conn. App. 40, 46–47, 188 A.3d 798, cert. denied, 330 Conn. 904, A.3d (2018).

Section 46b-215a-5c (b) of the Regulations of Connecticut State Agencies describes the criteria that may justify a support order different from the presumptive support amounts calculated under the child support guidelines. Specifically, it provides as criteria for deviation: (1) other financial resources available to a parent, (2) extraordinary expenses for care and maintenance of the child, (3) extraordinary parental expenses, (4) needs of a parent's other dependents, (5) coordination of total family support, and (6) special circumstances.

The special circumstances deviation criterion in § 46b-215a-5c (b) (6) of the regulations provides the following: "In some cases, there may be special circumstances not otherwise addressed in this section in which deviation from presumptive support amounts may be warranted for reasons of equity. Such circumstances are limited to the following:

"(A) Shared physical custody. When a shared physical custody arrangement exists, it may be appropriate to deviate from presumptive support amounts when: (i)

such arrangement substantially . . . (I) reduces expenses for the child, for the parent with the lower net weekly income, or (II) increases expenses for the child, for the parent with the higher net weekly income; and (ii) sufficient funds remain for the parent receiving support to meet the needs of the child after deviation; or (iii) both parents have substantially equal income.

"(B) Extraordinary disparity in parental income. When the custodial parent has high income, resulting in an extraordinary disparity between the parents' net incomes, it may be appropriate to deviate from presumptive support amounts if: (i) such deviation would enhance the lower income parent's ability to foster a relationship with the child; and (ii) sufficient funds remain for the parent receiving support to meet the basic needs of the child after deviation.

"(C) Total child support award exceeds 55 [percent] of obligor's net income.

If the total child support award exceeds 55 [percent] of the obligor's net income, it may be appropriate to deviate downward on any components of the award other than current support to reduce the total award to not less than 55 [percent] of the obligor's net income.

"(D) Best interests of the child.

"(E) Other equitable factors." Regs., Conn. State Agencies § 46b-215a-5c (b) (6). "[T]he decision whether to deviate from the guidelines on the basis of [the criteria] is left to the court's sound discretion. . . . [A] trial court's decision not to deviate from the guidelines does not, a fortiori, demonstrate a failure to consider that criterion." (Citation omitted; internal quotation marks omitted.) *Schoenborn* v. *Schoenborn*, 144 Conn. App. 846, 858, 74 A.3d 482 (2013).

The defendant specifically contends that he "presented evidence and argued that a deviation was warranted on the following grounds: the parties share

physical custody of the minor children; the needs of the children were being met at the then current amount, which amount was based on an agreed upon deviation from the presumptive child support amount; the defendant's agreement in the [parties' agreement] to undertake to pay the children's private educational expenses through eighth grade (estimate to be $141,185); and the defendant's agreement in the [parties' agreement] to undertake to pay the bulk of the children's expenses (over $30,000, 75 [percent] on unreimbursed)," but that the court failed to address his request for a deviation. (Footnote omitted.)

Here, the defendant asserts that the court failed to address his request for a deviation from the presumptive child support amount even after he submitted evidence and argued that he had established the shared physical custody criterion for a deviation. On the basis of the record, we are not persuaded that the court failed to consider the defendant's request for a deviation.

During closing argument on the motions heard by the court, the defendant's attorney fully explained to the court the defendant's request for a deviation; she fully explained how the parties at the time of dissolution had agreed to a deviation and why the defendant still thought a deviation was warranted. This discussion was extensive. During the discussion, the court also questioned the defendant's attorney about the merits of this request, and it commented extensively on the issue, including stating that "[c]hildren have an absolute right to child support" and that "the parties can agree to a whole host of things from a property settlement, from alimony, for a whole host of things. But, as far as the child support is concerned, the parties are not in a position to waive child support absent the court finding that there is an appropriate deviation criteria."

Furthermore, after the court rendered its decision, the defendant, in his motion to reargue, acknowledged

that the court specifically had recognized in its memorandum of decision that shared physical custody is a deviation criterion, and he requested that the court permit reargument on the matter and that it enter new orders. On November 19, 2015, the court held a hearing on this and other matters. During the hearing, the defendant's attorney argued that the court was required to give an explanation of its reasons for either granting or denying a requested deviation. Specifically, he argued: "In the case law, I believe . . . if you ask for a deviation, the court has to explain if they don't give you a deviation. [It must explain] [w]hy? And if they do give you a deviation, [it must explain] [w]hy? But in either [instance], there has to be some articulation, the why you deviated or why you didn't deviate." After hearing argument on the matter, the court agreed to take a second look at the request. The court also stated, and the parties agreed, that if the court found any merit to the defendant's request, it would permit further argument on it. On the basis of the foregoing, we conclude that the record establishes that the court considered the defendant's request for a deviation. Accordingly, the defendant's claim fails.

3

The defendant claims that the court improperly determined his child support, arrearage, and expense obligations because the court modified, rather than clarified, its decision in response to his motion for reargument on his request for a deviation. The plaintiff responds that the court's corrected memorandum of decision was in response to several motions that it heard, including the defendant's motion for reargument and the plaintiff's motion to reconsider. She argues that the defendant cannot complain because the court appropriately responded to the parties' motions, including the defendant's motion in which he specifically requested that the

court reconsider the defendant's request for a deviation. We agree with the plaintiff.

After the court issued its August 27, 2015 memorandum of decision, the defendant, on September 16, 2015, filed a motion to reargue. In that motion, the defendant specifically stated that the court, although "mention[ing] in its memorandum of decision that shared custody is a deviation factor," had failed to mention that the parties, at the time of the dissolution, had agreed to deviate from the child support guidelines. The defendant then reiterated that a deviation was warranted on the basis of the parties' shared physical custody agreement, and he asked the court to permit reargument on the matter and that it enter new orders. As we explained in part II A 2 of this opinion, during the hearing, the defendant's attorney specifically argued: "In the case law, I believe . . . if you ask for a deviation, the court has to explain if they don't give you a deviation. [It must explain] [w]hy? And if they do give you a deviation, [it must explain] [w]hy? But in either [instance], there has to be some articulation, the why you deviated or why you didn't deviate."

Thereafter, the court considered the issues raised and submitted a corrected memorandum of decision in which it stated, in relevant part, that it would be "equitable and appropriate *not to deviate* from the child support guidelines" in this case. (Emphasis added.) In light of the defendant's request that the court permit reargument and issue new orders, and his insistence that the court explain its reasons for either granting or denying a deviation, we conclude that the court's response was appropriate. Accordingly, we are not persuaded by the defendant's argument.

4

The defendant also claims that the court improperly determined his child support, arrearage, and expense

obligations by abusing its discretion when it determined that it was equitable and appropriate not to deviate from the child support guidelines. He argues that the parties' agreement, as incorporated into the judgment of dissolution, regarding the "shared custody arrangement and the defendant's financial concession *pertaining to the children* were made [on the basis of] there being a deviation from the presumptive support until such obligation terminated under their agreement," and, therefore, the court should not have denied the request for a continued deviation. (Emphasis in original.) He further contends that the plaintiff, herself, recommended an amount of child support that was in deviation from the presumptive amount, and that there is "no support in the record for the trial court to have denied the request for deviation . . . ." The plaintiff responds that the record of the dissolution canvass clearly demonstrates that the "financial concessions" made by the defendant were "made to induce the plaintiff to waive alimony, not deviate child support."[16] She argues that the court properly exercised its discretion in this matter. We agree that the court properly exercised its discretion.

"[A] court may deviate from the presumptive amount of child [support] if the procedures outlined in § 46b-215a-5c of the regulations are followed. Notably, an agreement may provide a sufficient basis for a deviation

[16] The transcript from the dissolution hearing is in the appellate record. During the hearing, the defendant's attorney offered an explanation of the defendant's agreement to pay the children's private education expenses through eighth grade: "[A]lthough [the defendant] believe[d] [the parties' prenuptial agreement was] enforceable . . . because of the children, he would work out this agreement whereby if there was no alimony . . . the tradeoff was these lump sums and the fact that he would guarantee that [the children's] eighth grade—up through eighth grade education in private school where they are now, which he'll assume, and then high school based on his options." The court then asked: "You mean the trade off for no alimony?" The defendant's attorney responded: "That's right."

when the agreement cites deviation criteria; the presumptive amount also 'may be rebutted by a specific finding on the record that such amount would be inequitable or inappropriate in a particular case.' Regs., Conn. State Agencies § 46b-215a-5c (a)." *Robinson* v. *Robinson*, 172 Conn. App. 393, 403, 160 A.3d 376, cert. denied 326 Conn. 921, 169 A.3d 233 (2017). "[O]nce the court enters an order of child support that substantially deviates from the guidelines, and makes a specific finding that the application of the amount contained in the guidelines would be inequitable or inappropriate, as determined by the application of the deviation criteria established in the guidelines, that particular order is no longer modifiable solely on the ground that it substantially deviates from the guidelines. . . . Rather, the party seeking modification must instead show that maintaining a child support order that deviates from the child support guidelines is inequitable or inappropriate as a result of a substantial change in circumstances." (Citation omitted; internal quotation marks omitted.) *Budrawich* v. *Budrawich*, 156 Conn. App. 628, 642–43, 115 A.3d 39, cert. denied, 317 Conn. 921, 118 A.3d 63 (2015). "In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Battistotti* v. *Suzanne A.*, supra, 182 Conn. App. 44.

In the present case, the court specifically found that a deviation from the presumptive amount of child support would be inappropriate and inequitable. The defendant contends that he was entitled to a continued deviation because he had agreed to assume the costs of the children's private education through eighth grade in light of this deviation and that this was in the parties' shared physical custody agreement at the time of the dissolution. He contends that the trial court "in a rather rogue

fashion, decided sua sponte to undo the mosaic of the parties' stipulated judgment and upset the very delicately balanced and carefully negotiated terms of the parties' stipulated agreement [at the time of the dissolution]."

We have reviewed the record and, although the dissolution court found the parties agreement to be fair and equitable, it did not make a finding on the record that the application of the guidelines would be inequitable or inappropriate at the time it rendered judgment incorporating the parties' agreement. See *Righi* v. *Righi*, supra, 172 Conn. App. 441 (rejecting plaintiff's claim that trial court necessarily found application of guidelines to be inequitable or inappropriate because it found parties' agreement, which included agreement to deviate from guidelines, fair and equitable); see generally *McHugh* v. *McHugh*, 27 Conn. App. 724, 728–29, 609 A.2d 250 (1992) ("[O]nce the court enters an order of child support that substantially deviates from the guidelines, and makes a specific finding that the application of the amount contained in the guidelines would be inequitable or inappropriate . . . that particular order is no longer modifiable solely on the ground that it substantially deviates from the guidelines. By the same token, in the absence of such a specific finding, the order is continually subject to modification on the ground of a substantial deviation from the guidelines." [Footnote omitted.]). In the absence of such a finding by the dissolution court in this case, we conclude that the trial court had the discretion to consider the question of a modification of child support anew, in accordance with the guidelines.

The court, after finding a substantial change in circumstances, which change is not disputed by the parties, examined the record, considered the evidence, and considered the defendant's request for a deviation from the presumptive amount of child support. Finding that

such a deviation would be inappropriate and inequitable, and that it would leave the plaintiff with insufficient funds to meet the needs of the children, the court properly exercised its discretion and denied the request.

B

The defendant next claims that the court abused its discretion by awarding the plaintiff $50,000 for attorney's fees pursuant to paragraph 10.3 of the parties' agreement.[17] The defendant argues that "[t]he underpinning for the award is that the trial court determined the defendant breached [paragraph 5.1 of] the separation agreement. . . . As a result of this alleged breach, the trial court awarded counsel fees . . . ." (Citations omitted.) He contends, however, that he did not breach the agreement and that the court's construction of paragraph 5.1 of the agreement "was not reasonable." Having concluded in part I of this opinion that the defendant was in contempt for breaching paragraph 5.1 of the parties' agreement, which had been incorporated into the judgment of dissolution, we conclude that this claim is without merit.[18]

Article 10.3 of the parties' agreement provides in relevant part: "In the event that it shall be determined by a court of competent jurisdiction that either party shall have breached any of the provisions of this Agreement or of any court decree . . . and regardless of whether the party is adjudicated in contempt, the offending party

[17] The defendant also argues that the court abused its discretion in awarding the plaintiff attorney's fees on the basis of General Statutes § 46b-62. Because we conclude that the court properly awarded attorney's fees for the defendant's breach of the parties' agreement, we need not consider this argument.

[18] We also are mindful that General Statutes § 46b-87 grants the court the discretion to award attorney's fees to the prevailing party in a contempt proceeding. Because the court awarded the plaintiff attorney's fees under paragraph 10.3 of the parties' agreement, we consider whether that was an abuse of discretion.

shall pay to the other party reasonable attorneys' fees, court costs and other expenses incurred in the enforcement of the provisions of this Agreement . . . ." Pursuant to article 10.3, the trial court awarded the plaintiff $50,000 for attorney's fees. The defendant now challenges that award as an abuse of the court's discretion.[19]

We set forth the standard of review and applicable legal principles for this claim. "The abuse of discretion standard of review applies when reviewing a trial court's decision to [grant or] deny an award of attorney's fees. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citations omitted; internal quotation marks omitted.) *Munro* v. *Munoz*, 146 Conn. App. 853, 858, 81 A.3d 252 (2013). "The general rule of law known as the American rule is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. . . . This rule is generally followed throughout the country. . . . Connecticut adheres to the American rule. . . . There are few exceptions. For example, a specific contractual term may provide for the recovery of attorney's fees and costs . . . or a statute may confer such rights." (Internal quotation marks omitted.) *Giordano* v. *Giordano*, 153 Conn. App. 343, 352–53, 101 A.3d 327 (2014).

"General Statutes § 46b-87 grants the court the discretion to award attorney's fees to the prevailing party in a contempt proceeding. The award of attorney's fees in contempt proceedings is within the discretion of the

[19] The defendant does not challenge the reasonableness of the fees.

court." (Footnotes omitted; internal quotation marks omitted.) *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 184, 138 A.3d 1069 (2016). "[T]he award of attorney's fees pursuant to § 46b-87 is punitive, rather than compensatory . . . ." (Internal quotation marks omitted.) *Allen* v. *Allen*, 134 Conn. App. 486, 503, 39 A.3d 1190 (2012). Additionally, where the parties, in their agreement, have provided for the payment of counsel fees in the event one party is in breach of the agreement, it is proper for the court to rely on the attorney's fee provision of that agreement, even if it declines to find a party in contempt. *Goold* v. *Goold*, 11 Conn. App. 268, 288–89, 527 A.2d 696, cert. denied, 204 Conn. 810, 528 A.2d 1156 (1987). "[A] contract clause providing for reimbursement of incurred [attorney's] fees permits recovery upon the presentation of an attorney's bill, so long as that bill is not unreasonable upon its face and has not been shown to be unreasonable by countervailing evidence or by the exercise of the trier's own expert judgment." (Internal quotation marks omitted.) *Storm Associates, Inc.* v. *Baumgold*, 186 Conn. 237, 246, 440 A.2d 306 (1982).

In the present case, the parties' agreement provides for the payment of attorney's fees in the event that a court determines "that either party shall have breached any of the provisions of this Agreement or of any court decree . . . and regardless of whether the party is adjudicated in contempt . . . ." The parties' agreement, therefore, authorizes the court to award attorney's fees when one of the parties is in breach of the agreement.

As set forth in part I of this opinion, the court found that the defendant had breached paragraph 5.1 of the agreement. This finding amply is supported by the evidence that the defendant breached the clear terms of the agreement and engaged in self-help. Accordingly,

the court did not abuse its discretion in awarding the plaintiff $50,000 in attorney's fees.

C

The defendant next claims that the court abused its discretion in declining to hold the plaintiff in contempt for violating paragraph 11.1 of the parties' agreement on the basis of ambiguity in the language. He contends that the language is not ambiguous, and, even if an ambiguity exists, the court improperly failed to resolve the ambiguity through a determination of the parties' intent before finding that he failed to meet his burden. We are not persuaded.

The following additional facts inform our review. The defendant filed a motion for contempt on December 9, 2013, alleging that the plaintiff had violated paragraph 11.1 of the parties' agreement by claiming the real estate taxes for the marital residence as a deduction on her 2009 income tax return. That provision provides: "The parties shall file separate federal and state income tax returns for the calendar year 2009 however, the parties agree to file joint tax returns for 2006, 2007 and 2008 and will split equally all refunds. The parties shall be entitled to claim the mortgage interest and real property tax deductions with respect to the marital residence for calendar year 2009 to the extent that each party has paid the mortgage and/or real estate taxes. The parties acknowledge that the [defendant] made said payments for 2009."

The court specifically found that paragraph 11.1 was ambiguous, and that the defendant had failed to prove by clear and convincing evidence that the plaintiff wilfully had violated the provision. In so concluding, the court reasoned, "[o]n the one hand, by the terms of the [agreement], each party is entitled to claim a portion of mortgage and taxes in 2009, and, yet, the wording

also seemingly allows the [defendant] to take all." We agree with the court that paragraph 11.1 is ambiguous.

As set forth in part I of this opinion: "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . A contempt judgment cannot stand when, inter alia, the order a contemnor is held to have violated is vague and indefinite, or when the contemnor, through no fault of his own, was unable to obey the court's order. . . .

"Consistent with the foregoing, when we review such a judgment, we first consider the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review." (Internal quotation marks omitted.) *Hirschfeld* v. *Machinist*, supra, 181 Conn. App. 318.

"Contract language is unambiguous when it has a definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion . . . . In contrast, an agreement is ambiguous when its language is reasonably susceptible of more than one interpretation." (Internal quotation marks omitted.) *McTiernan* v. *McTiernan*, 164 Conn. App. 805, 825, 138 A.3d 935 (2016). However, "any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . [T]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Celini* v. *Celini*, 115 Conn. App. 371, 377, 973 A.2d 664 (2009).

The relevant portion of paragraph 11.1 provides: "The parties shall be entitled to claim the mortgage interest and real property tax deductions with respect to the marital residence for calendar year 2009 to the extent

that each party has paid the mortgage and/or real estate taxes. The parties acknowledge that the [defendant] made said payments for 2009." We conclude that this language is confusing, leading to ambiguity.

This provision states, in relevant part, that each party is entitled to claim a deduction to the extent that each party has paid the mortgage and/or the real estate taxes for 2009. The provision then contains an acknowledgement that the defendant made such payments in 2009. The provision, however, does not state that the plaintiff made no such payments or that the defendant exclusively made such payments. In fact, if this provision were meant to convey that the defendant was the only party to have made such payments in 2009, and the provision specifically applies only to 2009, then we question why the provision also specifically allows *each party* to claim the deduction for 2009 to the extent of what each party paid. Nevertheless, we recognize that the provision does contain an acknowledgement that the defendant made such payments while not acknowledging that the plaintiff also made such payments. Accordingly, we agree with the trial court that the provision is ambiguous.

The defendant also contends that even if this language is ambiguous, the court also should have construed the agreement by determining the intent of the parties. We conclude that because the court found that, to the extent that the plaintiff may have breached paragraph 11.1, her breach was not wilful but was based on a good faith misunderstanding of the ambiguous provision, the court had no need to further interpret the provision. See *Parisi* v. *Parisi*, 315 Conn. 370, 379, 107 A.3d 920 (2015) ("[a] contempt judgment cannot stand when, inter alia, the order a contemnor is held to have violated is vague and indefinite").

During trial, the plaintiff testified regarding her preparation of her income tax return for 2009. She confirmed

that her income contributed to one third of the marital expenses during 2009, that the parties were living together in the marital residence for the entirety of 2009, and that it was not her intention to violate the court's order. The court, obviously, credited this testimony when it concluded that the defendant had not met his burden to demonstrate that the plaintiff wilfully breached a clear and unambiguous order of the court. We conclude that the court did not abuse its discretion in declining to find the plaintiff in contempt on the basis of an ambiguous provision of which the defendant failed to establish, by clear and convincing evidence, a wilful breach.

D

The defendant's final claim is that the court abused its discretion when it held him in contempt for failing to make certain payments of child support during the months of May through August, 2015, while the parties were awaiting the court's decision on their postjudgment motions. We are not persuaded.

On May 6, 2015, evidence closed in the hearing on the parties' numerous posttrial motions. Approximately two months later, on June 29, 2015, the plaintiff filed a motion for contempt alleging that the defendant had failed to pay any child support since the close of evidence. This motion and others were heard by the court on November 19, 2015. In finding the defendant in contempt for failing to make child support payments from May through August, 2015, the court found that "there was no effort between . . . basically the beginning of May . . . through the end of August . . . . And that strikes me as, again, clear and unequivocal order of the court. There's no question. There's no evidence that he paid during those months. And there was no reason not to pay, and I think that's clear and unequivocal evidence, and I'm going to so find that he is in wilful contempt

of a clear and unequivocal order of the court." The defendant claims this was error.

"[W]e first consider the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." (Citations omitted; internal quotation marks omitted.) *Parisi* v. *Parisi*, supra, 315 Conn. 380.

As to the first prong of our analysis, the record and our analysis in part I of this opinion make it clear that the orders that underlie the plaintiff's motion for contempt were clear and unambiguous. We need not discuss this prong further.

As to the second prong of our analysis, the record amply supports the court's finding that the defendant's failure to abide by the court's order was wilful. This is especially true in light of the court's admonition during the hearing, specifically on April 29, 2015, that "the order is the order until [it is] changed," that it was "a continuing obligation," that "[it is] incumbent upon the obligor . . . to come back to court," and that a person who engages in self-help acts at his own peril.

As stated previously in this opinion, our law is clear: "An order of the court must be obeyed until it has been modified or successfully challenged." (Internal quotation marks omitted.) *Eldridge* v. *Eldridge*, supra, 244 Conn. 530. "[O]ur Supreme Court [has] stated that

[a]lthough one party may believe that his or her situation satisfies [the] standard [of changed circumstance], *until a motion is brought to and is granted by the court, that party may be held in contempt in the discretion of the trial court if, in the interim, the complaining party fails to abide by the support order*." (Emphasis in original; internal quotation marks omitted.) *Nunez* v. *Nunez*, 85 Conn. App. 735, 739–40, 858 A.2d 873 (2004); see also *Eldridge* v. *Eldridge*, supra, 531–32 (good faith belief that party was justified in suspending alimony payment did not preclude finding of contempt).

On the basis of the record before us, we conclude that it is undisputed that the defendant failed to pay any amount of child support for the months of May through August, 2015. As a result of the defendant's unilateral decision to stop paying child support during this time, it was not an abuse of discretion for the court to find the defendant in wilful contempt.

The judgment is reversed as to the denial of the plaintiff's motion for contempt, number 157, and the case is remanded with direction to grant the plaintiff's motion and for consideration of appropriate sanctions, if any; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.