ELANA GERSHON *v.* RONALD BACK
(AC 42778)

Lavine, Bright and Beach, Js.*

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved pursuant to a foreign judgment of dissolution, appealed to this court from the judgment of the trial court dismissing her motion to open the judgment for lack of subject matter jurisdiction. Prior to their marriage in New York, the parties entered into a prenuptial agreement, which the New York dissolution court determined was valid. During the dissolution proceedings, the parties entered into a stipulation that provided, inter alia, that it superseded the prenuptial agreement, that it was incorporated but not merged into the dissolution judgment and that it was to be governed by New York law. Following the dissolution of their marriage, the parties both moved to Connecticut, and the plaintiff registered the New York dissolution judgment in Connecticut pursuant to statute (§ 46b-71). In her motion to open, the plaintiff sought to have the trial court open the dissolution judgment, vacate the stipulation and order

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

a new trial, claiming that the judgment was obtained through the defendant's fraudulent conduct in that he made material misrepresentations and failed to disclose certain assets in his sworn financial statement at the time the stipulation was negotiated. Following a hearing, the trial court, applying New York law, dismissed the plaintiff's motion to open, concluding that to challenge the validity of the stipulation, which was incorporated but not merged into the dissolution judgment, the plaintiff was required to bring a plenary action. *Held* that, although the trial court improperly dismissed the plaintiff's motion to open the dissolution judgment for lack of subject matter jurisdiction because that court had jurisdiction to consider the motion pursuant to the applicable statutes (§§ 46b-1 and 46b-71 (b)), this court concluded that, contrary to the plaintiff's contention, the trial court properly determined that the plaintiff was required to bring a plenary action to vacate the stipulation, as the New York rule requiring a party to challenge a separation agreement that is not merged into the dissolution judgment through a plenary action is substantive and, as such, § 46b-71 and the stipulation required the trial court to apply that rule to the motion to open; accordingly, the trial court should have denied the motion to open rather than dismissed it, and the case was remanded with direction to render judgment denying the plaintiff's motion to open.

Argued May 20—officially released November 10, 2020

Procedural History

Motion by the plaintiff to open a foreign judgment of dissolution, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Michael E. Shay*, judge trial referee, dismissed the plaintiff's motion, and the plaintiff appealed to this court. *Improper form of judgment*; *judgment directed.*

Alexander J. Cuda, for the appellant (plaintiff).

Joseph T. O'Connor, for the appellee (defendant).

Opinion

LAVINE, J. The present appeal concerns the judgment rendered by the trial court when it dismissed the motion to open the 2011 New York judgment of marital dissolution (motion to open) filed by the plaintiff, Elana Gershon, some years after she registered the judgment in

Connecticut. The plaintiff claims on appeal that the trial court improperly dismissed her motion to open for lack of subject matter jurisdiction by applying New York procedural rules, rather than Connecticut procedural rules, when it dismissed the motion.[1] We conclude that the court properly determined that New York law governed the plaintiff's rights with respect to the parties' stipulation, but we agree with the plaintiff that the court improperly dismissed the motion to open for lack of subject matter jurisdiction. The form of the judgment is improper. We, therefore, reverse the judgment of dismissal and remand the case with direction to render judgment denying the motion to open.

The record discloses the following contentious and protracted litigation history between the plaintiff and her former husband, the defendant, Ronald Back.[2] In

[1] In addition, the plaintiff claims that the court (1) improperly addressed the merits of the motion to open after determining that it lacked subject matter jurisdiction, (2) abused its discretion by failing to grant her motion for a continuance after her counsel disclosed that she intended to withdraw her appearance, and (3) erred in finding that the plaintiff had failed to demonstrate probable cause for postjudgment discovery under *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 540 A.2d 713 (1988), or comparable New York law. We need not address these claims as we conclude that, pursuant to New York law, the trial court properly determined that the plaintiff was required to raise her claims with respect to the parties' stipulation by means of a plenary action.

The plaintiff's additional claims are subsumed within her principal claim that the court improperly dismissed her motion to open. As we explain in the body of this opinion, the court properly determined that all matters regarding the stipulation are governed by New York law and that the plaintiff was required to bring a plenary action to challenge her rights under the stipulation. Although the trial court held a hearing to determine whether the plaintiff had more than a mere suspicion of fraud to permit postjudgment discovery and made certain factual findings in that regard, it later determined that it improperly had entertained the motion to open because the plaintiff had not commenced a plenary action to vacate the stipulation.

[2] Since 2014, when the plaintiff registered the New York dissolution judgment in Connecticut, more than 280 entries have been made on the trial court docket.

August, 1997,[3] prior to their marriage, the parties entered into a prenuptial agreement.[4] The plaintiff was

[3] The trial court found that the prenuptial agreement is undated. The defendant signed it on August 14, 1997, and the plaintiff, then known as Elana Horowitz, signed it on August 12, 1997.

[4] We set forth portions of the parties' prenuptial agreement to provide context for the issues in the present appeal. The trial court found that § 10, "PAYMENT UPON OPERATIVE EVENT," is the provision germane to the plaintiff's motion to open.

"WHEREAS, a marriage is about to be solemnized between the parties . . . [and] the parties desire to fix . . . certain of their respective rights . . . that shall or may accrue to each of them in certain real and personal property; and

". . . both parties acknowledge that they understand their respective rights . . . as provided for in [New York] Domestic Relations Law [§] 236-B and that they make this Agreement with the understanding that they are hereby settling the prospective terms . . . of the marriage relationship with respect to matters of property rights, and they further understand that this Agreement is in lieu of their prospective rights to litigate such matters before a court of competent jurisdiction; and

". . . both parties have discussed the terms . . . implications and monetary considerations involved between themselves, [and] they desire to set forth their agreement in writing, without any duress . . . and they do fully and voluntarily enter into this Agreement. . . .

"1. <u>FINANCIAL DISCLOSURE</u>

"[Each of] the parties . . . has furnished the other with a copy of [his or her] 1996 Federal Income Tax Return . . . and . . . they have each had the opportunity to review same.

"[The defendant] has . . . filed . . . Corporate and Partnership Tax Returns for those items of separate property . . . which are deemed to be confidential due to the interest of . . . parties not in privity [with this] Agreement. Although [the plaintiff has requested them, she] has not been furnished with copies of such documents, and is executing this Agreement despite her lack of access to [them].

"In lieu of providing copies of such Corporate and Partnership Tax Returns, [the defendant] has [represented to the plaintiff] . . . the value of the businesses as set forth in Schedule 'A.' Similarly, [the plaintiff has represented to the defendant] the value of assets listed on Schedule 'B.' Both parties acknowledge that they are relying upon such representations . . . regarding the financial . . . circumstances of the other party, in executing this Agreement. . . .

"5. <u>OWNERSHIP AND DIVISION OF PROPERTY</u>

"In the event of a . . . judicial dissolution of the marriage, each party shall retain his or her separate property to his or her exclusive ownership and use. . . .

"7. <u>INTENTION OF AGREEMENT</u>

"This Agreement is solely intended to make provision for the ownership, division and distribution of marital and separate property. . . .

"10. <u>PAYMENT UPON OPERATIVE EVENT</u>

"If an operative event . . . occurs . . . [the defendant] shall pay to [the plaintiff] . . . in full . . . settlement of . . . all claims . . . that [the

a school psychologist, and the defendant was a businessman with a substantial interest in a family business. The parties married on August 16, 1997, resided in New York state, and had two children together. As the dissolution judgment, reciting the parties' stipulation, states: "[c]ertain unhappy and irreconcilable differences [arose] between the parties, as a result of which they . . . separated and have been living apart from each other since in or about February 6, 2009 . . . ." On or about the date of separation, the plaintiff, then known as Elana Back, commenced an action for divorce in the New York Supreme Court, county of Westchester (New York court). During the course of the divorce proceedings, the parties engaged in extensive litigation, discovery, and negotiations regarding the prenuptial agreement, which the plaintiff sought to invalidate. The New York

plaintiff] may have against [the defendant] for a distributive award for any contribution . . . of whatever kind . . . to the appreciation of separate property, including but not limited to: Essential Oils, Inc.; Flavormatic, Inc.; or R & R Realty or any subsidiary or derivative endeavor. . . .

"C. If an operative event first occurs after . . . the seventh anniversary . . . but not later than the twelfth anniversary . . . of the marriage, then as a property settlement [the defendant] shall pay [the plaintiff a] sum equal to twenty . . . percent of [his] adjusted gross income . . . .

" '[A]djusted gross income' shall be . . . the average of [the defendant's] adjusted gross annual income . . . for the five . . . years immediately preceding . . . the operative event, including the year of the operative event. . . .

"11. OPERATIVE EVENT, DEFINED

"[A]n operative event . . . shall mean . . . [c]ommencement of an action . . . by either party seeking a . . . dissolution of the marriage . . . .

"15. SUBSEQUENT PROCEEDINGS

"The parties agree that all . . . provisions of the Agreement shall be binding upon them upon the date of [their] marriage . . . [and] shall . . . be binding upon [them] and shall become a part of any subsequent agreement entered into between [them] . . . . The provisions of this Agreement shall . . . be *incorporated but not merged* in any judgment . . . of divorce . . . obtained by either party . . . [and] shall . . . survive the same . . . .

"19. SITUS

"*This Agreement shall be construed . . . in accordance with the laws of the State of New York.* . . .

"21. LEGAL REPRESENTATION

"The parties represent . . . that [they have been represented by counsel of their respective choice] . . . ." (Emphasis added.)

court determined that the prenuptial agreement was valid.[5] On April 11, 2011, the parties settled, for the time being, their dispute over the division of marital property. The parties signed a stipulation that provided in part that it superseded "the [p]renuptial [a]greement, [which] shall be of no further force or effect upon the effective date of this [stipulation]." The stipulation further provided, among other things, that it was to be incorporated by reference, *but not merged*, in the judgment of dissolution and that it "may be enforced independently of such decree or judgment [of dissolution]."[6]

[5] The New York court upheld the validity of the prenuptial agreement, stating in its May 4, 2010 decision: "The plaintiff has failed to establish that the represented value of the Flavormatic Companies was false at the time it was made; that the defendant knew the values to be false; and that the alleged misrepresentation of the value of the companies was made for the purpose of inducing the plaintiff to enter into the prenuptial agreement. Moreover, there is no showing that the plaintiff relied on the alleged misrepresentation or that she was injured as a result of the alleged misrepresentation. On the contrary, the plaintiff concedes that she knowingly waived any and all rights to the Flavormatic Companies. She testified unequivocally that she knew the defendant intended to keep these companies as separate property regardless of their values."

[6] Other pertinent provisions of the stipulation that underscore its contractual nature follow.

"ARTICLE XVI

"WAIVER OF EQUITABLE DISTRIBUTION

"1. The parties intend this Agreement to constitute an Agreement pursuant to [New York Domestic Relations Law] § 236 (B) (3). They intend this Agreement and its provisions to be in lieu of each of their respective rights pursuant to all aspects of [New York Domestic Relations Law] § 235 (B). Accordingly, except to the extent provided in this Agreement, the parties *mutually waive their rights and release each other from any claims for* maintenance, distribution of marital property, distributive awards, special relief or claims regarding *separate property or increase in the value thereof*. . . .

"ARTICLE XVII

"FULL DISCLOSURE

"Each party has had the opportunity to make independent inquiry into the complete financial circumstances of the other and is fully informed of the income, assets, property and financial prospects of the other. Each has had a full opportunity and has consulted at length with his or her attorney regarding all of the circumstances hereof, and acknowledges that this *Agreement has not been the result of any fraud*, duress or undue influence exercised by either party upon the other or any other person or persons upon the other. Both parties acknowledge that this Agreement has been achieved after competent legal representation and honest negotiations. . . .

The stipulation also provided that "[a]ll matters affecting the execution, interpretation, performance and enforcement of this [a]greement and *the rights of the parties hereto shall be governed by the laws of the [s]tate of New York*."[7] (Emphasis added.) Thereafter,

"ARTICLE XXIII

"RECONCILIATION AND MATRIMONIAL DECREES

"1. This Agreement shall not be invalidated or otherwise affected by a reconciliation . . . and this Agreement shall not be invalidated or otherwise affected by any decree or judgment of separation or divorce made by any court in any action which may presently exists or may hereafter be instituted by either party against the other for a separation or divorce, and the *obligations and covenants of this Agreement shall survive any decree or judgment of separation or divorce and shall not merge therein, and this Agreement may be enforced independently of such decree or judgment*. . . .

"ARTICLE XXIV

"LEGAL INTERPRETATION

"All matters affecting the execution, interpretation, performance and enforcement of this Agreement and the rights of the parties hereto shall be governed by the laws of the State of New York. . . . Any actions or claims involving this Agreement . . . shall be governed by the Laws of the State of New York and the Supreme Court of the State of New York, Westchester County will retain jurisdiction . . . of all such issues, provided at least one party resides in Westchester County New York. . . . If both parties reside outside of New York State, any actions or claims involving this Agreement . . . *shall be brought in a court of competent jurisdiction, and with respect to any choice of laws, the Laws of the State of New York shall be applied and govern in all respects*." (Emphasis added.)

[7] "The general rule is, that by a judgment . . . the contract or instrument upon which the proceeding is based becomes entirely merged in the judgment. By the judgment of the court, it loses all of its vitality and ceases to bind the parties to its execution. Its force and effect are then expended, and all remaining legal liability is transferred to the judgment or decree. Once becoming merged in the judgment, no further action at law or suit in equity can be maintained on the instrument." (Internal quotation marks omitted.) 30 R. Lord, Williston on Contracts (4th Ed. 2004) § 76:50, p. 237.

"However, the *parties may agree that certain contractual rights will survive the entry of a judgment. This is particularly likely in the case of separation agreements in divorce cases*. Thus, it has been said: 'If parties who are dissolving their marriage wish to retain contractual remedies as well as the remedies that are available under the dissolution judgment, then they may do so by entering into an agreement and identifying which, if any, of the terms of their agreement they wish to have the court incorporate into the judgment, and which terms they wish to have survive as separate agreements.' " (Emphasis added.) Id., 239.

"Contract clauses which require the application of the laws of other states upon breach or dispute are recognized as proper in Connecticut. . . . The ordinary rule is that where a cause of action arising in another [s]tate is asserted in our courts, we look to the laws of that [s]tate to determine all

the New York court rendered a judgment of dissolution of the parties' marriage on May 11, 2011.

The plaintiff remarried three days following her divorce from the defendant and moved with the parties' children to Greenwich. The defendant eventually moved to Connecticut, as well. The plaintiff registered the dissolution judgment in the Superior Court in the judicial district of Stamford-Norwalk on October 27, 2014, pursuant to General Statutes § 46b-71 (a). On November 24, 2014, the plaintiff filed a motion to modify child support (motion to modify) as permitted by the dissolution judgment.[8] The parties again engaged in extensive discovery with respect to the defendant's finances. On April 26, 2017, pursuant to New York Domestic Relations Law,[9] the trial court granted the plaintiff's motion to modify, increased the defendant's monthly child support obligation and awarded the plaintiff attorney's fees.[10] In a seprate order, the court awarded the defendant a credit in

matters of substance involved in it, but that matters of procedure are governed by our own law . . . ." (Citation omitted; internal quotation marks omitted.) *People's United Bank* v. *Kudej*, 134 Conn. App. 432, 438, 39 A.3d 1139 (2012); see also General Statutes § 46b-71 (b).

[8] The stipulation provided that following the sale of the marital home, the defendant was to pay the plaintiff base child support in the amount of $5000 per month. The judgment of dissolution states in relevant part: "Each party has a right to seek a modification of the child support order upon a showing of: (I) a substantial change in circumstances; or (II) that three years have passed since the order was entered, last modified or adjusted; or (III) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted; however, if the parties have specifically opted out [of] subparagraph (II) or (III) of this paragraph in a validly executed agreement or stipulation, then that basis to seek modification does not apply."

[9] The court's application of New York Domestic Relations Law was in keeping with § 46b-71 (b), which provides in relevant part that, in modifying a foreign matrimonial dissolution judgment, the substantive law of the foreign jurisdiction shall be controlling.

[10] The court ordered the defendant to pay the plaintiff $10,190 per month in child support until the older of the parties' two children attained the age of twenty-one years. The modified support order was made retroactive, resulting in an arrearage of $145,320. The court ordered the defendant to pay the arrearage to the plaintiff in three installments. The court also awarded the plaintiff $50,000 in attorney's fees.

light of his having paid a portion of the college room and board expenses of the parties' older child.

On September 5, 2018, the plaintiff filed the motion to open that is the subject of the present appeal. In that motion, the plaintiff sought to have the court open the dissolution judgment, vacate the stipulation, and order a new trial,[11] "as the judgment was obtained through the fraudulent conduct of the [defendant] and there is a reasonable probability that the result of the *settlement* would have been different had the defendant not made material misrepresentations of fact to the court and to the plaintiff in his sworn financial statement provided at the time of settlement."[12] (Emphasis added.) In con-

[11] It is perplexing why the plaintiff filed a motion to open the judgment of dissolution and requested a new dissolution trial because she remarried three days after divorcing the defendant. The parties agreed pursuant to the stipulation that the plaintiff may enforce the stipulation independently without disturbing the judgment of dissolution. As the trial court stated, the plaintiff was required to bring a plenary contract action, rather than attack the judgment of dissolution.

[12] In her motion to open, the plaintiff averred in part:

"2. Prior to their marriage, the parties entered into a prenuptial agreement [pursuant to which], plaintiff waived her interest in defendant's separate property, including his business interests. At the time, defendant was a 50 [percent] owner of Flavormatic Industries, Essential Oil Suppliers and R & R Realty, of which entities defendant's brother was his partner. Defendant's financial disclosure for purposes of the prenuptial agreement consisted of his 1996 personal income tax return reflecting $41,000 in wages and $11,157 in rental income, a schedule listing his business interests and the values of his bank and brokerage accounts . . . and a statement from his accountant of the fair market value of his business interests. Plaintiff specifically waived any further discovery in executing the prenuptial agreement. . . .

"4. Plaintiff commenced a divorce action on February 2, 2009. During the divorce proceedings, plaintiff unsuccessfully challenged the prenuptial agreement on the basis of defendant's fraud . . . and, as a result, the Court limited discovery and plaintiff was not permitted access to documents related to defendant's business interests . . . .

"5. The parties started a divorce trial on April 4, 2011 [but] *settled and executed a* [*stipulation*] *dated April 11, 2011, which was subsequently incorporated into the divorce judgment.*

"6. In connection with the trial, defendant had submitted to plaintiff and to the Court a sworn Statement of New Worth . . . dated April 1, 2011.

"7. On his [statement of net worth] under GROSS INCOME, defendant wrote '0.00.' Defendant then wrote 'See Attached 2010 income information' . . . [and] attached . . . documents relative to the prior year's income . . . ."

nection with her motion to open, the plaintiff sought

"8. Defendant indicated total expenses on his [statement of net worth] of $12,096 per month . . . not including any support to be paid towards plaintiff and the parties' two children.

"9. On his [statement of net worth], defendant [listed his assets] . . . .

"10. . . . According to defendant at the time of the parties' divorce, other than the value of his business (which he stated was N/A), his other cash and retirement assets totaled $131,215 . . . which he claimed was his 'separate property' under the parties' prenuptial agreement except for [a] . . . brokerage account and the cash value of his life insurance policy.

"11. Based upon defendant's 'disclosures' on his sworn financial statement, relied upon by plaintiff, the parties entered into [a] settlement, which set forth that their [stipulation] superseded the Prenuptial Agreement:

"a. Child Support:

"- Defendant to pay child support to plaintiff in the amount of $5000 per month, based upon defendant's gross income of $265,000 in 2009 . . .

"- Defendant to pay 80 [percent] of statutory add-ons for the children; and

"- Defendant to pay 60 [percent] of college [costs] for the children with a [State University of New York] cap.

"b. Alimony: Plaintiff waived her right to alimony. . . .

"12. . . . [P]laintiff [received] cash assets from the marriage totaling $488,776 . . . .

"15. On November 21, 2014 . . . after domesticating the New York Judgment of Divorce in Connecticut, plaintiff filed a motion to modify . . . on the ground that under New York law, defendant's income had increased by at least [15] percent since the Judgment of Divorce resulting in a substantial change in circumstances requiring an upward modification . . . .

"18. It was only during the discovery process on the [motion to modify] did plaintiff begin to learn that defendant's April, 2011 statement of net worth . . . contained false statements and material omissions intended to mislead plaintiff and the Court, and misrepresent his actual income and the parties' marital assets. . . .

"20. Defendant lied on his [statement of net worth] about his available and true compensation as the owner of Flavormatic, listing his 2011 income as '0.00' and his 2010 income as $150,000, and then each year starting with the year of his divorce taking compensation ranging from $950,000 to $1,900,000 . . . .

"21. Defendant stockpiled money in his corporation in order to avoid equitable distribution of marital assets and to avoid paying alimony and child support . . . .

"25. Defendant hid the income [he earned] during the marriage, which would have resulted in significant nonbusiness assets subject to equitable distribution, stockpiling those sums in his businesses, because he knew that plaintiff would not have access to the information by virtue of the trial court upholding the enforceability of the prenuptial agreement. Defendant intentionally omitted this information on his [statement of net worth] for

postjudgment discovery of the defendant's financial records. The defendant opposed both the plaintiff's motion to open and her request for postjudgment discovery. The parties filed numerous motions, objections, and memoranda with respect to the motion to open and request for discovery.

On October 26, 2018, counsel for the parties appeared before the court at which time the court ruled on several of the parties' outstanding motions and objections not at issue here. At the time, the court stated that, in Connecticut, postjudgment discovery generally is not permitted in the absence of a demonstration by the plaintiff that she has more than a "mere suspicion" of fraud on the part of the defendant in his conduct relating to the execution of the stipulation. The court specifically referenced *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 269–70, 540 A.2d 713 (1988).[13] To determine whether the plaintiff could demonstrate more than a mere suspicion of the defendant's alleged fraud,[14] the court ordered the parties to appear for an *Oneglia* hearing on Decem-

the purpose of fraudulently inducing plaintiff [to enter] into a [stipulation] which was egregiously inequitable. Defendant's misconduct was wilful, malicious and unlawful, as a result of which this Court should vacate the parties' April, 2011 [stipulation], open the divorce judgment and order a new trial.

"26. Had defendant been truthful on his [statement of net worth], there is a reasonable possibility that . . . the settlement would have been different [in that plaintiff would not have waived alimony, would not have agreed to $5000 per month in child support, would have demanded counsel fees, would not have agreed to limit the defendant's obligation to pay for the children's college expenses at the State University of New York cap, would not have agreed to pay 40 percent of the children's college expenses, would not have agreed to leave the marriage with less than $500,000, and would have demanded higher life insurance coverage for child support and for alimony]." (Emphasis altered; footnote omitted.)

[13] "*Oneglia* and its progeny are grounded in the principle of the finality of judgments." *Brody* v. *Brody*, 153 Conn. App. 625, 631, 103 A.3d 981, cert. denied, 315 Conn. 910, 105 A.3d 901 (2014).

[14] In *Oneglia*, the plaintiff wife filed a motion to open the judgment of dissolution, claiming that the defendant husband fraudulently had misrepresented his finances with respect to the parties' separation agreement. *Oneglia* v. *Oneglia*, supra, 14 Conn. App. 268. The wife asked the court to open the judgment and to allow " 'complete discovery.' " Id. The trial court

ber 4, 2018. Furthermore, because the parties had agreed that the stipulation was to be governed by New York law, the court ordered counsel for the parties to file simultaneous memoranda of law two weeks prior to the start of the *Oneglia* hearing to address "the standard in New York for opening a matrimonial judgment. And . . . under all the facts and circumstances of this case is there either res judicata or was there accord and satisfaction, or whatever that would militate against this particular motion, in other words, would support a motion to dismiss [the motion to open]. That's what I'm looking for."[15]

The court conducted an *Oneglia* hearing on December 4, 5, and 6, 2018. Both parties testified at the hearing, as well as the plaintiff's forensic accountant, Lee Sanderson. On December 21, 2018, counsel for the parties appeared for final arguments. Counsel for the plaintiff argued that the evidence demonstrated that the defendant had failed to disclose significant assets at the time the

deferred a decision on the issue of discovery until it had conducted a hearing to determine whether the wife "possessed enough preliminary evidence on the question of fraud to justify a full-blown discovery process." Id. Following the hearing, the court found that the wife "had not put forth sufficient indicia of fraud to justify an opening of the judgment and further discovery." Id., 269. The wife appealed, claiming that she had a right to conduct discovery and to compel the husband to testify. Id. This court disagreed and affirmed the judgment of the trial court, stating that the wife's premise was incorrect in that our rules of practice and statutes do not provide for postjudgment discovery. Id. The trial court's position was straightforward: "If the [wife] was able to substantiate her allegations of fraud *beyond mere suspicion*, then the court would open the judgment for the limited purposes of discovery, and would later issue an ultimate decision on the motion to open after discovery had been completed and another hearing held." (Emphasis added.) Id., 269–70.

[15] At the conclusion of the October 26, 2018 hearing, counsel for the defendant informed the court that the defendant wanted to address the court personally. The defendant then stated to the court that he wanted the proceedings to be expedited because he had been diagnosed with glioblastoma, a brain tumor. His desire was to resolve the litigation to put his affairs in order and to not burden his family and his estate.

stipulation was negotiated. Counsel for the defendant argued that eight years after the plaintiff had received the benefits of the stipulation, she was precluded from relitigating the parties' divorce on the grounds of collateral estoppel, ratification, and lack of evidence to sustain the allegation of fraud. Counsel for the defendant also argued that the *plaintiff could not challenge the stipulation by way of a motion to open the judgment; rather, she had to file a plenary action sounding in contract*; but that the statute of limitations had run on such an action. Counsel further argued that, given the validity of the prenuptial agreement, the plaintiff would have received far less under the prenuptial agreement than she received under the stipulation and, therefore, she could not argue credibly that she had sustained any damages.[16]

At the conclusion of the arguments, the court explained that, under *Oneglia*, if the evidence demonstrated that the plaintiff had more than a mere suspicion of fraud, the discovery process would begin, and thereafter the court would hold a hearing to determine whether the dissolution judgment should be opened. If the court found that the plaintiff had no more than a mere suspicion of fraud, there would be no discovery regarding the defendant's finances. Without additional discovery, the plaintiff would have to decide whether to pursue her motion to open with the evidence she had presently.

On January 31, 2019, the court issued a memorandum of decision regarding the *Oneglia* hearing, the outcome of which determined whether the plaintiff could conduct discovery of the defendant's finances. As a preliminary matter, the court stated that two facts were critical

[16] Counsel for the defendant also argued that the court should dismiss the motion to open because the plaintiff had failed to make out a prima facie case of fraud on the part of the defendant. Although the court found that the plaintiff failed to make out a prima facie case of fraud, it did not dismiss the motion to open on that basis.

to its decision, to wit: (1) *the stipulation was incorporated in, but not merged into, the dissolution judgment and* (2) *the stipulation provided that all matters related to it were to be governed by New York law*. The court recounted the relevant facts and procedural history of the case and that it previously had ruled on the plaintiff's motion to modify and the defendant's motion for child support credit. The court then stated that the present matter came before the court by way of the plaintiff's motion to open.

As it did at the October 26, 2018 proceeding, the court stated that Connecticut's rules of practice do not permit postjudgment discovery unless the plaintiff can show that there is more than a "mere suspicion" of fraud on the part of the defendant in his conduct related to the execution of the stipulation. See *Oneglia* v. *Oneglia*, supra, 14 Conn. App. 269–70. The court noted that it had conducted the *Oneglia* hearing and argument over four days in December, 2018, and recounted its order that, because "the parties had agreed that New York law would be controlling, prior to the hearing [it had] ordered each counsel to submit a memorandum of law addressed to the holdings of New York law regarding the opening of a matrimonial judgment based upon an unmerged stipulation, and whether or not there were facts in this case that would support a *motion to dismiss the motion to open*." (Emphasis added.) Having reviewed the memoranda of law submitted by counsel and the relevant New York law, the court concluded that the parties had arrived at their choice of law decision without fraud or duress, with the advice of counsel, and that their choice of New York law should be given effect, citing *Elgar* v. *Elgar*, 238 Conn. 839, 848, 679 A.2d 937 (1996) (court should give effect to express choice of law by parties to contract provided it was made in good faith). The court also concluded that an

established body of New York law relating to postjudgment discovery in matrimonial cases was controlling and *not Oneglia*.

The court cited the New York law it had considered in reaching its decision, stating that "[t]here is a clear societal benefit in reliance upon the finality of judgments, particularly in family relations matters, where the judgment is based upon an agreement of the parties. It is the general policy of the courts in New York to uphold settled domestic relations judgments. *Rainbow* v. *Swisher*, 72 N.Y.2d 106, 110–11, 527 N.E.2d 258, 531 N.Y.S.2d 775 (1988). To that end, the courts have drawn a distinction between actions to overturn such judgments as opposed to enforcing their provisions. *It is well settled that a party to a stipulation that is incorporated, but not merged, into a judgment of divorce cannot challenge the enforceability of the stipulation by way of motion but, rather, must do so by commencement of a plenary action.* Conversely, a party seeking to enforce the terms of such a stipulation may do so either by motion to enforce the judgment or by a plenary action. *Anderson* v. *Anderson*, 153 App. Div. 3d 1627, 1628, 61 N.Y.S.3d 405 (2017) . . . . In fact, *it is error for a court to entertain such a motion on its merits. Spataro* v. *Spataro*, 268 App. Div. 2d 467, 468, 702 N.Y.S.2d 342 (2000)." (Citations omitted; emphasis added; internal quotation marks omitted.) In light of the law and under the circumstances, the court stated that it found "it appropriate to consider a motion *to dismiss*." (Emphasis added.)

The court continued, stating, "[i]n general, financial disclosure is inappropriate unless and until the existing separation agreement is set aside. *Rupert* v. *Rupert*, 190 App. Div. 2d 1027, 594 N.Y.S.2d 663 (1993). Referring to a new operative standard set forth in [New York]

Domestic Relations Law § 236 (B), a [New York] Appellate Division court held that . . . to permit such discovery would require an affirmative, factual showing, at least prima facie that the agreement was unfair or unreasonable when executed or unconscionable at the time of the entry of final judgment. That lacking, the court disallowed the request for discovery. *Oberstein* v. *Oberstein*, 93 App. Div. 2d 374, 377–79, 462 N.Y.S.2d 447 (1983)."[17] (Emphasis omitted; internal quotation marks omitted.) The court in the present case also recognized the " 'sensitive balancing' " permitted under New York Civil Practice Law and Rules 3102 (c) and

[17] In *Oberstein*, the defendant wife sought by way of counterclaims to reform the parties' separation agreement at the time the plaintiff husband commenced an action for dissolution of marriage. *Oberstein* v. *Oberstein*, supra, 93 App. Div. 2d 375. The court set forth the rule of law in that regard as follows: "It has been established law in this [s]tate that where there is an existing separation agreement, which controls the respective support obligations of the parties, in a subsequent matrimonial action for divorce neither alimony nor support is in issue unless and until the support terms of the separation agreement are set aside. On this basis, the courts have regularly denied any financial disclosure in such an action, as long as the support terms of the separation agreement remain in effect." Id., 376. "However, so much of defendant's notice to take plaintiff's oral deposition as requests information regarding his present financial condition is premature. Plaintiff's present financial circumstances are not relevant to the defendant's claim, inter alia, that she was deceived regarding the true extent of her husband's income at the time that the separation agreement was entered into and will not become an issue unless and until the separation agreement or its support provisions have been vacated or set aside on the grounds of fraud, duress or overreaching, etc." (Internal quotation marks omitted.) Id., 376–77, quoting *Potvin* v. *Potvin*, 92 App. Div. 2d 562, 563, 459 N.Y.S.2d 313 (1983).

"The equitable distribution statute . . . continued, in effect, the prior rule which directed compulsory financial disclosure where alimony, maintenance or support is in issue. . . . However, where, as here the support or maintenance obligations of the parties are fixed by an agreement, neither support nor maintenance is 'in issue' unless there is a real and legitimate presentation to vacate the support terms of the agreement on the basis of the criteria explicitly set forth in the statute. Thus, in such cases, it is necessary to review the factual predicate which has been set forth to ascertain whether, in fact, the underlying circumstances establish a proper basis to modify the agreement." *Oberstein* v. *Oberstein*, supra, 93 App. Div. 2d 379–80.

utilized in *Moore* v. *Moore*, Docket No. 2013/995, 2015 WL 4530304 (N.Y. Sup. July 9, 2015) (decision without published opinion, 48 Misc. 3d 1214 (A), 22 N.Y.S.3d 138 (2015)). The court stated: "In [*Moore*], a subpoena duces tecum was served in connection with a motion to vacate a [dissolution] judgment, the provisions of which stemmed from an agreement, incorporated but not merged in the judgment, and was therefore subject to dismissal, there being no pending plenary action on the underlying agreement."

The court continued, stating that, given the circumstances of the present case and under the standard articulated by the New York courts, "even applying a sensitive balancing, the plaintiff had failed to meet her burden with at least a prima facie showing either that the stipulation was unfair or unreasonable when negotiated, or unconscionable when the dissolution judgment was entered, or that the defendant's action amounted to wilful fraud or fraudulent concealment. Moreover, [the plaintiff] has not established that, even if the judgment were to be opened and the stipulation were to be set aside, that the resulting judgment would likely be substantially different."[18] The court denied the plaintiff's request for discovery and ordered that the "matter

[18] In *Moore*, the New York trial court balanced the need to respect the finality of separation agreements with the need for accurate disclosure and permitted postjudgment discovery. *Moore* v. *Moore*, supra, 2015 WL 4530304, *5–8. *Moore* is factually and procedurally distinguishable from the present case. *Moore* concerned the *application* of a former husband seeking to subpoena financial records from his former spouse in order "to frame [a] complaint to challenge a two-year old separation agreement." Id., *1. The court stated that New York Civil Practice Law and Rules 3102 (c) "contains no preconditions to pre-complaint disclosure—[it] seems to obviate the need to have an already vacated separation agreement as a predicate to disclosure. Instead, as interpreted by the New York courts, [it] simply requires a party seeking such disclosure to articulate the elements of a cause of action." Id., *5. In balancing the need for accurate disclosure and the finality of separation agreements, the court noted that "[t]he parties expressly agreed that further disclosure to enforce the [a]greement would be permissible at any time either party had an obligation to the other." Id., *7. "In concluding that the sensitive balance of the intrusiveness of the requested discovery when

shall be set down for argument as to show cause as to why the plaintiff's motion to open . . . should not be *denied* consistent with New York law."[19] (Emphasis added.)

The parties and their counsel appeared in court on March 19, 2019. The court commenced the proceeding by stating: "I think that since the matter started with a hearing with regard to postjudgment discovery and was not per se a hearing on the merits, I believe that the appropriate course of action is to dismiss . . . because it's jurisdictional and jurisdiction . . . always in this particular instance . . . implicates the subject matter, [which] can [be] raise[d] . . . at any time and even by the court and that's Practice Book [§] 10-33 . . . ." The court then explained that the judgment was subject to New York law and that the gravamen of the motion to open was the prenuptial agreement. Prior to the dissolution of the parties' marriage, the court noted, a New York court had determined that the prenuptial

weighed against the nature of the claim makes disclosure permissible, this court is not conducting any pre-screening of the merits of the husband's claim. Any such determination would await the filing of a complaint, an answer and further proceedings." Id. The court further concluded that to the extent the husband wished to "invalidate the agreement incorporated [but] not merged into a judgment of divorce, he must do so by a plenary action." Id., *8.

In the present case, the stipulation contained no provision for further disclosure to enforce or to vacate it. Furthermore, the plaintiff's motion to open is not the equivalent of a New York Civil Practice Law and Rules 3102 (c) application for preaction discovery, which can be pursued in Connecticut through an equitable bill of discovery. See Practice Book § 13-18. Finally, the plaintiff's motion to open seeks to avoid the plenary action to challenge the stipulation that the court in *Moore* said was the complaining party's sole method to challenge the separation agreement. Under the procedural posture of this case, if the court had permitted discovery, the plaintiff would not have been required to commence such an action in which to allege fraud.

[19] The court also set forth in detail its legal analysis, including eight specific factual findings. Because we conclude that the trial court properly determined that, pursuant to New York substantive law, the plaintiff was required to bring a plenary action to challenge the stipulation, we need not address her remaining claims. See footnote 1 of this opinion.

agreement was valid and that there was no fraud on the part of the defendant. The trial court then reviewed and analyzed the evidence that supported the New York court's decision regarding the absence of fraud. The court concluded: "[T]he bottom line, when all is said and done, is that *New York law says you cannot attack the [judgment] based on a motion to open. It must be done by a plenary action, a contract action, and that is why I am going to dismiss this action immediately.*"[20] (Emphasis added.) See *Spataro* v. *Spataro*, supra, 268 App. Div. 2d 468 ("Supreme Court erred in entertaining defendant's motion on merits, as motion is not proper vehicle for challenging a separation agreement incorporated but not merged into divorce judgment. Rather, defendant should have commenced plenary action seeking vacatur or reformation of the agreement.").

On April 5, 2019, the plaintiff appealed from the judgment of dismissal, raising numerous claims. Of the plaintiff's several claims, the determinative one is whether the court improperly dismissed the motion to open on the ground that it lacked subject matter jurisdiction.[21] We agree with the plaintiff that the court improperly dismissed the motion to open on the ground that it

[20] It appears that the court may have used the terms "deny" and "dismiss" interchangeably. The order the court issued on January 31, 2019, stated that the "matter shall be set down for argument as to show cause as to why the plaintiff's motion to open . . . should not be *denied* consistent with New York law." (Emphasis added.) At the commencement of the hearing on March 19, 2019, the court stated: "I think that since the matter started with a hearing with regard to postjudgment discovery and was not per se a hearing on the merits, I believe that the appropriate cause of action is to dismiss and to the extent that my memorandum, although I think in two places one place I think I said deny/dismiss and just—I type my own decisions so—but in any event that's the appropriate remedy because it's jurisdictional and jurisdiction is always in this particular instance because it implicates the subject matter, you can raise it at any time and even by the court and that's Practice Book [§] 10-33 is a motion to dismiss . . . ."

[21] On appeal, the defendant argues that the stipulation exists independently of the dissolution judgment and governs the parties' marital rights. We agree that the stipulation is independent of the dissolution judgment.

lacked subject matter jurisdiction but conclude that the court properly determined that the plaintiff was able to challenge the stipulation only by bringing a plenary action. In other words, the court should have denied the plaintiff's motion to open, hence, the form of the judgment is improper.

We begin our analysis with the applicable standard of review. "[A] determination regarding a court's subject matter jurisdiction is a question of law . . . ." *Rathblott* v. *Rathblott*, 79 Conn. App. 812, 816, 832 A.2d 90 (2003). The plenary standard of review applies to questions of law. See *Pond View, LLC* v. *Planning & Zoning Commission*, 288 Conn. 143, 155, 953 A.2d 1 (2008). "[T]he question of subject matter jurisdiction, because it addresses the basic competency of the court, can be raised by any of the parties, or by the court sua sponte, at any time." (Internal quotation marks omitted.) *Webster Bank* v. *Zak*, 259 Conn. 766, 774, 792 A.2d 66 (2002). "Once the question of lack of jurisdiction of a court is raised . . . [t]he court must fully resolve it before proceeding further with the case. . . . Whenever a court finds that it has no jurisdiction, it must dismiss the case . . . ." (Citation omitted; internal question marks omitted.) *Rathblott* v. *Rathblott*, supra, 817.

"[E]very presumption favoring jurisdiction should be indulged." *Connecticut Light & Power Co.* v. *Costle*, 179 Conn. 415, 421 n.3, 426 A.2d 1324 (1980). "A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action." (Internal quotation marks omitted.) *Amodio* v. *Amodio*, 247 Conn. 724, 728, 724 A.2d 1084 (1999).

As we noted previously, the plaintiff registered the New York judgment of dissolution in Connecticut in

October, 2014, pursuant to § 46b-71, which provides in relevant part: "(a) Any party to an action in which a foreign matrimonial judgment has been rendered, shall file, with a certified copy of the foreign matrimonial judgment, in the court in this state in which enforcement of such judgment is sought, a certification that such judgment is final, has not been modified, altered, amended, set aside or vacated and that the enforcement of such judgment has not been stayed or suspended . . . .

"(b) Such foreign matrimonial judgment *shall become a judgment of the court of this state* where it is filed and *shall be enforced and otherwise treated in the same manner as a judgment of a court of this state* . . . . A foreign matrimonial judgment so filed shall have the same effect and may be enforced or satisfied in the same manner as any like judgment of a court of this state and is subject to the same procedures for modifying, altering, amending, vacating, setting aside, staying or suspending said judgment as a judgment of a court of this state; provided, *in modifying, altering, amending, setting aside, vacating, staying or suspending any such foreign matrimonial judgment in this state the substantive law of the foreign jurisdiction shall be controlling*." (Emphasis added.)

Under General Statutes § 46b-1 (4), "the Superior Court is vested with plenary and general subject matter jurisdiction over legal disputes in family relations matters . . . ." (Internal quotation marks omitted.) *Reinke* v. *Sing*, 328 Conn. 376, 389, 179 A.3d 769 (2018). "With subject matter jurisdiction established, the trial court's task is to apply the statute to the facts of a particular case, indeed, interpreting statutes and applying the law to the facts before it [fall within] the traditional province of the trial court. . . . Upon review of the trial court's actions, therefore, [our] role is to review the trial court's

exercise of its authority to act." (Internal quotation marks omitted.) Id., 390.

Section 46b-71 provides that the Superior Court where the foreign dissolution judgment is registered has jurisdiction to modify the judgment, provided that it applies the substantive law of the foreign jurisdiction. See *Vitale* v. *Krieger*, 47 Conn. App. 146, 148–49, 702 A.2d 148 (1997). The record, in fact, discloses that the trial court previously exercised its jurisdiction over the parties' dissolution judgment when it granted the plaintiff's motion to modify. We, therefore, conclude that the court improperly determined that it lacked subject matter jurisdiction over the plaintiff's motion to open.

As the court stated in its January 31, 2019 memorandum of decision, two facts were critical to its decision: (1) the stipulation was incorporated but not merged in the dissolution judgment and (2) the stipulation provided that all matters related to it were to be governed by New York law.

Nevertheless, because the issue of whether New York substantive law precluded the court from granting the plaintiff the relief she requested raises a question of law, we consider whether the court should have denied the plaintiff's motion to open. "A stipulated judgment is not a judicial determination of any litigated right. . . . It may be defined as a contract of the parties acknowledged in open court and ordered to be recorded by a court of competent jurisdiction. . . . [It is] the result of a contract and its embodiment in a form which places it and the matters covered by it beyond further controversy. . . . The essence of the judgment is that the parties to the litigation have voluntarily entered into an agreement setting their dispute or disputes at rest and that, upon this agreement, the court has entered judgment conforming to the terms of the agreement." (Internal quotation marks omitted.) *Barber* v. *Barber*,

114 Conn. App. 164, 168, 968 A.2d 981, cert. denied, 292 Conn. 915, 973 A.2d 661 (2009). The court found that the parties bargained in good faith for New York law to apply to their stipulation. Although the plaintiff moved to open the judgment of dissolution, in reality, it is the stipulation that is at issue in the present matter, not the judgment of dissolution. Had the plaintiff commenced a plenary contract action to vacate the stipulation, the trial court would have had jurisdiction to adjudicate the action by applying the substantive law of New York.[22] See *Wayne* v. *Wayne*, Superior Court, judicial district of Litchfield, Docket No. FA-94-0549968 (February 17, 1999) (when certain provisions in New York agreement do not merge into judgment, they retain contractual significance).

Although the court conducted an *Oneglia* hearing in December, 2018, in its January 31, 2019 memorandum of decision, it recognized that *Oneglia* did not control postjudgment discovery and applied New York law to the evidence presented at the hearing. The court further recognized that a stipulation that is incorporated, but not merged, into a New York dissolution judgment may not be challenged by way of a motion to open the dissolution judgment, but only by the commencement of a plenary action seeking to undo the stipulation itself. See *Anderson* v. *Anderson*, supra, 153 App. Div. 3d 1628. The court also recognized that it is error for a court to entertain a motion to open such a judgment on its merits when the underlying stipulation has not

[22] "Contract clauses which require the application of the laws of other states upon breach or dispute are recognized as proper in Connecticut. . . . The ordinary rule is that where a cause of action arising in another [s]tate is asserted in our courts, we look to the laws of that [s]tate to determine all matters of substance involved in it, but that matters of procedure are governed by our own law . . . ." (Citation omitted; internal quotation marks omitted.) *People's United Bank* v. *Kudej*, 134 Conn. App. 432, 438, 39 A.3d 1139 (2012).

been set aside. See *Spataro* v. *Spataro*, supra, 268 App. Div. 2d 468.[23]

The plaintiff argues that the court improperly applied New York procedural law rather than Connecticut procedural law, because the rule requiring a plenary action

[23] In her brief on appeal, the plaintiff argued that failure to commence a plenary action for reformation or rescission of a stipulation is not a fatal defect in New York. She cited the following cases to support her position: *MacDonald* v. *Guttman*, 72 App. Div. 3d 1452, 1455–56, 900 N.Y.S.2d 177 (2010) (malpractice action; stipulated agreement is independent contract obligation modifiable by plenary action; under certain circumstances court may reform agreement to conform to parties' intent); *Banker* v. *Banker*, 56 App. Div. 3d 1105, 1107, 870 N.Y.S.2d 481 (2008) (court did not exceed authority by reforming stipulation where there was mutual mistake, rendering portion of stipulation impossible or impracticable to carry out); *Brender* v. *Brender*, 199 App. Div. 2d 665, 666, 605 N.Y.S.2d 411 (1993) (relevant stipulation provision set aside where there was mutual mistake regarding insurance availability); *Gaines* v. *Gaines*, 188 App. Div. 2d 1048, 592 N.Y.S.2d 204 (1992) (postdissolution modification of agreement requires plenary action but modification on motion affirmed because it was granted after full hearing tantamount to plenary trial). In the present case there is no claim of mutual mistake, technical defect or agreement of the parties to proceed on a motion to modify or open the judgment.

The defendant, however, has pointed out that the New York cases cited by the plaintiff are distinguishable from the present case because the motions at issue were grounded in mistake, omission, defect, irregularity or a technical defect. The defendant argues that those cases teach that where the issue is not in dispute, e.g., inability to subdivide real property, no health insurance available, or that securities should have been included in equitable distribution, and both parties request that the court correct a mistake in the agreement, the Appellate Division of the New York Supreme Court will not reverse the trial court's judgment. Where the issue is in dispute, however, the issue must be bought pursuant to a plenary action to reform or to vacate the agreement. See New York Civil Practice Law and Rules 2001, which provides: "At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided than any applicable fees shall be paid." We agree with the defendant that the cases are distinguishable from the facts of the present case in which there is no mutual mistake, impossibility, or impracticality.

to challenge a stipulation not merged into the judgment of dissolution is procedural and not substantive. She also argues that discovery, which is what she sought in the trial court, is inherently procedural. She further contends that the fact that § 46b-71 sets forth the procedure for enforcing foreign matrimonial judgments in Connecticut confirms that the New York rule is procedural. Finally, the plaintiff posits that the court, up until the time it improperly applied New York procedural law to deny her discovery request, recognized the procedural nature of the issues before it and applied Connecticut's procedural rules under *Oneglia*.

The defendant argues that the New York rule requiring that the validity of a stipulation be challenged in a plenary action is substantive and that the trial court properly applied it. He also contends that the New York rule is predicated on public policy that recognizes that the valid substantive contractual rights of the parties take precedence over inchoate and previously waived statutory rights. We agree with the defendant that the New York rule requiring a plenary action to challenge the terms of a settlement agreement, incorporated but not merged into the judgment of dissolution, is substantive.

"The judicial rule of thumb, that in a choice of law situation the forum state will apply its own procedure . . . brings us to the vexing question of which rules are procedural and which substantive. These terms are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, substance and procedure are the same keywords to very different problems." (Citation omitted; internal quotation marks omitted.) *Paine Webber Jackson & Curtis, Inc.* v. *Winters*, 22 Conn. App. 640, 650, 579 A.2d 545, cert. denied, 216 Conn. 820, 581 A.2d 1055 (1990).

"The ordinary rule is that where a cause of action arising in another [s]tate is asserted in our courts, we look to the laws of that [s]tate to determine all matters of substance involved in it, but that matters of procedure are governed by our own law . . . ." *Broderick* v.*McGuire*, 119 Conn. 83, 101, 174 A. 314 (1934). "While there is no precise definition of either [substantive orprocedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a pro-cedural law prescribes the methods of enforcing such rights or obtaining redress. . . . Where the [law] is not substantive, i.e., not directed to the right itself, but rather to the remedy, it is generally considered a distinctly procedural matter." (Internal quotation marks omitted.) *DuBaldo Electric, LLC* v. *Montagno Construction, Inc.*, 119 Conn. App. 423, 449–50, 988 A.2d 351 (2010). In *Weber* v. *U.S. Sterling Securities, Inc.*, 282 Conn. 722, 735–41, 924 A.2d 816 (2007), our Supreme Court addressed whether a New York rule that prohibited class actions was procedural or substantive in nature. The court concluded that "[i]t is clear that [New York Civil Practice Law and Rules] § 901 (b) [McKinney 2006] is substantive because it abridges the rights of individuals to bring class action claims in New York state. We have determined that statutes, like § 901 (b), that affect an individual's cause of action clearly are substantive in nature. See *Doe* v. *Norwich Roman Catholic Diocesan Corp.*, 279 Conn. 207, 219, 901 A.2d 673 (2006) ([i]t is beyond dispute that [General Statutes] § 1-1d is substantive in nature because it generally gives persons . . . legal capacity, rights, powers, privileges, duties, liabilities)." (Internal quotation marks omitted.) *Weber* v. *U.S. Sterling Securities, Inc.*, supra, 739.

Consequently, we must examine whether the New York rule at issue in this case, i.e., that the validity of a stipulation must be challenged by means of a plenary action, defines rights under New York law or merely

provides a remedy for enforcing rights. Under New York law, a stipulation of settlement that is incorporated but not merged into a judgment of divorce is a contract subject to principles of contract construction and interpretation. See, e.g., *D'Sa* v. *D'Sa*, 182 App. Div. 3d 535, 536, 122 N.Y.S.3d 344 (2020); *Campello* v. *Alexandre*, 155 App. Div. 3d 1381, 1382, 65 N.Y.S.3d 348 (2017); *Anderson* v. *Anderson*, supra, 153 App. Div. 3d 1628. A stipulation of settlement not merged into the judgment is independently binding on the parties, and New York courts may not impair the parties' contractual rights under the agreement by modifying the divorce judgment. See *Fine* v. *Fine*, 191 App. Div. 2d 410, 594 N.Y.S.2d 309 (1993); see also *Lambert* v. *Lambert*, 142 App. Div. 2d 556, 558, 530 N.Y.S.2d 223 (1988) ("while a judgment of divorce can be attacked pursuant to [New York Civil Practice Law and Rules] 5015, the separation agreement will remain unimpeached unless challenged in a plenary action").[24] For example, in *Pellot* v. *Pellot*, 305 App. Div. 2d 478, 479–80, 759 N.Y.S.2d 494, (2003), the court held that the trial court incorrectly concluded that the defendant could not enforce her right to the amount of child support set forth in the parties' separation agreement because the family court had made a downward modification of the plaintiff's child support obligation in the judgment of dissolution. The court concluded: "[T]he [defendant] is entitled to enforce [the child support] provisions of the stipulation and to recover the difference between the amount of child support agreed to in the stipulation and the reduced amount set by the [f]amily [c]ourt." Id., 480. Thus, it is clear to us that, under New York law, the parties to a separation agreement that is not merged into a dissolution judgment have contractual rights that, in many

[24] Pursuant to New York Civil Practice Law and Rules 5015, New York trial courts may relieve a party from the terms of a judgment on the grounds of fraud or misrepresentation.

instances, cannot be undone by modifying the judgment of dissolution.

It is for this reason that under New York domestic relations law, "financial disclosure in support of a claim to overturn a separation agreement is inappropriate until the existing separation agreement is set aside. . . . The only exception to this rule requires the moving party to establish a 'legitimate factual predicate' for setting aside the existing agreement. . . . The spouse seeking discovery about the other spouse's finances—after execution of an agreement—must adduce sufficient factual support constituting a legitimate basis to warrant modification or vacatur of the support provisions of the separation agreement . . . . The Fourth Department has adopted this requirement for a legitimate factual predicate before allowing discovery by a party to overturn a separation agreement." (Citations omitted; internal quotation marks omitted.) *Moore* v. *Moore*, supra, 2015 WL 4530304 *2; see footnote 17 of this opinion. Significantly, such discovery, even where permitted, cannot be used to support a motion to open the judgment of dissolution. Instead, any challenge to whether the separation agreement was procured by fraud, as claimed by the plaintiff in the present case, must be brought in a plenary action. See id., *8.[25] There is simply no *right* under New York law to challenge the validity of a separation agreement through a motion

[25] In *Moore*, the court relied on New York Civil Practice Law and Rules 3102 (c) to conclude that the plaintiff was entitled to preaction discovery. *Moore* v. *Moore*, supra, 2015 WL 4530304, *8. New York Civil Practice Law and Rules 3102 (c), which applies to all civil matters, provides: "Before action commenced. Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony." In Connecticut, preaction discovery may be obtained by means of an equitable bill of discovery. See *Berger* v. *Cuomo*, 230 Conn. 1, 5–6, 644 A.2d 333 (1994). The plaintiff in the present case has not pursued an equitable bill of discovery.

to open the dissolution judgment. The New York rule affects the very existence of the cause of action. Consequently, we conclude that the New York rule requiring a party to challenge a separation agreement through a plenary action is substantive and not procedural. As such, § 46b-71 and the parties' stipulation required that the trial court apply this New York substantive rule to the plaintiff's motion to open.

In the present case, after conducting an *Oneglia* hearing, the court found that the plaintiff had failed to meet her burden with at least a prima facie showing either that the stipulation was unfair or unreasonable when negotiated or unconscionable when the dissolution judgment was entered, or that the defendant's actions amounted to wilful fraud or fraudulent concealment, or that, if the judgment were set aside, the resulting judg ment would be different. The court, however, determined that it erred in entertaining the merits of the plaintiff's discovery motion, which was ancillary to the motion to open, because a motion to open is not the proper vehicle to challenge a stipulation incorporated, but not merged, into a judgment of dissolution. See *Spataro* v. *Spataro*, supra, 268 App. Div. 2d 468. To challenge the validity of the stipulation that was not merged into the dissolution judgment, New York substantive law requires a party to bring a plenary action. Id.; see also *Moore* v. *Moore*, supra, 2015 WL 4530304, *8; *Marshall* v. *Marshall*, 124 App. Div. 3d 1314, 1317, 1 N.Y.S.3d 622 (2015); *Brody* v. *Brody*, 82 App. Div. 3d 812, 812, 918 N.Y.S.2d 383 (2011); *Lepe* v. *Rodriguez*, 73 App. Div. 3d 710, 710–11, 899 N.Y.S.2d 856 (2010); *Barany* v. *Barany*, 71 App. Div. 3d 613, 614, 898 N.Y.S.2d 146 (2010). In March, 2019, the court recognized that the plaintiff had to bring a plenary action to challenge the stipulation. We agree with the court's conclusion that, under New York substantive law, the plaintiff was required to bring a plenary action.

We disagree, however, with the court's conclusion that it lacked subject matter jurisdiction. The court had jurisdiction to consider the motion to open pursuant to §§ 46b-1 and 46b-71 (b), and, therefore, it should have denied, rather than dismissed, the motion to open.

The form of the judgment is improper, the judgment dismissing the plaintiff's motion to open is reversed and the case is remanded with direction to render judgment denying the motion to open.

In this opinion the other judges concurred.

RAUL DIAZ *v.* COMMISSIONER OF CORRECTION (AC 39651)

Elgo, DiPentima and Bear, Js.

Syllabus

The petitioner, who had been convicted, on a guilty plea, of the crime of home invasion, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel had provided ineffective assistance. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. On appeal, he claimed that the habeas court incorrectly concluded that his trial counsel's failure to file a motion to dismiss the home invasion charge, to which the petitioner had pleaded guilty pursuant to *North Carolina* v. *Alford* (400 U.S. 25), did not constitute ineffective assistance. *Held* that the petitioner could not prevail on his claim of ineffective assistance of counsel, as he failed to demonstrate that he was prejudiced by his trial counsel's alleged deficient performance; there was no evidence in the record showing that, but for his trial counsel's alleged deficient performance, the petitioner would have insisted on going to trial, and there was nothing to indicate that the dismissal of the home invasion charge would have resulted in any meaningful reduction in the petitioner's exposure to a lengthy period of incarceration.

Submitted for disposition October 15—officially released November 10, 2020

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, *Oliver, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court, *DiPentima, C. J.*, and *Elgo* and *Bear, Js.*, which affirmed the habeas court's judgment, and the petitioner, on the granting of certification, appealed to the Supreme Court, which reversed the judgment of this court and remanded the case to this court for further proceedings. *Affirmed.*

Deren Manasevit, assigned counsel, for the appellant (petitioner).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *David M. Carlucci*, assistant state's attorney, for the appellee (respondent).

Opinion

BEAR, J. This case returns to this court on remand from our Supreme Court. The petitioner, Raul Diaz, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The sole question presented by the petitioner on appeal is "[d]id the habeas court erroneously conclude that trial counsel's failure to file a motion to dismiss the charge of home invasion did not constitute ineffective assistance under *Strickland* v. *Washington* [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]?" The petitioner had pleaded guilty to that charge pursuant to the *Alford* doctrine.[1]

This court, however, affirmed the judgment of the habeas court, after raising, sua sponte, the issue of whether the petitioner had waived his right to raise a

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). "A defendant who pleads guilty under the *Alford* doctrine does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea." (Internal quotation marks omitted.) *State* v. *Webb*, 62 Conn. App. 805, 807 n.1, 772 A.2d 690 (2001).

claim of ineffective assistance of counsel and deciding that the petitioner did in fact waive that right by pleading guilty under the *Alford* doctrine. *Diaz* v. *Commissioner of Correction*, 185 Conn. App. 686, 689, 198 A.3d 171 (2018), rev'd, 335 Conn. 53, 225 A.3d 953 (2020). The petitioner then appealed the judgment of this court to our Supreme Court, alleging that this court "improperly raised and decided the unpreserved issue of waiver without first providing the parties with an opportunity to be heard on that issue . . . ." *Diaz* v. *Commissioner of Correction*, 335 Conn. 53, 54, 225 A.3d 953 (2020). Our Supreme Court granted the petition for certification to appeal, "limited to the following issue: 'Did the Appellate Court properly affirm the judgment of the habeas court on a legal ground that was not raised or decided in the habeas court and never raised or briefed by the parties in the Appellate Court?' " Id., 57. Our Supreme Court answered that question in the negative and remanded the case to this court with the following rescript: "The judgment of the Appellate Court is reversed and the case is remanded to that court for further proceedings in accordance with this opinion." Id., 62. The rescript of our Supreme Court presents this court with two possible courses of action. The first is to proceed "in a manner . . . consistent with [its] decision in *Blumberg* [*Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 143, 84 A.3d 840 (2014)]" with respect to the waiver issue. *Diaz* v. *Commissioner of Correction*, supra, 335 Conn. 61. The second is to decide the petitioner's appeal on the basis of his ineffective assistance of counsel claim, which previously has been briefed and argued by the parties. We take the latter course of action and affirm the judgment of the habeas court.

The following factual and procedural background is relevant to our resolution of the petitioner's appeal on

remand.[2] On October 27, 2011, the petitioner entered the Ellington home of the seventy-seven year old victim when the victim was not present. While the petitioner was still in the home, the victim returned. The petitioner asked the victim to step aside so that he could flee the home, but the victim refused. The petitioner then struck the victim with a jewelry box, which resulted in a laceration on his head, as well as a broken nose and cheekbone. After taking the victim's wallet and car keys, the petitioner fled in the victim's car and later was apprehended.

The petitioner was charged in a substitute information with two counts of home invasion in violation of General Statutes § 53-100aa,[3] two counts of burglary in the first degree in violation of General Statutes § 53a-101 (a) (1) and (2), one count each of larceny in the third degree in violation of General Statutes § 53a-124, larceny in the fourth degree in violation of General Statutes § 53a-125, assault in the second degree in violation of General Statutes § 53a-60b, and robbery in the first degree involving a dangerous instrument in violation of General Statutes § 53a-134 (a) (3). On April 26, 2013, after the petitioner entered into a plea agreement with the state, he pleaded guilty under the *Alford* doctrine to one count of home invasion in violation of § 53a-100aa (a) (2). After a thorough canvass, the court accepted the plea, rendered a judgment of conviction, and sentenced the petitioner in accordance with the plea agreement to twenty-five years of imprisonment. The petitioner did not appeal from the judgment of conviction.

[2] The facts are as recited by the state during the plea canvass of the petitioner.

[3] The second of the home invasion charges was added by the state immediately prior to the petitioner's anticipated trial, which did not take place. All references herein to the home invasion charge are to the first home invasion charge to which the petitioner pleaded guilty.

Thereafter, the petitioner commenced this habeas action. On February 25, 2016, the petitioner filed an amended petition for a writ of habeas corpus, alleging, among other claims, that his trial counsel had rendered ineffective assistance by failing to file a motion to dismiss the home invasion charge on the ground that it was duplicative of the burglary in the first degree charge. After a trial, the habeas court denied the petition for a writ of habeas corpus. In its memorandum of decision, the court concluded that the petitioner had failed to establish both that his trial counsel deficiently performed by not filing a motion to dismiss the home invasion charge and that there was prejudice to him as result of trial counsel's decision not to file such a motion. The court found that, although the petitioner's trial counsel had agreed with the state's assessment that the petitioner had violated the home invasion statute, he nonetheless argued, although unsuccessfully, to the court and the prosecutor that the home invasion charge should be dropped and that, in any event, the petitioner should be allowed to plead to the burglary in the first degree charge instead of the home invasion charge. Moreover, the court agreed with the testimony of the petitioner's trial counsel that there was no good faith basis on which to bring a motion to dismiss the home invasion charge in the trial court. After the court rendered its judgment denying the habeas petition, the petitioner filed a petition for certification to appeal to this court, which the habeas court granted.

In addressing the petitioner's sole claim on appeal, we first set forth the applicable standard of review. Although "[t]he underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous"; (internal quotation marks omitted) *Mozell* v. *Commissioner of Correction*, 87 Conn. App. 560, 564–65, 867 A.2d 51, cert. denied, 273 Conn. 934, 875 A.2d 543 (2005); "the effectiveness of an attorney's representation of a criminal defendant is

a mixed determination of law and fact that . . . requires plenary review . . . .'' (Internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 458, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006). ''To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong.'' (Internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). When reviewing a claim of ineffective assistance of counsel, a ''court can find against a petitioner on *either* ground, whichever is easier.'' (Emphasis added.) *Valeriano* v. *Bronson*, 209 Conn. 75, 86, 546 A.2d 1380 (1988). To satisfy the prejudice prong of *Strickland*, ''a claimant must demonstrate that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' '' *Ledbetter* v. *Commissioner of Correction*, supra, 458, quoting *Strickland* v. *Washington*, supra, 694. However, in the context of a guilty plea, our Supreme Court has determined that, ''[u]nder the test in *Hill* [v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)], in which the United States Supreme Court modified the prejudice prong of the *Strickland* test for claims of ineffective assistance when the conviction resulted from a guilty plea, the evidence must demonstrate that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial.'' [4] (Internal quotation marks omitted.) *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 833, 950 A.2d 1220 (2008).

[4] The petitioner did not mention the *Hill* prejudice prong in his appellate brief. The respondent, the Commissioner of Correction, in his appellate

On appeal, the petitioner argues that his trial counsel provided ineffective assistance by failing to file a motion to dismiss the home invasion charge to which he had ultimately pleaded guilty. There was no evidence before the habeas court, however, showing that, but for his trial counsel's alleged deficient performance, the petitioner would have insisted on going to trial. Furthermore, there is nothing in the habeas record indicating that the dismissal of the home invasion charge would have resulted in any meaningful reduction in the petitioner's exposure to a lengthy period of incarceration. The petitioner's initial exposure was, without enhancements, eighty-one years. After additional charges were added, including a second home invasion charge, the petitioner's exposure became 121 years, without enhancements. As the petitioner himself concedes, "even without the home invasion charge, [he] was charged with enough offenses to enable the court to impose what could effectively be a life long sentence. Removing the home invasion's potential . . . sentence . . . would not have denied the state the significant sentence it was seeking." For this reason, and because there is no evidence in the record to establish that, but for his trial counsel's allegedly deficient performance, the petitioner would have insisted on going to trial, the petitioner's claim of ineffective assistance of counsel cannot succeed because of his failure to demonstrate that he was prejudiced by any failure of his trial counsel. See *Washington* v. *Commissioner of Correction*, supra, 287 Conn. 833.

This conclusion is further supported by the petitioner's appellate brief, in which his arguments focus on the inapplicability of the home invasion statute and the structure of the plea agreement, instead of on the *Hill*

brief, set forth the *Hill* prejudice prong as the standard to be applied in this appeal. The petitioner, in his reply brief, did not dispute the applicability of the *Hill* prejudice prong to this appeal.

requirement that, but for counsel's deficient performance, he would have insisted on going to trial. Specifically, the petitioner claims in his brief, without any factual support in the habeas court record, that, but for his trial counsel's alleged deficient performance, he would have "been afforded the opportunity to plead guilty to . . . a class B felony carrying a minimum sentence of five years rather than a class [A] felony carrying a minimum sentence of ten years." Thus, even if his trial counsel had filed a motion to dismiss the home invasion charge and that motion had been granted, the petitioner has failed to demonstrate a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial. Accordingly, the petitioner has failed to satisfy the prejudice prong of the *Hill* test, and his claim of ineffective assistance of counsel fails.

The judgment is affirmed.

In this opinion the other judges concurred.

PAMELA BEVILACQUA *v.* JOHN BEVILACQUA
(AC 42518)

Elgo, Moll and Pellegrino, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and entering related financial orders. He claimed that the court abused its discretion in denying his request for a continuance of the trial, erred by ordering him to pay periodic alimony to the plaintiff, contrary to the parties' prenuptial agreement, and erred by awarding certain real property to him in its distribution order. *Held*:

1. The trial court's denial of the defendant's motion for a continuance of the trial was not an abuse of discretion; although the delays in the trial caused by the illness of the defendant's counsel and by the lack of an available judge were outside of the parties' control, by the time of the defendant's motion, the matter had been pending for more than 1000 days and involved the custody of minor children, and the defendant's

unsubstantiated claim that he required a continuance because could not miss additional days of work was unavailing.

2. The trial court properly concluded that the enforcement of the parties' prenuptial agreement would be unconscionable and properly awarded the plaintiff alimony; the defendant was responsible for his absence from the trial, which he claimed prevented him from contradicting the plaintiff's testimony regarding her capabilities or her employability, and there was evidence in the record that injuries the plaintiff sustained in a motor vehicle accident impaired her ability to work full-time and to achieve the earning capacity she had at the time she signed the prenuptial agreement, which represented a dramatic change in her financial circumstances.

3. The trial court properly determined the ownership and value of certain real properties and properly awarded those properties to the defendant; the defendant had listed the properties and assigned values to the properties in his prenuptial disclosure, there was evidence that the defendant had received mail regarding the properties from a taxing authority and the defendant did not appear at trial to challenge his ownership of the properties, and, because the defendant did not provide the court with a financial affidavit or other evidence of the value of the properties at the time of the dissolution, the court properly determined the value of those properties on the basis of the evidence that was available to it.

Argued September 22—officially released November 10, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, and referred to the Regional Family Trial Docket at Middletown, where the matter was tried to the court, *Hon. Gerald I. Adelman*, judge trial referee; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Affirmed.*

John Bevilacqua, self-represented, the appellant (defendant).

John J. Mager, for the appellee (plaintiff).

Opinion

PELLEGRINO, J. The self-represented defendant, John Bevilacqua, appeals from the judgment of the trial

court dissolving his marriage to the plaintiff, Pamela Bevilacqua, and entering related financial orders. On appeal, the defendant claims that the court (1) abused its discretion in denying his request for a continuance of the trial, (2) erred by ordering him to pay periodic alimony to the plaintiff,[1] and (3) erred by awarding certain real property to him in its property distribution order. We affirm the judgment of the trial court.

The following facts and procedural history, as set forth by the trial court in its memorandum of decision or otherwise gleaned from the record, are relevant to the defendant's claims on appeal. The parties were married on August 9, 2003. Prior to their marriage, the parties executed a prenuptial agreement (agreement) that provided that the defendant would not be obligated to pay spousal support in the event of a separation or divorce. After the plaintiff consulted with an attorney, she signed the agreement. The plaintiff also completed a financial affidavit that was attached to the agreement. The defendant similarly completed a financial affidavit in connection with the agreement, in which he disclosed his interest in two pieces of real property in the Bahamas valued at $40,000 and $60,000, respectively. The parties executed the agreement on their wedding day.

The court found that the marriage was troubled from its beginning. The parties have two minor children, who lived almost exclusively with the plaintiff during the pendency of this action. After the birth of the parties' first child, their relationship suffered due to the stresses of young parenthood. In 2005, the plaintiff commenced

[1] The defendant phrases his second claim differently, arguing that the "court erred in failing to establish and quantify the plaintiff's earning capacity in fashioning financial orders, resulting in a finding of 'unconscionability' of the parties' prenuptial agreement." The effect of that unconscionability holding, however, was that the court awarded the plaintiff alimony that would otherwise have been precluded by the parties' prenuptial agreement.

an action for dissolution of marriage, but she subsequently withdrew that action in an attempt to save the marriage. The parties attended marriage counseling and "were able to enjoy several good years of marriage, during which time their second [child] was born in late 2005."

In 2012, the parties were involved in a motor vehicle accident (accident). As of June, 2015, the plaintiff's treating neurologist diagnosed her as suffering from prolonged post-concussion syndrome caused by a mild traumatic brain injury. As a result of her injuries, the plaintiff has been unable to return to her profession as a teacher. She presently performs clerical work part-time in her brother's chiropractic office. The defendant also was injured in the accident, but his injuries did not affect his ability to remain in his profession as a school counselor. The plaintiff's inability to do certain things as a result of her injuries created significant tension between her and the defendant, and she again commenced a dissolution of marriage action in 2013. The plaintiff withdrew that second dissolution action for the sake of the parties' children and because "she felt that she had to work to try to save the family relationship." Her efforts were not successful.

The plaintiff commenced the present dissolution of marriage action on November 25, 2015. A three day trial followed, at which both parties were represented by counsel. The defendant, however, did not appear at trial and did not respond to his counsel, who, while the trial was in progress, had attempted to reach him on multiple occasions. As a result, the defendant also failed to file a financial affidavit with the court at the time of trial. Following the trial, the court issued a forty-four page memorandum of decision, ordering, among other things (1) sole custody of the children to the plaintiff, (2) that the defendant pay periodic alimony to the plaintiff, and

(3) an award of the Bahamian properties to the defendant. This appeal followed.

"The well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case, such as demeanor and attitude of the parties at the hearing. . . . The test is whether the court could reasonably conclude as it did . . . indulging every presumption in its favor. . . . A trial court's conclusions are not erroneous unless they violate law, logic, or reason or are inconsistent with the subordinate facts in the finding." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Ehrenkranz* v. *Ehrenkranz*, 2 Conn. App. 416, 420–21, 479 A.2d 826 (1984).

"Review of a trial court's exercise of its broad discretion in domestic relations cases is limited to whether that court correctly applied the law and whether it could reasonably conclude as it did. . . . The trial court must consider all relevant statutory criteria in a marital dissolution action but it does not have to make express findings as to the applicability of each criteria. . . . The trial court may place varying degrees of importance on each criterion according to the factual circumstances of each case." (Citations omitted; internal quotation marks omitted.) *Mathis* v. *Mathis*, 30 Conn. App. 292, 293, 620 A.2d 174 (1993).

"In general the same sorts of [criteria] are relevant in deciding whether [an alimony] decree may be modified as are relevant in making the initial award of alimony. . . . More specifically, these criteria, outlined

in [General Statutes] § 46b-82, require the court to consider the needs and financial resources of each of the parties . . . as well as such factors as the causes for the dissolution of the marriage and the age, health, station, occupation, employability and amount and sources of income of the parties. . . .

"Although financial orders in family matters are generally reviewed for an abuse of discretion . . . this court applies a less deferential standard when the decision of the trial court is based not on an exercise of discretion but on a purported principle of law. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citation omitted; internal quotation marks omitted.) *Rubenstein* v. *Rubenstein*, 172 Conn. App. 370, 375–76, 160 A.3d 419 (2017).

I

The defendant first claims that the court abused its discretion by denying his motion for a continuance of the trial. We disagree.

The following facts are relevant to this issue. The trial originally was scheduled to take place in March, 2018, but it was continued when one of the attorneys fell ill. The matter was continued a second time in August, 2018, due to the lack of an available judge, and it was rescheduled for October 1, 2018. On September 17, 2018, the defendant filed a motion for a continuance of the trial. In that motion, he stated "party not available" and that he "is a high school counselor . . . . He has . . . missed about [thirty] days from work for this matter and cannot miss more days. Case was scheduled for trial in [August] 2018, but was cancelled by the court." The defendant listed a series of dates on which he would be available, each of which corresponded

with typical school vacation periods, including Christmas Eve. The court summarily denied the defendant's motion, stating: "No parties present. No counsel present."[2] In its November 27, 2018 decision, the court stated, with respect to the denial of the motion for a continuance, that "[b]ecause the trial had been scheduled since August [2018] and the matter had been pending before the court for over two years, that request . . . was denied."[3]

The defendant argues that the court did not afford him the opportunity to be heard on the motion and that there was nothing in the record to support the court's denial. He relies on this court's decision in *Mensah* v. *Mensah*, 167 Conn. App. 219, 143 A.3d 622, cert. denied, 323 Conn. 923, 150 A.3d 1151 (2016), in which we outlined various factors that a trial court should consider when reviewing a motion for a continuance.[4] The defendant argues that the court ignored those factors, acted arbitrarily and in an abuse of its discretion, and thereby deprived him of his right to participate in the trial and to defend himself.

[2] Although the defendant takes issue with this language, we note that it is boilerplate language available, when applicable, in the judges' order entry system.

[3] The court also stated: "As of the start of the trial, this matter had been pending for over 1000 days. The court makes every effort to resolve custody matters within the first year after filing . . . . This matter has been on the docket . . . for nearly three times the normal length of most cases. . . . It is crucial that the matter be resolved as soon as possible. Whenever custody is in dispute, the court views the children involved as being at risk. A resolution and a stable parenting situation are necessary to eliminate such a risk."

[4] "Among the factors that may enter into the court's exercise of discretion in considering a request for a continuance are the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; [and] the [movant's] personal responsibility for the timing of the request . . . ." (Internal quotation marks omitted.) *Mensah* v. *Mensah*, supra, 167 Conn. App. 223.

The plaintiff argues that the defendant's claim is meritless because this matter had been pending for more than 1000 days and involved the custody of two children. The plaintiff states that the defendant provided no evidence in support of his motion that his employment was at risk, and he had two months to get his affairs in order at work so that he could actively participate in the trial.

We begin with our standard of review. "Appellate review of a trial court's denial of a motion for a continuance is governed by an abuse of discretion standard that, although not unreviewable, affords the trial court broad discretion in matters of continuances. . . . An abuse of discretion must be proven by the appellant by showing that the denial of the continuance was unreasonable or arbitrary." (Internal quotation marks omitted.) *Robelle-Pyke* v. *Robelle-Pyke*, 81 Conn. App. 817, 823, 841 A.2d 1213 (2004). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (Internal quotation marks omitted.) *O'Connell* v. *O'Connell*, 101 Conn. App. 516, 526, 922 A.2d 293 (2007).

This court has held that it is not an abuse of discretion to deny a motion for continuance in factual circumstances similar to those in the present case. In *In re Juvenile Appeal (85-2)*, 3 Conn. App. 184, 485 A.2d 1362 (1985), the respondent mother appealed from a termination of her parental rights. As part of her appeal, she argued that the trial court's denial of her motion for continuance, predicated on her assertion that she could not leave her place of employment, constituted a violation of due process. Id., 187. The trial court denied the motion "[i]n view of the long pendency of this case, the well-documented notices that were sent of [the]

. . . trial dates, and the nature of the reason given for seeking the continuance." (Internal quotation marks omitted.) Id. This court affirmed, concluding that, "[i]n view of the long history of these proceedings and the respondent's minimal economic reason for the continuance, we hold that the . . . trial court's denial of the continuance was well within its discretion." Id., 190.

The trial delays in the present case were outside of the parties' control. Nevertheless, the long pendency of the case was still a proper factor for the court to consider when ruling on the defendant's motion for a continuance of the trial. The defendant's unsubstantiated claim in support of his motion, that he could not miss more days of work, is no more compelling than the respondent's claim in *In re Juvenile Appeal (85-2)*. Accordingly, under these circumstances the trial court did not abuse its discretion in denying the defendant's motion for a continuance of trial.

II

The defendant's second claim is that the court erred by awarding periodic alimony to the plaintiff on holding that enforcement of the parties' prenuptial agreement would be unconscionable. We disagree.

The following facts are relevant to this issue. The agreement provides in relevant part: "Each party hereby waives any right he or she might otherwise have or acquire to seek any alimony or spousal support from the other in any action for a divorce, dissolution of marriage, legal separation or annulment. The parties intend that this waiver shall apply to claims either might otherwise have for temporary or pendente lite alimony or spousal support during the pendency of the action as well as to claims for alimony or spousal support to be awarded in connection with any final judgment in such action." The court concluded that, in light of the injuries the plaintiff suffered as a result of the accident,

it is unlikely that she will be able to return to her profession and earn a salary commensurate with her training and experience. The court stated that this created a factual scenario "far beyond the contemplation of the parties when they executed the [agreement]. The fact that . . . the plaintiff cannot earn what she disclosed her income to be in 2003 makes the enforcement of the prohibition to seek spousal support unconscionable."

In support of his claim, the defendant raises two arguments. He first claims that he was not able to provide testimony of his personal knowledge and observations of the plaintiff's capabilities or to offer evidence as to her employability, in violation of § 46b-82. The defendant also argues that the court erred by relying solely on the plaintiff's current employment without any evidence that her earning capacity is limited to such employment due to her health. In response, the plaintiff argues that the defendant's inability to provide testimony was due to his failure to appear at trial, and, in the alternative, that the court properly ordered the defendant to pay alimony because the totality of the evidence demonstrated that the agreement was unconscionable and unenforceable.

Prenuptial agreements are governed by General Statutes § 46b-36a et seq., also known as the Connecticut Premarital Agreement Act. Those statutes codified our Supreme Court's decision in *McHugh* v. *McHugh*, 181 Conn. 482, 485–86, 436 A.2d 8 (1980), which provided that prenuptial agreements "are generally enforceable where three conditions are satisfied: (1) the contract was validly entered into; (2) its terms do not violate statute or public policy; and (3) the circumstances of the parties at the time the marriage is dissolved are not so beyond the contemplation of the parties at the time the contract was entered into as to cause its enforcement to work injustice." With respect to the third prong,

which is central to this appeal, General Statutes § 46b-36g (a) (2) clarifies that "[a] premarital agreement or amendment shall not be enforceable if the party against whom enforcement is sought proves that . . . [t]he agreement was unconscionable when it was executed *or when enforcement is sought* . . . ." (Emphasis added.)

Whether the trial court erred by ordering the defendant to pay alimony to the plaintiff depends on whether it properly determined that the agreement was unconscionable at enforcement. It is well established that "[t]he question of unconscionability is a matter of law to be decided by the court based on all the facts and circumstances of the case. . . . Thus, our [appellate review] is unlimited by the clearly erroneous [or abuse of discretion] standard. . . . This means that the ultimate determination of whether a transaction is unconscionable is a question of law, not a question of fact, and that the trial court's determination on that issue is subject to a plenary review on appeal." (Internal quotation marks omitted.) *Crews* v. *Crews*, 295 Conn. 153, 163–64, 989 A.2d 1060 (2010).

The defendant first claims that the court erred by determining that the prenuptial agreement was unconscionable because he was not able to contradict the plaintiff's testimony at trial. His absence at trial, however, was a matter of his own doing. He moved for a continuance of the trial, provided nothing to the court in support of that motion, and upon receiving the court's denial, he did not explore additional options or communication with the court or even with his attorney, who, during the course of the trial, diligently sought his participation and additional financial information. This court has held that "[w]here a party's own wrongful conduct limits the financial evidence available to the court, that party cannot complain about the resulting calculation of a monetary award." (Internal quotation

marks omitted.) *Rosenfeld* v. *Rosenfeld*, 115 Conn. App. 570, 581, 974 A.2d 40 (2009).

The defendant also argues that the court relied "solely on the amount of the plaintiff's current part-time employment without any evidence that her earning capacity is limited to such employment due to health or medical disability," and that "the reports entered into evidence clearly and unambiguously state that the plaintiff is capable of all daily activities . . . ." The report authored by neurologist Thomas Toothaker, however, states that the plaintiff "retained [the] ability to perform all activities *of daily living*," not that the plaintiff was capable of performing all activities in general or those pertaining to full-time employment. (Emphasis added.) Additionally, Toothaker's report highlights several symptoms and issues the plaintiff continued to experience several years after the accident, which he opined were a result of "prolonged post-concussion syndrome as a result of [a] mild traumatic brain injury."[5] The report from James Connolly, a psychologist, identified similar persistent issues.[6]

In its decision, the court cited *Bedrick* v. *Bedrick*, 300 Conn. 691, 705–708, 17 A.3d 17 (2011). In *Bedrick*, the court held that enforcement of the parties' postnuptial

[5] Toothaker's report identifies the plaintiff's symptoms as "continued pressure-like headaches and cognitive issues" and "forgetting what she was saying and difficulty helping with her children's homework" and further notes that "her neuropsychological evaluation was intact except for some variable performance with executive functioning and visual memory which were . . . consistent with post-concussion syndrome"; "she would become easily distressed and feel overwhelmed"; she had "difficulty with concentration and multitasking"; and she was still suffering from tension and migraine headaches and fatigue.

[6] Connolly's evaluation identifies the plaintiff's symptoms as "memory difficulties, headache and nausea"; "feelings of confusion"; "some ongoing level of mild impairment"; "[somewhat elongated] processing time on . . . tests and answering some questions"; "occasional irritability"; "anxiety and depression"; and "difficulties concentrating and problems with becoming easily fatigued."

agreement would have been unconscionable because the financial circumstances of the parties had changed dramatically since the agreement was modified. Id., 706–708. Specifically, the court concluded that the fact that the parties had had a child together and that the husband's business had alternately prospered and deteriorated during the marriage constituted a sufficient change in their financial circumstances to render the agreement unconscionable and unenforceable. Id., 707–708.

The standards for determining whether prenuptial or postnuptial agreements are unconscionable at enforcement are analogous: "[T]he question of whether enforcement of a *prenuptial* agreement would be unconscionable is analogous to determining whether enforcement would work an injustice. . . . Thus, the trial court's finding that enforcement of the *postnuptial* agreement would work an injustice was tantamount to a finding that the agreement was unconscionable at the time the defendant sought to enforce it."[7] (Citation omitted; emphasis added.) Id., 707–708.

In the present case, there was evidence in the record that the accident impaired the plaintiff's ability to work full-time and, as a result, she was forced to obtain part-time employment at a salary far lower than the one she earned at the time the agreement was executed. Additionally, with the exception of several selectively chosen excerpts from the expert reports in evidence, the defendant cites to no evidence contradicting the

[7] In *Bedrick*, the court articulated the test for enforceability predicated on both § 46b-36g and the three-part test set forth in *McHugh* v. *McHugh*, supra, 181 Conn. 485–86. The third prong of that test—whether "the circumstances of the parties at the time the marriage is dissolved [are] so beyond the contemplation of the parties at the time the contract was entered into as to cause its enforcement to work injustice"; id.—informed the court's conclusion that "the question of whether enforcement of a prenuptial agreement would be unconscionable is analogous to determining whether enforcement would work an injustice." *Bedrick* v. *Bedrick*, supra, 300 Conn. 707.

plaintiff's position. In light of the plaintiff's injuries and her reduced earning capacity, we conclude, on the basis of our review of the law and record, that the court properly concluded that enforcement of the agreement would be unconscionable, and that it properly awarded the plaintiff alimony.

III

The defendant's last claim is that the court improperly awarded him two pieces of real property in the Bahamas. We disagree.

The following facts are relevant to this issue. With respect to the defendant's ownership interest in the two Bahamian properties, the court determined that "[t]here was no clear testimony as to whether said properties were owned by the defendant." Although the properties were included among the defendant's assets disclosed in connection with the agreement, he denied ever owning any property in the Bahamas during his deposition for the dissolution matter. The plaintiff, however, offered two letters from the Bahamian taxing authority that were mailed to the defendant's aunt on December 21, 2017, "in care of [the defendant]." The court concluded that the "evidence strongly suggests that the defendant has been less than candid about any ownership interest he may have in real estate in the Bahamas" and that "[h]is deposition testimony . . . is replete with vague answers and incomplete information and certainly places his credibility in question." Thus, the court awarded those two properties to the defendant, and valued them at $40,000 and $60,000 respectively— the same value the defendant had provided for them on his prenuptial disclosure.

In support of his claim on appeal, the defendant argues that (1) the court was not provided with any certified deeds or instruments that established his ownership of the Bahamian properties, and (2) the court

should have applied the "long settled principle" in this state that property is valued as of the date of dissolution. We do not agree.

This court "will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion . . . we allow every reasonable presumption in favor of the correctness of its action . . . . Furthermore, [t]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous . . . ." (Internal quotation marks omitted.) *Powers* v. *Hiranandani*, 197 Conn. App. 384, 394–95, 232 A.3d 116 (2020).

With respect to ownership of the Bahamian properties, the court awarded those properties to the defendant on the basis of his prenuptial financial disclosure and the letters from the Bahamian taxing authority. The defendant never provided the court with evidence of a transfer of ownership of the properties, and he did not appear at trial to contradict the plaintiff's evidence or otherwise challenge his ownership of the properties. Accordingly, the court did not err by awarding him those properties.

With respect to valuation, the value assigned to property in a dissolution proceeding should generally be calculated at the time of dissolution. See id., 407. In the present case, however, the defendant did not provide the trial court with a financial affidavit. In a dissolution proceeding, both parties "are required to itemize all of their assets in a financial affidavit and to provide the court with the approximate value of each asset." (Internal quotation marks omitted.) Id.

In *Powers*, the defendant did not provide the court with the value of certain real property on his financial

affidavit. As a result, the trial court relied on testimony and other financial affidavits to determine the value of the property in dispute. Id., 406–407. On appeal to this court, the *Powers* defendant argued that the trial court abused its discretion by "equitably distributing property between parties without properly determining the value of the real property." (Internal quotation marks omitted.) Id., 406. This court rejected that argument and held that if parties fail to provide the approximate value of each asset on their financial affidavits in a dissolution proceeding, then "*the equitable nature of the proceedings precludes them from later seeking to have the financial orders overturned on the basis that the court had before it too little information as to the value of the assets distributed*." (Emphasis in original; internal quotation marks omitted.) Id., 407. Accordingly, this court concluded that, without evidence of the value of the disputed property, the trial court did not abuse its discretion. Id., 408. The same is true in the present case.

We therefore conclude that the trial court properly determined the ownership and value of the Bahamian properties on the basis of the evidence that was available to it.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MICHAEL GASTON
(AC 43499)

Elgo, Moll and Pellegrino, Js.

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed, claiming that the trial court committed plain error pursuant to the applicable rule of practice (§ 60-5) when it permitted W, the key witness against him, to testify instead of accepting W's invocation of his fifth amendment right against self-incrimination.

W previously had been charged with felony murder, robbery in the first degree and conspiracy to commit robbery in the first degree in connection with the victim's death. A different trial court found no probable cause with respect to the felony murder charge against W and, after a trial, found him not guilty of robbery in the first degree and conspiracy to commit robbery in the first degree. When W invoked his fifth amendment privilege at the start of the state's direct examination of him, the court instructed counsel who had represented W during the proceedings in W's case to advise W of his rights. W then testified against the defendant, who did not object to or seek to preclude W's testimony. *Held* that this court lacked subject matter jurisdiction over the defendant's appeal, as he lacked standing to challenge the trial court's rejection of W's invocation of his fifth amendment privilege against self-incrimination; that right is a personal privilege that adheres to the person and not to information that may incriminate him, and, accordingly, the appeal was dismissed.

Argued September 22—officially released November 10, 2020

Procedural History

Substitute information charging the defendant with the crimes of murder, robbery in the first degree, conspiracy to commit robbery in the first degree and felony murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *D'Addabbo, J.*; verdict of guilty of murder, robbery in the first degree and felony murder; thereafter, the court vacated the verdict as to robbery in the first degree and felony murder, and rendered judgment of guilty of murder, from which the defendant appealed. *Appeal dismissed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Michael Gaston, appeals from the judgment of conviction, rendered after a jury

trial, of murder in violation of General Statutes § 53a-54a. The threshold issue in this appeal is whether the defendant has standing to challenge the trial court's initial decision refusing to accept a key state witness' invocation of his fifth amendment right against self-incrimination and, following the witness' consultation with counsel, permitting the witness to testify. We conclude that the defendant does not have standing to raise this claim and, accordingly, we dismiss this appeal.

The following procedural history and facts are relevant to our resolution of this appeal. On June 7, 2016, the defendant was arrested in connection with a robbery and an assault that occurred on May 16, 2016, resulting in the death of the victim, Marshall Wiggins. By way of a substitute long form information dated May 31, 2018, the defendant was charged with murder in violation of § 53a-54a, robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2), and felony murder in violation of General Statutes § 53a-54c. The defendant pleaded not guilty to the charges and elected to be tried by a jury. The trial began on May 31, 2018.

At trial, the state called as its key witness Laurence Washington, who was the sole witness to the underlying incident called by the state. In connection with the same incident, Washington previously had been charged with felony murder in violation of § 53a-54c, robbery in the first degree in violation of § 53a-134 (a) (2), and conspiracy to commit robbery in the first degree in violation of §§ 53a-48 and 53a-134 (a) (2). After a probable cause hearing, the trial court, *Crawford, J.*, made a finding of no probable cause with respect to the felony murder charge against Washington. Following a court trial conducted in 2017, Washington was found not guilty of the

charges of robbery in the first degree and conspiracy to commit robbery in the first degree.

Thereafter, during the defendant's trial, at the start of the state's direct examination of Washington, Washington almost immediately invoked his fifth amendment privilege against self-incrimination. Although the trial court, *D'Addabbo, J.*, informed Washington that he no longer had charges pending against him, and, therefore, he had nothing for which he could incriminate himself, Washington continued to assert the privilege. The court then stated: "[B]efore anything happens, I think it would be appropriate if we let you speak to an attorney." The court located an attorney, Dennis McMahon, in the courthouse to advise Washington of his rights and then instructed the attorney to remain in the courtroom in the event Washington desired to speak with him. Attorney McMahon had represented Washington in the aforementioned probable cause hearing and robbery trial. After speaking with counsel, Washington returned to the witness stand. Upon his return to the witness stand, the court asked Washington a series of questions, including if the attorney "answer[ed] all [of] the questions that [Washington] had for him . . . ." The court also asked Washington if he "need[ed] any more time to answer any questions . . . ." Last, the court asked if Washington would "be answering questions" once he returned to the witness stand. Washington answered each of the preceding questions, the first and last in the affirmative, and the second in the negative, and then proceeded to testify against the defendant. At no time did the defendant object to or otherwise seek to preclude Washington's testimony.

On June 6, 2018, the jury found the defendant guilty of murder in violation of § 53a-54a, robbery in the first degree in violation of § 53a-134 (a) (2), and felony murder in violation of § 53a-54c, and not guilty of conspiracy to commit robbery in the first degree in violation of

§§ 53a-48 and 53a-134 (a) (2). On July 25, 2018, pursuant to *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), the trial court vacated the conviction of robbery in the first degree and felony murder, subject to reinstatement in the event that "there is a reversal on appeal and a retrial," and sentenced the defendant on the murder conviction to fifty years of incarceration, with a mandatory minimum term of incarceration of twenty-five years. This appeal followed.

Relying on Practice Book § 60-5, the defendant's sole claim on appeal is that the trial court committed plain error by failing to accept Washington's invocation of his fifth amendment right against self-incrimination and thereafter permitting him to testify after he had consulted with counsel.[1] The defendant asserts that the court should have excused Washington after he had invoked his fifth amendment privilege. In response, the state argues, as an initial matter, that the defendant lacks standing to challenge the court's decision in that regard, and, therefore, this court lacks subject matter jurisdiction to entertain the defendant's claim. We agree with the state.

We begin by reviewing the well established principles of standing. "Generally, standing is inherently intertwined with a court's subject matter jurisdiction. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time." (Internal quotation marks omitted.) *State* v. *Brito*, 170 Conn. App. 269, 285, 154 A.3d 535, cert. denied, 324 Conn. 925, 155 A.3d 755 (2017). "A determination regarding standing concerns a question of law over which we

[1] The defendant concedes that this claim was not preserved for appellate review, and he does not seek review 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), because he characterizes his claim as an evidentiary, nonconstitutional claim.

exercise plenary review." *World Business Lenders, LLC* v. *526-528 North Main Street, LLC*, 197 Conn. App. 269, 273, 231 A.3d 386 (2020).

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . The question of standing does not involve an inquiry into the merits of the case. It merely requires the party to make allegations of a colorable claim of injury to an interest which is arguably protected or regulated by the statute or constitutional guarantee in question." (Internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 664, 881 A.2d 1005 (2005).

Relying on, inter alia, *State* v. *Williams*, 206 Conn. 203, 536 A.2d 583 (1988), the state argues that the defendant lacks standing to challenge the court's rejection of Washington's invocation of his fifth amendment right against self-incrimination because it is a personal privilege. The defendant contends that he has standing because he is an aggrieved party challenging what he characterizes as an evidentiary ruling made by the trial court. More specifically, he asserts that he has an interest in whether Washington could testify after invoking his fifth amendment right and that he has suffered an injury because the court allowed Washington, the state's key witness, to testify against him. We agree with the state and reject the defendant's contentions.

Courts have routinely held that "the [f]ifth [a]mendment privilege is a personal privilege: it adheres basically to the person, not to information that may incriminate him." (Emphasis omitted.) *Couch* v. *United States*, 409 U.S. 322, 328, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973). "By its very nature, the privilege [against compulsory

self-incrimination] is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." Id., 327.

In *State* v. *Williams*, supra, 206 Conn. 203, our Supreme Court applied the "general principle that a defendant does not have standing to challenge the method by which a witness against him has been immunized." Id., 207. In *Williams*, the chief court administrator appointed the Honorable Anthony V. DeMayo, a judge of the Superior Court, to conduct an inquiry into allegations of professional gambling and municipal corruption in the city of Torrington. Id., 205. During the course of the inquiry, the court granted immunity, under General Statutes § 54-47a, to a witness who had previously invoked his fifth amendment privilege against self-incrimination. Id. The defendant filed a motion seeking to bar the admission of the witness' testimony on the basis of that grant of immunity. Id. The trial court found that the prior grant of immunity was invalid because it was Judge DeMayo who acted on the earlier application for immunity, and he could not, in essence, "wear two hats . . . ." (Internal quotation marks omitted.) Id., 206. Nevertheless, after the state had applied for another grant of immunity so that the witness would testify in the hearing on that motion, the court granted the second application. Id. The witness then testified in accordance with the court's order in such a manner as to implicate the defendant in the crimes charged. Id.

"The trial court concluded that, although the general rule of standing would forbid the vicarious assertion of fifth amendment rights, this case called for an exception because, in its view, the grant of immunity had been made without authority." Id. It reasoned that because the grant of immunity by Judge DeMayo was " 'clearly illegal,' " the circumstances demanded an exception to the general rule that a party has no standing to assert

a privilege belonging to another. Id., 207. The trial court later suppressed the testimony. Id., 206.

On appeal, our Supreme Court concluded that the circumstances of the case did not warrant a departure from the general principle that a defendant does not having standing to challenge the method by which a witness against him has been immunized. Id., 207. In deciding *Williams*, our Supreme Court relied on the well settled principle that "the right to be free from testimonial compulsion is a personal one that may not be asserted vicariously." Id., 208, citing *Fisher* v. *United States*, 425 U.S. 391, 398–99, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976), and *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610–11, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); see also *State* v. *Pierson*, 208 Conn. 683, 686–89, 546 A.2d 268 (1988) (defendant lacks standing to challenge witness' waiver of psychiatrist-patient privilege), cert. denied, 489 U.S. 1016, 109 S. Ct. 1131, 103 L. Ed. 2d 193 (1989); *State* v. *Pierson*, supra, 689 ("[l]ike the marital privilege or *the privilege against self-incrimination* an erroneous denial of the psychiatrist-patient privilege does not infringe upon the right of any person other than the one to whom the privilege is given" (emphasis added)).

We conclude that the defendant's particular challenge in *State* v. *Williams*, supra, 206 Conn. 203—i.e., to the postinvocation grant of immunity pursuant to § 54-47a to a witness who testified against him—is substantially similar to the sole claim raised in the present appeal—i.e., that Washington should not have been permitted to testify after he initially invoked his fifth amendment privilege against self-incrimination. In light of the similarity between such claims, we align our analysis with the standing principles applied in *Williams* by which we are bound and conclude that the defendant in the present case lacks standing to challenge the trial court's

rejection of Washington's invocation of his fifth amendment privilege against self-incrimination.[2] Accordingly, we lack subject matter jurisdiction over this appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

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[2] We recognize that there are numerous cases in which our Supreme Court and this court have addressed the merits of a defendant's challenge to a trial court's *allowance* of a witness' invocation of his fifth amendment right against self-incrimination. See, e.g., *State* v. *Simms*, 170 Conn. 206, 207–10, 365 A.2d 821 (concluding that defendant's right to compulsory process under sixth amendment to federal constitution was not violated by trial court's allowance of witness' invocation of fifth amendment privilege against self-incrimination), cert. denied, 425 U.S. 954, 96 S. Ct. 1732, 48 L. Ed. 2d 199 (1976); *State* v. *Luther*, 152 Conn. App. 682, 697–701, 99 A.3d 1242 (concluding that defendant's constitutional right to present defense was not violated by trial court's allowance of witness' invocation of fifth amendment privilege against self-incrimination), cert. denied, 314 Conn. 940, 108 A.3d 1123 (2014); *State* v. *Ayuso*, 105 Conn. App. 305, 309–15, 937 A.2d 1211 (concluding that defendant's right to compulsory process under sixth amendment to federal constitution was not violated by trial court's allowance of witness' invocation of fifth amendment privilege against self-incrimination), cert. denied, 286 Conn. 911, 944 A.2d 983 (2008); *State* v. *Mourning*, 104 Conn. App. 262, 275–77, 934 A.2d 263 (same), cert. denied, 285 Conn. 903, 938 A.2d 594 (2007); *State* v. *Brown*, 22 Conn. App. 521, 524–27, 577 A.2d 1120 (same), cert. denied, 216 Conn. 825, 582 A.2d 204 (1990).

As an initial matter, we note that, in those cases, the courts did not address the question of standing. More significantly, however, the claims addressed on the merits in those cases involved the trial court's *acceptance* of a witness' invocation of his fifth amendment privilege against self-incrimination, which may conflict with the accused's constitutional rights to compel testimony and/or to present a defense, whereas, in the present case, the defendant challenges the court's *rejection* of Washington's invocation of such privilege, akin to the claim in *Williams*. Accordingly, we perceive no conflict between the merits discussions in the aforementioned cases and our holding herein.