IN RE AUBREY K.*
(AC 45241)

Bright, C. J., and Seeley and Pellegrino, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor

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

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any person protected or sought to be protected under a protection order,

child, A. The mother had a history of substance abuse, mental health issues, and domestic violence in her relationships, and A had witnessed such violence since her infancy. One of the mother's boyfriends seriously injured A's younger sister, requiring her to be hospitalized and, thereafter, the petitioner, the Commissioner of Children and Families, filed petitions for termination of the mother's parental rights as to both children. At the time of trial, the mother was allegedly engaged to a different man, L. On appeal, the mother claimed that there was insufficient evidence for the trial court to find that the termination of her parental rights was in A's best interest, in accordance with the applicable statute (§ 17a-112 (k)). *Held:*

1. The respondent mother could not prevail on her claim that the trial court's findings as to her ability to care for A were clearly erroneous:

   a. The trial court's conclusions regarding the mother's relationship with L and its indication of her ability to be trusted with the health and well-being of young children were supported by the record, including ample evidence demonstrating that the mother's past romantic relationships had significant adverse residual effects on A, evidence of L's previous criminal history, the mother's failure to disclose domestic violence in her relationships to the Department of Children and Families (department) in the past, evidence that supported the department's concern that there was a risk of domestic violence in the mother's relationship with L despite the testimony of service providers, and testimony that the mother would not permit an in-person meeting between the department and L.

   b. This court concluded that, although it agreed with the respondent mother's claim that the trial court had understated her efforts at rehabilitation, there was evidence in the record to support the trial court's finding that the mother was unable and/or unwilling to benefit from the services offered by the department and the record demonstrated that other factors considered by the trial court with respect to whether termination of the mother's parental rights was in A's best interest outweighed the continuing efforts made by the mother to advance her rehabilitation.

2. The respondent mother could not prevail on her claim that the trial court's best interest determination was clearly erroneous as the unchallenged factual findings regarding A's therapeutic needs, the department's concern for A's potential regression if she were returned to the mother's care, and the need for A to have stability in her life supported the court's determination.

3. Contrary to the respondent mother's claim, this court was not left with a definite and firm conviction that a mistake had been made by the trial court in its best interest determination as the facts in the record strongly supported that determination: the court addressed each of the seven factors delineated by § 17a-112 (k) and this court would not second-guess that court's assessment that A's need for permanency, stability

protective order, or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

and continuity of environment outweighed the benefits of maintaining a connection with the mother; in the present case, the court found that A required extensive and ongoing therapeutic and clinical services to treat her mental health issues, the frequency and severity of her behavioral issues had reduced in her most recent foster home because of the consistent and in-depth therapeutic services she engaged in with the facilitation of her foster parents, A had bonded with her most recent foster family, and A's foster parents were willing to adopt both A and her younger sister.

Argued September 6—officially released November 21, 2022**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, where the respondent father consented to the termination of his parental rights; thereafter, the matter was tried to the court, *C. Taylor, J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Joshua Michtom, assistant public defender, for the appellant (respondent mother).

Nisa J. Khan, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner).

Opinion

BRIGHT, C. J. The respondent mother, Victoria K., appeals from the judgment of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights with respect to her minor daughter, Aubrey K. (Aubrey),[1]

** November 21, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The court also terminated the parental rights of Aubrey's father, the respondent Jacob K. Because Jacob K. is not involved in this appeal, our references in this opinion to the respondent are to the respondent mother.

on the ground that the respondent's acts of parental commission or omission denied Aubrey the care necessary for her well-being pursuant to General Statutes § 17a-112 (j) (3) (C).[2] The court also found that, although the Department of Children and Families (department) had made reasonable efforts to reunify the respondent with Aubrey, the respondent was unable or unwilling to benefit from reunification efforts; see General Statutes § 17a-112 (j) (1); and that termination of the respondent's parental rights was in Aubrey's best interest. See General Statutes § 17a-112 (j) (2). On appeal, the respondent's single claim is that there was insufficient evidence for the trial court to find that the termination of her parental rights was in Aubrey's best interest. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of this appeal. Aubrey was born in October, 2014, to the respondent and Jacob K. (Jacob) and is the respondent's eldest child. Jacob abused the respondent during their relationship, and Aubrey was present as an infant during incidents of the abuse. In 2015, Jacob was arrested and charged with various offenses stemming from his physical abuse of the respondent, and the criminal court issued a protective order against Jacob protecting the respondent from May 26, 2015, through November 15, 2016. In December, 2017, the respondent had a second child, Amelia K. (Amelia), with Gregory S. (Gregory).[3]

[2] General Statutes § 17a-112 (j) (3) (C) provides that a trial court may terminate parental rights if "the child has been denied, by reason of an act or acts of parental commission or omission including, but not limited to, sexual molestation or exploitation, severe physical abuse or a pattern of abuse, the care, guidance or control necessary for the child's physical, educational, moral or emotional well-being, except that nonaccidental or inadequately explained serious physical injury to a child shall constitute prima facie evidence of acts of parental commission or omission sufficient for the termination of parental rights . . . ."

[3] The respondent and Gregory met in 2009 and were involved romantically until Gregory was arrested and incarcerated in 2013. The respondent and

In January, 2019, the respondent met and began a romantic relationship with Dylan V. (Dylan) while both were staying at a shelter in New Britain. In February, 2019, Dylan, the respondent, Aubrey, and Amelia moved into an apartment together. Dylan began physically abusing the respondent shortly thereafter and continued to do so on a regular basis while he lived with the respondent. While she and her children lived with Dylan, the respondent left Aubrey and Amelia alone in Dylan's care while she went to work Monday through Friday afternoons and when she had appointments in the mornings. During this time, Aubrey was assaulted by Dylan at least once in the respondent's presence.

On June 22, 2019, the department received a report from the Hospital of Central Connecticut (hospital) regarding Amelia through its Child Abuse and Neglect Careline (careline). After an initial evaluation at the hospital, Amelia was transferred to Connecticut Children's Medical Center (medical center) due to physical injuries. She had sustained multiple rib fractures, two healing hand fractures of the right hand, a laceration to the pancreas, significant bruising to her body, and bruising around her anus. Amelia had also lost two pounds in one week, vomited several times, had a low-grade fever for two weeks, and appeared "wobbly and weak." Her blood work did not show any underlying medical conditions that may have caused the injuries. Amelia's injuries were suspicious for inflicted injury and the matter was referred to the medical center's Suspected Child Abuse and Neglect (SCAN) team for further investigation.

In the early hours of June 23, 2019, the department faxed a suspected abuse and neglect report to the New Britain Police Department. The department also

Gregory reconnected when Gregory was released in or around 2016. By the time of Amelia's birth, Gregory was reincarcerated.

assigned the case to a careline primary investigator, who worked with the SCAN team to investigate the matter. Due to the suspicious nature of Amelia's injuries, the department investigator and the SCAN team had Aubrey examined for similar injuries. Aubrey did not present with any bruising or physical injuries. At that time, both the respondent and Dylan maintained that they did not know how Amelia had been injured.

At 1:50 p.m., the department investigator and a medical center trauma team member spoke with the respondent individually and informed her of the full extent of Amelia's injuries. Upon hearing this, the respondent became extremely upset and stated that only she and Dylan care for the children, and because she did not injure Amelia, Dylan must have done so. The department thereafter implemented a ninety-six hour administrative hold on behalf of both Aubrey and Amelia.

Police officers then brought the respondent and Dylan to the New Britain Police Department and interviewed them separately. The respondent reported that she first noticed bruises on Amelia two weeks prior to June 22, 2019, and that the bruises continued to grow. On June 22, 2019, upon seeing that Amelia could not walk, the respondent brought Amelia to the hospital. She had not sought medical attention for Amelia in relation to the bruising prior to that point.

During his interview with the police, Dylan admitted to causing Amelia's injuries. About two weeks prior to June 22, 2019, Amelia became fussy and would not go back to bed. Amelia had been constipated, so Dylan put her on the kitchen counter and began pushing on her stomach with his fists. Dylan became frustrated and proceeded to push on her stomach as hard as he could. He also said that he became angry and "snapped" and might have punched Amelia in the stomach. Dylan then placed Amelia in her crib. When Amelia continued to

cry, Dylan went into her room and grabbed two of her fingers and bent them backward. Dylan did not tell the respondent about his actions. On June 24, 2019, Dylan was arrested and charged with cruelty to persons, risk of injury to a child, and assault in the first degree.

On June 24, 2019, department investigators and SCAN team members met with the respondent to gather social history information regarding Amelia and further interview her about the events leading to Amelia's injuries. The respondent disclosed previous incidents of domestic violence by Dylan and indicated that she was fearful of him. Although she had wanted to bring Amelia for medical care earlier than June 22, Dylan had told her not to and she had been afraid Dylan would hurt her if she did not do what he said.

On June 27, 2019, the respondent was arrested and charged with risk of injury to a child and cruelty to persons for her failure to seek medical attention for Amelia in a timely manner. Subsequently, the respondent pleaded nolo contendere and was thereafter convicted of one count of risk of injury to a child.[4] She was sentenced to five years of incarceration, execution suspended, with three years of probation. The sentencing court also issued a no contact standing criminal protective order prohibiting the respondent from having any contact with Amelia until January 7, 2099.

On June 27, 2019, the petitioner sought an order of temporary custody on behalf of both Aubrey and Amelia. She alleged that the children were in physical danger and that immediate removal was necessary to ensure their safety. That day, the petitioner also filed neglect petitions and termination of parental rights petitions as to both children.

[4] The respondent entered her plea and was sentenced in the criminal proceedings on January 7, 2020.

In the neglect petitions, the petitioner alleged that the children had been denied proper care and attention, physically, educationally, emotionally, or morally, and that the children had been permitted to live under conditions, circumstances, or associations injurious to their well-being. Additionally, the petitioner alleged that Amelia had been abused in that she (1) had physical injury or injuries inflicted by other than accidental means, (2) had injuries that were at variance with the history given of them, or (3) was in a condition that resulted from maltreatment, including but not limited to malnutrition, sexual molestation or exploitation, deprivation of necessities, emotional maltreatment, or cruel punishment.

In the termination of parental rights petition for Aubrey, the petitioner alleged claims of abandonment and no ongoing relationship as to her father, Jacob, and acts of commission/omission as to the respondent. Regarding Amelia, the petitioner alleged claims of abandonment and no ongoing relationship as to her father, Gregory, and acts of commission/omission and assault of a sibling as to the respondent.

On June 27, 2019, the court, *Aaron*, *J.*, granted an ex parte order of temporary custody and ordered specific steps for the respondent. On July 2, 2019, the respondent appeared in court with counsel. She did not challenge the order for temporary custody and entered a pro forma denial as to the neglect allegations. The court, *Abery-Wetstone*, *J.*, issued amended preliminary steps for the respondent.

On October 28, 2019, the department began facilitating weekly supervised visits between Aubrey and the respondent. Those visitations continued through trial of the termination petition.

On January 27, 2020, the respondent entered written pleas of nolo contendere to the conditions injurious

section of the neglect petitions concerning Amelia and Aubrey. The respondent also entered written pleas of nolo contendere to the abuse section concerning Amelia relating to physical injury or injuries inflicted by nonaccidental means and to a condition that is the result of maltreatment. The court, *Huddleston*, *J.*, accepted the respondent's pleas, adjudicated both children neglected, and committed the children to the care and custody of the petitioner. The court also ordered final steps for the respondent.[5] In accordance with those steps and the department's reunification efforts, the respondent was referred to several service providers.

In or around March, 2020, the department was made aware that the respondent had begun a romantic relationship with Luis C. (Luis), whom she met four months earlier while both were residing in a shelter. When the respondent found housing, she invited Luis to move in with her. Luis had been convicted of disorderly conduct, did not have steady employment, and was "the subject of several expired full no contact protective orders with a former girlfriend (December, 2015, to June, 2016) and family members (July, 2017, to November, 2019) identified as protected parties." Consequently, the department was concerned that reuniting Aubrey with the respondent would place her in an environment where she could again be exposed to domestic violence.

[5] Those steps included: "(1) Create and maintain safe, stable, and nurturing environment free from substance abuse, mental health issues, and intimate partner violence. (2) Learn triggers for substance use and develop alternate coping mechanisms through individual and group sessions. (3) Understand impact of substance use and intimate partner violence on present functioning and children. (4) Address trauma history and understand impact on present functioning and parenting skills. (5) Learn and demonstrate age-appropriate parenting, supervision, discipline and developmental expectations. (6) Develop and implement appropriate coping mechanisms to safely address stressors of parenting. (7) Address any identified mental health needs in individual counseling in order to maintain emotional stability and be a stable resource for child."

In July, 2020, the petitioner filed a motion to review the children's permanency plans. The permanency plan for each child called for the termination of the respondent's parental rights and the rights of each child's father and subsequent adoption of Aubrey and Amelia. On October 7, 2020, the court, *C. Taylor*, *J.*, granted the motion, approving the plans.

A trial on the petitions to terminate parental rights occurred on March 8 and 15, June 14, and July 20, 21 and 22, 2021. The respondent appeared and was represented by counsel. On the second day of trial, Aubrey's father, Jacob, consented to the termination of his parental rights.

On November 17, 2021, the court, *C. Taylor*, *J.*, issued a memorandum of decision in which it granted the petitions to terminate the respondent's parental rights as to both Aubrey and Amelia.[6] The court made extensive findings of fact and concluded that the petitioner had established by clear and convincing evidence that statutory grounds for termination of parental rights existed and that such termination was in the best interests of the children.

With respect to the statutory grounds, the court found by clear and convincing evidence that Aubrey and Amelia had been denied, by reason of an act or acts of parental commission or omission, including but not limited to severe physical abuse or a pattern of abuse, the care, guidance or control necessary for the child's physical, educational, moral or emotional well-being. In particular, the court determined that the respondent's failure to remove Amelia and Aubrey from Dylan's presence, to obtain prompt medical care for Amelia, and to

[6] The respondent has not appealed from the judgment terminating her parental rights as to Amelia given the standing criminal protective order prohibiting her from having contact with Amelia until 2099. The court also terminated Gregory's parental rights as to Amelia, and he has not challenged that judgment on appeal.

object or to act when Dylan assaulted Aubrey in her presence showed that her priorities were not those consistent with the best interests of her children and demonstrated that she could not be relied on to care for them adequately and safely. The court also found, pursuant to § 17a-112 (j) (1), that the department had made reasonable efforts to reunify the respondent with Aubrey and Amelia and that the respondent was unable or unwilling to benefit from those efforts.

Finally, in the dispositional phase of the proceedings, the court considered and made the requisite factual findings pursuant to § 17a-112 (k)[7] and concluded that the petitioner had proved by clear and convincing evidence that terminating the respondent's parental rights

[7] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

was in Aubrey's and Amelia's best interests. Specifically, the court made the following relevant findings:

"Considered carefully, the clear and convincing evidence shows that [the department] offered timely, appropriate, and comprehensive services to [the respondent] to facilitate her reunification with Aubrey and made reasonable efforts to reunite her with Aubrey. . . . The clear and convincing evidence indicates that [the respondent] did utilize some services as indicated herein but failed to gain appropriate benefits from these services. . . .

"The court further finds that the clear and convincing evidence presented in the present case indicates that [the respondent] was aware of her issues and deficits and had received specific steps addressing said issues. The clear and convincing evidence shows that despite having knowledge of the nature of [her] individual issues, [the respondent] remained unable and/or unwilling to benefit from reasonable reunification services with Aubrey. . . .[8]

"The clear and convincing evidence shows that [the respondent] has generally complied with the final specific steps, and that she was still in treatment at [Community Mental Health Affiliates (CMHA)] at the time of the . . . trial. However, [the respondent] does not appear to have undertaken an intensive domestic violence program yet. . . .[9]

"The court finds by clear and convincing evidence that [the respondent] has been unable and/or unwilling to make realistic and sustained efforts to conform her conduct to acceptable parental standards. The clear

[8] The court noted that the department was unable to provide services to reunify the respondent with Amelia due to the standing criminal protective order prohibiting the respondent from having contact with Amelia.

[9] The respondent's attendance at an intensive domestic violence program was neither a specific step nor a mandate from the department.

and convincing evidence indicates that [the respondent] has been unable and/or unwilling to address her issues, especially her mental health issues, substance abuse issues, domestic violence issues, parenting deficits, and failure to fully benefit from counseling and services in a timely manner. The clear and convincing evidence also shows that [the respondent] has been placed on notice to address her issues in the past. Despite being offered opportunities to address her issues, [the respondent] has failed to do so with any degree of finality.

"The clear and convincing evidence indicates that [the respondent] is still in individual therapy and has yet to appropriately address her troubling domestic violence issues. [The respondent's] domestic violence issues are extremely concerning. Those issues have resulted in the present situation that she finds herself in, and her relationships with men have been beset with domestic violence issues, which has resulted in serious physical injury to Amelia. . . . [The respondent's] rashness in establishing a hasty relationship with Luis . . . demonstrates her questionable judgment.

"The clear and convincing evidence shows that despite the best efforts by [the department], [the respondent] is unable and/or unwilling to take the steps necessary in order to attempt to become a safe, nurturing and responsible parent for Amelia and Aubrey. The evidence at the . . . trial clearly and convincingly shows that she is incapable of being a safe, nurturing and responsible parent for her children. [The respondent] is obviously unable to care for Amelia and Aubrey appropriately and to provide them with the safety, care, permanence, and stability that each child needs and deserves. Her obvious parental deficits and other issues make her incapable of being a safe, responsible and nurturing mother for Amelia and Aubrey.

"The court finds by clear and convincing evidence that [the respondent] has not made the changes necessary in her individual lifestyle in a timely manner that would indicate that she would be a safe, responsible and nurturing parent for Amelia and Aubrey.

"The court finds by clear and convincing evidence that to allow [the respondent] further time to rehabilitate herself, if that were possible, and to assume a responsible position in the children's lives would not be in the best interests of Amelia and Aubrey." (Citations omitted.)

The court then explained that it had "examined multiple relevant factors, including the children's interests in sustained growth, development, well-being, stability, and continuity of their environment; their length of stay in foster care; the nature of their relationships with their foster parents and their biological parents; and the degree of contact maintained with their biological parents," to determine whether termination of parental rights would be in the best interests of the children.

The court noted that it had "to balance the children's intrinsic needs for stability and permanency against the benefits of maintaining a connection with their biological parents." The court determined that, "under such scrutiny, the clear and convincing evidence in the present matter establishes that it is not in the best interests of Amelia and Aubrey to continue to maintain any legal relationship with the respondent parents.

"The clear and convincing evidence shows that Jacob, [the respondent] and Gregory have numerous issues that are clearly antithetical to safe, responsible, and nurturing parenting, and are also antagonistic to the best interests of Amelia and Aubrey. . . .

"The clear and convincing evidence shows that [the respondent's] issues are those of substance abuse, mental health, parenting deficits, domestic violence and a

failure to complete and benefit from counseling and services. The clear and convincing evidence also shows that [the respondent] was unable to appropriately address these issues by the time of the filing of the . . . petition or by the time of the . . . trial.

"[The respondent] has undertaken some treatment. Alison Cormier, [a licensed clinical social worker], [the respondent's] clinician at the jail diversion program at CMHA, testified that [the respondent] had successfully completed that program. Cormier characterized [the respondent] as having gone from high risk to a lesser level. Cormier also indicated that one of the objectives of the program was that [the respondent] work on developing healthy relationships. Cormier opined that [the respondent] was no longer at high risk for substance abuse and domestic violence and that she had gained insight into her predicament.

"Kimberly Sullivan, [a licensed clinical social worker], testified as to [the respondent's] successful completion of the [intensive outpatient program] at CMHA, and stated that [the respondent] was an active participant and had made progress toward the [treatment] goals. Sullivan testified that domestic violence was not one of [the respondent's] treatment goals.

"The most telling aspect as to [the respondent's] mindset lies in her most outstanding issue. [The respondent's] downfall has always been her choice of male companionship. [The respondent's] men have been violent, involved in the criminal justice system and have domestic violence involvement.

"Jacob is a violent convicted felon, and he has a lifetime no contact protective order with the mother of his older child. He has a history of serious dysfunction, which dates back to his childhood. Jacob has a history

of delinquency, [families with service needs][10] behavior and mental health issues. Yet, [the respondent] believed that Jacob was an appropriate individual to have a relationship with and to father her child, despite his concerning issues.

"Gregory is a violent convicted felon, and he is presently finishing a five year jail term for violation of a [protective] order and assault in the second degree. He has numerous other felony and misdemeanor convictions, including additional convictions for violation of a [protective] order, assault in the second degree and sale of narcotics. . . . Again, [the respondent] believed that Gregory, like Jacob, was an appropriate individual to have a relationship with and to father her child, despite his concerning issues.

"The court next addresses Dylan, who [the respondent] had met in a homeless shelter and established a relationship with. In February, 2019, through the auspices of [the Supportive Housing for Families program], [the respondent] secured housing for herself and her children, but then invited Dylan to reside with them. [The respondent] was aware that Dylan was residing at the shelter after his discharge from a hospital as a result of a [suicide] attempt. She also knew that he was not allowed to go back to his family's home after a fight with his brother. Nevertheless, she invited Dylan to reside with her and her young, dependent children. The results of that dangerous exercise of extremely poor

[10] " 'Family with service needs' means a family that includes a child who is at least seven years of age and is under eighteen years of age who, according to a petition lawfully filed on or before June 30, 2020, (A) has without just cause run away from the parental home or other properly authorized and lawful place of abode, (B) is beyond the control of the child's parent, parents, guardian or other custodian, (C) has engaged in indecent or immoral conduct, or (D) is thirteen years of age or older and has engaged in sexual intercourse with another person and such other person is thirteen years of age or older and not more than two years older or younger than such child . . . ." General Statutes § 46b-120 (3).

judgment left Amelia seriously injured and Aubrey further traumatized.

"[The respondent] has again exercised extremely poor judgment in returning to the homeless shelter and establishing a relationship with Luis . . . one of the fellow denizens therein. She established that relationship in an extremely short period of time. Like [the respondent did with] Dylan, when she found housing, she invited Luis . . . to move in with her. Not much is known about [Luis'] history. He has a conviction for disorderly conduct and has been the alleged perpetrator in various protective orders. He does not have any steady employment. [The respondent] has done her best to prevent [the department] from getting any further information about [Luis]. [The respondent] now refers to Luis . . . as her fiancé.

"It is clear that [the respondent's] need to have a relationship with a man overpowers any maternal protective instinct and any individual protective instinct that she may have possessed. That need appears to defy all logic and common sense, and places her children and herself in dire peril, as demonstrated by her relationship with Dylan. Despite the fact that Dylan beat her, beat Aubrey, and left Amelia with a mass of bruises, [the respondent] could not force herself to leave Dylan to save herself and her children.

"[The respondent] has proven that she cannot be trusted with the health and well-being of young children. She cannot prioritize their health, safety and well-being over the man in her life, regardless of how callous his hands might be. Perhaps an accurate assessment of [the respondent] and her situation has already been made by Jacob, who had reported to [the department] 'that [the respondent] has the tendency to neglect her children when she is involved in intimate relationships due to her low self-esteem and mental instability.'

"Unfortunately, the clear and convincing evidence shows that, despite her referrals and services, [the respondent] has failed to rehabilitate herself sufficiently to be a safe, nurturing, and responsible parent for both Amelia and Aubrey. The court also finds that too much time has already elapsed to justify giving [the respondent] further time to show her rehabilitation.

"The clear and convincing evidence shows that . . . [the respondent] . . . cannot keep [her] children safe or care for them properly. The clear and convincing evidence also shows that . . . [the respondent has] failed to gain insight into the efforts that [she] needs to make in order to become a safe, nurturing, and responsible parent for [her] children. The clear and convincing evidence shows that the individual judgment and conduct of [the respondent] still remains questionable.

"The clear and convincing evidence shows that Amelia and Aubrey cannot afford to wait any longer for [the respondent] to rehabilitate [herself]. [The respondent] represent[s] a well demonstrated hazard and a danger to them.

"The clear and convincing evidence shows that the time that the respondent . . . need[s] to attempt to rehabilitate [herself] and establish [herself] in the community as [a] safe, nurturing, and responsible [parent], if that were possible, is time that the children cannot spare.

"The individual parental performance . . . of [the respondent] clearly and convincingly show[s] that [she] lacks the attributes and characteristics necessary to fulfill a valid parental role. [Her] individual [failure] to address [her] issues in a timely manner and to successfully address [her] individual parental deficits clearly and convincingly show that it is unlikely that [she] will ever be able to conform [her] individual behaviors to

appropriate parental standards or be able to serve as a safe, nurturing, and responsible [parent] for Amelia or Aubrey.

"Based upon the individual behaviors and performances so far of . . . [the respondent] . . . this court cannot foresee . . . the respondent . . . ever having the ability or the patience required to follow the regimen necessary for . . . her children to maximize their abilities and achievements.

"[The department] recommended the [termination of parental rights]. . . . [The department] also noted that [the respondent] was aware of Dylan's abusive behavior and psychological issues but still asked him to move into her home with her children. [The department] argued that [the respondent] had not yet adequately dealt with her domestic violence issues.

"[The respondent] has barely begun unearthing her domestic violence and mental health issues. Her previous clinician, [Antonia] Mahoney, reported that domestic violence was addressed in individual sessions, but that [the respondent] has only 'briefly' discussed her current relationship with Luis . . . . On January 28, 2021, [Raven] Williams, another clinician, reported that [the respondent] accepts responsibility for 'not knowing' what Dylan was doing to her children. Williams reported that a domestic violence component has not been added to [the respondent's] treatment at this time. [The department] indicated concern with [the respondent's] conduct concerning Luis. . . .

"There has been absolutely no evidence to establish the unreasonableness of this request.

"At the . . . trial, counsel for the children recommended the [termination of parental rights] as being in the best interests of Amelia and Aubrey. . . .

"Counsel for [the respondent] argued against the [termination of parental rights], pointing out that Dylan had abused and controlled [the respondent] and that [the respondent's] low self-esteem and history of childhood abuse made her susceptible. Counsel for [the respondent] conceded that her client could not effectively contest the [termination of parental rights] for Amelia due to the criminal disposition and the standing criminal protective order. She also claimed that [the department] was shortsighted in not acknowledging any damage caused to Aubrey by the change in foster homes.

"Counsel for [the respondent] pointed out that [the respondent] had done services, gotten a job and was involved in a new relationship. She claimed that [the respondent] has gained insight into how she failed her children. Counsel for [the respondent] claimed that her client was a changed woman, was capable of parenting Aubrey and should be given a chance to do so. . . .

"The clear and convincing evidence shows that the respondent [is] in no position to assume [her] children's care in a safe, nurturing and responsible manner.

"[The respondent] has undertaken services and has visited with Aubrey. [The respondent] also has a residence and full-time employment. Unfortunately, [the respondent] has yet to appropriately address her domestic violence issues, and has prioritized her relationship with Luis . . . over her children. . . .

"The clear and convincing evidence shows that Amelia and Aubrey can no longer wait for permanency, continuity, and stability in their lives. The children need a chance to grow up in a stable home with responsible, nurturing and trustworthy caretakers who have their best interests as paramount. The present foster parents have indicated a willingness to adopt the children. Amelia and Aubrey . . . have an opportunity for stability,

nurture and permanence in the foster home." (Footnotes omitted.)

The court concluded that, having balanced the individual and intrinsic needs of Amelia and Aubrey for stability and permanency against the benefits of maintaining a connection with the respondent, the clear and convincing evidence established that the best interests of Amelia and Aubrey could not be served by continuing to maintain any legal relationship to the respondent. The court therefore granted the petitions to terminate the respondent's parental rights as to Amelia and Aubrey. This appeal as to Aubrey followed. Additional facts will be set forth as necessary.

On appeal, the respondent does not contest the court's findings in the adjudicatory phase of the proceeding, namely, that the respondent's acts of parental commission or omission denied Aubrey the care necessary for her well-being and that the department made reasonable efforts to reunify Aubrey with the respondent. The respondent concedes that these findings are supported by clear and convincing evidence. Instead, the respondent challenges the court's finding in the dispositional phase of the proceeding that it was in the best interest of Aubrey to terminate the respondent's parental rights. Specifically, the respondent contends that there was insufficient evidence for the court to find that the termination of her parental rights was in Aubrey's best interest. We disagree.

We begin with our standard of review. Our Supreme Court has clarified that a trial court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. See *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015) (clarifying standard of review); see also *In re Egypt E.*, 327 Conn. 506, 525–26, 175 A.3d

21 ("[a]lthough the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency"), cert. denied sub nom. *Morsy E.* v. *Commissioner, Dept. of Children & Families*, U.S. , 139 S. Ct. 88, 202 L. Ed. 2d 27 (2018).

Since *In re Shane M.*, our Supreme Court has not had the occasion to address whether the evidentiary sufficiency standard of review applies to a court's best interest determination. As a result, this court has either declined to decide whether to apply the evidentiary sufficiency standard of review to a best interest claim; see, e.g., *In re Elijah G.-R.*, 167 Conn. App. 1, 29–30 n.11, 142 A.3d 482 (2016); *In re Nioshka A. N.*, 161 Conn. App. 627, 637 n.9, 128 A.3d 619, cert. denied, 320 Conn. 912, 128 A.3d 955 (2015); or has continued to apply the clearly erroneous standard of review. See, e.g., *In re Angelina M.*, 187 Conn. App. 801, 803–804, 203 A.3d 698 (2019); *In re Gabriella C.-G.*, 186 Conn. App. 767, 770, 200 A.3d 1201 (2018), cert. denied, 330 Conn. 969, 200 A.3d 699 (2019); *In re Athena C.*, 181 Conn. App. 803, 811, 186 A.3d 1198 (2018). Following our precedents, we apply the clearly erroneous standard of review to the respondent's claim.[11]

[11] Consistent with our precedents, we decline to apply the evidentiary sufficiency standard for the following reasons. First, we decline to adopt a standard of review for a best interest determination that our Supreme Court has yet to adopt. Second, despite the respondent phrasing her claim as a sufficiency of the evidence claim, both parties on appeal agree that the clearly erroneous standard of review applies to the present claim. Third, the evidence in the present case supports the court's determination under either standard because, as articulated by this court in *In re Nioshka A. N.*, "if the evidence upon which we have relied in finding that the trial court's best interest determination was not clearly erroneous were considered under the evidentiary sufficiency standard, and, thus, was construed in the light most favorable to upholding the trial court's best interest determination . . . that evidence, so construed, would be sufficient to prove by clear and convincing evidence that termination of the respondent's parental rights was in the best interest of the child." (Citation omitted.) *In re Nioshka A. N.*, supra, 161 Conn. App. 637 n.9.

"In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the [respondent's] parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven statutory factors delineated in [§ 17a-112 (k)]. . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence. . . .

"[T]he fact that the legislature [has interpolated] objective guidelines into the open-ended fact-oriented statutes which govern [parental termination] disputes . . . should not be construed as a predetermined weighing of evidence . . . by the legislature. [If] . . . the record reveals that the trial court's ultimate conclusions [regarding termination of parental rights] are supported by clear and convincing evidence, we will not reach an opposite conclusion on the basis of any one segment of the many factors considered in a termination proceeding . . . . Indeed . . . [t]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . [A] trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise

factually supported and legally sound." (Internal quotation marks omitted.) *In re Ryder M.*, 211 Conn. App. 793, 817–18, 274 A.3d 218, cert. denied, 343 Conn. 931, 276 A.3d 433 (2022); see also *In re Malachi E.*, 188 Conn. App. 426, 443–45, 204 A.3d 810 (2019); *In re Jacob M.*, 204 Conn. App. 763, 787–89, 255 A.3d 918, cert. denied, 337 Conn. 909, 253 A.3d 43 (2021), and cert. denied sub nom. *In re Natasha T.*, 337 Conn. 909, 253 A.3d 44 (2021).

"A finding is clearly erroneous when either there is no evidence in the record to support it, or the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 488, 940 A.2d 733 (2008).

In the present case, the court addressed each of the factors set forth in § 17a-112 (k) before determining that terminating the respondent's parental rights was in the best interest of Aubrey. On appeal, the respondent challenges the court's subordinate factual findings. The respondent contends that (1) the court's findings as to her efforts to improve her ability to care for Aubrey are clearly erroneous, (2) the court's findings as to Aubrey's need for permanency ignore the evidence presented, and (3) "the facts of this case are unusual and should leave this court with the definite and firm conviction that a mistake has been made." We address each contention in turn.

I

The respondent contends that the court's findings as to her ability to care for Aubrey are clearly erroneous.[12] We disagree.

[12] Relying on *In re Vincent B.*, 73 Conn. App. 637, 644–45, 809 A.2d 1119 (2002), the respondent argues, as a preliminary matter, that the court improperly made "conclusive assumptions about a parent's future ability to care for [her] children based only on prior bad conduct and without considering present, sustained good conduct." Notably, however, the court expressly considered the respondent's present involvement with several treatment

A

First, the respondent advances several related arguments that, when read together, dispute the court's finding that "[the respondent] has again exercised extremely poor judgment in returning to the homeless shelter and establishing a relationship with Luis . . . one of the fellow denizens therein. . . . It is clear that [the respondent's] need to have a relationship with a man overpowers any maternal protective instinct and any individual protective instinct that she may have possessed. . . . [The respondent] has proven that she cannot be trusted with the health and well-being of young children. She cannot prioritize their health, safety and well-being over the man in her life, regardless of how callous his hands might be." The gravamen of the respondent's arguments is that the court drew conclusions about the respondent's relationship with Luis that were unsupported by the evidence. Specifically, the respondent argues: (1) the court improperly considered her former romantic partners, their involvement with the criminal justice system, and their histories of violence in evaluating her current relationship with Luis; (2) the court failed to cite any authority for the premise that romantic relationships with homeless people are presumptively ill-considered or that there is a timeline for relationships that is presumptively imprudent; (3) the court did not point to evidence in the record indicating problematic aspects of her relationship with Luis; and (4) "there is no evidence in the record of violence, coercion, or red flags of any kind in this relationship." For the reasons that follow, we find the respondent's arguments unpersuasive.

At the outset, we note that there is ample evidence in the record demonstrating that the respondent's past

programs as well as the testimony of the respondent's service providers and current case worker in concluding that the termination of the respondent's parental rights was in the best interest of Aubrey.

romantic relationships had significant adverse residual effects on Aubrey. In December, 2019, when the respondent was released from prison, Aubrey talked about killing herself out of fear that Dylan was also being released and would be able to hurt Aubrey and the respondent. At the time of trial, Aubrey continued to demonstrate anxiety about her mother's relationships, asking the respondent if Luis was nice to her or yelled at her. Sasha Baldwin, the respondent's department case worker, testified that she believed Aubrey's questions demonstrated a concern for the respondent's safety in a new relationship. Although the respondent argues that the court's consideration of her past relationships was improper, we conclude that the court properly considered the respondent's past relationships in evaluating how the respondent's present circumstances would affect Aubrey, including Aubrey's concerns about the respondent's new relationship because of what Aubrey witnessed in the respondent's past relationships.

Further, the court's findings as to the respondent's relationship with Luis are supported by evidence in the record. The respondent began an intimate relationship with Luis in March, 2020, approximately nine months after Amelia had been hospitalized due to injuries inflicted on her by Dylan and shortly after the respondent had resolved her own criminal case relating to those injuries. Though not referenced by the court in its decision, Baldwin testified that "there were concerns regarding [the respondent] involving herself in an intimate relationship . . . and . . . the choice of the individual who she chose to involve herself with and how that may impact her children." Baldwin also testified that the department was concerned that, should Aubrey be returned to the respondent's care, she would be placed in a situation to witness domestic violence in the respondent's relationship with Luis that was similar

to what she had witnessed in the respondent's relationship with Dylan. There was also evidence in the record that Luis had been convicted of disorderly conduct, did not have steady employment, and was "the subject of several expired full no contact protective orders with a former girlfriend (December, 2015, to June, 2016) and family members (July, 2017, to November, 2019) identified as protected parties." Although the details of the protective orders and the conviction were not introduced at trial, the court, as the trier of fact, reasonably could infer that Luis' past legal issues supported the department's contention that the respondent was at risk of further domestic violence.[13] Accordingly, there is evidence in the record to support the court's assessment of the risks attendant to the respondent's relationship with Luis.

In addition, contrary to the respondent's assertion, the court was permitted to give little weight to the evidence "that none of the service providers working with [the respondent] while she was living with Luis . . . had any concern that there was domestic violence in the relationship." "It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses. . . . It is the quintessential

[13] We note that, although the court stated that "[the respondent] has done her best to prevent [the department] from getting any further information about Luis," Baldwin testified that she engaged in several virtual meetings with Luis. Further, documentary evidence in the record establishes that Luis completed a mental health evaluation per the department's request and that his evaluation contained no recommendations for further services. Nevertheless, Baldwin testified that the respondent denied the department access to Luis when Baldwin made efforts to see him in person in April, 2021.

function of the fact finder to reject or accept certain evidence, and to believe or disbelieve any expert testimony. . . . The trier may accept or reject, in whole or in part, the testimony of an expert offered by one party or the other." (Citations omitted; internal quotation marks omitted.) *In re Carissa K.*, 55 Conn. App. 768, 781–82, 740 A.2d 896 (1999). Although the trial court may rely on expert testimony, it ultimately must make its own independent determination as to the best interest of the child. See *In re Jeisean M.*, 270 Conn. 382, 398, 852 A.2d 643 (2004) ("[a]lthough we often consider the testimony of mental health experts . . . such expert testimony is not a precondition of the court's own factual judgment as to the child's best interest" (citations omitted; internal quotation marks omitted)). In sum, we must defer to both the court's weighing of the testimony presented and its independent factual determination as to what was in Aubrey's best interest as long as they are supported by evidence in the record.

Of note, the record contains evidence of the respondent's failure to disclose domestic violence in her relationships on previous occasions. Further, there was testimony that the respondent would not permit an in-person meeting between the department and Luis. Accordingly, the court had evidence that supported the department's concern that there was a risk of domestic violence in the respondent's relationship despite the testimony of the respondent's service providers. Therefore, we cannot conclude that the court's finding regarding the respondent's relationship with Luis and its indication of her inability to be "trusted with the health and well-being of young children" was clearly erroneous. There is evidence in the record that supports the court's finding, and we are not left with a definite and firm conviction that a mistake has been made.

B

Second, the respondent generally disputes the court's finding that "[t]he clear and convincing evidence also

shows that [the respondent] was unable to appropriately address [her presenting issues of substance abuse, mental health, parenting deficits, domestic violence, and a failure to complete and benefit from counseling and services] by the time of the filing of the [termination of parental rights] petition or by the time of the . . . trial."

In arriving at this conclusion, the court discussed the respondent's participation in several treatment programs, noting that the respondent "has undertaken some treatment." We agree with the respondent that the court understated the respondent's efforts at rehabilitation. The evidence presented at trial indicated that the respondent participated in and successfully completed all treatment and services to which she was referred by the department and was deemed by every service provider to have made progress and to have gained insight surrounding her mental health needs, substance abuse, and domestic violence.

In particular, the record demonstrates that the respondent had maintained her engagement with CMHA since December, 2019, and had "successfully completed CMHA's Adult Intensive Outpatient Program . . . and Jail Diversion for Women program. [The respondent] continue[d] to engage in biweekly individual sessions and medication management to address her diagnoses of [post-traumatic stress disorder] and major depressive disorder, severe, and its impact on [the respondent's] cycle of intimate partner violence . . . victimization, and parenting capacities."

The respondent also participated in dialectical behavior therapy[14] groups from March, 2021, through May,

[14] "Dialectical [b]ehavior [t]herapy is an evidence-based psychotherapy to treat borderline personality disorder and is useful in treating patients seeking change in behavioral patterns such as substance abuse and domestic or non-domestic violence against others. It is a process in which the therapist helps the patient find and employ strategies and ultimately synthesize them to accomplish consistently the defined ultimate goal and is used to treat

2021, once per week for one and one-half hours. According to the department social study in support of termination of parental rights, the respondent was "reportedly one of the most actively engaged participants." In addition, the respondent engaged in Circle of Security and Triple P Parenting services through Catholic Charities from July 15, 2020, through January 6, 2021. A parent educator with the program reported to the department that the respondent was able to process information effectively and relate it to her own parenting experiences.

In June, 2021, Cormier, the respondent's current clinician, reported to the department that the respondent was doing well in her sessions and had demonstrated insight and self-awareness. She stated that the respondent had processed how intimate partner violence was related to her current legal involvement and "[connected] the dots" as to how intimate partner violence impacted her adult life and led to her children entering the department's care. At trial, Cormier testified that she would not classify the respondent as "high risk in relation to her mental health, substance use, [or] legal involvement." Cormier further testified that the respondent soon would graduate from the jail diversion program and step down to a lower level of care due to her improvements.

The court's minimization of the aforementioned evidence does not, however, undermine its finding that the respondent was unable and/or unwilling to benefit from the services offered by the department. Indeed, there was evidence in the record that supported the court's finding that the respondent did not address her underlying issues sufficiently by the time of the trial.

borderline personality disorders and addictive personality disorders. To be successful, it demands honesty both from the patient and the clinician." (Internal quotation marks omitted.) *In re Xavier H.*, 201 Conn. App. 81, 90 n.3, 240 A.3d 1087 (2020).

Specifically, Baldwin testified that "throughout the life of this case it appears that [the respondent] has done really well at going to services and engaging in services, but when it comes to demonstrating the newly learned coping skills, [the respondent's] decisions or her judgment has left the department with concerns as it relates to parenting, [intimate partner violence], and her mental health." Baldwin further testified that, "it is the department's understanding that [the respondent's] choice of men and the predicaments that she has found herself in is a symptom of her mental health hygiene, which is why the department has communicated with CMHA asking that [the respondent] intentionally explore how her childhood maltreatment and her mental health has impacted her adult life and her parenting capacities as well as her choice in her intimate relationships." Finally, Baldwin testified that "the biggest concern [for the department] is that it appears by [the respondent's] decisions that she is not demonstrating that she is really intentionally engaged in services. And I say that because, not that she chose to get into a relationship, but I think from the department's perspective it is a concern that her choices would not—that Aubrey and Amelia were not at the forefront of her decision making. And that is as evidenced by Aubrey reportedly having some anxiety around having knowledge [that the respondent] is engaged to another man."

That the court placed greater weight on Baldwin's testimony than Cormier's does not mean its finding was clearly erroneous. The court, as the finder of fact, was "the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . [T]he trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible." (Citation omitted; internal quotation marks omitted.) *In re Carissa K.*, supra, 55 Conn. App. 781–82. Therefore, because there is evidence in the record to support the court's finding

regarding the respondent's failure to appropriately address her various issues, that finding is not clearly erroneous.

Moreover, assuming, arguendo, that the court's finding that the respondent failed to appropriately address her presenting issues was clearly erroneous, that alone does not support the contention that the court's best interest determination was clearly erroneous. "As we have stated previously, the court's inquiry in the dispositional phase of the proceeding was properly focused on whether termination of the respondent's parental rights was in the children's best interest." *In re Omar I.*, 197 Conn. App. 499, 586, 231 A.3d 1196, cert. denied, 335 Conn. 924, 233 A.3d 1091, cert. denied sub nom. *Ammar I.* v. *Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020). "The respondent's efforts to rehabilitate, although commendable, speak to [her] own conduct, not the best interests of the child." *In re Daniel A.*, 150 Conn. App. 78, 104, 89 A.3d 1040, cert. denied, 312 Conn. 911, 93 A.3d 593 (2014); see id. (court's finding that father made efforts to rehabilitate himself did not undermine court's best interest determination).

Further, whatever progress a parent arguably has made toward rehabilitation is insufficient to reverse an otherwise factually supported best interest finding. See *In re Malachi E.*, supra, 188 Conn. App. 445–46 ("[a]lthough the respondent directs our attention to other findings that are more favorable to her position, specifically . . . that the respondent was making progress in her rehabilitation, these facts do not provide us a basis to reverse the court's determination"); see also *In re Daniel A.*, supra, 150 Conn. App. 104. Even in cases that consider the rehabilitative status of the parents, "the critical issue is not whether the parent has improved [his or her] ability to manage [his or her] own life, but rather whether [he or she] has gained the ability to care for the particular needs of the child at issue."

(Internal quotation marks omitted.) *In re Ryder M.*, supra, 211 Conn. App. 814. A determination with respect to rehabilitation is not solely dependent on a parent's technical compliance with specific steps but rather on the broader issue of whether the factors that led to the initial commitment have been corrected. See *In re Omar I.*, supra, 197 Conn. App. 575.

In addition, "[a]lthough commendable, any continuing efforts made by the respondent to advance [her] rehabilitation do not outweigh the other factors considered by the court with respect to whether termination of the respondent's parental rights was in [the child's] best interest." *In re Ryder M.*, supra, 211 Conn. App. 822; see also *In re Anaishaly C.*, 190 Conn. App. 667, 692, 213 A.3d 12 (2019) (court properly determined that termination of respondents' parental rights was in children's best interests when respondents "successfully complet[ed] some programs" but were "unsuccessful, or noncompliant, with others" (internal quotation marks omitted)), cert. denied, 345 Conn. 914, A.3d (2022); *In re Malachi E.*, supra, 188 Conn. App. 445–46 (court's finding that respondent was making progress in rehabilitating herself did not undermine court's determination that termination of respondent's parental rights was in child's best interest, which was supported by other unchallenged findings).

In the present case, the record demonstrates that other factors considered by the court with respect to whether termination of the respondent's parental rights was in Aubrey's best interest outweighed the continuing efforts made by the respondent to advance her rehabilitation. Specifically, there was an abundance of evidence presented relating to Aubrey's specific needs, which supports the court's conclusion that the respondent would be unable to provide an environment that would meet those needs. As a result of the trauma Aubrey had experienced, specifically her exposure to domestic

violence, witnessing the abuse of her sister, and witnessing sexual behavior between adults, Aubrey requires extensive and ongoing therapeutic and clinical services. Aubrey has been diagnosed with unspecified trauma and stressor related disorder and adjustment disorder.

Since her removal from the respondent's care in June, 2019, Aubrey has been placed with several therapeutic foster homes. From December, 2020, through the trial, Aubrey had remained with one foster family. Aubrey's behavioral issues appeared to have reduced in her new foster home. Baldwin testified that, at the time of trial, Aubrey was the most stable that she had ever been, and there was "significant potential" for regression should she be returned to the respondent's care. Notably, the record contained evidence that "resiliency was a strength of Aubrey's and . . . she would benefit from continued stability in caregivers, routine, and environment to ensure that she felt a strong level of safety." The court also heard testimony that Aubrey referred to her foster parents as "mommy and daddy" and that the foster parents were willing to adopt both Aubrey and Amelia.

Of significance is the continuity that Amelia has provided to Aubrey's life. Aubrey has had her younger sister at her side with each foster placement. Reports by Aubrey's clinicians and the department case worker noted Aubrey's protectiveness for her sister. At trial, Baldwin testified that, based on clinical recommendations, "both Amelia and Aubrey . . . have generational separations with family which has impacted them on their adult life. So, if [the department has] the opportunity to keep these children together despite the adverse experience that they have been subjected to . . . the department feels that . . . it remains in their best interest." Given the protective order prohibiting the respondent from having contact with Amelia, should Aubrey

return to the respondent's care, Aubrey's contact with Amelia would likely cease or be reduced dramatically.

Thus, the record supports the court's finding that Aubrey's need for permanency, stability, and continuity of environment outweighed the benefits of maintaining a connection with the respondent. See *In re Daniel N.*, 163 Conn. App. 322, 135 A.3d 1260 (termination of parental rights was in child's best interest where child had multiple placements, had been hospitalized twice for psychiatric issues, would suffer significantly if moved again, and developed relationship with foster parents), rev'd on other grounds, 323 Conn. 640, 150 A.3d 657 (2016); *In re Janazia S.*, 112 Conn. App. 69, 79–80, 961 A.2d 1036 (2009) (termination of parental rights was in child's best interest where child had made tremendous psychological and behavioral progress since placement in therapeutic foster home, was bonded to foster parents, referred to foster parents as mom and dad, and had positive relationships with others in home); *In re Deana E.*, 61 Conn. App. 185, 195, 763 A.2d 37 (2000) (termination of parental rights was in children's best interests where children suffered from psychological and behavioral problems, lived in secure foster home, attended therapy and counseling sessions, and bonded with foster family, and foster parents were willing to adopt children).

The respondent further points to Baldwin's testimony that visits between the respondent and Aubrey "go great" and that the department had no concerns regarding the visits. With respect to the respondent's continued and meaningful contact with Aubrey, "[a]s this court has explained, the appellate courts of this state consistently have held that even when there is a finding of a bond between [a] parent and a child, it still may be in the child's best interest to terminate parental rights." (Internal quotation marks omitted.) *In re Ryder M.*, supra, 211 Conn. App. 821; see also *In re Sequoia*

G., 205 Conn. App. 222, 231, 256 A.3d 195 ("the existence of a bond between a parent and a child, while relevant, is not dispositive of a best interest determination" (internal quotation marks omitted)), cert. denied, 338 Conn. 904, 258 A.3d 675 (2021). That a bond may exist between the respondent and Aubrey does not undercut the court's best interest determination in light of the myriad of other considerations taken into account by the court in reaching its ultimate conclusion. The court found that "Aubrey [is] entitled to the benefit of ending, without further delay, the period of uncertainty that [she] has lived with as to the unavailability of [her] biological parents as caretakers." This is an important factor that the court properly considered.

"On appeal, our function is to determine whether the trial court's conclusion was factually supported and legally correct. . . . In doing so, however, [g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached." (Internal quotation marks omitted.) *In re Omar I.*, supra, 197 Conn. App. 584; see also *In re Jacob M.*, supra, 204 Conn. App. 790 ("[w]e will not scrutinize the record to look for reasons supporting a different conclusion than that reached by the trial court" (internal quotation marks omitted)). As we have stated previously, the dispositional phase of a termination of parental rights proceeding centers on the best interest of the child, not the conduct or improvements of the parent. The record here supports the court's finding that, despite the respondent's rehabilitation progress and bond with Aubrey, other pertinent factors indicate that the respondent would not be able to provide an environment to meet Aubrey's needs and that Aubrey's interests would be best served by the termination of the respondent's

parental rights.[15] Accordingly, we conclude that the court's determination that termination of the respondent's parental rights was in Aubrey's best interest was not clearly erroneous.

II

The respondent next contends that "[t]he court's assessment of Aubrey's prospects for permanency in [the department's] care ignores the evidence." Specifically, the respondent argues that the court failed to consider that Aubrey had been in at least five foster placements, some of which were preadoptive, at the time of trial. We disagree.

Although the court did not discuss Aubrey's multiple foster placements, there was an abundance of evidence presented to support the court's determination that terminating the respondent's parental rights would provide Aubrey with permanency, continuity, and stability in her life and would put an end to the period of uncertainty. In particular, the record contains evidence relating to Aubrey's emotional, mental, and physical improvements while residing in a stable therapeutic foster home environment in addition to the testimony of Baldwin about the department's concern that Aubrey would regress should she return to the care of the respondent. "We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Internal quotation marks omitted.) *In re Omar I.*, supra, 197 Conn. App. 584.

Further, "the balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial

[15] In addition, we are not left with a definite and firm conviction that a mistake has been made. See part III of this opinion.

court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . Although a judge [charged with determining whether termination of parental rights is in a child's best interest] is guided by legal principles, the ultimate decision [whether termination is justified] is intensely human. It is the judge in the courtroom who looks the witnesses in the eye, interprets their body language, listens to the inflections in their voices and otherwise assesses the subtleties that are not conveyed in the cold transcript." (Internal quotation marks omitted.) *In re Nevaeh W.*, 317 Conn. 723, 740, 120 A.3d 1177 (2015).

Affording the appropriate deference to the court's findings, our review of the record leads us to conclude that the court's best interest determination was not clearly erroneous. The combination of the court's unchallenged and not clearly erroneous factual findings regarding Aubrey's therapeutic needs, the department's concern for Aubrey's potential regression should she return to the respondent's care, and the need for the child to have stability in her life support the court's determination. Although the respondent directs our attention to her own therapeutic improvements, these facts do not provide a basis to reverse the court's best interest determination. Accordingly, we decline the respondent's invitation to reweigh the evidence and, instead, conclude that the court's best interest determination was factually supported and legally correct.[16]

[16] We note that the respondent, in her reply brief, advanced a related argument: "Had the trial court rendered conclusions reasonably connected to the evidence concerning other relevant factors, this court might reasonably conclude that the court weighed all the evidence and concluded that Aubrey's needs were simply too great and that no amount of rehabilitation on [the respondent's] part could ever put her in a position to parent Aubrey. But that is not the decision that this court must consider on appeal. Rather, the trial court's conclusions on [the respondent's] circumstances at the time of trial were wholly unmoored from the evidence presented. No insight can be gained into a trial court's weighing of different factors when its conclusions are not supported by the evidence, and as such, this court must not speculate on how the trial court balanced different factors." (Emphasis

III

Finally, the respondent contends that "[t]he facts of this case are unusual and should leave this court with the definite and firm conviction that a mistake has been made." In particular, the respondent argues that the facts of this case stand out from other terminations involving similar allegations of harm because (1) the trial court's conclusions about the respondent's possible future risk to Aubrey were not supported by a clinical opinion, (2) it is rare in our case law to terminate the parental rights of a parent who has participated in all referred services and who has been determined to have benefitted from those services, (3) unlike other cases involving parents who allowed their children to be exposed to harm by others, there was no evidence that the respondent returned to a prior abusive relationship or entered into a new abusive relationship, and (4) there was a strong bond between Aubrey and the respondent. We are not persuaded.

Although we recognize that the trial court did not discuss the admirable progress the respondent has made in treatment, we are not left with a definite and firm conviction that a mistake has been made. As stated previously, due to the trauma she has experienced, Aubrey requires extensive and ongoing therapeutic and clinical services to treat her unspecified trauma and stressor related disorder and her adjustment disorder. In her most recent foster home, Aubrey's behavioral issues have apparently reduced because of the consistent and in-depth therapeutic services she has engaged in with the facilitation of her foster parents. After several years of minimal progress, there have been no recent incidences of Aubrey engaging in malicious or

omitted.) Because we have determined the court's findings were not clearly erroneous, the court's conclusions were reasonably connected to the evidence. Accordingly, this argument fails.

aggressive behavior toward her foster siblings or Amelia. There is evidence in the record indicating that Aubrey has bonded with this foster family, calling her foster parents "mommy and daddy." The record also demonstrates that the foster parents are willing to adopt both Aubrey and Amelia.

These facts strongly support the court's best interest determination, and we will not second-guess the court's assessment that Aubrey's need for permanency, stability, and continuity of environment outweighs the benefits of maintaining a connection with the respondent. As long as the respondent's parental rights still exist, allowing potential for change, Aubrey will be unable to truly settle in and attach to her foster parents. See *In re Daniel N.*, supra, 163 Conn. App. 336; *In re Janazia S.*, supra, 112 Conn. App. 79–80; *In re Deana E.*, supra, 61 Conn. App. 195. "[W]e will not scrutinize the record to look for reasons supporting a different conclusion than that reached by the trial court." *In re Shane M.*, supra, 318 Conn. 593. Accordingly, we are not left with a definite and firm conviction that a mistake has been made.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE G. H. ET AL.*
(AC 45427)

Alvord, Clark and Palmer, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor

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

children G and N. At the time of the trial on the termination petitions, G was two and one-half years old and N was four years old. G, who was born prematurely and is considered medically complex, has never resided with the mother. P, the father of G and N, was also named as a respondent in the petitions for termination but died during the pendency of the proceedings. *Held*:

1. The trial court correctly concluded that the respondent mother failed to achieve a sufficient degree of personal rehabilitation as would encourage the belief that, within a reasonable time, she could assume a responsible position in the lives of G and N, as the record contained sufficient evidence to support that court's conclusion that the petitioner, the Commissioner of Children and Families, had proven by clear and convincing evidence that the mother failed to rehabilitate, considering the ages and needs of G and N; moreover, contrary to the mother's claims, the trial court acknowledged that the mother complied with medication management and substance abuse treatment, obtained housing and secured part-time employment, but the court also noted that the mother was unclear as to how she would financially support the children if they were returned to her care, and considered the mother's progress in relation to her failure to consistently engage with and reap any benefit from individual counseling services, her resistance to appreciate and articulate how she would avoid negative relationships in the future, and her persistent involvement with P in the face of his multiple arrests for drug sales; furthermore, the court repeatedly emphasized the opinion of a psychologist that the mother exhibited continued and unaddressed mental health difficulties, had only a visiting relationship with G and N, was unable to keep her children safe during her extended relationship with P, and put her relationship with P above the needs of her children, despite acknowledging that it was dangerous for the children to be in a home during drug sales; accordingly, the court's subordinate factual findings, contrary to the mother's claims, were supported by the evidence and the rational inferences to be drawn therefrom and were not clearly erroneous.

2. The respondent mother could not prevail on her claim that the trial court's judgment should be reversed on the basis that its memorandum of decision contained inconsistent statements as to whether it considered only events preceding the filing of the petitions or whether it exercised its discretion to consider events through the time of trial: in the adjudicatory phase, the trial court may rely on events occurring after the date of the filing of the petition to terminate parental rights when considering the issue of whether the degree of rehabilitation was sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time; in the present case, the two statements that the mother claimed were inconsistent were set forth during the trial court's analysis of whether the mother's degree of rehabilitation was sufficient to foresee that she may resume a useful role in the lives of G and N within a

reasonable time, and, therefore, were properly incorporated into the court's determination of whether a ground for termination of parental rights existed; furthermore, regardless of whether the court expressly stated that it considered events preceding the filing of the petitions or through the time of trial, the record demonstrated that the court considered events that occurred after the filing of the petitions and through the time of trial.

3. The respondent mother's claim that the trial court erroneously concluded that termination of her parental rights was in the best interests of G and N was unavailing: the trial court considered and made findings under each of the seven factors delineated in the applicable statute (§ 17a-112 (k)) and properly determined that, under the totality of the circumstances, the termination of the mother's parental rights was in the best interests of G and N; in the present case, the trial court considered the ages of G and N, as well as the amount of time they have spent in foster care, the children's needs for stability and permanence, the opportunity for the children to have a healthy and emotionally stable life, and its findings as to the mother's failure to rehabilitate; furthermore, although the court acknowledged the relationship between G and N and the mother, as well as the relationship between G and N and their siblings, such a bond did not overcome the court's conclusion that termination of the mother's parental rights was in the best interests of G and N.

Argued October 4—officially released November 22, 2022**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondent mother's parental rights with respect to her minor children, brought to the Superior Court in the judicial district of New London, Juvenile Matters, and tried to the court, *Hoffman, J.*; judgments terminating the respondent mother's parental rights, from which the respondent mother appealed to this court. *Affirmed.*

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

Amanda Szyszkiewicz, assistant attorney general, with whom, on the brief, were *William Tong*, attorney

** November 22, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner).

Opinion

ALVORD, J. The respondent mother, Jessica M. H., appeals from the judgments of the trial court terminating her parental rights with respect to her minor children, G. H. (G) and N. H. (N).[1] On appeal, the respondent claims that the trial court (1) improperly concluded that she had failed to rehabilitate to such a degree as to reasonably encourage a belief that she could assume a responsible position in the lives of her children, (2) made inconsistent statements in its memorandum of decision that require reversal, and (3) improperly concluded that the termination of her parental rights was in the best interests of the children.[2] We affirm the judgments of the trial court.

The following facts, which the court found by clear and convincing evidence, and procedural history, are relevant to this appeal. The respondent has nine children and her history with the Department of Children and Families (department) dates back to 1999. At the time of trial, five of the respondent's children were adults; two were teenagers, N. A. (A) and S. H. (S); and the two at issue in this appeal, N and G, were four years old and two and one-half years old, respectively. The respondent has had twenty-one referrals to the department that include allegations of inadequate supervision, drug use by parents and older children, drug dealing resulting in criminal charges and incarceration, domestic violence, emotional neglect, physical abuse, untreated mental health issues, and medical neglect.

[1] Patrick H., the father of G and N, also was named as a respondent in the petitions for termination of parental rights. Patrick H. died on May 12, 2021, during the pendency of these proceedings. We hereinafter refer to the respondent mother as the respondent and to Patrick H. by name.

[2] Pursuant to Practice Book §§ 67-13 and 79a-6 (c), the attorney for the minor children filed a statement adopting in its entirety the brief filed by the petitioner, the Commissioner of Children and Families.

N was born in August, 2017.[3] Shortly thereafter, on September 12, 2017, the petitioner, the Commissioner of Children and Families, filed neglect petitions and motions for orders of temporary custody on behalf of A, S, and N. On October 2, 2017, the orders of temporary custody were sustained and A, S, and N were removed from the respondent's care. On September 4, 2018, the court approved a concurrent permanency plan of termination of parental rights and adoption or reunification with the respondent and Patrick H. with regard to N. On November 9, 2018, A, S, and N were found neglected and were committed to the care and custody of the petitioner. G was born in April, 2019. She was born prematurely, developed chronic lung disease, and is considered medically complex. G was successfully discharged from the care of the pulmonology department at Yale New Haven Children's Hospital on December 14, 2020.

On March 7 and April 22, 2019, the respondent participated in a court-ordered evaluation with Nancy Randall, a psychologist, as a result of the pending neglect allegations as to A, S, and N. At that time, the respondent was diagnosed with generalized anxiety disorder, bipolar 2 disorder, and opiate use disorder. The opiate use disorder was in sustained remission on maintenance therapy. As part of her evaluation, Dr. Randall indicated that the respondent needed continued support for her recovery and mental health, and "recommended [that the respondent] receive mental health treatment and continued methadone maintenance and psychiatric medication management services."

The respondent participated in Intensive Family Preservation and Reunification and Therapeutic Family

[3] On two occasions, the court's memorandum of decision reflects that N was born in October, 2017. Given that the court accurately set forth N's birthdate previously in its decision, this appears to be a scrivener's error.

Time services with her teenage children, A and S. Upon completion of the court-ordered evaluation in June, 2019, Dr. Randall recommended that the respondent engage in individual counseling and medication management, in order for the petitioner to recommend reunification with the teenage children. On August 6, 2019, the petitioner filed a permanency plan on behalf of the respondent's teenage children, A and S, with a recommendation of reunification.

On July 12, 2019, the petitioner filed a petition for the termination of parental rights as to N. Shortly thereafter, on July 18, 2019, the petitioner filed, with respect to G, a motion for an order of temporary custody, which was granted, and a neglect petition. On October 22, 2019, the court adjudicated G neglected and she was committed to the care and custody of the petitioner.

The respondent was provided with court-ordered specific steps, on November 9, 2018, and October 23, 2019, to facilitate the return of N and G to her care. Additionally, the department referred the respondent to numerous services to aid in her reunification with N and G, including supervised visitation, individual counseling, substance abuse evaluation and treatment, drug screening, mental health services, transportation assistance, case management services, and psychological evaluations.

On August 20, 2020, the petitioner filed a permanency plan on behalf of N and G, with a recommendation of termination of parental rights. That same day, the petitioner filed a permanency plan on behalf of A and S, with a recommendation of reunification. On October 5, 2020, the court approved both permanency plans, and a motion to revoke commitment and an order of six months of protective supervision was granted as to the respondent's teenage children. On March 4, 2021,

the petitioner filed a petition for termination of parental rights as to G.

In the petitions, the petitioner alleged that G and N were found in a prior proceeding to have been neglected and that the respondent "failed to achieve the degree of personal rehabilitation that would encourage the belief that, considering the ages and needs of the children, she would assume a responsible position in the life of her children." During the trial, the petitioner introduced testimony from Dr. Randall and department social workers and case managers. The respondent testified and presented testimony from her case manager in the supportive housing program at The Connection, Inc.; her counselor at the Root Center for Recovery; and Andrea R., her adult daughter.

The respondent gave birth to her first child when she was nineteen years old and had no support from her family. Her history with drugs began when she started taking "percs" because they made her feel good. She was prescribed medication for her mental health issues but did not like the way it made her feel, so "she started using heroin, because it was cheap, but hard to get off." The respondent's work history is minimal and "she has a history of not sustaining employment for any significant period of time."

The respondent married Patrick H., the father of N and G,[4] in 2016. Patrick H. had a significant criminal history dating back to 1988. In August, 2020, Patrick H. was arrested at the family home for possession of illegal narcotics, while A and S were residing there. Patrick H. was found in possession of 100 bags, packaged for sale, of fentanyl, heroin and marijuana. The respondent failed to report this arrest to the department. The respondent "indicated that she and Patrick H. had been

[4] Patrick H. was also the father of S, one of the respondent's teenage children, who was born in June, 2006.

selling drugs to support the family some years ago but indicated she was surprised by the arrest in August, 2020." The trial court found that the respondent's "continued denial of any knowledge of [Patrick H.'s] involvement in drug dealing is not credible."

On February 24, 2021, after Patrick H. posted bond on drug charges, the respondent signed a service agreement with the department, confirming that she would not allow Patrick H. back in the home, due to the two teenage children living in the home. The department subsequently received anonymous information that Patrick H. "was frequenting the home on a daily basis." On May 12, 2021, Patrick H. died, of an apparent allergic reaction to seafood, while in a sober house.

The respondent's compliance with individual counseling was inconsistent. From August, 2019, until March, 2020, the respondent was not engaged in individual counseling. From January, 2019, until January, 2020, the respondent saw Stephanie Sloan, an advanced practice registered nurse, for medication management once a month. Sloan diagnosed the respondent with "bipolar disorder, current episode depressed moderate," and recommended that she engage in individual counseling "due to [her] limited understanding as to why [the department] was involved with her family." On December 31, 2019, Sloan indicated that the respondent "was at risk for being discharged due to her missing appointments." Following Sloan's unexpected death in January, 2020, the respondent was referred to Child and Family Services for mental health and medication management. The respondent failed to follow through with the referral, did not engage in the recommended counseling, and was at risk of running out of her medication. The department "made many efforts to engage [the respondent] in individual counseling and a new medication provider for many months."

In March, 2020, the respondent completed a mental health intake with Sound Community and, in April, 2020, began attending weekly, individual sessions via telehealth. Additionally, she "engaged in medication management and methadone treatment with the Root Center."

In September, 2020, the respondent began seeing a new therapist, Mary Ann Campbell, at Sound Community. The respondent was scheduled to have biweekly virtual meetings with Campbell, who was beginning to develop a treatment plan for the respondent. By October 23, 2020, however, the respondent "had missed three out of her last five appointments for a total of nine missed appointments out of fourteen." As a result of these absences, Campbell was unable to effectuate a treatment plan, and the respondent was sent an engagement letter stating that her case would be closed, unless she scheduled an appointment. The respondent scheduled an appointment for February 14, 2021. The respondent's most recent clinician, Judy Bolanos, was seeing the respondent every two weeks but had recently changed their sessions to every three weeks. "[Bolanos] indicated [that the respondent] is difficult to engage and resistant to discussing things in depth."

The respondent has successfully engaged in substance abuse treatment and medication services, has been compliant with communicating and meeting with the department, and has participated in grief counseling. Additionally, the respondent has participated in all of her supervised visits with N and G When Patrick H. posted bond on February 24, 2021, his visits with N and G were required to be held at the department's offices due to safety concerns related to his drug use and sales. The respondent took the position that her visits with N and G must be combined with Patrick H.'s visits, and thus joined those visits at the department offices. The respondent thereafter "declined visits that were offered

in the community with [N] and [G], as she wanted all visits to be with [Patrick H.]."

On September 16, 2021, the court ordered a second evaluation for the respondent, which Dr. Randall conducted. On the basis of her evaluation, "Dr. Randall indicated that the [respondent's] diagnos[es] of bipolar 2 disorder by history and opiate use disorder in sustained remission on maintenance therapy continue to be appropriate." Additionally, Dr. Randall indicated that the respondent "is in limited mental health therapy," is "resistant to greater participation," and needs "to have a better understanding of identifying positive and negative markers in new relationships, in order to avoid further negative relationships." Dr. Randall recommended that the respondent continue participating in grief support services, methadone maintenance, and medication management.

Upon completing her evaluation, Dr. Randall did not recommend reunification because the respondent's "participation in recommended treatment has varied." "Dr. Randall indicated [that the respondent] has done well in recovery but has resisted mental health treatment." The respondent verbalized to Dr. Randall that it was wrong for her and Patrick H. to sell drugs and acknowledged that it posed a danger to her children; however, Dr. Randall indicated that "[the respondent] never was willing to protect her children from [Patrick H.'s] drug sales."

After conducting the parent and child sessions with the respondent, N and G, "Dr. Randall observed that the children do not view [the respondent] as their primary caregiver" and that the respondent "has a visiting relationship with the children." Additionally, "Dr. Randall indicated [that the respondent] minimizes the difficulty likely to occur for [N] and [G] if they are disrupted

from their current home, and how that will impact her ability to manage childcare and employment."

At the time of trial, the respondent resided with A and S in supportive housing obtained and subsidized through The Connection, Inc., for which she was paying 30 percent of the rent. She had been employed part-time for six months and had recently secured a second part-time job. During her session with Dr. Randall, the respondent was "unclear [about] how she will financially support the children if they are returned to her care" and "indicated [that] she has no supports other than believing that her older children could help with childcare."

As to the children, the court found that both N and G are thriving in their shared foster care placement and are bonded to their foster care parents. Despite recognizing the respondent and presenting as comfortable in her care, the children do not view her as their primary caregiver. Their current home presents a long-term and adoptive resource for the children. The court also found that since N was removed from the respondent's care, he has resided in eight department placements, three of which were disrupted due to the respondent "creating stress [for the foster] family," engaging in "aggressive behaviors," and posting remarks about one foster mother on Facebook. Additionally, since her birth and release from the hospital, G has never resided with the respondent.

On February 10, 2022, the court, *Hoffman*, *J.*, issued a memorandum of decision terminating the respondent's parental rights and appointing the petitioner as statutory parent for N and G In the adjudicatory phase,[5] the

[5] "Proceedings to terminate parental rights are governed by [General Statutes] § 17a-112. . . . Under § 17a-112, a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. . . .

court found "by clear and convincing evidence that [the department] made reasonable efforts to locate [the respondent], and to reunify her with [N] and [G], and further that she is unable or unwilling to benefit from the reunification efforts." Of concern to the court was the respondent's "belief [that] she was doing everything possible to reunify with her children but she continued her involvement with [Patrick H.], despite his multiple arrests for drug sales"; her failure "to reap any benefit or insights" from individual counseling services; and her "minimiz[ing] the difficulties she might have if the children are returned to her"; as well as "the issue of stability and permanency for [G] and [N]." Therefore, the court concluded that the respondent "has not made significant progress toward personal rehabilitation and clearly cannot assume a responsible position in [N's] and [G's] [lives] given their age and needs."

In the dispositional phase; see footnote 5 of this opinion; the court considered the seven statutory factors of General Statutes § 17a-112 (k)[6] before finding "that

If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence." (Citation omitted; internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 582–83 n.12, 122 A.3d 1247 (2015).

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

termination of [the respondent's] parental rights is in the best interest of [G] and [N]." This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The respondent first claims that the court improperly concluded that she had failed to rehabilitate to such a degree as to reasonably encourage a belief that she could assume a responsible position in the lives of N and G. Specifically, the respondent argues that "there is insufficient evidence to support the trial court's conclusion that [she] has failed to rehabilitate" and challenges several of the court's subordinate factual findings as clearly erroneous. We disagree.

We begin by setting forth the established principles of law and the applicable standard of review. "The trial court is required, pursuant to § 17a-112, to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . The statute does not require [a parent] to prove precisely when [she] will be able to assume a responsible position in [her] child's life. Nor does it require [her]

significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

to prove that [she] will be able to assume full responsibility for [her] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [she] can assume a responsible position in [her] child's life." (Citations omitted; internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 585–86, 122 A.3d 1247 (2015). "Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to [her] former constructive and useful role as a parent. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [her] ability to manage [her] own life, but rather whether [she] has gained the ability to care for the particular needs of the [children] at issue." (Internal quotation marks omitted.) *In re Brian P.*, 195 Conn. App. 558, 568, 226 A.3d 159, cert. denied, 335 Conn. 907, 226 A.3d 151 (2020).

"[The] completion or noncompletion [of the specific steps], however, does not guarantee any outcome. . . . Accordingly, successful completion of expressly articulated expectations is not sufficient to defeat a department claim that the parent has not achieved sufficient rehabilitation." (Citation omitted; internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 587. "Whereas, during the adjudicatory phase of a termination proceeding, the court is generally limited to considering events that precede the date of the filing of the petition or the latest amendment to the petition, also known as the adjudicatory date, it may rely on events occurring after the [adjudicatory] date . . . when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Internal quotation marks omitted.) *In re Brian P.*, supra, 195 Conn. App. 569.

"A conclusion of failure to rehabilitate is drawn from *both* the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . We will not disturb the court's subordinate factual findings unless they are clearly erroneous. . . . A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Emphasis in original; internal quotation marks omitted.) Id., 569–70.

In determining that the respondent failed to rehabilitate, the court found that the respondent "has attempted to engage in individual counseling but has been inconsistent, [she] has engaged in medication management and [she] has maintained visitation with the children. Despite being referred to individual counseling services by [the department], [the respondent] has failed to reap any benefit or insights from these services. Notably, [the respondent] allowed [Patrick H.] back [into their] home after his arrest for drug sales. She has clearly failed to gain an understanding of the harmful effects [of Patrick H.'s] drug sales [and that they] placed her children at risk while they resided with her and [Patrick H.]. Also, [the respondent] is unable to articulate how she would avoid negative relationships in the future.

[The respondent] has been unable to benefit from mental health treatment services offered to her." Additionally, the court found that "[w]hile [the respondent] clearly loves [N] and [G], her attempts to reunify with them have failed. . . . Of paramount consideration to the court is the issue of stability and permanency for [the children]. . . . [G's] and [N's] need for permanence far outweighs any remote chance that [the respondent] may rehabilitate in the far distant future. [The respondent] has, either because of lack of ability or lack of desire, failed to successfully accomplish what was needed to consider reunification as an appropriate conclusion. [G] and [N] can't afford to wait for [the respondent] to rehabilitate . . . they need permanency and stability now." The court concluded, "[t]hus, the evidence clearly and convincingly establishes that as of the end of trial of this matter, [the respondent] had not sufficiently rehabilitated herself to the extent [that] she could assume a responsible position in [G's] and [N's] [lives] in view of their ages and needs, or within a reasonable period of time thereafter."

The respondent argues, inter alia, that there was insufficient evidence to support the court's determination that she had failed to rehabilitate. To support her argument, she relies on evidence in the record that she (1) successfully engaged in substance abuse treatment and has been drug free since 2016, (2) obtained secure housing "and has been able to do so for many years," (3) was able to maintain consistent legal employment and can "meet the financial needs of her family," and (4) shares a bond with G and N.

Construing the record before us in the manner most favorable to sustaining the judgments of the trial court, as we are obligated to do; see *In re Brian P.*, supra, 195 Conn. App. 569; we conclude that the record contains sufficient evidence to support the court's conclusion that the petitioner had proven by clear and convincing

evidence that the respondent failed to rehabilitate, considering the ages and needs of G and N. See General Statutes § 17a-112 (j) (3) (B). At the outset, we note that, contrary to the respondent's contention, the court acknowledged that the respondent (1) complied with medication management and substance abuse treatment; (2) obtained housing; (3) secured two part-time jobs, although the court noted that, in her evaluation with Dr. Randall, "[the respondent] was unclear [about] how she will financially support the children if they are returned to her care"; and (4) loves her children. The trial court considered this progress, however, in relation to the respondent's failure to consistently engage with and reap any benefit from individual counseling services, resistance to appreciate and articulate how she would avoid negative relationships in the future, and persistent involvement with Patrick H. in the face of his multiple and continuing arrests for drug sales. We cannot conclude that any of these findings are clearly erroneous. See *In re Shane M.*, supra, 318 Conn. 593 ("[a]lthough the respondent encourages us to focus on the positive aspects of [her] behavior and to ignore the negatives, we will not scrutinize the record to look for reasons supporting a different conclusion than that reached by the trial court"); see also *In re Victoria B.*, 79 Conn. App. 245, 255, 829 A.2d 855 (2003) ("even if a parent has made successful strides in her ability to manage her life and may have achieved a level of stability within her limitations, such improvements, although commendable, are not dispositive on the issue of whether, within a reasonable period of time, she could assume a responsible position in the life of her child").

Moreover, in its memorandum of decision, the court repeatedly emphasized the opinion of Dr. Randall that the respondent exhibited continued and unaddressed mental health difficulties, had a visiting relationship with G and N, and was unable to keep her children safe

during her extended relationship with Patrick H. "The testimony of professionals is given great weight in parental termination proceedings. . . . It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses. . . . It is the quintessential function of the fact finder to reject or accept certain evidence, and to believe or disbelieve any expert testimony. . . . The trier may accept or reject, in whole or in part, the testimony of an expert offered by one party or the other." (Internal quotation marks omitted.) *In re Jason R.*, 129 Conn. App. 746, 772–73, 23 A.3d 18 (2011), aff'd, 306 Conn. 438, 51 A.3d 334 (2012).

At trial, Dr. Randall opined that the children should not be reunified with the respondent because she had "not seen any indication that [the respondent] is really able and willing to provide [the children] with the safe and nurturing home that they need." Dr. Randall elaborated that the respondent has repeatedly been involved in relationships with "negative components . . . that would be dangerous to the children to be exposed to"; however, the respondent is unwilling to discuss how to identify these potential risk factors to make better choices regarding who she is around and to whom she exposes her children. Additionally, Dr. Randall testified that the respondent continuously put her relationship with Patrick H. above the needs of her children and that, despite acknowledging that it could be a danger for the children to be in the home during drug sales, she never left the marriage. Accordingly, the evidence supports the court's determination that the respondent

had failed to make significant progress toward personal rehabilitation and that she would be unable to assume a responsible role in the lives of G and N within a reasonable time.[7]

The respondent challenges several of the court's factual findings as clearly erroneous. We conclude that the court's subordinate factual findings, each of which we will address in turn, are supported by the evidence and the rational inferences to be drawn therefrom, and, thus, the respondent has failed to demonstrate that there was insufficient evidence to support the court's determination that she failed to rehabilitate.

First, the respondent challenges as clearly erroneous the court's finding that "[the respondent] also indicated that she has no supports other than believing that her older children could help with childcare." In making her argument, the respondent accurately notes that her adult daughter, Andrea R., testified at trial that she would be a resource for the respondent. The respondent proffered no evidence as to other persons who could be a support to her if G and N were returned to her care. Therefore, we conclude that the trial court's finding that the respondent "has no supports other than believing that *her older children* could help with

[7] As part of her argument, the respondent maintains that her "reunification with [A] and [S] has gone well," and argues that the court "does not even attempt to explain its conclusion that [she] is unable to assume a responsible position in the lives of [G] and [N], when she has proven herself to be a capable caregiver for [A] and [S] since October, 2020." The relevant inquiry under § 17a-112 requires the court "to analyze the [parent's] rehabilitative status as it relates to the *needs of the particular child*." (Emphasis added; internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 585. In contrast to the maturity of the respondent's teenage children, the children subject to this opinion, N and G, are four years old and two and one-half years old, respectively. Additionally, "[N] has not lived with [the respondent] since [before he was] one month of age and [G] has never lived with [the respondent]" and "the children did not show significant attachments to [the respondent], which was not unexpected given [their] length of time in foster care." Therefore, the respondent's argument is unavailing.

childcare" necessarily includes Andrea R.[8] (Emphasis added.)

Second, the respondent challenges as clearly erroneous the court's finding that "the [respondent] has not received any benefit or insight from mental health services offered to her by [the department]." In support of her argument, the respondent asserts that there was evidence in the record, namely, her own testimony,[9] that she benefitted from the mental health services provided because the parenting programs helped her regain custody of her teenage children and she addressed her poor judgment by "[g]etting clean, stopping from the sale of drugs, engaging in two jobs, engaging in . . . programs and . . . counseling, doing everything that [the department] asked." The court acknowledged the

[8] In her brief, the respondent further argues that "the trial court's failure to consider the support that will be provided by her family [Andrea, A, and S] constitutes legal error [because] the failure to rehabilitate ground pursuant to § 17a-112 does not require . . . her to prove that she will be able to assume full responsibility for her child, unaided by available support systems." (Emphasis omitted; internal quotation marks omitted.) We reject the premise of the respondent's argument because, as previously stated, the court acknowledged that the respondent would have the support of her older children.

[9] In support of her argument, the respondent also points to the department's case status reports and studies and a report from a counselor at the Hartford Dispensary. The respondent concedes that some of these documents were not introduced as exhibits at trial. She asserts, however, that the trial court "expressly took judicial notice of the entire record of the prior nondelinquency proceedings, including pleadings, petitions, social studies, status reports, [and] evaluations" and that this court may do so as well. (Internal quotation marks omitted.) She points to the court's statement that it was taking "judicial notice of the entire record of the prior nondelinquency proceedings, including pleadings, petitions, social studies, status reports, evaluations, court memoranda and specific steps, as well as the dates and contents of the court's findings, order, rulings, and judgments." Despite the fact that the court generally stated that it was taking judicial notice of broad categories of documents, that "does not mean that [the court] might use every statement it found in the papers constituting the file with the same effect as though the facts were in evidence before it." (Internal quotation marks omitted.) *In re Mark C.*, 28 Conn. App. 247, 253, 610 A.2d 181, cert. denied, 223 Conn. 992, 614 A.2d 823 (1992).

respondent's testimony by stating that, "[o]f concern to the court is [the respondent's] belief [that] she was doing everything possible to reunify with her children but [yet] she continued her involvement with [Patrick H.], despite his multiple arrests for drug sales." Additionally, as set forth previously, the court continuously referred to Dr. Randall's conclusion that "[the respondent] continues to have a lack of understanding as to her struggles, [the department's] involvement, and her lack of keeping her children safe while they resided with [Patrick H.]."

Third, the respondent challenges as clearly erroneous the trial court's finding that the respondent was "offered numerous services to aid in attaining reunification with [N] and [G], including . . . visitation, individual counseling, substance abuse evaluation and treatment, drug screening, mental health services . . . case management services, [and] psychological evaluations . . . . [However, the respondent] has failed to complete all these services." The respondent then points to the court's own memorandum of decision and asserts that the court "made express factual findings that the [respondent] successfully completed many of these services." The respondent's assertion is correct in that the court found that she "successfully engaged in substance abuse services . . . is compliant with medication services . . . engaged in grief counseling . . . [and] has attended all of her supervised visits with [the] children." The respondent fails to acknowledge, however, that the court also explicitly concluded that her attendance in individual counseling, one of the services the respondent includes as part of her argument, was "inconsistent and her engagement has been minimal." The respondent argues that the trial court "failed to recognize" that the gaps in her counseling were caused by several factors outside of the respondent's control, such as the untimely death of her therapist. We disagree. The court

found that, during the gaps, "[the department] made many efforts to engage [the respondent] in individual counseling . . . for many months." Moreover, the trial court found that, once she connected with a new therapist, the respondent missed a total of nine out of fourteen scheduled appointments.

Fourth, the respondent challenges as clearly erroneous the trial court's findings that she (1) "failed to gain an understanding of the harmful effects [of] [Patrick H.'s] drug sales [in that they] placed her children at risk while they resided with her and [Patrick H.]," (2) "continues to have a lack of understanding as to her struggles, [the department's] involvement, and her lack of keeping the children safe while they resided with [Patrick H.]," and (3) "is unable to articulate how she would avoid negative relationships in the future."[10] In

[10] The respondent further argues that "this is not a case where the [respondent] refused to live separately from [Patrick H.], whose drug [addiction] and unlawful activity posed a threat to the safety of her children. Rather, at the insistence of [the department], the [respondent] agreed to do so." Moreover, she asserts that because Patrick H. died on May 12, 2021, "there is no danger that [she] will ever reside with [Patrick H.] again after she is reunified with her children." We disagree.

"As our Supreme Court has observed, in considering whether a parent has failed to rehabilitate, trial courts have relied on evidence that a parent has continued to associate with a party who poses a danger to a child." *In re Lillyanne D.*, 215 Conn. App. 61, 93, 281 A.3d 521 ("court found that the respondent father enabled the respondent mother and consistently demonstrated a blind spot for appropriately assessing the risk that the respondent mother poses to the children's welfare and safety," which contributed to finding of failure to rehabilitate (internal quotation marks omitted)), cert. denied, 345 Conn. 913, A.3d (2022); see also *In re Albert M.*, 124 Conn. App. 561, 565–66, 6 A.3d 815 (trial court's determination that father failed to rehabilitate was not clearly erroneous because record supported trial court's findings that father had "knowledge of the necessity of changing his relationship with the mother . . . [that] [t]he petitioner presented probative evidence that the relationship between the parents posed a significant barrier to the father's effective parenting . . . and that the father failed fully to appreciate the risk that the mother could pose to their [child]"), cert. denied, 299 Conn. 920, 10 A.3d 1050 (2010).

Here, the court found that "[the respondent] allowed [Patrick H.] back in [the] home after his arrest for drug sales" and did not credit the respondent's

challenging these findings, the respondent points to a department social study from November, 2021, which states that the respondent "reported that she understands that she placed her children in harm's way when she engaged in selling drugs"; her testimony at trial in which she testified that she became involved in selling drugs as a way to support her family, but, since the department's involvement in her life, she has realized that selling drugs was "unsafe" for her children; and asserts that "she intends to avoid negative relationships by refraining from dating or having any other romantic partners in the future." The respondent's recognition of how past acts may have harmed her children does not demonstrate her ability to keep the children safe in the future from similar negative activities and influences in her life, which was the premise of the court's concern. The court's concern stemmed from Dr. Randall's indications that the respondent (1) "never was willing to protect her children from [Patrick H.'s] drug sales" and (2) "needed to have a better understanding of identifying positive and negative markers in new relationships, in order to avoid further negative relationships." Additionally, the respondent's expressed intention to "refrain from dating . . . in the future" does not demonstrate an understanding of how to avoid negative relationships, romantic or otherwise, but rather supports the trial court's finding that the respondent is "resistan[t] to discussing ways to avoid negative relationships."

"continued denial of any knowledge of [Patrick H.'s] involvement in drug dealing." Additionally, the court found that the respondent "signed a service agreement with [the department] on February 24, 2021, that she would not allow [Patrick H.] back in the home, [but] [the department] subsequently received anonymous information stating that [Patrick H.] was frequenting the home on a daily basis." Moreover, the fact that Patrick H. has died does not resolve the court's concern that the respondent "continued her involvement with [him], despite his multiple arrests for drug sales," especially because the trial court found that the respondent "is unable to articulate how she would avoid negative relationships in the future."

Fifth, the respondent challenges the trial court's finding that she "minimizes the difficulties she might have if the children are returned to her." The respondent asserts that she has adequate room for the children in her current apartment; she is employed and financially secure enough to cover her monthly expenses; and, based on her successful reunification with A and S, she understands the difficulties she may face if G and N are returned to her care. We are not persuaded. The trial court found that during her evaluation with Dr. Randall, the respondent "was unclear [about] how she will financially support the children if they are returned to her care" and did not consider how the children's return would "impact her . . . ability to manage childcare and employment." Additionally, despite recognizing that the respondent was employed in two part-time jobs at the time of trial, the court found that "she has a history of not sustaining employment for any significant period of time." Moreover, the court found that, "[w]hile [the respondent] clearly loves [the children] . . . motivation to parent is not enough; ability is required." Therefore, the trial court found that the respondent "is unable to meet the developmental, emotional, educational, medical, and moral needs of [N] and [G] . . . [and] does not have stability in her life to enable her to care for [the children]." Furthermore, the trial court properly considered the children's "young age and need for permanency in finding that the respondent's rehabilitation was not foreseeable within a reasonable time." *In re Zion R.*, 116 Conn. App. 723, 739, 977 A.2d 247 (2009).

For the foregoing reasons, we find that there was sufficient evidence for the court to conclude that the respondent had failed to rehabilitate.

II

The respondent next claims that the court's memorandum of decision contains inconsistent statements

that require reversal of the judgments terminating her parental rights. We are not persuaded.

We begin by setting forth the standard of review. "Resolving the respondent's claim requires us to interpret the court's judgment. The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole. . . . If there is ambiguity in a court's memorandum of decision, we look to the articulations [if any] that the court provides. . . . [W]e are mindful that an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding. . . . Furthermore, [w]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Internal quotation marks omitted.) *In re November H.*, 202 Conn. App. 106, 118, 243 A.3d 839 (2020).

In the adjudicatory part of its decision, the court first determined "by clear and convincing evidence that [the department] made reasonable efforts . . . to reunify [the respondent] with [N] and [G] and, further, that she is unable or unwilling to benefit from the reunification efforts." Thereafter, the court determined that the petitioner sustained her burden to prove that the respondent had failed to rehabilitate under § 17a-112 (j) (B) (3). In setting forth its analysis, the court stated "that when the termination of parental rights petition was filed as to [N], on July 12, 2019, and the [termination of] parental rights petition [was] filed as to [G], on March 4, 2021 . . . [the respondent] had failed to achieve such a degree of personal rehabilitation as

would encourage the belief that, within a reasonable period of time, considering the ages and needs of her children, she could assume a responsible position in their lives." The court then discussed the respondent's inconsistency in engaging in individual counseling, failure to gain an understanding of the harmful effects of Patrick H.'s sale of illegal narcotics impacting the safety of her children, inability to articulate how she would avoid negative relationships in the future, and lack of stability in her life to enable her to care for the children. In light of this evidence, the court concluded that "as of the end of the trial of this matter, [the respondent] had not sufficiently rehabilitated herself to the extent she could assume a responsible position in [G's] and [N's] [lives] in view of their ages and needs, or within a reasonable period of time thereafter."

The respondent argues that there is inconsistency between the court's initial statement, that *at the time the petitions for termination of parental rights were filed* there was clear and convincing evidence that the respondent had failed to rehabilitate, and the court's concluding statement, that *by the end of trial* there was clear and convincing evidence that the respondent had failed to rehabilitate. (Emphasis added.) Specifically, she argues that this inconsistency is "highly significant" and that "as a result of the trial court's inconsistent statements in this case, it is impossible to know whether the trial court has only considered events preceding the filing of the petitions, or whether it has exercised its discretion to consider events through the time of trial." We disagree.

"Inconsistent statements can warrant reversal of a trial court's order. *In re Pedro J. C.*, 154 Conn. App. 517, 531, 105 A.3d 943 (2014) ([t]here are instances in which the trial court's orders warrant reversal because they are logically inconsistent rulings), overruled in part on other grounds by *In re Henrry P. B.-P.*, 327 Conn.

312, 335 n.17, 173 A.3d 928 (2017). *In re Ava W.*, 336 Conn. 545, 588, 248 A.3d 675 (2020); see also *In re Jacob W.*, 178 Conn. App. 195, 215–19, 172 A.3d 1274 (2017) (concluding that, even if trial court had applied proper legal test, reversal of judgment was warranted on basis of fundamentally inconsistent findings by court that grandparents' unreasonable conduct interfered with father's parent-child relationship with children and that there was no evidence of unreasonable interference by any person), aff'd, 330 Conn. 744, 200 A.3d 1091 (2019)." (Internal quotation marks omitted.) *In re November H.*, supra, 202 Conn. App. 118–19.

As set forth previously, it is well established that, "[i]n the adjudicatory phase, the judicial authority is limited to evidence of events preceding the filing of the petition or the latest amendment, except where the judicial authority must consider subsequent events as part of its determination as to the existence of a ground for termination of parental rights. Practice Book § 35a-7 (a). In the adjudicatory phase, the court may rely on events occurring after the date of the filing of the petition to terminate parental rights when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Emphasis omitted; internal quotation marks omitted.) *In re Selena O.*, 104 Conn. App. 635, 646, 934 A.2d 860 (2007). The two statements that the respondent takes issue with were set forth during the court's analysis of whether the respondent's degree of rehabilitation was sufficient to foresee that she may resume a useful role in the lives of G and N within a reasonable time and, hence, properly incorporated into the court's determination of whether a ground for termination of parental rights existed. See id.; see also Practice Book § 35a-7 (a).

In her brief, the respondent argues that "it is also impossible for this court to say with certainty what

evidence was considered by the trial court in this case" and that, if the court only considered events as of the filing of the petitions for termination of parental rights, it would not have considered months and years "during which time the [respondent] was able to achieve many of her significant steps toward rehabilitation." Moreover, the respondent argues that, "if this court cannot ascertain whether the trial court exercised its discretion to consider evidence of events through the final day of trial, then it cannot properly evaluate whether there is adequate evidence to support the trial court's legal conclusion that the [respondent] failed to rehabilitate." We disagree.

Regardless of whether the court expressly stated that it considered events preceding the filing of the petitions or through the time of trial, it is evident that the court in fact considered events that occurred after the filing of the petitions and through the time of trial. The petitions for termination of parental rights as to N and G were filed on July 12, 2019, and March 4, 2021, respectively. In its analysis, the court explicitly referred to events that had occurred after the filing of the petitions, namely, the "exhibits and testimony presented at trial," Dr. Randall's psychological evaluation from September, 2021, and the respondent's engagement in grief counseling, which began after Patrick H. died in May, 2021. Moreover, we already have determined that there was sufficient evidence to conclude that the respondent had failed to rehabilitate. See part I of this opinion. Accordingly, we reject the respondent's claim that the court's decision contains inconsistent statements that require reversal.

III

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

We first set forth the relevant principles and the standard of review. "In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the [children]. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [children] only if the court's findings are clearly erroneous. . . . The best interests of the [children] include the [children's] interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the [respondent's] parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven statutory factors delineated in [§ 17a-112 (k)]. . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Internal quotation marks omitted.) *In re Brian P.*, supra, 195 Conn. App. 579.

The court considered and made findings under each of the seven statutory factors of § 17a-112 (k) before determining that, under the totality of the circumstances, a termination of the respondent's parental rights was in the best interests of N and G. The respondent challenges as clearly erroneous the fact that, "[d]espite the substantial progress made by the [respondent], the trial court found that [she] is in no better position today to provide for [her children] than she was at the time of their removal." The court found that "[N] and [G] have been in foster care most or all of

their lives and are in need of permanency and stability." The court also found that the children's "needs are those of all children. They have an interest in sustained growth, development, well-being, and a continuous, stable environment."

In support of her argument, the respondent renews her assertion that several of the court's findings were clearly erroneous.[11] Given the ages of N and G, the amount of time they have spent in foster care—most or all of their lives—and the court's findings as to the respondent's failure to rehabilitate—as detailed in part I of this opinion—we cannot conclude that the court's findings as to the children's need for "stability . . . permanency . . . and the opportunity to have a healthy and emotional[ly] stable life" and the respondent's inability to meet that need are clearly erroneous. See *In re Anthony H.*, 104 Conn. App. 744, 767, 936 A.2d 638 (2007) ("[o]ur appellate courts have recognized that long-term stability is critical to a child's future health and development" (internal quotation marks omitted)), cert. denied, 285 Conn. 920, 943 A.2d 1100 (2008); *In re Victoria B.*, supra, 79 Conn. App. 263 (trial court's findings as to best interest of child were not clearly erroneous when much of child's short life had been spent in custody of petitioner and child needed stability and permanency in her life).

Moreover, the respondent asserts that "the trial court failed to consider the detrimental effect of separating these children from [the respondent] and [their] two

[11] Specifically, the respondent argues that, "[s]ince [N] was removed in September [2017] and [G] was removed in July, 2019, the [respondent] has obtained stable housing, secured legal employment, maintained her sobriety, made progress in engagement with mental health services, and earned enough money to pay her rent and all of her bills." The respondent's argument centers on the same factual findings that she challenged as to the court's determination that she failed to rehabilitate; therefore, we decline to repeat our analysis here. See part I of this opinion.

siblings, [A] and [S] . . . [and] if the [decision] is affirmed, then [G] and [N] will not only lose the bond they have with [the respondent], but they will also lose their bond with their siblings." The respondent cites to the testimony of Matthew Ashmead, a department social worker who observed visits between the respondent, G, and N, that he observed a bond between the respondent and the children. The court did not overlook the relationship between the children and the respondent.[12] The court acknowledged that "[N] recognizes [the respondent] and presents as comfortable in her care [and] [d]uring visitation he seeks her out for attention and solace" and that "[G] recognizes [the respondent] and presents comfortable in her care." These statements reflect that the court appreciated the relationship between the children and the respondent but, nevertheless, concluded that it was in their best interests to terminate the respondent's parental rights. See *In re Anthony H.*, supra, 104 Conn. App. 765–66 ("[o]ur courts consistently have held that even when there is a finding of a bond between [a] parent and a child, it still may be in the child's best interest to terminate parental rights" (internal quotation marks omitted)). We cannot conclude from our review of the record that this finding is clearly erroneous.

The judgments are affirmed.

In this opinion the other judges concurred.

[12] The court expressly found that "[G] is not bonded with [the respondent]." Additionally, the court did not find that N was bonded with the respondent. Therefore, it likely did not credit Ashmead's testimony, on which the respondent relies. See *In re Cesar G.*, 56 Conn. App. 289, 297, 742 A.2d 428 (2000) ("[t]he court, as the trier of fact, is free to accept or reject, in whole or in part, the testimony offered by either party" (internal quotation marks omitted)).

The bond between the children and their siblings, A and S, is not a consideration in any of the seven statutory factors found in § 17a-112 (k); therefore, the court's failure to consider it was not clearly erroneous. See *In re Brian P.*, supra, 195 Conn. App. 581 n.12 (court's failure to consider bond between child and his grandparents, which is not factor in § 17a-112 (k), was not clearly erroneous).

IN RE MALIYAH M.*
(AC 45183)

IN RE OCTAVIA D.
(AC 45199)

IN RE EDGAR S. ET AL.
(AC 45369)

Bright, C. J., and Alvord and Elgo, Js.

Syllabus

The respondent parents in three separate cases appealed to this court from the judgments of the trial court terminating their parental rights as to their minor children. Because of the COVID-19 pandemic, the trials on the termination petitions were held virtually, either in whole or in part, via the Microsoft Teams platform, during which witnesses for the petitioner, the Commissioner of Children and Families, testified remotely. On appeal, the parents claimed that they were denied their rights to due process under the fourteenth amendment to the United States constitution because the trial courts did not first conduct an evidentiary hearing to determine whether, under *State* v. *Jarzbek* (204 Conn. 683), there was a compelling need for the petitioner's witnesses to testify remotely. *Held* that the records of the three trials were inadequate under *State* v. *Golding* (213 Conn. 233) to review the parents' unpreserved claims that they were denied due process when the trial courts failed to conduct hearings pursuant to *Jarzbek* before allowing the petitioner's witnesses to testify remotely: because the parents never objected to the virtual format of the termination trials on the ground that it violated their constitutional rights to confront the witnesses in person, the trial courts had no occasion to make findings of fact regarding the threat posed by COVID-19 and whether that threat was sufficiently compelling to curtail the parents' confrontation rights; moreover, the parents could not overcome the inadequacy of the trial records by claiming that they had an unqualified right to a hearing at which the petitioner would bear the burden of establishing by clear and convincing evidence a compelling governmental interest in presenting the witnesses' testimony virtually, that claim having been rejected by our Supreme Court in *In re Annessa J.* (343 Conn. 642); furthermore, even if the parents' claim was distinct

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

from that asserted in *In re Annessa J.*, it would fail under *Golding*, as there is no constitutional right to a *Jarzbek*-type hearing ordered by a trial court sua sponte.

Argued September 8—officially released November 22, 2022**

Procedural History

Petition, in the first case, by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Conway*, *J.*, and petition, in a second case, by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Marcus*, *J.*, and petition, in a third case, by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, and tried to the court, *Hoffman*, *J.*; thereafter, in the first case, the court, *Conway*, *J.*, rendered judgment terminating the respondents' parental rights, from which the respondent father appealed to this court, and, in the second case, the court, *Marcus*, *J.*, rendered judgment terminating the respondents' parental rights, from which the respondent father appealed to this court, and, in the third case, the court, *Hoffman*, *J.*, rendered judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed*.

James P. Sexton, assigned counsel, with whom, on the brief, was *Albert J. Oneto IV*, assigned counsel, for

** November 22, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

the appellants in Docket Nos. AC 45183 and AC 45199 (respondent fathers).

Matthew C. Eagan, assigned counsel, for the appellant in Docket No. AC 45369 (respondent mother).

Evan O'Roark, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Nisa Khan*, assistant attorney general, for the appellee in each case (petitioner).

Opinion

PER CURIAM. These three appeals present the same legal claim and involve similar, though unrelated, factual and procedural histories. In each appeal, the respondent parent appeals from the judgment of the trial court terminating his or her parental rights. On appeal, each respondent asserts the same claim—that the court "denied the respondent the due process of law under the fourteenth amendment to the United States constitution" when it conducted the termination of parental rights trial, either in whole or in part, virtually, via Microsoft Teams,[1] without first holding an evidentiary hearing to determine whether there was a compelling need for virtual testimony.

After the respondents filed their principal briefs in each appeal, this court granted the unopposed motions filed by the petitioner, the Commissioner of Children and Families, requesting that her brief be due thirty days after our Supreme Court issued its decisions in *In re Annessa J.*, 343 Conn. 642, A.3d (2022), and its companion cases, *In re Vada V.*, 343 Conn. 730, 275 A.3d 1172 (2022), and *In re Aisjaha N.*, 343 Conn.

[1] Microsoft Teams is "collaborative meeting [computer software] with video, audio, and screen sharing features." Connecticut Judicial Branch, Connecticut Guide to Remote Hearings for Attorneys and Self-Represented Parties (November 23, 2021) p. 5, available at https://jud.ct.gov/HomePDFs/ConnecticutGuideRemoteHearings.pdf (last visited November 22, 2022).

709, 275 A.3d 1181 (2022), which involved claims similar to the claim in the present cases. Our Supreme Court issued those decisions on June 20, 2022, and we now conclude that *In re Annessa J.* is dispositive of the issue in the present appeals. Accordingly, we affirm the judgments of the trial courts.

In Docket No. AC 45183, the respondent father, Hector R.-B., appeals from the judgment of the court terminating his parental rights as to Maliyah M. on the ground of failure to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B) (i).[2] In his brief, he represents that the termination of parental rights trial was a " 'hybrid' virtual proceeding, in which the respondent was present with counsel and a Spanish speaking interpreter in the courtroom, but all other participants except [the] child's counsel appeared virtually." On appeal, he claims "that he was denied the due process of law under [the] fourteenth amendment to the United States constitution at the partially virtual parental rights termination trial when the trial court dispensed with his right of physical confrontation without first holding an evidentiary hearing to determine by clear and convincing evidence that

[2] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing . . . may grant a petition [for termination of parental rights] if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts . . . (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

there was a compelling need for the petitioner's last four witnesses to testify against him virtually."

In Docket No. AC 45199, the respondent father, Jason D., appeals from the judgment of the court terminating his parental rights as to his minor child, Octavia D., on the grounds of failure to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B) (i) and (E).[3] On appeal, he claims "that he was denied the due process of law under [the] fourteenth amendment to the United States constitution at the virtual parental rights termination trial when the trial court dispensed with his right of physical confrontation without first holding an evidentiary hearing to determine by clear and convincing evidence that there was a compelling need for the petitioner's witnesses to testify against him virtually."

In Docket No. AC 45369, the respondent mother, Lymari O., appeals from the judgments of the court terminating her parental rights as to her four minor children, Edgar S., Jaden A., Jeomarye A., and Josue G., on the ground of failure to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B) (i). She claims "that she was denied the due process of law under [the] fourteenth amendment to the United States constitution at the virtual parental rights termination trial when the trial court dispensed with her right of physical confrontation without first holding an evidentiary hearing to determine by clear and convincing

[3] Subparagraph (E) of § 17a-112 (j) (3), in relevant part, provides for the termination of parental rights when "the parent of a child under the age of seven years who is neglected, abused or uncared for, has failed, is unable or is unwilling to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child and such parent's parental rights of another child were previously terminated pursuant to a petition filed by the Commissioner of Children and Families . . . ." General Statutes § 17a-112 (j) (3) (E).

evidence that there was a compelling need for the petitioner's witnesses to testify against her virtually."

Each respondent concedes that their claim is unpreserved and seeks review pursuant to *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). "Pursuant to *Golding*, a [respondent] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial; and (4) if subject to harmless error analysis, the [petitioner] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . [S]ee *In re Yasiel R.*, [supra, 781] (modifying third prong of *Golding*). The first two steps in the *Golding* analysis address the reviewability of the claim, [whereas] the last two steps involve the merits of the claim." (Emphasis in original; internal quotation marks omitted.) *In re Annessa J.*, supra, 343 Conn. 656–57.

In *In re Annessa J.*, the respondent mother, Valerie H., appealed from the judgment of the trial court terminating her parental rights. Id., 650. Due to the COVID-19 pandemic, the trial had been conducted virtually, via Microsoft Teams, and, on appeal to this court, the respondent mother claimed, inter alia, that the trial court "violated her right to due process of law by precluding her from confronting witnesses in court and in person . . . ." Id. She conceded that her claim was unpreserved and sought review pursuant to *Golding*. Id., 661. This court determined that, "because Valerie did not ask the trial court to hold an evidentiary hearing on the need for a virtual trial, the record was inadequate

to review Valerie's unpreserved federal due process claim." Id., 651.

After granting the respondent mother certification to appeal, our Supreme Court agreed with this court that the record was inadequate to review her unpreserved claim. The court explained that, "[u]nlike her state constitutional claim, which did not require any factual predicates because she claimed an unqualified right to an in person trial, Valerie's federal constitutional claim is not based on an alleged unqualified right to confront the petitioner's witnesses in person under the fourteenth amendment to the United States constitution. Rather, Valerie claims that she had the right to do so 'in the absence of evidence demonstrating the existence of a compelling governmental interest sufficient to curtail the right.' Valerie thus acknowledges that there are certain countervailing governmental interests that may be sufficient to justify curtailing any constitutional right to in person confrontation. Indeed, to address the merits of Valerie's claim, this court would apply the three part test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The third part of that test requires us to consider the governmental interests at stake. . . . [T]he trial court explained that, '[d]ue to the COVID-19 . . . pandemic, the trial [on the termination of parental rights petition] was conducted virtually.' As a result, we would need to consider the specific factual circumstances surrounding the trial and the COVID-19 pandemic to properly evaluate Valerie's claim. As Valerie concedes, '[a]lthough the trial court referenced the COVID-19 public emergency as the reason for conducting the trial virtually, there was no actual evidence before the court that [SARS-CoV-2, the virus that causes COVID-19], threatened the health or safety of any of the persons involved in this particular case.' It is for this reason that the record is inadequate to review Valerie's unpreserved federal due process

claim. Even if this court were to assume that Valerie had a right to in person confrontation in the absence of compelling countervailing interests, this court has no factual record or factual findings on which to base a determination of whether that right was violated or whether the trial court correctly concluded that the government's interests were sufficiently great to warrant conducting the trial virtually." (Citation omitted.) Id., 661–62. The court also rejected the respondent mother's contention that the lack of evidence in the record was not her burden to overcome under the first prong of *Golding*. Id., 662–63.

Similarly, in *In re Vada V.*, supra, 343 Conn. 738, the respondent parents appealed from the judgments of the trial court terminating their parental rights after a trial held virtually, via Microsoft Teams, during the COVID-19 pandemic. The respondents asserted an unpreserved claim that "the trial court denied them the right to physically confront and cross-examine the witnesses against them at the virtual trial, thereby violating their right to due process . . . ." Id. Our Supreme Court again concluded that the record was inadequate to review the unpreserved due process claim, reiterating that, "even if [it] were to assume that there is a constitutional right to in person confrontation, there is no factual record or factual findings for [the court] to rely on to determine whether that right was violated or whether the trial court correctly concluded that the government's interests were sufficiently great to warrant conducting the trial virtually." Id., 740.[4]

[4] In *In re Aisjaha N.*, the respondent mother raised a due process claim distinct from the one raised by the respondents in *In re Annessa J.* and *In re Vada V.* In *In re Aisjaha N.*, the respondent claimed "that she was denied due process of law . . . when the trial court failed to ensure that she was present by two-way video technology at the virtual trial." *In re Aisjaha N.*, supra, 343 Conn. 717. Our Supreme Court held that the record was inadequate to review the respondent's unpreserved due process claim "[b]ecause the record [was] largely silent regarding the nature of [the respondent's] participation in the virtual trial . . . ." Id., 721. Accordingly, *In re Aisjaha N.* is not relevant to our resolution of the claim in the present appeals.

After those decisions were issued, the petitioner moved to dismiss each of the present appeals, arguing that, because the records are inadequate to review the respondents' unpreserved due process claim "in the same way the respective records in *In re Annessa J.* and *In re Vada V.* were inadequate, the result must be the same." This court denied the motions to dismiss and, sua sponte, ordered the parties in each appeal to file supplemental memoranda of law addressing whether the judgments terminating the respondents' parental rights should be summarily affirmed in light of our Supreme Court's decisions in *In re Annessa J.*, *In re Vada V.*, *In re Aisjaha N.* and *In re Juvenile Appeal (Docket No. 10155)*, 187 Conn. 431, 435–41, 446 A.2d 808 (1982) (holding that respondent father's constitutional rights were not violated when he was unable to be physically present in courtroom for termination of parental rights trial but participated via telephone).

In their principal briefs, filed before our Supreme Court issued its decisions in *In re Annessa J.*, *In re Vada V.* and *In re Aisjaha N.*, the respondents in the present appeals contended that the trial court violated their right to due process by failing to hold a compelling needs hearing pursuant to *State* v. *Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988), before allowing the petitioner's witnesses to testify remotely. In *State* v. *Jarzbek*, supra, 707, our Supreme Court held "that, in criminal prosecutions involving the alleged sexual abuse of children of tender years, videotaping the testimony of a minor victim outside the physical presence of the defendant is a constitutionally permissible practice if, and only if, the state proves by clear and convincing evidence a compelling need to exclude the defendant from the witness room during the victim's testimony."

In their supplemental memoranda of law, the respondents contend that their unpreserved constitutional claim is distinct from the one recently addressed by our Supreme Court because, "[u]nlike in *In re Annessa J.* and *In re Vada V.*, the issue to be resolved in [these] appeal[s] is whether the rule in [*Jarzbek*]—requiring the state to establish a compelling governmental need by clear and convincing evidence at a hearing before the trial court may dispense with the right of physical confrontation—applies with equal force in parental rights termination trials . . . ." They argue that "[t]he distinction is significant because the only factual predicate required to resolve the constitutional issue . . . is the lack of a compelling needs hearing in the trial court, which factual predicate is supported by the record." The petitioner responds that the respondents' claim is another way of stating that the lack of evidence in the record as to a compelling governmental interest is not the respondents' burden to overcome, an argument our Supreme Court rejected in *In re Annessa J.* We agree with the petitioner.

In her brief to the Supreme Court in *In re Annessa J.*, the respondent mother cited *Jarzbek* in support of her due process claim and argued "that the right of physical confrontation under the due process clause is not limited to criminal cases but extends to civil matters, including parental rights termination cases, where state action threatens fundamental liberty interests. . . . Although the trial court referenced the COVID-19 public emergency as the reason for conducting the trial virtually, there was no actual evidence before the court that the COVID-19 virus threatened the health or safety of any of the persons involved in [the trial]. . . . [T]his lacuna in the record with respect to whether there was a compelling reason to curtail her right of physical confrontation was not [the respondent's] burden to overcome under the first prong of . . . *Golding*. Under

Golding, it was sufficient for the respondent to show that she was denied the ability to confront physically the witnesses against her at the virtual trial, with the burden falling on the state to demonstrate that the record disclosed facts sufficient to justify an abridgment of the right." (Citation omitted.) *In re Annessa J.*, Conn. Supreme Court Briefs & Appendices, Third Term, 2021–2022, Appellant's Brief pp. 22–24.

In rejecting the claim that the lack of evidence in the record "was not her burden to overcome," our Supreme Court expressly held that the respondent mother's claim must be analyzed pursuant to the three part *Mathews* test. *In re Annessa J.*, supra, 343 Conn. 661. Because that test is fact intensive, the court held that her claim failed in the absence of an evidentiary record regarding the *Mathews* factors and that she indeed had the burden to ensure an adequate evidentiary record for review of her claim. In particular, the court explained: "During the trial, the petitioner and the trial court were never put on notice that Valerie objected to the virtual nature of the termination of parental rights trial on the basis that it violated her right to confront the petitioner's witnesses. . . . Because the trial court was not alerted to this right to confrontation issue, it did not have occasion to make findings of fact regarding the threat posed by the COVID-19 pandemic and whether that threat was sufficiently compelling to curtail any constitutional right to in person confrontation. In such circumstances, the [petitioner] bears no responsibility for the evidentiary lacunae, and, therefore, it would be manifestly unfair to the [petitioner] for [the reviewing] court to reach the merits of the [respondent's] claim upon a mere assumption that [the factual predicate to her claim has been met]. . . .

"Not only would such an assumption be improper, but, because, under the test in *Golding*, [the reviewing court] must determine whether the [appellant] can pre-

vail on his [or her] claim, a remand to the trial court would be inappropriate. The first prong of *Golding* was designed to avoid remands for the purpose of supplementing the record. . . . The parties agree that there is an inadequate basis in the record for the trial court to determine whether the government's interests warrant conducting a virtual trial. Thus, in order to make the requisite findings, the trial court, on remand, would have to open the evidence. In cases of unpreserved constitutional claims, this court consistently has refused to order a new trial when it would be necessary to elicit additional evidence to determine whether the constitutional violation exists. . . . Therefore, we agree with the Appellate Court that the record is inadequate for review of this claim." (Citations omitted; internal quotation marks omitted.) *In re Annessa J.*, supra, 343 Conn. 662–64.

In the present cases, just as in *In re Annessa J.*, 343 Conn. 661, the respondents acknowledge that their right to confrontation is not unqualified and agree that their due process claims must be analyzed pursuant to the three part test in *Mathews*. Furthermore, there is no dispute that they failed to object to the virtual format of the trial on the ground that it violated their right to confront the petitioner's witnesses.[5] Nevertheless, the

[5] We note that, in AC 45183, the respondent father filed an "objection to virtual termination of parental rights trial," claiming that conducting the trial virtually would deprive him of his due process rights in myriad ways, including by denying him the right to confront in person the witnesses against him. At a hearing on October 29, 2020, however, his counsel did not advance that claim in support of the objection. Instead, counsel argued that the respondent required a Spanish interpreter but that there was no procedure for providing simultaneous, as opposed to consecutive, interpretation over the Microsoft Teams platform. At the hearing, the following colloquy occurred between the court and the respondent's counsel:

"The Court: . . . [W]hat's your position if you and your client were put in a [courtroom] and were able to access an interpreter for simultaneous interpretation, not consecutive?

"[The Respondent's Counsel]: Would the interpreter be assisting my client in [the] courtroom . . . also?

"The Court: There—this is hypothetically; yes.

respondents attempt to avoid the consequences of the inadequacy of the records by claiming that they have

"[The Respondent's Counsel]: I'm trying to think to make sure the—so, [he] would be getting an interpreter interpreting what's going on with the trial; is that correct?

"The Court: So, theoretically, all right, your client would have headphones on . . .

"[The Respondent's Counsel]: Let me. I'm trying to see what—if there's issues with that.

"The Court: All right. So, this is all hypothetical. So, I agree that this concurrent or nonconsecutive interpretation is not feasible in a trial of this complexity. I am hoping that in the next months, because we are scheduling out now until next year, that we have innovation in our technology that will permit simultaneous interpretation by an interpreter. If we get that type of technology, what I need to have answered, [counsel], is, will that obviate your concerns and objections?

"[The Respondent's Counsel]: I think the—I think the uniformity of the procedure, the input of the Limited English Proficiency Committee, just—and I think that it would be vetted so that it's a uniform process . . . that's just the concern I have, is, you know, I'd like to see what the procedures is of, you know, what it looks like."

After hearing from all the parties involved, the court ruled as follows: "I think the bigger issue that we have to resolve is the simultaneous interpretation. And so at this point, having heard from the parties, the court makes a finding that, based on the complexity of this trial, meaning the number of days of the trial that are left to be had, the number of witnesses that are left to testify, the additional documentary evidence that may be forthcoming, and the fact that this is a termination trial, and up to it not being a case that is not conducive to being tried virtually unless and until we have the ability to have the interpreter interpret simultaneously. So, I am—to the extent [the] objection relates to the [consecutive] interpretation during the [termination] trial, the court agrees, but the court also will pursue a virtual trial with accommodations, use of the courtroom here, use of one or more interpreters, assuming we can get the interpretation to occur simultaneous with the testimony."

After scheduling tentative dates for the virtual trial, the court stated: "All right. And . . . just so everyone's clear on the court's order, assuming we have the ability and the technology in February and March of 2021, this trial will be conducted virtually if simultaneous interpretation to accommodate [the respondent] father's needs can be effectuated. Anything else today?"

The respondent's counsel, along with counsel for all parties involved, responded in the negative, and the court adjourned. Thus, although the respondent's counsel raised the right to confrontation in his written objection, he failed to advance that claim at the hearing on his objection and, instead, seemed to accept the court's solution of in-court concurrent interpretation. On appeal, the respondent father concedes that his due process claim based on his right of confrontation was not preserved.

an unqualified right to a hearing at which the burden would be on the petitioner to demonstrate a compelling governmental interest pursuant to *State* v. *Jarzbek*, supra, 204 Conn. 707. According to the respondents, because the record establishes that no such hearing was held, this court may "review whether [they were] denied the due process of law when the trial court dispensed with [their] right of physical confrontation at the parental rights termination trial[s] without first determining by clear and convincing evidence at a special hearing that there was a compelling state interest that justified curtailment of the right."

The respondents, presuming that the rule in *Jarzbek* applies, then argue that the three part *Mathews* due process balancing test weighs in their favor because "[t]he state's interest in limiting [their] right of physical confrontation . . . was never established in the record. The trial court never made a finding by clear and convincing evidence at a compelling needs hearing that there was an overriding state interest that justified abridging [their] right to confront physically the witnesses against them."

We see no meaningful distinction between the claim presented in the present appeals and the one rejected by our Supreme Court in *In re Annessa J.*, supra, 343 Conn. 662. In the same way that the respondent mother in *In re Annessa J.* invoked *Jarzbek* to claim that the inadequacy of the record was not her burden to overcome, the respondents here rely on *Jarzbek* to disclaim their burden under the first prong of *Golding* by claiming that the constitutional error was the trial court's failure to make a finding, sua sponte, as to an issue the respondents failed to raise. As our Supreme Court explained, however, "[*b*]*ecause the trial court was not alerted to this right to confrontation issue*, it did not have occasion to make findings of fact regarding the threat posed by the COVID-19 pandemic and whether

that threat was sufficiently compelling to curtail any constitutional right to in person confrontation." (Emphasis added.) Id., 663. In other words, the trial court had no duty to make findings of fact relevant to the right of confrontation issue when that issue never was raised before the court. Thus, our Supreme Court necessarily rejected the present claim, which seeks to impose such a duty. Merely recasting the claim as involving an unqualified right to a *Jarzbek* hearing instead of relying on *Jarzbek* to argue that they had no burden to overcome the lack of evidence in the record does not alter our analysis. Consequently, for the same reason that the respondent mother's claim in *In re Annessa J.* failed under *Golding*'s first prong, so, too, does the respondents' claim in the present cases.

Furthermore, even if we were to treat the respondents' claim as somehow different from that asserted in *In re Annessa J.*, the result would be the same. By rejecting the respondent mother's argument in *In re Annessa J.* that, pursuant to *Jarzbek*, the burden was on the petitioner "to demonstrate that the record disclosed facts sufficient to justify an abridgment of the right [of physical confrontation]," the court necessarily determined that there was no constitutional right to a sua sponte *Jarzbek*-type hearing. Consequently, insofar as the respondents' claim is distinct from the respondent mother's claim in *In re Annessa J.*, it fails under the third prong of *Golding* because they have failed to establish that the alleged constitutional violation exists. See *In re Tayler F.*, 296 Conn. 524, 554, 995 A.2d 611 (2010) ("[a] due process violation exists only when a claimant is able to establish that he or she was denied a specific procedural protection to which he or she was entitled" (internal quotation marks omitted)).

The judgments are affirmed.

CITY OF WATERBURY *v.* ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT ET AL.
(AC 44635)

Cradle, Suarez and Harper, Js.

Syllabus

The plaintiff employer, the city of Waterbury, appealed to this court from the judgment of the trial court dismissing its appeal from the decision of the Board of Review of the Employment Security Appeals Division (board), which affirmed the determination by an appeals referee that the defendant claimant was entitled to certain unemployment compensation benefits. The claimant, who had been a firefighter for the plaintiff, was discharged from his employment after testing positive for marijuana in a random drug test. The plaintiff alleged that the positive drug test was in violation of a "last chance agreement" that the claimant had previously made with the plaintiff and the claimant's union and other employer policies. The plaintiff contested the claimant's claim for unemployment benefits, asserting that the claimant had been discharged for wilful misconduct under the applicable statute (§ 31-236 (a) (2) (B)). The appeals referee determined that the claimant was a qualifying patient and had been using palliative marijuana prescribed by a physician for post-traumatic stress disorder in accordance with a provision (§ 21a-408p) of the Palliative Use of Marijuana Act (§ 21a-408 et seq.), and that the plaintiff had failed to allege that the claimant was discharged because he was impaired on the job, in possession of marijuana at work, or selling or trading drugs. The referee further determined that the claimant was not discharged for wilful misconduct because the plaintiff did not demonstrate that the claimant was discharged because he had been disqualified under state or federal law from performing the work for which he was hired as a result of a drug or alcohol testing program mandated by and conducted in accordance with such law. The board affirmed the appeals referee's findings, reasoning that, to the extent the last chance agreement contained a blanket prohibition against the use of palliative marijuana, without specific consideration of the claimant's fitness for duty, the agreement was unreasonable as of the date of the claimant's discharge based on the protections of § 21a-408p (b) (3), which provides that an employer cannot discharge a person solely on the basis of his status as a qualifying patient under the act. The board further concluded that the physician's prescribing palliative marijuana for the claimant's medical condition constituted good cause or a mitigating circumstance for the claimant's violation of the last chance agreement, which prevented the board from finding that he committed wilful misconduct. The plaintiff appealed the board's decision to the trial court,

which, having found that the claimant fell under the protections of § 21a-408p (b) (3), granted the motion for judgment of dismissal filed by the named defendant, the Administrator of the Unemployment Compensation Act. *Held* that contrary to the plaintiff's claim, because the legality of the claimant's discharge was not at issue and the issue before the board was whether the claimant's violation of the last chance agreement constituted wilful misconduct that disqualified him from receiving unemployment benefits, § 21a-408p (b) (3) was relevant to the reasonableness of the last chance agreement, on which the plaintiff based its claim that the claimant was discharged for wilful misconduct, and, therefore, the board properly considered it in the resolution of this case; moreover, because it was undisputed that the claimant was a qualifying patient entitled to protection under § 21a-408p (b) (3), the claimant was likewise entitled to protection against employment penalties resulting from his legal, off-duty use of medical marijuana; furthermore, the board reasonably concluded that, insofar as the last chance agreement operated to allow the plaintiff to terminate the claimant's employment for his palliative use of marijuana, it was unreasonable, and the unreasonable application of the last chance agreement to the claimant's palliative marijuana use foreclosed the possibility that the claimant's employment was terminated for wilful misconduct.

Argued September 7—officially released November 29, 2022

Procedural History

Appeal from the decision of the Board of Review of the Employment Security Appeals Division affirming the decision of the appeals referee that the claimant was entitled to unemployment compensation benefits, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of Waterbury, where the court, *Hon. Joseph H. Pellegrino*, judge trial referee, granted the named defendant's motion for judgment and rendered judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Daniel J. Foster, corporation counsel, for the appellant (plaintiff).

Richard T. Sponzo, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare Kindall*, solicitor general, and *Matthew LaRock*,

deputy associate attorney general, for the appellee (named defendant).

Opinion

CRADLE, J. The plaintiff, the city of Waterbury, appeals from the judgment of the trial court, rendered in favor of the named defendant, the Administrator of the Unemployment Compensation Act (defendant), dismissing the plaintiff's appeal from the decision of the defendant Board of Review of the Employment Security Appeals Division (board). The board held that the defendant Thomas F. Eccleston II (claimant) was eligible for unemployment benefits because he was not discharged for wilful misconduct, even though he tested positive for marijuana use. On appeal, the plaintiff claims that the board (1) erred in finding the Palliative Use of Marijuana Act (PUMA); see General Statutes § 21a-408 et seq.;[1] and specifically General Statutes § 21a-408p,[2] applicable to the present case, and (2) erroneously concluded that the claimant was not discharged for wilful misconduct. We disagree and, therefore, affirm the judgment of the court.

The following undisputed facts and procedural history are relevant to our resolution of the plaintiff's appeal. The claimant was employed by the plaintiff as a firefighter beginning in 1995. On November 23, 2015, in light of his issues with alcohol abuse and domestic

[1] Although the act has been amended by the legislature since the events underlying this appeal; see, e.g., Public Acts, Spec. Sess., June, No. 21-1, § 77; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the act.

[2] General Statutes § 21a-408p provides in relevant part: "(3) No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver under sections 21a-408 to 21a-408n, inclusive. Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours."

violence, the claimant entered into a last chance agreement with the plaintiff and his union. The last chance agreement contained several stipulations regarding the claimant's employment, including one that stated the claimant "may be subject to immediate termination . . . [i]f [the claimant] tests positive for alcohol (at the level of 0.04 or above) or a controlled substance." Subsequently, the claimant was prescribed and began lawfully using medical marijuana in compliance with the terms of PUMA. Following a random drug test administered on March 20, 2018, the claimant's employment was terminated for testing positive for marijuana, a controlled substance, in violation of the last chance agreement and other employer policies.

On April 28, 2018, the claimant submitted a claim for unemployment benefits to the defendant. The plaintiff contested the claim for benefits, asserting that the claimant had been discharged for wilful misconduct under General Statutes § 31-236 (a) (2) (B)[3] for violating the last chance agreement by testing positive for a controlled substance. On June 19, 2018, the defendant concluded that the claimant was discharged for wilful misconduct and denied his claim for benefits. The claimant appealed the defendant's decision to the Employment Security Appeals Division (appeals division) in June, 2018, arguing that he was not discharged for wilful misconduct.

Following a hearing before the appeals division on August 6, 2018, an appeals referee for the appeals division reversed the defendant's decision. In an August

[3] General Statutes § 31-236 provides in relevant part: "(a) An individual shall be ineligible for benefits . . . (2) (B) [i]f, in the opinion of the administrator, the individual has been discharged or suspended for . . . wilful misconduct in the course of the individual's employment . . . ."

Although § 31-236 has been amended since the events underlying this appeal; see, e.g., Public Acts 2021, No. 21-200, § 3; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

29, 2018 memorandum of decision, the appeals referee set forth the following findings of fact: "The claimant was employed by [the plaintiff] since 1995, most recently as Fire Lieutenant. On April 23, 2018, the [plaintiff] terminated the claimant after he exercised a leave of absence from March 28, 2018, until this formal separation. . . . On March 20, 2018, the [plaintiff] randomly tested the claimant for drugs. The claimant tested positive for marijuana, triggering a leave of absence and eventual termination. . . . The [plaintiff] terminated the claimant citing violation of the last chance agreement dated November 19, 2015; the Substance Abuse Testing Policy (Collective Bargaining Agreement); the Agreement between the city of Waterbury and the Local 1339, IAFF, AFL-CIO, and the [plaintiff's] Random Drug Testing Policy. . . . During February, 2018, the claimant obtained a prescription for medical marijuana in connection with [post-traumatic stress disorder]. As confirmed by the Connecticut Department of Consumer Protection, letter dated March 6, 2018, the claimant holds [a] medical marijuana Registration Card, valid January 31, 2018, through January 31, 2019. The claimant never used prescription marijuana within [twenty-four] hours of reporting for duty. . . . The claimant only used prescribed marijuana outside of work. . . . The [plaintiff] never charged the claimant with being or appearing intoxicated while on duty. . . . The claimant entered [into] a last chance agreement on November 19, 2015, whereby any positive test for alcohol or a controlled substance will trigger immediate termination. . . . An underlying policy of the rule is that THC levels may not be accurately detected at any given time and that the danger posed by the position requires clear thinking at all times."

In its conclusions of law, the appeals referee noted that "[i]t is undisputed that the claimant in the case before us has been designated by his physician as a

qualifying patient suffering from a medical condition and that he was prescribed medical marijuana in accordance with [§] 21a-408p."[4] The appeals referee determined that the plaintiff had "failed to allege . . . that the claimant was discharged because he was impaired on the job" or that "the claimant was in possession of marijuana while at work, or that he was selling or trading drugs." (Emphasis omitted.) Finally, the appeals referee concluded: "Because the [plaintiff] did not demonstrate that the claimant in this case was impaired at work or discharged because he has been disqualified under state or federal law from performing the work for which he was hired as a result of a drug or alcohol testing program mandated by and conducted in accordance with such law,[5] it has not established that the

[4] Although not cited in the appeals referee's decision, the term "qualifying patient" is defined by General Statutes § 21a-408 (16), which provides in relevant part: "Qualifying patient means a person who: (A) Is a resident of Connecticut, (B) has been diagnosed by a physician or an advanced practice registered nurse as having a debilitating medical condition, and (C) (i) is eighteen years of age or older . . . ." (Internal quotation marks omitted.)

[5] Section 21a-408p proscribes the termination of a qualifying patient on the basis of the patient's status as such with limited exceptions. One exception provides that termination on the basis of one's status as a qualifying patient is permissible where "required by federal law or required to obtain federal funding . . . ." General Statutes § 21a-408p (b) (3).

The appeals referee, citing board precedent, differentiated firefighters from public trust employees, for whom drug testing is mandated, by stating that "[a] firefighter is hired for his skill and knowledge in fighting fires but is not charged with protecting the public while off duty (such as public trust employees including police officers) and his off-duty conduct does not relate to his job duties or to a legitimate employer interest any more than does the off-duty conduct of other municipal [employees]." The appeals referee thus distinguished the present case, in which "the test taken by the claimant was not part of a drug or alcohol testing program mandated by and conducted in accordance with state or federal law," from cases in which employees were discharged for positive drug tests that were mandated by law. Moreover, the appeals referee concluded that no other state or federal law required termination of the claimant's employment.

Another exception to § 21a-408p exists where qualifying patients are intoxicated during work hours. See General Statutes § 21a-408p (b) (3). However, as we explain subsequently in this opinion, that exception similarly does not apply in the present case.

claimant was discharged for wilful misconduct in the course of the employment." (Footnote added.)

On September 19, 2018, the plaintiff appealed the decision of the appeals referee to the board. The board adopted the appeals referee's findings of fact and added the following relevant amendments: "We add the following sentence to the referee's finding of [fact]: The claimant was dependent on alcohol at the time that he entered into the last chance agreement. We modify the referee's [last] finding of fact . . . as follows . . . . On March 30, 2018, the claimant's physician performed a fitness for duty test and found that the claimant was fit to perform his job as a firefighter without restrictions." (Internal quotation marks omitted.)

The board affirmed the decision of the appeals referee and, in doing so, reasoned: "[T]here is no evidence in the record, or claim by the [plaintiff] that it was mandated to conduct random drug tests on its firefighters by either state or federal law, and therefore the claimant is not disqualified from receiving benefits pursuant to [§] 31-236 (a) (14).[6] . . . The board has previously ruled that a claimant's violation of an employment agreement to participate in a drug treatment program as part of a return-to-work agreement without good cause or excuse may constitute wilful misconduct. . . . [PUMA] prevents an employer from discharging an individual solely on the basis of the employee's status as a qualifying medical marijuana patient. See General Statutes [§] 21a-408p (b) (3). Such act does not restrict an employer from prohibiting the use of intoxicating

[6] General Statutes § 31-236 provides in relevant part: "(a) An individual shall be ineligible for benefits . . . (14) [i]f the administrator finds that the individual has been discharged or suspended because the individual has been disqualified under state or federal law from performing the work for which such individual was hired as a result of a drug or alcohol testing program mandated by and conducted in accordance with such law, until such individual has earned at least ten times such individual's benefit rate . . . ."

substances during work hours, or being under the influence of intoxicating substances during work hours. [See General Statutes § 21a-408p (b) (3).] In response to the board's request for written argument, the [defendant] maintains that an employee's status as a safety-sensitive employee does not, in and of itself, cause such employee to fall outside the protections of § 21a-408p (b) (3). However, the [defendant] notes that a medical review officer (MRO) is required to report a positive test for marijuana to a third party, such as the employer, if the employee's continued performance of his or her safety-sensitive function is likely to pose a significant safety risk, see 49 C.F.R. § 40.327, at which time the employer may require a fitness-for-duty test.

"In the instant case, the [last chance] agreement was signed prior to the legislature's approval of medical or palliative marijuana, and was reasonable at the time based on the claimant's alcohol dependency. However, to the extent that the last chance agreement contained a blanket prohibition against the use of palliative marijuana, without specific consideration of the employee's fitness for duty, such agreement would be unreasonable as of the date of the claimant's discharge on April 23, 2018, based on the protections of [§] 21a-408p (b) (3). Moreover, the claimant's physician's prescribing palliative marijuana for the claimant's medical condition constituted good cause or a mitigating circumstance for the claimant's violation of the last chance agreement, which prevents us from finding that he committed wilful misconduct.

"To the extent that the [plaintiff] maintains that it did not discharge the claimant solely for his status as a qualifying patient, we do not need to determine whether the [plaintiff] violated § 21a-408p (b) (3). Rather, we only need to determine whether the claimant's violating the last chance agreement constituted wilful misconduct such that he is disqualified from

receiving unemployment benefits. While the [plaintiff] argues that the claimant failed to disclose his medical condition or his prescription until the [plaintiff] received the positive drug test, it cites no specific provision requiring such disclosure in the last chance agreement." (Citations omitted; emphasis omitted; footnote added.)

Thereafter, on March 18, 2019, the plaintiff appealed from the decision of the board to the trial court in accordance with General Statutes § 31-249b[7] and Practice Book § 22-1 et seq. On appeal to the trial court, the plaintiff argued that the board erred when it transformed the issue of whether the claimant breached the last chance agreement into one of determining "whether a finding of a breach was foreclosed by the protections of [PUMA]." On January 14, 2021, the defendant filed a motion for judgment seeking dismissal of the plaintiff's appeal. After hearing arguments on the defendant's motion, the court rendered judgment in favor of the defendant and dismissed the appeal on March 29, 2021. In its memorandum of decision, the court concluded that it could not ignore "the language of § 21a-408p (b) (3), which very clearly states that an employer cannot discharge a person solely on the basis of his status as a qualifying patient under [PUMA]" and, further, that the claimant fell under those protections. This appeal followed.

On appeal, the plaintiff claims that the trial court (1) erred in adopting the board's finding that § 21a-408p

[7] General Statutes § 31-249b provides in relevant part: "At any time before the board's decision has become final, any party, including the administrator, may appeal such decision, including any claim that the decision violates statutory or constitutional provisions, to the superior court for the judicial district of Hartford or for the judicial district wherein the appellant resides. Any or all parties similarly situated may join in one appeal. . . . An appeal may be taken from the decision of the Superior Court to the Appellate Court in the same manner as is provided in section 51-197b."

was applicable to the present case and (2) erroneously affirmed the board's decision, which concluded that the claimant was not discharged for wilful misconduct.

We begin by setting forth the relevant legal principles and applicable standard of review. "In the processing of unemployment compensation claims . . . the administrator, the referee and the [board] decide the facts and then apply the appropriate law. . . . [The administrator] is charged with the initial responsibility of determining whether claimants are entitled to unemployment benefits. . . . Appeals are taken to the employment security appeals division which consists of a referee section and the board of review. . . . The first stage of claims review lies with a referee who hears the claim de novo. The referee's function in conducting this hearing is to make inquiry in such manner, through oral testimony or written and printed records, as is best calculated to ascertain the substantial rights of the parties and carry out justly the provisions . . . of the law. . . . This decision is appealable to the board . . . . Such appeals are heard on the record of the hearing before the referee although the board may take additional evidence or testimony if justice so requires. . . . Any party, including the administrator, may thereafter continue the appellate process by appealing to the Superior Court and, ultimately, to [the Appellate and Supreme Courts]. . . .

"The standard of review for judicial review of this type of case is well established. In appeals under . . . § 31-249b, the Superior Court does not retry the facts or hear evidence but rather sits as an appellate court to review only the record certified and filed by the board of review. . . . The court is bound by the findings of subordinate facts and reasonable factual conclusions made by the appeals referee where, as here, the board . . . adopted the findings and affirmed the decision of the referee. . . . Judicial review of the conclusions of

law reached administratively is also limited. The court's ultimate duty is only to decide whether, in light of the evidence, the board . . . has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Nonetheless, issues of law afford a reviewing court a broader standard of review when compared to a challenge to the factual findings of the referee." (Internal quotation marks omitted.) *Mendes* v. *Administrator, Unemployment Compensation Act*, 199 Conn. App. 25, 29–30, 235 A.3d 665 (2020).

Section 21a-408p (b) (3) provides in relevant part that "[n]o employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver under [§§] 21a-408 to 21a-408n, inclusive. Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours."

The plaintiff first claims that the board erroneously concluded that § 21a-408p (b) (3) was applicable in this case even though neither the board, nor the appeals referee, made a finding of fact concerning the reason for the plaintiff's discharge of the claimant. Specifically, the plaintiff argues that "this provision would be applicable only if the [plaintiff] discharged the claimant solely on the basis of his status as a qualifying patient under PUMA."[8] The plaintiff's argument is misplaced

[8] The plaintiff also argues that, insofar as the trial court "made its own finding as to the [plaintiff's] reason or reasons for discharging the claimant," it did so improperly and "could not properly have made any such finding" relying solely on the findings of fact from the appeals referee and the board. See General Statutes § 31-249b (requiring court to rely solely on findings of fact made by appeals referee and amended by board on appeals from administrative unemployment benefits decisions). After our review of the board's decision, we conclude that the court did not depart from the findings of fact made by the appeals referee and the board.

because it would only be necessary to determine whether an adverse employment action was made "solely on the basis of such person's or employee's status as a qualifying patient" if the question at issue concerned the legality of the claimant's *discharge*. General Statutes § 21a-408p (b) (3). Here, the legality of the discharge was not at issue. As the board aptly stated, the issue before it was "whether the claimant's violating the last chance agreement constituted wilful misconduct such that he is disqualified from receiving unemployment benefits." Because § 21a-408p (b) (3) is relevant to the reasonableness of the last chance agreement, on which the plaintiff bases its claim that the claimant's employment was terminated for wilful misconduct, the board properly considered it in the resolution of this case.

The foregoing conclusion leads us to the plaintiff's next claim on appeal, that the board erroneously concluded that the claimant was not discharged for wilful misconduct. "Whether the circumstances of an employee's termination constitute wilful misconduct on the employee's part is a mixed question of law and fact." (Internal quotation marks omitted.) *Tosado* v. *Administrator, Unemployment Compensation Act*, 130 Conn. App. 266, 276, 22 A.3d 675 (2011).

Under § 31-236 (a) (2) (B), an individual is ineligible for unemployment benefits if their discharge resulted from "wilful misconduct in the course of the individual's employment . . . ." The statutory definition of "wilful misconduct" includes a "knowing violation of a reasonable and uniformly enforced rule or policy of the employer, when reasonably applied, provided such violation is not a result of the employee's incompetence . . . ." General Statutes § 31-236 (a) (16). Furthermore, "[t]o establish that an individual was discharged or suspended for wilful misconduct under this definition, pursuant to § 31-236-26b of the Regulations of Connecticut

State Agencies," the agency must find that "the rule or policy [is] reasonably applied in that (1) . . . the adverse personnel action taken by the employer is appropriate in light of the violation of the rule or policy and the employer's lawful business interest . . . and (2) . . . there were no compelling circumstances which would have prevented the individual from adhering to the rule or policy." (Internal quotation marks omitted.) *Seward* v. *Administrator, Unemployment Compensation Act*, 191 Conn. App. 578, 581 n.3, 215 A.3d 202 (2019); see also Regs., Conn. State Agencies § 31-236-26b (d).

The plaintiff argues that "[t]here can be no serious question that [the last chance agreement] was reasonable, as the claimant was a firefighter who was admittedly alcohol dependent. . . . The board erred, however, by concluding that the claimant's subsequent status as a qualifying patient under PUMA rendered the last chance agreement unreasonable insofar as it applied to the claimant's marijuana use." The plaintiff asserts that, even though, under PUMA, the claimant's use of marijuana was not a violation of state law, that "does not change the fact that [the claimant] breached a last chance agreement, nor does it render that agreement unreasonable. A contrary argument—that a voluntary last chance agreement may only forbid criminal conduct—would be untenable." We disagree.

The legality of the claimant's conduct and the reasonableness of the last chance agreement are distinguishable legal issues with separate considerations. An agreement between an employer and an employee can reasonably prohibit certain, otherwise legal behaviors, but it cannot reasonably do so in a way that runs contrary to state law. See Regs., Conn. State Agencies § 31-236-26b (d) ("[t]o find that a rule or policy of an employer was reasonably applied, the Administrator must find . . . that the adverse personnel action taken

by the employer is appropriate in light of the violation of the rule or policy and the employer's lawful business interest"); see also id., § 31-236-26b (b) ("the Administrator must find that the rule or policy furthers the employer's *lawful* business interest" (emphasis added)). Highlighting the unreasonable *application* of the last chance agreement under the circumstances of this case, the board concluded that the last chance agreement became unreasonable "as of the date of the claimant's discharge." It is undisputed that the claimant is a qualifying patient entitled to protections under PUMA, which likewise entails protection against employment penalties resulting from the claimant's legal, off-duty use of medical marijuana.[9] General Statutes § 21a-408p (b) (3); see also General Statutes § 21a-408a (a) ("[a] qualifying patient who has a valid registration certificate from the Department of Consumer Protection . . . and complies with the requirements of [PUMA] . . . shall not be subject to arrest or prosecution, penalized in any manner, including, but not limited to, being subject to any civil penalty, or denied any right or privilege, including, but not limited to, being subject to any disciplinary action by a professional licensing board, for the palliative *use* of marijuana" (emphasis added)). Consequently, the board reasonably concluded that, insofar as the last chance agreement

[9] Although there are exceptions to the anti-employment discrimination provisions of PUMA; see General Statutes § 21a-408p (b) (3) ("[n]othing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours"); General Statutes § 31-236 (a) (14) ("[a]n individual shall be ineligible for benefits . . . [i]f the administrator finds that the individual has been discharged or suspended because the individual has been disqualified under state or federal law from performing the work for which such individual was hired as a result of a drug or alcohol testing program mandated by and conducted in accordance with such law, until such individual has earned at least ten times such individual's benefit rate"); the board concluded that these exceptions do not apply in the present case, and the plaintiff has not challenged that conclusion on appeal.

operated to allow the plaintiff to terminate the claimant's employment for his palliative use of marijuana, it was unreasonable. See Regs., Conn. State Agencies § 31-236-26b (d). Further, the unreasonable application of the last chance agreement to the claimant's palliative marijuana use forecloses the possibility that the claimant's employment was terminated for wilful misconduct. See General Statutes § 31-236 (a) (16).[10]

Therefore, the decision of the board was not unreasonable, arbitrary, illegal, or an abuse of discretion, and the court was correct in so holding.

The judgment is affirmed.

In this opinion the other judges concurred.

L. L. *v.* M. B.*
(AC 45141)

Alvord, Seeley and Sheldon, Js.

Syllabus

The plaintiff appealed from the judgment of the trial court dismissing her application filed pursuant to statute (§ 46b-15) on behalf of her minor

[10] The plaintiff also argues that the board erroneously found that there was good cause or mitigating circumstances for the claimant's violation of the last chance agreement. However, because the unreasonable application of the last chance agreement precludes the denial of benefits on the basis of a violation thereof, we need not decide whether the claimant's status as a qualifying patient under PUMA qualifies as mitigating circumstances in this case. See *Seward* v. *Administrator, Unemployment Compensation Act*, supra, 191 Conn. App. 581 n.3 (identifying both reasonable application of policy and absence of mitigating circumstances as required elements to establish that an individual was discharged or suspended for wilful misconduct); see also Regs., Conn. State Agencies § 31-236-26b (d).

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

daughter for a domestic violence restraining order against the defendant. At the time of the hearing on the application, the parties were seniors attending the same high school. Evidence submitted at the hearing showed that the parties last dated for a short period when they were sophomores, two years prior. In dismissing the plaintiff's application, the court found that the relationship between the parties did not meet the requirement for relief from abuse in accordance with § 46b-15 (a), which requires that the applicant be a family or household member as defined in the applicable statute (§ 46b-38a (2)). The court concluded that the relationship between the parties did satisfy the requirement of § 46b-38a (2) (F), namely, "persons in, or who have recently been in, a dating relationship." On the plaintiff's appeal to this court, *held*:

1. The defendant could not prevail on his claim that the plaintiff's appeal should have been dismissed as moot because practical relief could not be afforded to the plaintiff: this court concluded that, if it were to determine that the trial court improperly determined that the plaintiff did not satisfy the statutory requirement of being a family or household member, relief in the form of a new hearing would be available to the plaintiff, which was sufficient to demonstrate that a successful appeal would benefit her; moreover, the defendant's proposed grounds for a determination of mootness, that the parties would no longer be in the same school by the time the appeal was heard and that the events that led to the filing of the application would be so remote in time that there would be no continuing threat of present physical pain or injury, instead reflected arguments as to the merits of what would be decided at a potential new hearing, the outcome of which was undetermined.

2. The trial court did not abuse its discretion in concluding, based on the facts presented, that the plaintiff did not meet the definition of a family or household member as required for relief under § 46b-15, as the parties did not have a recent dating relationship: the court held a full evidentiary hearing on the application, during which both parties testified and had the opportunity to proffer evidence, the court found that the parties last had dated for a short period when the parties, now seniors, were sophomores, and that such dating had ceased almost two years prior to the filing of the application, and the plaintiff did not direct this court's attention to any factual findings of the trial court or any evidence in the record that would suggest that the court could not have reasonably concluded as it did based on the facts presented; moreover, the term "recently" as set forth in § 46b-38a (2) (F) was interpreted in conformity with commonly approved definitions of the term, and this court was satisfied that the plain meaning of the statute did not yield an unworkable or absurd result, such that the plaintiff's asserted considerations under the guise of absurd results were instead more appropriately considerations of broader public policy that typically follow a determination of textual ambiguity; furthermore, the trial court's determination that the

plaintiff's daughter did not fall within the definition of a family or household member did not implicate the subject matter jurisdiction of the court, and, accordingly, the court should have denied rather than dismissed the application.

Argued October 27—officially released November 29, 2022

Procedural History

Application for a domestic violence restraining order, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *McLaughlin*, *J.*, rendered judgment dismissing the application, from which the plaintiff appealed to this court. *Improper form of judgment*; *reversed*; *judgment directed*.

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

Philip Russell, with whom, on the brief, was *Catherine Keenan*, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiff, L. L., on behalf of her minor daughter, N. R.,[1] appeals from the judgment of the trial court dismissing her application for a domestic violence restraining order pursuant to General Statutes (Rev. to 2021) § 46b-15, as amended by Public Acts 2021, No. 21-78.[2] On appeal, the plaintiff claims that the trial court improperly dismissed her application on the basis that she was not eligible for relief because she did not fall within the definition of "[f]amily or household member" as set forth in General Statutes § 46b-38a (2).[3] We reject

[1] In the interest of simplicity, we refer to N. R. as the plaintiff in this opinion.

[2] All references herein to § 46b-15 are to the 2021 revision as amended.

[3] The plaintiff raises a second claim on appeal that the court applied incorrect legal standards when, after dismissing the plaintiff's application, the court additionally stated on the record that the credible evidence presented "did not give rise to granting a restraining order." Because we conclude that the court properly determined that the plaintiff was not eligible for relief, in that she did not fall within the definition of "[f]amily or household member" as set forth in § 46b-38a (2), we decline to address the plaintiff's second claim.

the plaintiff's claim that the court improperly determined that she did not fall within the definition of family or household member but conclude that the form of the judgment is improper and, therefore, remand this case with direction to deny the plaintiff's application.

The following facts and procedural background are relevant to the plaintiff's claim. On October 1, 2021, the plaintiff filed an application for relief from abuse pursuant to § 46b-15, seeking a restraining order against the defendant, M. B. On that same day, the court, *Kowalski*, *J.*, issued an ex parte restraining order against the defendant and scheduled a hearing for October 14, 2021. On October 14, the parties appeared before the court, *McLaughlin*, *J.*, and jointly requested that the matter be continued on the grounds that a motion to seal the courtroom had been filed and the parties were awaiting documents that had been subpoenaed. The court continued the matter until October 28, 2021, and ordered, without objection by the defendant's counsel, that the restraining order remain in place until that date.

The hearing on the restraining order application was held over two dates, October 28 and November 12, 2021. The court heard the testimony of the plaintiff and the defendant, who were seniors attending the same high school. The court also heard the testimony of Kristina Colmenares, the assistant principal of the high school; the plaintiff's mother; and a mutual friend of the parties, who was called by the defendant. The parties also entered exhibits into evidence.

At the conclusion of the hearing, the court stated in relevant part: "The court found this case very troubling, but I note that the question before me is a limited one, which is under [§] 46b-15 of our statutes, whether or not, as we sit here together [the plaintiff] has been subjected to a continuous threat of present physical pain or injury, stalking or a pattern of threatening from

[the defendant]. If [the defendant] satisfies the definition of family or household member. Family or household member, under our laws, the relevant part, is persons who have recently been in a dating relationship.

* * *

"Here, the evidence to the court establishes that, at best, these parties had a dating relationship in 2019, when they were sophomores. Prior to that point in time, was when they were in eighth grade.

"So, from the court and the evidence, the court finds that the parties do not satisfy the family or household member portion of the statute, which requires a recent dating relationship."

On November 15, 2021, the court issued a written order dismissing the plaintiff's application. The order stated: "Based on a preponderance of the credible evidence, the parties last dated for a short period in 2019. Thereafter, the parties interacted socially but were not dating. [Section] 46b-15 provides for the filing of an application for relief from abuse under specific circumstances. The statute, in relevant part, requires the parties to be in an existing dating relationship or to have recently been in a dating relationship. General Statutes § 46b-38a (2) (F). Here, the relationship between the parties does not satisfy the requirement for relief from abuse in accordance with . . . § 46b-15 (a) because it ended almost two years prior to the filing of the application for relief from abuse. As such, this matter is dismissed." This appeal followed.

Before addressing the merits of the plaintiff's appeal, we turn to the defendant's contention that the appeal should be dismissed as moot. First, he represents that "the events immediately preceding the plaintiff's filing of the application . . . occurred on a school bus and in school." Because the parties were seniors in high

school for the 2021-2022 academic year, he contends that, "[b]y the time this appeal is heard, the parties will no longer be in the same school and no practical relief will be available." Second, he argues that "by the time this appeal is heard, the events leading up to the filing of the application . . . will be remote in time and there is no evidence of a continuing threat of present physical pain or physical injury. Thus, [the] plaintiff cannot be said to have been subjected to a continuous threat of present physical pain or physical injury by the defendant, as required by § 46b-15 (a)." We disagree with the defendant.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . ." (Internal quotation marks omitted.) *Putman* v. *Kennedy*, 279 Conn. 162, 168, 900 A.2d 1256 (2006). "[A]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Citation omitted; internal quotation marks omitted.) *Wendy V.* v. *Santiago*, 319 Conn. 540, 544–45, 125 A.3d 983 (2015).

Applying this standard, we determine that the present appeal is not moot because practical relief can be afforded to the plaintiff. The question presented by the plaintiff's appeal is whether the court properly determined that she was not eligible to obtain a domestic violence restraining order because she did not fall within the definition of "[f]amily or household member" as set forth in § 46b-38a (2). Were this court to determine that the trial court improperly determined that

she did not satisfy that statutory requirement, relief in the form of a new hearing[4] would be available to the plaintiff. That potential relief is sufficient to demonstrate that a successful appeal would benefit the plaintiff. The defendant's two proposed grounds for a determination of mootness do not implicate mootness but instead reflect arguments as to the merits of what would be decided at the potential new hearing, the outcome of which is undetermined. Because this court could grant practical relief to the plaintiff, we conclude that her appeal is not moot.

Our conclusion that the present appeal is not moot is supported by our Supreme Court's decision in *Wendy V.* v. *Santiago*, supra, 319 Conn. 540. In that case, the plaintiff filed an ex parte restraining order application, and the court denied the application as well as the plaintiff's request for a full hearing on the application. Id., 542–43. The plaintiff appealed and requested as relief a hearing on her application. Id., 543. While her appeal was pending, the trial court held a hearing on her original application, and a second application she had filed, and then denied the applications. Id., 544. On appeal, our Supreme Court concluded that the fact that the trial court had held a hearing on the plaintiff's applications had rendered the plaintiff's appeals moot. Id.

Our Supreme Court then turned to the "capable of repetition, yet evading review" exception to the mootness doctrine. Id., 545. The first requirement to qualify under the exception is that "the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong

[4] The proper remedy, in the event this court were to agree with the plaintiff's claim on appeal, would be to remand the case for a new hearing on the plaintiff's application, not, as the plaintiff requests, a direction for the trial court to "render judgment for the plaintiff and reinstate the restraining order against the defendant which was originally entered on an ex parte basis."

likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded." (Internal quotation marks omitted.) Id. Our Supreme Court determined that the plaintiff's case failed to meet the first prong, explaining that "[t]he effect of the challenged action, namely, the denial of a hearing after an application under § 46b-15, is not, by its very nature, of limited duration. Rather, the effects of a denied hearing generally will persist indefinitely. Therefore, in cases in which a hearing is denied, the case would not become moot before appellate litigation that ensues can be concluded. Anomalously, this case became moot only because the trial court ultimately *did* provide the hearing that the plaintiff had requested." (Emphasis in original; footnote omitted.) Id., 546–47. In a footnote, the court rejected the plaintiff's contention that the effect of the denial of a hearing is of limited duration, explaining that, "[u]nlike the effect of an order granting a restraining order, however, which generally expires after one year, the effect of the denial of such an order continues indefinitely." Id., 547 n.7.

Although the relevant analysis in *Wendy V.* pertained to the "capable of repetition, yet evading review" exception, and the case uniquely involved the denial of a hearing, the discussion contained therein further supports our conclusion that the present appeal is not moot. Our Supreme Court recognized that in cases in which a hearing is denied, the case would not become moot before appellate litigation could be concluded and further recognized that the effect of the denial of an application is not of limited duration. Id. The guidance from *Wendy V.*, although pertaining to the denial of a hearing and not the denial of an application after a hearing, is instructive in our analysis with respect to mootness.

Having concluded that this appeal is not moot, we turn to the plaintiff's claim that the trial court improperly dismissed her application on the basis that she was not eligible for relief because she did not fall within the definition of "[f]amily or household member" as set forth in § 46b-38a (2). Specifically, she contends that she and the defendant are included within the category of "persons . . . who have recently been in, a dating relationship." General Statutes § 46b-38a (2) (F). The defendant responds, inter alia, that "[t]he trial court reasonably concluded, based on the facts presented, that the parties did not have a recent dating relationship." We agree with the defendant.

We first set forth our standard of review. "[T]he standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Our deferential standard of review, however, does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal. . . .

"To the extent that the defendant's claims raise issues of statutory interpretation, we note that [i]ssues of statutory construction raise questions of law, over which

we exercise plenary review. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . General Statutes § 1-2z directs this court to first consider the text of the statute and its relationship to other statutes to determine its meaning. If, after such consideration, the meaning is plain and unambiguous and does not yield absurd or unworkable results, we shall not consider extratextual evidence of the meaning of the statute. . . . Only if we determine that the statute is not plain and unambiguous or yields absurd or unworkable results may we consider extratextual evidence of its meaning such as the legislative history and circumstances surrounding its enactment . . . the legislative policy it was designed to implement . . . its relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . We presume that the legislature did not intend to enact meaningless provisions. . . . [S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . .

"Furthermore, [i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly. . . . If a statute or regulation does not sufficiently define a term, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Citations

omitted; footnote omitted; internal quotation marks omitted.) *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 111–13, 89 A.3d 896 (2014).

We begin our analysis with the language of § 46b-15 (a), which governs this case. It provides in relevant part: "Any family or household member, as defined in section 46b-38a, who is the victim of domestic violence, as defined in section 46b-1, by another family or household member may make an application to the Superior Court for relief under this section. . . ." General Statutes (Rev. to 2021) § 46b-15 (a), as amended by Public Acts 2021, No. 21-78, § 2. General Statutes (Rev. to 2021) § 46b-1 (b), as amended by Public Acts 2021, No. 21-78, § 1, defines "domestic violence" in relevant part as: "(1) A continuous threat of present physical pain or physical injury against a family or household member, as defined in section 46b-38a; (2) stalking, including, but not limited to, stalking as described in section 53a-181d, of such family or household member; (3) a pattern of threatening, including, but not limited to, a pattern of threatening as described in section 53a-62, of such family or household member or a third party that intimidates such family or household member; or (4) coercive control of such family or household member, which is a pattern of behavior that in purpose or effect unreasonably interferes with a person's free will and personal liberty. . . ."[5] Section 46b-38a (2) defines a "[f]amily

[5] " 'Coercive control' includes, but is not limited to, unreasonably engaging in any of the following:

"(A) Isolating the family or household member from friends, relatives or other sources of support;

"(B) Depriving the family or household member of basic necessities;

"(C) Controlling, regulating or monitoring the family or household member's movements, communications, daily behavior, finances, economic resources or access to services;

"(D) Compelling the family or household member by force, threat or intimidation, including, but not limited to, threats based on actual or suspected immigration status, to (i) engage in conduct from which such family or household member has a right to abstain, or (ii) abstain from conduct that such family or household member has a right to pursue;

or household member" to include, among other categories of persons, "persons in, or who have recently been in, a dating relationship."

Because the word "recently" is not defined in § 46b-38a (2), we begin by looking to the dictionary definition of the word "recently" in order to understand its ordinary meaning. See, e.g., *Seramonte Associates, LLC* v. *Hamden*, 345 Conn. 76, 84, 282 A.3d 1253 (2022); see also General Statutes § 1-1 (a) ("[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly").

We look to definitions contemporaneous with the statute's amendment in 1999, which added subsection (2) (F). See Public Acts 1999, No. 99-186. Dictionaries consistently have defined the relevant term from at least 1985 through 2014. "[R]ecently" is defined as "during a recent period of time," and "recent" is defined as "of or relating to a time not long past" and "having lately come into existence." Webster's Ninth New Collegiate Dictionary (1985) p. 982; see also Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 1038 (providing same definitions).[6] Ballentine's Law Dictionary concordantly defines "recently" as "[l]ately" and "recent" as "[n]ew or fairly new," "[c]haracterizing the period of time immediately preceding the present moment." Ballentine's Law Dictionary (3d Ed. 1969) p. 1065. We interpret the statute in conformity with these commonly

"(E) Committing or threatening to commit cruelty to animals that intimidates the family or household member; or

"(F) Forced sex acts, or threats of a sexual nature, including, but not limited to, threatened acts of sexual conduct, threats based on a person's sexuality or threats to release sexual images." General Statutes (Rev. to 2021) § 46b-1 (b), as amended by Public Acts 2021, No. 21-78, § 1.

[6] The plaintiff sets forth these same definitions in her appellate brief and does not propose any alternative definitions.

approved definitions, and we are satisfied that the plain meaning of the statute does not yield an unworkable or absurd result.[7] See *Princess Q. H.* v. *Robert H.*, supra, 150 Conn. App. 115.

In so construing the statute, we are mindful that the legislature added the limiting term "recently," expressly specifying that, in the context of former dating partners, the protections of § 46b-15 extend only to "persons . . . who have *recently* been in, a dating relationship." (Emphasis added.) General Statutes § 46b-38a (2) (F). Had the legislature intended to extend the reach of § 46b-15 to parties who had been in a dating relationship at any time, it would have used that broader language.[8] See *Perry* v. *Perry*, 312 Conn. 600, 624, 95 A.3d 500 (2014) (noting "well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so" (citation omitted; internal quotation marks omitted)).

In accordance with § 1-2z, we continue our analysis by looking to the relationship of the statute to other statutes. "There are a number of statutory provisions granting the court the authority to issue protective or restraining orders. See, e.g., General Statutes § 46b-15 (family violence restraining orders); General Statutes § 46b-16a (civil protection orders); General Statutes § 46b-38c (family violence protective orders); General

[7] The plaintiff argues that the term "recently" is ambiguous and, thus, this court should review the legislative history of the statute to ascertain its meaning. Because we conclude that the text of the statute is unambiguous, we do not consider the legislative history. See *Mandable* v. *Planning & Zoning Commission*, 173 Conn. App. 256, 263 n.8, 163 A.3d 69 (2017).

[8] In arguing that the term recently "extends to a period well in excess of two years," the plaintiff cites a decision of our Supreme Court in which the court described cases as having been "recently" decided. We disagree that the court's reference to cases as having been "recently" decided is persuasive evidence of the meaning of the word "recently" in the context of a dating relationship.

Statutes § 53a-40e (standing criminal protective orders);[9] General Statutes § 54-1k (criminal protective orders); General Statutes § 54-82q (temporary restraining order regarding witnesses); General Statutes § 54-82r (protective orders for witnesses). Each provision contains its own set of specific requirements and procedures." (Footnote added.) *S. A.* v. *D. G.*, 198 Conn. App. 170, 186, 232 A.3d 1110 (2020).

As the plaintiff recognizes in her brief, with respect to the categories of relationships set forth in § 46b-38a, only the former dating partner category contains a time limitation. The definition of "[f]amily or household member" includes "any of the following persons, regardless of the age of such person: (A) Spouses or former spouses; (B) parents or their children; (C) persons related by blood or marriage; (D) persons other than those persons described in subparagraph (C) of this subdivision presently residing together or who have resided together; (E) persons who have a child in common regardless of whether they are or have been married or have lived together at any time; and (F) persons in, or who have recently been in, a dating relationship." General Statutes § 46b-38a (2). We cannot ignore the legislature's addition of the limiting word "recently" in the context of persons who have been in a dating relationship, when the legislature did not include such a limitation on the remaining categories of relationships. See *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010) ("[b]ecause [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant" (internal quotation marks omitted)).

[9] Notably, § 53a-40e incorporates the same definition of family or household member as § 46b-15. Section 53a-40e authorizes the court to issue a standing criminal protective order following a defendant's conviction of certain crimes against a family or household member.

We next turn to a consideration of whether the court properly determined that the plaintiff did not fall within the definition of "[f]amily or household member" because the parties were not "persons . . . who have recently been in, a dating relationship." General Statutes § 46b-38a (2) (F). The plaintiff argues that "the connection between the parties as recent ex-boyfriend/girlfriend remains intact given the factual context and the ongoing actions of the defendant arising out of that relationship, not to mention their continuing proximity in the same high school. The underlying emotions which drive domestic violence remain in play unabated, with the parties still in the same high school and overlapping social circles." The plaintiff maintains that the COVID-19 pandemic "create[d] an artificial social buffer" during much of the intervening time, and states that the "resumption of in-school activity gave a renewed opportunity for the defendant to continue his pattern of inappropriate conduct which relates back to the dating relationship . . . ." The defendant contends that, "[w]hen looking at the issue of whether a dating relationship was 'recent' in this case, the trial court was well within [its] discretion to find that a dating relationship which occurred two years prior to the filing of the application was not 'recent.' "

Before making its determination, the court held a full evidentiary hearing on the application, during which both parties testified and had the opportunity to proffer evidence. Considering all of the evidence before it, the court found that the parties last had dated "for a short period in 2019" when the parties, now seniors, were sophomores, and that such dating had ceased almost "two years prior to the filing of the application . . . ." The plaintiff does not contest the trial court's findings, which are supported by the testimony of the plaintiff that the parties last had dated for "[a] month" in 2019, when the parties were sophomores in high school. In

conducting this fact sensitive inquiry, the court appropriately considered that the relationship, the duration of which the court described as "short," had ended almost two years prior to the filing of the application.[10] The plaintiff has not directed our attention to any factual findings of the court or any evidence in the record

[10] The plaintiff points to certain remarks that the trial court made while issuing evidentiary rulings during the hearing and argues that "[t]he record demonstrates that the trial court was conflating an improper imminence requirement with the time period for dating, so that by doing so it resulted in the trial judge [applying] too narrow and strict a consideration of what 'recently' meant in this context." The plaintiff refers to the following colloquy between the court, her counsel, Attorney Alexander Cuda, and the defendant's counsel, Attorney Philip Russell, which concerned an incident that occurred on the school bus in 2019, in support of her argument:

"[The Defendant's Counsel]: I'm going to object at this point, we're talking about an infraction that might [have] occurred in 2019 on a hearing involving imminent threat or stalking.

"The Court: So, Attorney Cuda.

"[The Plaintiff's Counsel]: Your Honor, this, this is not just involv[ing] imminent threat, and in fact, stalking has a very broad definition in terms of a pattern of incidents that can include, you know, going back years, including, you know, more recent incidents. In terms of issues of coercive control, you know, there is a very broad set of circumstances that the court can consider, indeed, and there is not, for either stalking or coercive control issues, the imminence requirement that Attorney Russell is trying to, to add to this.

"The Court: Well, under either scenario, there still needs to be a risk associated with that. There needs to be something for the court to determine that someone's safety is at risk, that there's a need to enter a restraining order against an individual. So, I disagree with your assessment that coercive control or, or stalking doesn't need to also present an imminent risk to the moving party."

In considering the plaintiff's argument, we first note that she does not claim on appeal any error in the evidentiary rulings made by the trial court. Rather, she argues that the court "applied an incorrect standard of 'imminence,' " which, she contends, "improperly influenced the trial court's determination of what 'recently' means."

We disagree that the trial court's remarks regarding "imminence" impacted the trial court's determination as to the recency of the dating relationship. Viewing the record as a whole, it is clear the trial court determined that the plaintiff was not a "[f]amily or household member" because the parties were not "persons . . . who have recently been in, a dating relationship." General Statutes § 46b-38a (2) (F). We are not persuaded by the plaintiff's arguments that the court's determination on that issue was related to, or

that would suggest that the court could not have reasonably concluded as it did based on the facts presented.[11] See *Princess Q. H.* v. *Robert H.*, supra, 150 Conn. App. 111. Accordingly, we conclude that the court did not abuse its discretion in determining that the month long, two year old relationship was not recent.

The plaintiff raises, among other concerns,[12] potential uncertainty an applicant may face in determining which type of protective or restraining order the applicant should seek. Specifically, she notes that § 46b-16a authorizes the court to grant a civil protective order, and that statute does not contain a relationship requirement. Section 46b-16a (a) does specify, however, that relief under that section is only available to a plaintiff who "does not qualify to seek relief under section 46b-15."[13] The plaintiff questions: "If an applicant has previously

affected by, any remarks regarding the evidence required to support issuance of a restraining order.

[11] See *S. B-R.* v. *J. D.*, 208 Conn. App. 342, 351, 266 A.3d 148 (2021) (court abused its discretion in issuing order of civil protection where court could not reasonably find that continuing conduct element of § 46b-16a was proven); *C. A.* v. *G. L.*, 201 Conn. App. 734, 746, 243 A.3d 807 (2020) (court did not abuse its discretion in deciding that defendant had stalked plaintiff).

[12] Those other concerns are as follows. The plaintiff contends that "[i]t is inconsistent for a self-represented party to be granted an ex parte restraining order in this case, noting her prior dating relationship, and then be denied a restraining order after a hearing which finds that there was an insufficient dating relationship for application of the statute." She further contends that application of the recent requirement is unfair to teenage victims of domestic violence, who are less likely to fall within the remaining relationship categories set forth in § 46b-38a, because they are far less likely to be married, living with a partner, or having children. Last, she contends that "[t]he only way an applicant would know for sure that the relationship is 'recent' enough is to stay in the relationship as close as possible to applying for the restraining order, because if they dump their abuser and wait then it may not be recent enough for the court."

[13] General Statutes § 46b-16a (a) provides in relevant part: "Any person who has been the victim of sexual abuse, sexual assault or stalking may make an application to the Superior Court for relief under this section, provided such person has not obtained any other court order of protection arising out of such abuse, assault or stalking and does not qualify to seek relief under section 46b-15. . . ."

dated the respondent, how is the applicant to know whether that relationship is recent or not? If the applicant were to file pursuant to [§] 46b-16a, if the relationship were considered recent it could very well disqualify the applicant from relief under [§] 46b-16a." She additionally raises a concern that, in the case of a former dating partner continuing a pattern of conduct over a period of years, the plaintiff "should not be penalized [for trying] other alternatives" before seeking a restraining order.

The plaintiff asserts these and other considerations; see footnote 12 of this opinion; under the guise of "absurd results" illustrated by a determination like that made in this case that a period of almost two years was not recent. We disagree that the concerns identified by the plaintiff demonstrate "absurd or unworkable" results, and we instead view the plaintiff's arguments as more appropriately constituting the considerations of broader public policy that typically follow a determination of textual ambiguity. The argument that a better public policy, in the plaintiff's view, exists does not mean that the plain and unambiguous language of the statute yields absurd results. "[I]t is the legislature, and not [our courts], that is responsible for formulating and implementing public policy. . . . The legislature speaks on matters of public policy through legislative enactments and through the promulgation of regulations by state agencies as authorized by statute. . . . When there is no ambiguity in the legislative commandment, this court cannot, in the interest of public policy, engraft amendments onto the statutory language." (Citations omitted; internal quotation marks omitted.) *Hasychak* v. *Zoning Board of Appeals*, 296 Conn. 434, 441 n.8, 994 A.2d 1270 (2010); see also *Seramonte Associates, LLC* v. *Hamden*, supra, 345 Conn. 91 n.11 (noting that "the question of whether the plaintiff's reading of

the relevant statutory text 'yield[s] absurd or unworkable results' is analytically distinct from the examination of extratextual sources, such as expressions of legislative intent and considerations of broader public policy, that typically follows a determination of textual ambiguity").

Last, we note that the trial court's determination that the plaintiff did not fall within the definition of "[f]amily or household member" as set forth in § 46b-38a (2), did not implicate the subject matter jurisdiction of the court. Accordingly, the trial court should have denied rather than dismissed the application.[14] See *Board of Education* v. *Commission on Human Rights & Opportunities*, 344 Conn. 603, 633, 280 A.3d 424 (2022) ("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. . . . [T]he question of whether the action belongs to the class of cases that the tribunal has authority to decide is [s]eparate and distinct from . . . the question of whether a [tribunal] . . . properly exercises its statutory authority to act." (Citation omitted; internal quotation marks omitted.)); see also *State* v. *Clark*, 137 Conn. App. 203, 215, 48 A.3d 135 (2012) (holding that trial court lacked statutory authority, under § 53a-40e, to issue standing criminal restraining order where victim and defendant were not family or household members with one another), aff'd, 314 Conn. 511, 103 A.3d 507 (2014).

[14] In her principal brief before this court, the plaintiff states that "[t]he trial court also erroneously issued an order of dismissal pursuant to Practice Book § 14-3, 'Dismissal for Lack of Diligence' . . . ." Our review of the case detail reveals that the judgment of dismissal notice stated incorrectly that the court dismissed the action for "failure to prosecute said action with reasonable diligence, (P.B. 14-3)." Because we determine that the form of the judgment was improper and remand with direction to render judgment denying the application, we need not discuss this apparent clerical error further.

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

In this opinion the other judges concurred.

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307 WHITE STREET REALTY, LLC *v.* BEAVER BROOK GROUP, LLC (AC 44740)

Prescott, Suarez and Clark, Js.

Syllabus

The plaintiff sought, inter alia, specific performance of an option to purchase certain real property that it had been leasing from the defendant and to recover damages for unjust enrichment. The option to purchase clause was contained in the parties' commercial lease agreement. After the plaintiff filed its complaint, the court granted multiple continuances while the parties engaged in settlement negotiations, during which time the parties entered into a purchase and sale agreement for the property. Thereafter, the defendant filed an answer and special defense, namely, that the purchase and sale agreement superseded the option to purchase in the lease agreement and rendered the action moot. Eight days prior to trial, the defendant moved to dismiss the action, reiterating the mootness argument made in its special defense. Specifically, the defendant argued that the action was moot because it sought the interpretation and enforcement of a lease option that was no longer in effect, depriving the court of subject matter jurisdiction. The plaintiff opposed the motion to dismiss, arguing that the purchase and sale agreement was an executory accord, which was executed as part of the parties' efforts to settle the underlying litigation and which was intended to have no legal effect unless and until the sale actually occurred. Following a hearing, which was limited to the arguments of counsel, the court granted the defendant's motion to dismiss, concluding that it lacked subject matter jurisdiction because, although the allegations in the complaint contemplated an action under the option to purchase clause of the lease agreement, the purchase and sale agreement was the controlling contract for the sale of the property. From the judgment of dismissal, the plaintiff appealed to this court. *Held*:

1. The trial court improperly granted the defendant's motion to dismiss as that court improperly determined that the defendant's motion to dismiss, which was premised on the argument that the purchase option had been superseded and rendered inoperative by the terms of the purchase and

sale agreement, implicated mootness and, therefore, subject matter jurisdiction: the defendant's argument was best construed as a legal defense to the plaintiff's allegations, as the defendant itself recognized when it filed its answer, the defendant, as the party raising the special defense, had the burden of proving the facts alleged therein, namely, the existence of the purchase and sale agreement and its implications relative to the merits of the underlying action when it filed its special defense, and the trial court, by adjudicating the special defense by way of a motion to dismiss, impermissibly shifted the burden of proof from the defendant to the plaintiff; moreover, in its motion to dismiss, the defendant was making a factual and legal argument regarding a change in circumstances that occurred after the plaintiff filed its complaint, premised on the parties' intent in executing the purchase and sale agreement, as to why the plaintiff could not succeed on the merits of its complaint, when the proper inquiry with regard to mootness was whether that change would prevent the court from granting any and all practical relief, regardless of the likelihood that the proponent is able to prevail on the merits; accordingly, this court reversed the judgment and remanded the case for further proceedings.

2. Even if this court were to conclude that the defendant's motion to dismiss implicated mootness and the trial court's subject matter jurisdiction, the trial court abused its discretion by failing to hold an evidentiary hearing before granting the motion: although it is within the trial court's discretion to choose when to address jurisdictional issues, be it at the time they arise, after discovery or after a full trial on the merits, it is often prudent to defer action on a motion to dismiss raising issues that are interrelated or inextricably intertwined with the merits of a dispute, particularly in cases involving the motives and purposes of contracting parties; in the present case, the trial court acknowledged that the issues raised in the complaint were intertwined with and dependent on the interpretation of the purchase agreement and the intent of the parties, as expressed in their agreements, the court had already scheduled the trial when the motion to dismiss was filed and had the discretion to postpone consideration of the mootness issue until after the trial was complete, and, having decided to resolve factual disputes at the motion stage, in particular with regard to the parties' intent and how the purchase and sale agreement should be construed in the context of the ongoing settlement negotiations of the parties, the court was obligated, at the very least, to hold an evidentiary hearing with respect to the disputed jurisdictional facts.

3. The trial court improperly determined that the parties' execution of the purchase and sale agreement rendered the underlying action moot in its entirety: even assuming that the defendant's motion to dismiss implicated mootness and that the lease option no longer had an operative legal effect with regard to the parties' sale of the property, such a

determination would have no bearing on the allegations that the defendant was unjustly enriched by the plaintiff's continuing to honor its obligations under the lease, including by continuing to pay rent, even though it did not include any provision requiring the plaintiff to do so; moreover, the court failed to discuss the unjust enrichment allegations and whether it could provide the plaintiff with practical relief even if the purchase and sale agreement superseded the lease agreement, and, at a minimum, it should have denied the motion to dismiss with respect to the unjust enrichment claim.

Argued September 14—officially released November 29, 2022

Procedural History

Action to recover damages for, inter alia, unjust enrichment, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the court, *Brazzel-Massaro*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Dana M. Hrelic, with whom were *Timothy G. Ronan* and *Meagan A. Cauda*, and, on the brief, *Johanna S. Katz*, for the appellant (plaintiff).

Alexander Copp, with whom was *Neil R. Marcus*, for the appellee (defendant).

Opinion

PRESCOTT, J. The present appeal arises out of an action brought by the plaintiff lessee, 307 White Street Realty, LLC, against the defendant lessor, Beaver Brook Group, LLC, to enforce an option to purchase clause in the parties' commercial lease (lease option), which included certain concomitant contractual and statutory obligations related to the Hazardous Waste Establishment Transfer Act, General Statutes § 22a-134 et seq. (Transfer Act). The plaintiff appeals from the judgment of the trial court granting the defendant's motion to dismiss the present action as moot because, after the plaintiff commenced it, the parties executed a purchase

and sale agreement regarding the leased property that purportedly supersedes the lease option with respect to the sale of the property such that the court no longer can afford any practical relief to the plaintiff by adjudicating the underlying action. The plaintiff claims on appeal that the court improperly (1) determined that the defendant's motion to dismiss implicated the court's subject matter jurisdiction, (2) failed to hold an evidentiary hearing necessary to resolve disputed material facts, and (3) concluded that the execution of the purchase and sale agreement rendered the plaintiff's action moot in its entirety. For the reasons that follow, we agree with the plaintiff that the court improperly granted the motion to dismiss, and, accordingly, we reverse the judgment of the court and remand for further proceedings.

The following facts, as alleged in the complaint or evidenced as undisputed in the record, and procedural history are relevant to our resolution of this appeal. The plaintiff is an affiliate of Winter Brothers Waste Systems (Winter Bros.), which operates a waste and recycling business in Long Island, New York. The defendant is the owner of commercial property located at 307 White Street in Danbury.

In July, 2011, the defendant leased the 307 White Street property to WWSCT, LLC, another affiliate of Winter Bros. The lease, which was modified by the parties in 2013, contains a detailed lease option that, inter alia, grants the lessee the right to purchase the leased property for $7,250,000. The lease option also contains language addressing obligations of the parties to the contract that could arise pursuant to the Transfer Act if the lease option were exercised.[1] In November,

[1] The Transfer Act is a state environmental statute that was "enacted to protect purchasers of property from being liable for the subsequent discovery of hazardous waste on the property" and that "subjects transferors of establishments to reporting, investigation and remediation requirements that depend on the environmental condition of the property being transferred."

2013, WWSCT, LLC, assigned its interest in the lease to Winter Bros. Realty Holdings I, LLC. Thereafter, in October, 2017, Winter Bros. Realty Holdings I, LLC, assigned its rights under the lease to the plaintiff.

On June 28, 2016, prior to assigning the lease to the plaintiff, Winter Bros. Realty Holdings I, LLC, had provided the defendant with written notice that it was exercising its right to purchase the property in accordance with the lease option. Prior to receiving this option notice, however, the defendant, through counsel, had sent a letter to Winter Bros. Realty Holdings I, LLC, in which it disputed whether the lease option remained in effect. Moreover, after Winter Bros. Realty Holdings I, LLC, exercised the lease option, the defendant, as alleged in the complaint, "periodically disputed the effectiveness of the exercise of the [lease option] . . . and, by extension, the viability of the [lease option] itself." Although Winter Bros. Realty Holdings I, LLC, and, later, the plaintiff as its assignee, were ready, willing, and able to proceed with the purchase in accordance with the lease option, the defendant ignored the plaintiff's demands to acknowledge its obligations under the lease option, including duties it may have had under the Transfer Act vis-à-vis remediation of the property.[2]

(Internal quotation marks omitted.) *Northeast Ct. Economic Alliance, Inc.* v. *ATC Partnership*, 272 Conn. 14, 40, 861 A.2d. 473 (2004). "Establishment" is a defined term meaning "any real property at which or any business operation from which (A) on or after November 19, 1980, there was generated more than one hundred kilograms of hazardous waste in any one month, (B) hazardous waste generated at a different location was recycled, reclaimed, reused, stored, handled, treated, transported or disposed of, (C) the process of dry cleaning was conducted on or after May 1, 1967, (D) furniture stripping was conducted on or after May 1, 1967, or (E) a vehicle body repair facility was located on or after May 1, 1967. . . ." General Statutes § 22a-134 (3).

[2] The 307 White Street property previously had been identified as containing environmental contamination that required remediation, but the parties do not agree on who is responsible for ongoing remediation and reporting obligations imposed by the Transfer Act.

The plaintiff commenced the present action against the defendant in September, 2018. The complaint contains three counts. Count one sounds in both declaratory judgment and unjust enrichment.[3] With respect to the former, the plaintiff seeks a declaration that, "since March of 2017, by virtue of the exercise of the [lease option], [1] the lease is and has been an executory contract for purchase and sale of the property, [2] [the plaintiff] is a vendee under that contract, and [3] the obligations of [the plaintiff] as tenant under the lease, including, without limitation, the obligation to pay rent, were (and remain) extinguished." With respect to unjust enrichment, the plaintiff alleges that, although the lease does not include any provision requiring the plaintiff to continue to pay rent after the lease option is exercised, the plaintiff has continued to pay rent and to perform other responsibilities under the lease, and, therefore, the defendant has been "unjustly enriched by receiving and retaining a benefit to which it is not legally entitled." As to the relief sought with respect to count one, the plaintiff, in addition to seeking a declaration that the defendant has been unjustly enriched, asks for restitution of all rents paid since March, 2017, and "the value of other actions performed by [the plaintiff] or its assignor since March of 2017 that fall within the lease obligations of the tenant."

Count two also seeks a declaratory judgment. Specifically, the plaintiff asks for a declaration that (1) the defendant has taken actions that amounted to an anticipatory repudiation of the lease option, (2) the plaintiff properly and timely executed the lease option, (3) the lease option remains in full force and effect, and (4) the defendant was obligated to transfer title and satisfy its Transfer Act obligations as provided for in the lease option.

[3] The defendant never filed a request to revise asking to separate these causes of action into different counts. See Practice Book § 10-35.

Finally, count three is captioned "specific performance." Specific performance is a remedy, not an independent cause of action.[4] Nonetheless, we construe count three, which incorporates by reference allegations regarding the defendant's repudiation of the lease option, as asserting a cause of action for anticipatory breach of contract for which the plaintiff seeks the equitable remedy of specific performance.

Early in the proceedings before the trial court, the parties sought and received multiple continuances of status conferences and other pretrial hearings, indicating to the court that the parties were engaged in settlement negotiations. In one such continuance, the plaintiff stated that the parties "hope to conclude a settlement agreement that contemplates closing on or about June 28, 2019." In a later request for continuance, the defendant similarly asserted that the parties were "close to settlement" and needed additional time "to finalize same."

On February 25, 2020, the defendant filed an answer and special defense to the complaint. In its special defense, the defendant alleged that the parties, during the period of continuances arising out of the parties' apparent settlement negotiations, had entered into a purchase and sale agreement on or about March 29,

[4] "Specific performance is an equitable remedy whereby courts may compel the performance of land sale contracts, and certain other contracts, pursuant to the principles of equity. . . . Every complaint asking for specific performance of a contract to convey real estate is addressed to the discretion of the court, and will not be granted unless the contract is made according to the requirements of law, and is fair, equitable, reasonable, certain, mutual, on good consideration, consistent with policy and free from fraud, surprise or mistake. . . . Even when a valid contract is found, however, there is no right to specific performance, but rather [t]he granting of specific performance of a contract to sell land is a remedy which rests in the broad discretion of the trial court depending on all of the facts and circumstances when viewed in light of the settled principles of equity." (Citations omitted; internal quotation marks omitted.) *Battalino* v. *Van Patten*, 100 Conn. App. 155, 159–60, 917 A.2d 595, cert. denied, 282 Conn. 924, 925 A.2d 1102 (2007).

2019, that required the plaintiff to purchase and the defendant to sell the leased property for $7,250,000. Among the differences between the purchase and sale agreement and the lease option were changes to the parties' respective Transfer Act obligations. The closing of the sale was supposed to have occurred on June 28, 2019, and, according to the defendant, it "was ready, willing, and able to convey title to the plaintiff, pursuant to the [purchase and sale agreement]." The defendant alleged, however, that "the plaintiff has refused to attend a closing of title and has failed to proffer the balance of the purchase price due and owing under the contract and has been in default thereof."[5] The defendant also alleged in its special defense that the purchase and sale agreement "supersedes the [lease option] and renders the allegations of the plaintiff's complaint moot."

Sometime later, on November 20, 2020, the court issued notice that it had scheduled a remote video court trial to commence on January 27, 2021.[6] On January 19,

[5] Despite these allegations, the defendant did not assert any counterclaim against the plaintiff on the basis of an alleged breach of the purchase and sale agreement and seeking specific performance thereof. Further, to the extent that the defendant believed that the parties had reached an enforceable out-of-court settlement, the defendant did not request a hearing pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 811–12, 626 A.2d 729 (1993) (*Audubon*). An *Audubon* hearing "is conducted to decide whether the terms of a settlement agreement are sufficiently clear and unambiguous so as to be enforceable as a matter of law." *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 499 n.5, 4 A.3d 288 (2010).

[6] The trial date was delayed at the request of the parties. Following a teleconference with the parties on September 10, 2020, the court issued an order stating that it was "prepared to assign a trial date but the parties have entered into an agreement which requires approval from the [Connecticut Department of Energy and Environmental Protection (DEEP)]. Counsel have advised the court that the status of the approval is not known. The court has ordered counsel to contact the department to determine where the approval stands. Counsel are to submit a written status report on or before September 25, 2020, as to the progress with approval from [DEEP] and the time frame for the approvals required and the time to complete these obligations pursuant to the Transfer Act to complete the sale. After the

2021, only eight days prior to the start of the trial, the defendant filed the motion to dismiss that is the subject of the present appeal and a memorandum in support of the motion. The defendant argued that the court should dismiss the present action as moot for the same reason it had asserted in its special defense. Namely, it argued that "after this action was commenced . . . the plaintiff and the defendant entered into a purchase and sale agreement . . . which replaces and supersedes the option to purchase in the lease. . . . Because the instant action seeks interpretation and enforcement of a lease option that is no longer of any force or effect, the instant action is moot, thereby depriving [the court] of subject matter jurisdiction." Much of the defendant's argument relied on a boilerplate merger clause in the purchase and sale agreement that stated that "[t]his [a]greement embodies the entire agreement between the parties and supersedes all prior agreements and understandings relating to the [p]roperty."

The following day, January 20, 2021, the plaintiff sought a continuance of the trial date to April 27, 2021,

submission of the status [report], the court will determine if the parties require a trial date or an additional teleconference with the court." The parties filed the required joint status report on September 25, 2020, and requested that the court hold a status conference within sixty to ninety days. The status report indicated as follows: "In the last three to five months, the plaintiff's retained Licensed Environmental Professional and other representatives have had numerous phone meetings with representatives of [DEEP] and the United States Environmental Protection Agency (Region 1) (EPA), both jointly and separately, respecting approval and/or sign-off on (i) allowable concentrations in parts per million (ppm) of polychlorinated biphenyls (PCBs) that can remain on site (both in soils and beneath floors of structures) and (ii) design of regulatorily appropriate engineering controls to be installed at the site. That dialogue, and the sharing of additional testing data, and data analysis, is ongoing. [The parties] are also working to confirm the acceptance by the EPA and DEEP of [the defendant's] compliance with certain notices. . . . The parties project that the time needed to complete the items mentioned . . . will be sixty to ninety days. . . . The parties anticipate that time needed to complete transfer and settlement after the items mentioned . . . are completed will be forty-five to sixty days."

explaining that it needed "time to reorganize its presentation of evidence" because its chief trial witness had passed away on January 5, 2021, and it "require[d] time to reply to [the defendant's] motion to dismiss, which is based on a 2019 document but filed only one week before trial." The court granted the continuance to August 5, 2021, and ordered the plaintiff to respond to the motion to dismiss by February 26, 2021.

The plaintiff timely filed its memorandum in opposition to the motion to dismiss. It argued that the purchase and sale agreement had been negotiated by the parties as a conditional agreement in an attempt to settle the present litigation and, thus, should be construed as an executory accord that never was intended to replace or supersede the lease or lease option unless and until a sale was consummated. According to the plaintiff, the sale of the subject property that was contemplated by the purchase and sale agreement never occurred, and, thus, because there was never a satisfaction of the accord, the lease option remains in full effect. In support of its argument that the purchase and sale agreement was a conditional contract that had no impact on the court's power to adjudicate the claims under the lease option, the plaintiff points to language in the purchase and sale agreement that states that the plaintiff's obligations to withdraw the present action and to release its claims against the defendant expressly were tied to the closing of the sale of the property, which never occurred.[7] The defendant filed a reply memorandum in support of the motion to dismiss on March 12, 2021.

The court, *Brazzel-Massaro*, *J.*, conducted a hearing on the motion to dismiss on March 15, 2021. The hearing was limited to the arguments of the parties' counsel. No

[7] Each side blames the other for the failure of the parties to consummate the sale of the subject property as contemplated under the purchase and sale agreement.

evidence was presented, including evidence concerning the parties' competing factual assertions regarding their intent in executing the purchase and sale agreement.

On May 5, 2021, the court issued a memorandum of decision granting the motion to dismiss and rendering a judgment of dismissal. The court first reasoned that the plaintiff was correct that, by exercising the lease option, "the relationship between the parties as landlord-tenant transformed into vendor-vendee. However, once the option was exercised, the lease between the plaintiff and the defendant was extinguished." The court then stated that "[t]he allegations of the complaint contemplate an action under the option clause of the lease which no longer exists and bears no legal effect on the purchase and sale of the property. Once the parties executed the purchase agreement, any issues regarding the purchase and sale of the property must be viewed through the terms of that contract instead of the option clause under the lease. The plaintiff commenced the present action in order to enforce the option. However, the purchase agreement is an enforcement of the option because it expresses the terms and conditions that both parties need to meet in order to consummate the purchase and sale of the property. . . . The plaintiff's argument that the purchase agreement is an executory accord without satisfaction is misguided. When the parties executed the purchase agreement, a new bilateral contract was formed and the exchange of mutual promises between the parties was enough to properly form the contract. Moreover, both parties acknowledge the existence of the executed purchase agreement and both parties express a willingness to fulfill the obligations of the purchase agreement by signing the agreement. Furthermore, the plaintiff did not allege in the complaint or attach any evidence demonstrating the purchase agreement was merely part

of ongoing negotiations. Therefore, the purchase agreement is the controlling contract for the purchase and sale of the property." (Citation omitted.)

The court continued: "Although ordinarily the question of contract interpretation being question of the parties' intent, is a question of fact . . . where there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law. . . . With definitive contract terms available in the purchase agreement, the court can determine what the parties intended when executing the agreement, the purchase and sale of the property. In this case, the parties executed the purchase agreement on May 23, 2019, after the plaintiff commenced the present action. . . . The parties intended to be legally bound and agreed on the purchase price, the closing date of June 28, 2019, and the parties' remedies in the event of default. . . . If the plaintiff seeks performance in purchase of the property, then the plaintiff need only effectuate closing on the property as stated in the purchase agreement." (Citations omitted; footnotes omitted; internal quotation marks omitted.) The court concluded: "Construing the allegations in the complaint in the light most favorable to the plaintiff, the plaintiff did not allege sufficient facts to withstand the defendant's motion to dismiss. *The plaintiff's claims against the defendant are intertwined with, and dependent upon, the interpretation of the purchase agreement.* The language of the purchase agreement indicates the clear intention of the parties to execute a binding purchase and sale of the property. Therefore, the court does not have subject matter jurisdiction." (Emphasis added.) This appeal followed.[8]

[8] In addition to filing this appeal, the plaintiff also filed a timely motion for reconsideration that raised many of the same arguments it advances on appeal. The defendant filed an objection on June 7, 2021, and, that same day, the court issued an order stating that it would hold a hearing on June 21, 2021, to hear argument "as to whether the court should permit reargument or reconsideration." On June 21, 2021, however, the court issued orders

The plaintiff claims on appeal that the court improperly granted the defendant's motion to dismiss because (1) the motion did not truly implicate the court's subject matter jurisdiction but rather sought a summary adjudication of the defendant's special defense, (2) the court failed to hold an evidentiary hearing to resolve disputed issues of material fact regarding the intent of the parties, and (3) the parties' execution of the purchase and sale agreement did not render the entirety of the underlying action moot. We address each argument in turn, although we recognize that the issues raised are somewhat overlapping. Ultimately, we are not persuaded that the motion to dismiss raised a valid claim of mootness and, thus, agree that the defendant's motion did not implicate the court's subject matter jurisdiction. Notwithstanding the foregoing, even had the motion to dismiss properly invoked a challenge to the court's jurisdiction, it would have been an abuse of discretion, under the circumstances of this case, for the court to grant the motion without the benefit of an evidentiary hearing or a trial on the merits. Finally, we agree that the portion of count one of the complaint alleging unjust enrichment should have survived the motion to dismiss. In short, we conclude that the court should have denied the motion to dismiss.

marking off the motion and the objection. The court explained that no action was necessary because an appeal had been filed.

Although not directly at issue in the present appeal, we feel it is important to reiterate that the filing of an appeal does not stay a trial court's continuing authority to adjudicate any properly filed motions to reargue, reconsider or open the judgment that is the subject of the appeal; see Practice Book § 11-11; irrespective of the possibility that the trial court's action on such a motion potentially could render the appeal moot. See *Ahneman* v. *Ahneman*, 243 Conn. 471, 482–84, 706 A.2d 960 (1998). Said another way, although the filing of an appeal may, in certain instances, result in a stay of actions to *enforce or carry out* the judgment on appeal; see Practice Book § 61-11 et seq.; any such appellate stay does not affect a court's authority to rule on motions filed with the trial court, including any Practice Book § 11-11 motions.

We begin our discussion with general legal principles, including those governing our review of a court's granting of a motion to dismiss pursuant to Practice Book § 10-30.[9] "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, *every presumption favoring jurisdiction should be indulged*. . . .

"Trial courts addressing motions to dismiss for lack of subject matter jurisdiction pursuant to [Practice Book § 10-30] may encounter different situations, depending on the status of the record in the case. . . . [L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . [If] a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

[9] Practice Book § 10-30 provides: "(a) A motion to dismiss shall be used to assert: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; and (4) insufficiency of service of process.

"(b) Any defendant, wishing to contest the court's jurisdiction, shall do so by filing a motion to dismiss within thirty days of the filing of an appearance.

"(c) This motion shall always be filed with a supporting memorandum of law and, where appropriate, with supporting affidavits as to facts not apparent on the record."

"In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . other types of undisputed evidence . . . and/or public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein. . . .

"Finally, [if] a jurisdictional determination is dependent on the resolution of a critical factual dispute, *it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing* to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . *[If] the jurisdictional facts are intertwined with the merits of the case, the court may in its discretion choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, a full trial on the merits has occurred.* . . . In that situation, [a]n evidentiary hearing is necessary because a court

cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Cuozzo* v. *Orange*, 315 Conn. 606, 614–17, 109 A.3d 903 (2015).

Because mootness implicates a court's subject matter jurisdiction, it is properly raised by way of a motion to dismiss. *We the People of Connecticut, Inc.* v. *Malloy*, 150 Conn. App. 576, 581 n.3, 92 A.3d 961 (2014). "Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . A case becomes moot [if] due to intervening circumstances a controversy between the parties no longer exists." (Citation omitted; internal quotation marks omitted.) Id., 581. "The test for determining mootness is whether a judgment, if rendered, would have any practical legal effect upon an existing controversy. Thus, the central question in a mootness problem is whether a change in the circumstances that prevailed at the beginning of the litigation has forestalled the prospect for meaningful, practical, or effective relief." (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Burton*, 282 Conn. 1, 13, 917 A.2d 966 (2007).

I

The plaintiff first claims that the court improperly determined that the defendant's motion to dismiss implicated the court's subject matter jurisdiction over the action. According to the plaintiff, rather than raising any colorable issue of subject matter jurisdiction, the motion to dismiss effectively sought summary adjudication of the defendant's special defense, which the plaintiff construes as asserting that the purchase and sale

agreement was a novation of the lease option.[10] The plaintiff further argues that by adjudicating the special defense by way of a motion to dismiss, the court necessarily and impermissibly shifted the burden of proof from the defendant to the plaintiff. The defendant suggests that the plaintiff failed to preserve these arguments by raising them before the trial court. Alternatively, it argues that, even if properly preserved, the plaintiff's claim fails because the motion to dismiss raises an issue of mootness that implicates the court's subject matter jurisdiction and is a proper basis for a motion to dismiss. We are persuaded by the plaintiff's arguments.

As a preliminary matter, we briefly address the defendant's argument that the plaintiff's claim is not properly preserved for our review. It is axiomatic that "[a]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." (Internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619–20, 99 A.3d 1079 (2014). A careful review of the record, including the hearing on the motion to dismiss, convinces us that the gravamen of the argument advanced

[10] "Novation may be broadly defined as a substitution of a new contract or obligation for an old one which is thereby extinguished. . . . Novation and substitute contract often are used interchangeably to refer to a subsequent contract. . . . Our Supreme Court has stated that a novation [usually refers] to instances in which a new party is introduced into the new contract, while substitute contract is the designation commonly employed to cover agreements between the same parties which supersede and discharge prior contract obligations." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Willamette Management Associates, Inc.* v. *Palczynski*, 134 Conn. App. 58, 71–72, 38 A.3d 1212 (2012). Thus, under our Supreme Court's definition, the defendant's special defense asserts the existence of a substitute contract that would foreclose any enforcement of the original lease option. Whether the substitute contract was intended by the parties fully to supersede the lease option, however, is an issue of fact that is disputed by the parties.

on appeal was raised with sufficient clarity before the court to provide both the court and the defendant with notice of the same. The plaintiff argued in its opposition to the motion to dismiss that the purchase and sale agreement did not extinguish or supersede the lease option and thus *did not deprive the court of subject matter jurisdiction*. The only ground raised in the motion to dismiss implicating the court's subject matter jurisdiction was mootness. Thus, whether the defendant's motion properly invoked the doctrine of mootness is properly before us for review.

We are unconvinced that the defendant's argument that the terms of the lease option have been superseded and rendered inoperative by the terms of the purchase and sale agreement is one that implicates mootness. Rather, that argument is best construed—as the defendant itself seemed to initially recognize in its answer to the complaint—as a legal defense, either in whole or in part, to the allegations raised in the complaint. In the present case, the defendant pleaded by way of special defense the existence of the purchase and sale agreement and its implications relative to the merits of the underlying action. By doing so, the defendant assumed the burden of proof and persuasion not only regarding the existence of the subsequent purchase and sale agreement and its terms but also whether the parties actually intended for it to supersede any and all aspects of the lease option including any obligations arising thereunder. See *AGW Sono Partners, LLC* v. *Downtown Soho, LLC*, 343 Conn. 309, 323, 273 A.3d 186 (2022) ("a party raising a special defense has the burden of proving the facts alleged therein" (internal quotation marks omitted)). Although the defendant stated without elaboration in its special defense that it believed that the purchase and sale agreement superseded the lease option and thus "render[ed] the allegations of the plaintiff's complaint moot," it did not file a motion to dismiss

the action at that time or assert that the court lacked subject matter jurisdiction over the action. Rather, it waited until the eve of trial.[11]

Even the most compelling legal or factual argument that a particular claim or cause of action will fail on its merits will not support a conclusion that the asserted claim or cause of action is moot. This is because the proper inquiry with regard to mootness is not whether some change in circumstances has occurred after the claim or cause of action is asserted that forecloses any chance of success on the merits but, rather, whether that change would prevent the court from granting any and all practical relief *even assuming that the proponent is able to prevail on the merits, no matter how unlikely.* See *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 224–25, 982 A.2d 1053 (2009) ("[w]e can conclude, however, on the basis of the current state of the record before us, that the plaintiffs' claims are not moot because a determination of the controversy in the plaintiffs' favor could result in practical relief to the plaintiffs"); *Washington Mutual Bank* v. *Coughlin*, 168 Conn. App. 278, 287 n.13, 145 A.3d 408 (explaining that mootness doctrine is not truly implicated by argument that appeal would be rendered moot if Appellate Court agreed with appellee on the merits because, "[i]n determining whether an appeal is moot, we *ordinarily do not decide the merits of the claims raised*; rather,

[11] If the defendant believed that the plaintiff's action was moot as asserted, it could have filed a motion to dismiss at that time rather than answering the allegations of the complaint. Although mootness implicates justiciability and the subject matter jurisdiction of the court and certainly can be raised at any time; *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 222, 982 A.2d 1053 (2009); we note that the defendant waited until the eve of trial to press adjudication of the purported mootness issue. The defendant's delay in filing the motion to dismiss factors into our consideration of whether the court properly exercised its discretion in choosing not to postpone a final decision on the motion until after a trial on the clearly intertwined merits of the action.

we ask whether there is any practical relief that could be granted *even assuming that the appellant prevails on appeal*" (emphasis altered)), cert. denied, 323 Conn. 939, 151 A.3d 387 (2016).

Here, the defendant asserts that the lease option on which the action was based has been superseded by the parties' subsequent execution of a purchase and sale agreement regarding the same leased property. In other words, the defendant is making a factual and legal argument as to why the plaintiff cannot succeed on the merits of its complaint. The plaintiff's position, however, is that the purchase and sale agreement was executed as part of the parties' efforts to settle the current litigation and was intended to have no legal effect unless the sale actually closed. If the plaintiff is correct, then there remains a possibility that the plaintiff could prevail and obtain practical relief.

We agree with the plaintiff that the motion to dismiss filed by the defendant did not implicate mootness and, thus, did not implicate the court's subject matter jurisdiction. Accordingly, it was not the proper procedural vehicle to address the true nature and legal effect of the purchase and sale agreement. On that basis, the court should have denied the motion to dismiss.

II

The plaintiff next argues, in the alternative, that even if this court determines that the motion to dismiss properly raised a claim of mootness thereby implicating the court's subject matter jurisdiction, the court nevertheless improperly failed to hold an evidentiary hearing to resolve disputed issues of jurisdictional fact. We agree with the plaintiff that it was an abuse of discretion for the court to have decided the issues raised in the motion to dismiss solely on the basis of the papers and arguments of counsel without the benefit of an evidentiary hearing.

Generally speaking, it often will be prudent to defer action on a motion to dismiss raising issues that are interrelated or inextricably intertwined with the merits of a dispute, particularly in cases involving the motives and purposes of contracting parties. See *Conboy* v. *State*, 292 Conn. 642, 653 n.16, 974 A.2d 669 (2009); *Anderson* v. *Bloomfield*, 203 Conn. App. 182, 197, 247 A.3d 642 (2021). Our Supreme Court, however, has left it within the discretion of the court to address jurisdictional issues at the time raised, stating, "the court may *in its discretion* choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, a full trial on the merits has occurred." (Emphasis added.) *Conboy* v. *State*, supra, 653 n.16. Whether the court properly exercises that discretion in a given case, however, is not beyond our review.

"Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . The salient inquiry is whether the court could have reasonably concluded as it did. . . . It goes without saying that the term abuse of discretion does not imply a bad motive or wrong purpose but merely means that the ruling appears to have been made on untenable grounds. . . . In determining whether there has been an abuse of discretion, much depends upon the circumstances of each case." (Internal quotation marks omitted.) *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 61–62, 256 A.3d 684, cert. denied, 339 Conn. 909, 261 A.3d 744 (2021).

Here, the court acknowledged in its decision on the motion to dismiss that the issues raised in the complaint were "intertwined with, and dependent upon, the interpretation of the purchase agreement." Whether the parties have a binding agreement for the sale of the subject

property and, if so, whether the operative contract governing that sale is the lease option, the subsequently executed purchase and sale agreement, or some combination thereof requires consideration of the parties' intent as expressed in their agreements. Thus, resolution regarding any potential mootness of the action or claims made therein was intertwined with the merits of the action. This is further exemplified by the fact that the defendant originally raised the argument that the purchase and sale agreement wholly superseded the lease option such that the plaintiff was not entitled to judgment on any count of its complaint as a special defense to the complaint and not as a motion to dismiss.

Even if the motion properly raised a question of mootness, it was within the court's discretion either to resolve that question or to postpone consideration of it until it had conducted an evidentiary hearing or a trial, which in this case already had been scheduled at the time the motion to dismiss was filed. See footnote 11 of this opinion. Although there is no indication in the record that either party requested that the court hold an evidentiary hearing at which they could enter evidence or call witnesses, the pleadings before the court nonetheless established that material facts involving the parties' true intent and motives remained in dispute.[12] Having decided to resolve factual disputes at

[12] "Parties may alter any term of an existing contract by entering into a subsequent contract. . . . The contract as modified becomes a new contract between the parties. . . . The meaning to be given subsequent agreements . . . depends on the intention of the parties. As intention is an inference of fact, the conclusion is not reviewable unless it was one which the trier could not reasonably make." (Citation omitted; internal quotation marks omitted.) *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 189–90, 2 A.3d 873 (2010). "Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [if] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]. . . . If the language of [a] contract is susceptible to more than one reasonable interpretation, [however] the contract is ambiguous." (Internal quotation marks omitted.) *Tomey Realty Co.* v. *Bozzuto's, Inc.*, 168 Conn. App. 637, 646–47, 147 A.3d 166 (2016).

the motion stage, in particular with regard to the parties' intent and how the purchase and sale agreement should be construed in the context of the ongoing settlement negotiations of the parties, the court was obligated, at the very least, to hold an evidentiary hearing with respect to these disputed jurisdictional facts.[13] Because a motion to dismiss ordinarily is limited to resolving issues of jurisdiction rather than the merits of the action, we agree that the court improperly granted the motion to dismiss without first conducting an evidentiary hearing.

[13] We recognize that prior decisions of this court contain language that could be construed as contradictory regarding a trial court's obligation to hold an evidentiary hearing in the face of disputed jurisdictional facts, suggesting on the one hand that a trial court must always hold an evidentiary hearing whenever it determines that resolution of a motion to dismiss turns on a disputed jurisdictional fact; see *Property Asset Management, Inc.* v. *Lazarte*, 163 Conn. App. 737, 749, 138 A.3d 290 (2016) ("[a] court is required to hold an evidentiary hearing before adjudicating a motion to dismiss only if there is a genuine dispute as to some [material] jurisdictional fact"); and, on the other hand, declining to find error in a trial court's decision to rule on a motion to dismiss without holding an evidentiary hearing because the parties never requested an evidentiary hearing. See, e.g., *Walshon* v. *Ballon Stoll Bader & Nadler, P.C.*, 121 Conn. App. 366, 371, 996 A.2d 1195 (2010) ("it is the plaintiff's burden both to request an evidentiary hearing and to present evidence that establishes disputed factual allegations in support of an evidentiary hearing, and [if] the plaintiff *failed to do either*, the court [may] properly [decide] the motion [to dismiss] on the basis of the pleadings and affidavits" (emphasis added)). In those cases in which we have noted the failure of a party to request an evidentiary hearing, we inevitably determined that the party also failed to present evidence that raised a dispute regarding a fact upon which jurisdiction turned; see, e.g., *Priore* v. *Haig*, 196 Conn. App. 675, 686, 230 A.3d 714 (2020), rev'd on other grounds, 344 Conn. 636, 280 A.3d 402 (2022); and thus have concluded that the court properly could decide the motion on the undisputed facts contained in the record before it. It remains axiomatic, however, that in a case where the pleadings and submissions of the parties themselves necessarily raise a dispute about a fact that is central to the court's jurisdictional determination, the court has an independent duty, even in the absence of a parties' request, to hold an evidentiary hearing prior to resolving the factual dispute. See *Cuozzo* v. *Orange*, supra, 315 Conn. 616–17 ("a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties" (internal quotation marks omitted)).

Our conclusion finds support in this court's decision in *Air-Care N.O. Nelson Co.* v. *Patchet*, 5 Conn. App. 203, 205–207, 497 A.2d 771 (1985). In that case, in which the parties similarly reached a subsequent agreement attempting to settle a contract dispute; id., 203; this court held that the trial court improperly dismissed the action without holding an evidentiary hearing necessary "to make an evidentiary determination of the intention of the parties." Id., 205. We explained that whether a settlement agreement constitutes an executory accord or a substitute agreement turns upon the intent of the parties and that "[i]t is frequently difficult to determine as a matter of fact whether the parties agreed that the settlement agreement itself constituted satisfaction of the original cause of action, or whether the performance of the agreement was intended to be the satisfaction." (Emphasis omitted.) Id. This court concluded: "The intent of the parties to a contract is generally considered to be a question of fact. . . . Nothing in the record or transcript of this case indicates that the trial court received any evidence or considered the question of whether the parties intended the agreement itself or the performance of the agreement to constitute satisfaction of the original claim." (Citation omitted.) Id., 206.

In the present case, the trial court, like the trial court in *Air-Care N.O. Nelson Co.*, rejected the plaintiff's assertion that the purchase and sale agreement was executed as a means to settle the parties' dispute over the sale of the property, and that it was only intended to act as a substitute contract upon performance of the new agreement, without the benefit of any evidence regarding the parties' intent. Like in *Air-Care N.O. Nelson Co.*, we are persuaded that an evidentiary hearing devoted to the question of the parties' intent in entering into the purchase and sale agreement would have best served "the interests of justice" in the present case. See id. This is particularly true in the present case in which

the motion to dismiss was filed so close to trial. Accordingly, even if the motion to dismiss properly invoked a challenge to the court's jurisdiction, the court abused its discretion, under the circumstances of this case, by granting the motion without the benefit of an evidentiary hearing or a trial on the merits.

III

Finally, the plaintiff argues that the court improperly determined that the parties' execution of the purchase and sale agreement rendered the underlying action moot in its entirety. The plaintiff argues that its claims under the lease option were not moot but that, even if they were moot, the court still could have awarded it meaningful relief with respect to its unjust enrichment cause of action in count one. We agree with the plaintiff that, at the very least, the court should have denied the motion to dismiss with respect to the plaintiff's claim of unjust enrichment.

As we already have explained in part I of this opinion, we are not convinced that the defendant's argument that the lease option was superseded by the purchase and sale agreement implicated the mootness doctrine rather than simply providing a basis for ruling in favor of the defendant on the merits of the action. Even assuming that it did implicate mootness, however, and further assuming that the lease option no longer had any operative legal effect vis-à-vis the parties' sale of the property, such a determination would have no bearing on the plaintiff's allegations in count one of the complaint that the defendant was unjustly enriched by the plaintiff's continuing to honor its obligations under the lease, including by continuing to pay rent. At a minimum, the court should have denied the motion to dismiss with respect to the unjust enrichment allegations.

As the defendant correctly argues, and the plaintiff concedes, the purchase and sale agreement provides that the plaintiff would continue to pay rent to the defendant under the terms of the lease. That obligation, however, expressly arises "from and after the [e]ffective [d]ate" of the purchase and sale agreement, which is April, 2019. The plaintiff's claim of unjust enrichment involves allegations that it made lease payments that the defendant was not legally entitled to beginning in March, 2017.

The court failed to discuss the unjust enrichment allegations and whether it could provide the plaintiff with practical relief even in the face of a superseding contract. We agree with the plaintiff that, at the very least, the court should have denied the motion to dismiss with respect to the plaintiff's claim of unjust enrichment. In sum, for the reasons provided, we are convinced that the court improperly granted the defendant's motion to dismiss.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

TREMONT PUBLIC ADVISORS, LLC *v.*
MATERIALS INNOVATION AND
RECYCLING AUTHORITY
ET AL.
(AC 45078)

Cradle, Seeley and DiPentima, Js.

Syllabus

The plaintiff public affairs firm sought to recover damages from the defendant quasi-public agency for violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). The defendant, an entity

responsible for providing waste and recycling services to various municipalities pursuant to statute (§ 22a-257), requested proposals for the provision of municipal government liaison services. The plaintiff submitted a proposal that complied with the request, but the defendant awarded the liaison services contract to a law firm, whose proposal was noncompliant. The plaintiff alleged, inter alia, that the award of the contract to the law firm without a legitimate public bidding process violated CUTPA. The defendant filed a motion to strike the plaintiff's complaint, arguing that it was exempt from CUTPA pursuant to the provision (§ 42-110c (a) (1)) that exempts from liability "[t]ransactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States . . . ." The trial court granted the defendant's motion to strike and rendered judgment in favor of the defendant. On the plaintiff's appeal to this court, *held* that the trial court did not err in granting the motion to strike; the bidding process the defendant engaged in before entering into the contract was expressly authorized and regulated by statute and its conduct throughout that process was subject to pervasive state regulation, which exempts the defendant from CUTPA liability pursuant to the governmental exemption, § 42-110c (a) (1).

Argued September 15—officially released November 29, 2022

Procedural History

Action to recover damages for violations of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the action was withdrawn as against the defendant Thomas Kirk; thereafter, the court, *Cobb*, *J.*, granted the named defendant's motion to strike; subsequently, the court, *M. Taylor*, *J.*, granted the named defendant's motion for judgment and rendered judgment for the named defendant, from which the plaintiff appealed to this court. *Affirmed.*

Michael C. Harrington, for the appellant (plaintiff).

Alexander W. Ahrens, for the appellee (named defendant).

Opinion

CRADLE, J. The plaintiff, Tremont Public Advisors, LLC, appeals from the judgment of the trial court, rendered following the court's decision striking the plaintiff's complaint. The plaintiff claims that the court erred

in concluding that the defendant, Materials Innovation and Recycling Authority (MIRA), formerly known as Connecticut Resources Recovery Authority,[1] is exempt from liability under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., for engaging in allegedly illegitimate bidding practices. We affirm the judgment of the trial court.[2]

The following undisputed facts and procedural history are relevant to this appeal. The defendant is a quasi-public agency responsible for providing solid waste disposal and recycling services to numerous municipalities in this state pursuant to the Connecticut Solid Waste Management Services Act, General Statutes § 22a-257 et seq.[3] In 2011, the defendant issued a request for proposals for the provision of municipal government liaison services (liaison services). The plaintiff is a public affairs firm that submitted a proposal that complied with the request for proposals, but the defendant awarded the liaison services contract to the law firm of Brown Rudnick, LLP (Brown Rudnick), whose proposal was noncompliant.

Thereafter, the plaintiff brought this action against the defendant, alleging that the defendant had evaluated the bids to provide liaison services in a biased manner so as to ensure that Brown Rudnick was selected, that the public bidding process for the liaison services contract was a sham, and that the award of the contract to Brown Rudnick without a legitimate public bidding

[1] Thomas Kirk, the president of MIRA, also was named as a defendant in this action. The plaintiff withdrew its claims against him on January 26, 2021, and all references herein to the defendant are to MIRA.

[2] Because we conclude that the court properly determined that the defendant is exempt from liability under CUTPA in this case, we need not address the defendant's alternative grounds to affirm the judgment of the trial court.

[3] Although the act has been amended by the legislature since the events underlying this appeal; see, e.g., Public Acts 2014, No. 14-94, § 7; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the act.

process violated General Statutes § 22a-268 and the defendant's own procurement policies.[4] The plaintiff claimed that this conduct violated CUTPA.[5]

The defendant moved to strike the plaintiff's complaint, arguing, inter alia, that the defendant is exempt from liability under CUTPA based on General Statutes § 42-110c (a), which provides in relevant part: "Nothing in this chapter shall apply to: (1) Transactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States . . . ." The plaintiff argued that the exemption did not apply to the conduct of the defendant in this case. The trial court agreed with the defendant, concluding that "the [defendant] is a statutorily created quasi-governmental entity whose actions and transactions are permitted by law, administered by a regulatory board, and is empowered to enter into contracts like the one at issue here, as well as do all things necessary for the performance of its duties." Accordingly, the court granted the motion to strike and thereafter rendered judgment in favor of the defendant. This appeal followed.

"The standard of review in an appeal challenging a trial court's granting of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts

[4] The plaintiff further alleged that the defendant awarded the liaison services contract to Brown Rudnick because Brown Rudnick improperly carried out lobbying activities on behalf of the defendant.

[5] In 2013, the plaintiff brought an antitrust action against the defendant, which was then known as Connecticut Resources Recovery Authority. The factual allegations underlying that cause of action and the present case, as gleaned from a comparison of the plaintiff's complaints in both actions, are essentially identical. That case was ultimately dismissed by our Supreme Court for lack of standing. *Tremont Public Advisors, LLC* v. *Connecticut Resources Recovery Authority*, 333 Conn. 672, 217 A.3d 953 (2019).

to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Sullivan* v. *Lake Compounce Theme Park, Inc.*, 277 Conn. 113, 117–18, 889 A.2d 810 (2006). Likewise, the determination of whether a party is exempt from CUTPA liability also presents a question of law of which our review is plenary. *Connelly* v. *Housing Authority*, 213 Conn. 354, 364–65, 567 A.2d 1212 (1990).

CUTPA provides, inter alia, that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." General Statutes § 42-110b (a). As noted, however, § 42-110c (a), which is also referred to as the "governmental exemption," expressly exempts from liability "[t]ransactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States . . . ." Pursuant to § 42-110c (b), a party claiming an exemption under § 42-110c (a) has the burden of proving its entitlement to such exemption.

The plaintiff claims that the trial court erred in granting the defendant's motion to strike on the ground that the defendant is exempt from liability under § 42-110c (a). We disagree. As the trial court aptly noted, our Supreme Court has previously construed the language of the exemption. In *Connelly*, the court held that the governmental exemption applied to allegations that the municipal housing authority had violated CUTPA by failing to provide adequate heat and hot water to its tenants because the transactions at issue, namely, the renting of subsidized apartments to low income tenants, were "expressly authorized and pervasively regulated by both the state department of housing and the [United

States Department of Housing and Urban Development]." *Connelly* v. *Housing Authority*, supra, 213 Conn. 361.

Similarly, in *Danbury* v. *Dana Investment Corp.*, 249 Conn. 1, 18–20, 730 A.2d 1128 (1999), our Supreme Court held that the governmental exemption provided by § 42-110c (a) (1) applied to allegations that the city of Danbury had violated CUTPA by overassessing real properties and incurring needless expenses by filing several tax foreclosure actions, rather than just one action. The court held that the exemption applied because the process of real estate assessment by a municipality is authorized and regulated by statute. Id., 20; see also *Neighborhood Builders, Inc.* v. *Madison*, 142 Conn. App. 326, 331, 64 A.3d 800 (municipality's act of allegedly overcharging for building permit fees is exempt from CUTPA liability because entire system of issuing building permits and collecting fees is authorized and regulated by state statute and regulation), cert. denied, 309 Conn. 905, 68 A.3d 660 (2013).

Here, the crux of the plaintiff's complaint against the defendant arises from the bidding process employed by the defendant to allegedly bypass the plaintiff and ensure that the contract at issue was awarded to Brown Rudnick. Although the plaintiff complains that the process employed by the defendant was improper, the bidding process the defendant engaged in before entering into a contract was expressly authorized and regulated by statute, which exempts the defendant from CUTPA liability pursuant to the governmental exemption. As noted by the trial court, the defendant was created by the legislature as the successor authority to the Connecticut Resources Recovery Authority by the enactment of General Statutes § 22a-260a. An examination of the comprehensive statutory scheme governing the operations of the defendant reveals that the authority of the defendant and the limits to that authority are

extensively detailed by statute. General Statutes § 22a-265 (3) authorizes the defendant to, inter alia, "[m]ake and enter into any contract or agreement necessary or incidental to the performance of its duties and execution of its powers . . . ." In so doing, General Statutes § 22a-268 expressly requires the defendant to engage in competitive negotiation or competitive bidding when entering into business contracts, and General Statutes § 22a-268a requires the defendant to adopt written procedures pertaining to the bidding process. General Statutes § 22a-263 regulates the activity by requiring the defendant to maintain all necessary records and data with respect to its operations and to report quarterly to the governor and annually to the General Assembly. Those reports must include, inter alia, a listing of all contracts entered into by the defendant, and the defendant "shall be subject to audit by the state Auditors of Public Accounts in accordance with normal audit practices prescribed for departments, boards, commissions and other agencies of the state." General Statutes § 22a-263. General Statutes § 22a-263a provides that the defendant must make available to the public, inter alia: "(7) A report on any contract between the authority and a person, other than a director, officer or employee of the authority, for the purpose of influencing any legislative or administrative action on behalf of the authority or providing legal advice to the authority. The report shall indicate for each such contract (A) the names of the parties to the contract, (B) the cost of the contract, (C) the term of the contract, (D) a summary of the services to be provided under the contract, (E) the method used by the authority to award the contract, and (F) a summary of the authority's need for the services provided under the contract. Such report shall be made available through the Internet not later than fifteen days after the contract is entered into between the authority and the person." Finally, General Statutes

§ 22a-264 requires the defendant to create an annual plan of operations, which is reviewed by the Commissioner of Energy and Environmental Protection for consistency with the statewide solid waste management plan.

The statutes cited herein demonstrate that the defendant was expressly authorized, and, in fact, required, to engage in a bidding process before entering into the contract for services that ultimately was awarded to Brown Rudnick. In addition, the defendant's conduct throughout that process is subject to pervasive state regulation, which is overseen by the General Assembly, the Commissioner of Energy and Environmental Protection, and account auditors. Accordingly, we conclude that the trial court properly determined that the conduct of the defendant, as alleged in the plaintiff's complaint, fell within the CUTPA exemption embodied in § 42-110c (a).

The judgment is affirmed.

In this opinion the other judges concurred.