direction to reverse the decision of the Workers' Compensation Commissioner and to remand the case to the commissioner for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

IN RE AMANDA C. ET AL.*
(AC 45713)

Alvord, Clark and DiPentima, Js.

Syllabus

Pursuant to the Interstate Compact on the Placement of Children (§ 17a-175), which governs the placement of a minor child in a home in another state, no child shall be sent or brought or caused to be sent or brought into another party state "for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein."

The respondent mother appealed to this court from the judgments of the trial court granting the motion of the children's father to revoke the commitment of their three minor children to the custody of the petitioner, the Commissioner of Children and Families, approving the permanency plan requested by the petitioner to reinstate guardianship in the father, and to vest coguardianship in the children's paternal aunt, S. At the time the children were removed from the mother's care, adjudicated neglected, and committed to the custody of the petitioner, the father and S resided in Florida. On appeal, the mother claimed that the court improperly determined that the compact did not apply under the facts of this case including, inter alia, that the father has cognitive limitations, which occasioned the appointment of S as coguardian, and that the petitioner had previously sought to terminate the parental rights of both parents. *Held* that the trial court properly determined that the compact did not apply to the present case: by its plain and unambiguous language, the compact's applicability is limited to the out-of-state placement of children "in foster care or as a preliminary to a possible adoption," and the court's reunification of the children with the father did not constitute

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* 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 court.

either foster care or adoption; moreover the appointment of S as coguardian did not convert the reunification into foster care or adoption, as the ruling to vest coguardianship in S was made in conjunction with the reinstatement of the father's guardianship, which fell outside the express provisions of the statute.

Argued February 8—officially released April 12, 2023**

Procedural History

Petitions by the Commissioner of Children and Families to adjudicate the respondents' minor children neglected, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Maronich, J.*; judgment adjudicating the minor children neglected and ordering commitment to the custody of the petitioner; thereafter, the respondent father filed a motion to revoke the commitment of the children and to reunify the children with him; subsequently, the petitioner filed petitions to terminate the respondents' parental rights with respect to their minor children; thereafter, the petitioner filed motions to amend the permanency plan for each child to a plan of reunification with the respondent father and the appointment of a paternal aunt as a coguardian; subsequently, the cases were tried to the court, *Gonzalez, J.*; judgments revoking the commitment of the children and reinstating guardianship in the respondent father and vesting coguardianship in the paternal aunt, from which the respondent mother appealed to this court. *Affirmed.*

James P. Sexton, assigned counsel, with whom was *Gail Oakley Pratt*, assigned counsel, for the appellant (respondent mother).

Andrew Mark Ammirati, assistant attorney general, with whom, on the brief, were *William Tong*, attorney

** April 12, 2023, 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 primary issue in this case is whether the Interstate Compact on the Placement of Children (compact), General Statutes § 17a-175,[1] applies to the revocation of commitment and reunification of children with their out-of-state parent, when such ruling also appoints the children's out-of-state paternal aunt as coguardian for the children. The respondent mother, Christine C. (respondent), appeals from the judgments of the trial court granting the motion of the children's father, Robert L. (father), to revoke the commitments of their

[1] General Statutes § 17a-175, article III, provides: "(a) No sending state shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.

"(b) Prior to sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state. The notice shall contain:

"(1) The name, date and place of birth of the child.

"(2) The identity and address or addresses of the parents or legal guardian.

"(3) The name and address of the person, agency or institution to or with which the sending agency proposes to send, bring, or place the child.

"(4) A full statement of the reasons for such proposed action and evidence of the authority pursuant to which the placement is proposed to be made.

"(c) Any public officer or agency in a receiving state which is in receipt of a notice pursuant to paragraph (b) of this article may request of the sending agency, or any other appropriate officer or agency of or in the sending agency's state, and shall be entitled to receive therefrom, such supporting or additional information as it may deem necessary under the circumstances to carry out the purpose and policy of this compact.

"(d) The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child."

three minor children, A, B, and D; approving the permanency plan requested by the petitioner, the Commissioner of Children and Families (petitioner); reinstating guardianship in the father; and vesting coguardianship in the children's paternal aunt, S.[2] On appeal, the respondent claims that the trial court improperly determined that the compact does not apply under the circumstances of the present case. We affirm the judgments of the trial court.[3]

The following facts and procedural history are necessary for our resolution of this appeal. The respondent and the father are the parents to three children: A, born in 2010; B, born in 2011; and D, born in 2016. On June 2, 2020, the children were removed from the respondent's care[4] under a ninety-six hour hold pursuant to General Statutes § 17a-101g. The reasons for removal were the respondent's unaddressed mental health issues and unstable housing. On June 4, 2020, the petitioner filed ex parte motions for orders of temporary custody with respect to each of the children, which the court granted, and petitions alleging that the children had been neglected. The father was living in Florida, and the children were placed in a nonrelative foster home in Connecticut. The orders of temporary custody were sustained by agreement of the respondent and the petitioner and were entered without prejudice to the father. On January 14, 2021, the court adjudicated the children as neglected, ordered specific steps for the respondent and the father, and committed the children to the custody of the petitioner.

[2] The attorney for the minor children filed a statement, pursuant to Practice Book § 79a-6 (c), adopting the brief of the petitioner in this appeal.

[3] Because we conclude that the compact does not apply, we need not address the respondent's claim, premised on the applicability of the compact, that the court exceeded its statutory authority by reinstating guardianship of the children in their father and vesting coguardianship in S without providing notice to, and receiving approval from, authorities in Florida.

[4] The file reflects that the respondent was staying at a shelter arranged hotel room in West Haven with the children at the time of their removal.

On April 15, 2021, the court approved a permanency plan of revocation of commitment and reunification of the children with the respondent and the father. In November, 2021, the father filed a motion to revoke the commitment of the children and seeking reunification of the children with him, either with or without protective supervision. A permanency plan of termination of parental rights and adoption was sought by the petitioner on January 14, 2022, and approved by the court on February 17, 2022. On April 18, 2022, the petitioner filed motions to amend the permanency plan for each child to a plan of reunification of the children with the father and the appointment of S as a coguardian.

The court held a hearing virtually, via Microsoft Teams, on the father's motion to revoke the commitments and the petitioner's motions to amend the permanency plans on June 30, 2022.[5] At the beginning of the hearing, the petitioner's counsel represented to the court that the petitioner had adopted the father's motion to revoke the commitments and that she was prepared to take the lead on pursuing the motion during the hearing. The petitioner then presented the testimony of Renata Tecza, a social worker with the Department of Children and Families (department), and entered into evidence two exhibits—the department's April 12, 2022 study in support of the amended permanency plan[6] and

[5] The father's motion to revoke the commitments originally was scheduled for a hearing on May 4, 2022. At that time, the petitioner proposed continuing the hearing until June. Counsel for the father agreed with the request to continue the matter and stated that the father would like to see the children finish out the school year. Thus, the matter was continued until June 30, 2022.

[6] The April 12, 2022 study in support of the amended permanency plan describes the status of the children, the respondent, and the father. With respect to the respondent, the study states, among other things, that she "is not cooperating with the majority of her court-ordered specific steps and continues to make minimal progress towards her identified treatment goals to address her mental health needs and stabilize her life, despite being offered the recommended and required services." In contrast, the study states that the father "has been cooperating with his court-ordered specific steps and has been motivated to reunify with his children. . . . [He] is

an April, 2022 home study of the father's home, conducted by ISS-USA.[7] The father presented the testimony of S. Neither the respondent nor the father testified or introduced any documentary evidence.

During the cross-examination of Tecza, the respondent disconnected from the proceeding, declined to rejoin the proceeding, and represented to her counsel that she did not want the proceeding to go forward. Shortly after the hearing resumed, the respondent, who still declined to join the proceeding, sent a text message to her counsel requesting that the proceeding be continued. After hearing argument, the court denied the request for a continuance.

Following the presentation of evidence, the court heard oral argument. The respondent's counsel argued, inter alia, that the vesting of coguardianship in S necessitated an interstate compact study. The children's counsel disagreed, as did counsel for the petitioner and counsel for the father. Argument did not conclude by the end of the day and resumed the next morning. When argument resumed the next morning, the respondent's counsel represented that he had communicated with the respondent earlier that morning and that she "opt[ed] not to participate in the . . . proceedings."

cooperating with [cognitive behavioral] therapy, as recommended by the court ordered evaluation." The study recommends that the children be reunified with the father with coguardianship in S "due to the recent efforts they have made toward reunification."

[7] ISS-USA is an independent agency engaged by the department to perform studies of parents in other states and other countries. The home study consisted of an assessment of the father and the household. The recommendation contained in the report following the study stated, inter alia, that "[the father] is interested, able, and appropriate to care for his children . . . . [The father] has consistent, reliable support from his biological sisters . . . . Both sisters seem to have a vested interest in the overall quality of life of their nieces and nephew. They are all well-versed in the needs of the children and seem to have clear understanding of the children's specific issues and the resources to accommodate them."

At the conclusion of argument, the court issued an oral decision on the motions. The court first rejected the respondent's argument that an interstate compact study was required in the present case. It explained that "the proposed reunification and the proposed guardianship does not amount to a placement under the definition in the compact." The court reasoned that, because the children would be reunified with their father, to whom the interstate compact study requirement does not apply, the appointment of the children's aunt as a coguardian did not necessitate an interstate compact study.

Turning to the substance of the motions, the court found that the father and the petitioner had met their burden of demonstrating by a fair preponderance of the evidence that the cause for commitment of the children no longer existed. The court noted that the prior permanency plan was termination of parental rights and adoption and explained that the plan changed when the father's sisters, S and K, agreed to be additional caretakers for the children. Specifically, the court found that, "[a]lthough the father has been cooperating with his court-ordered steps, including by attending biweekly [cognitive behavioral therapy] sessions, the father has cognitive limitations that prevent him from caring for the children independently. But the addition of his sisters as familial support, particularly [S's] willingness to serve as coguardian, alleviates any concerns regarding the father's limitations. The father has demonstrated that he can provide a safe and stable home and . . . has put himself in a position where he can support the children. According to . . . Tecza's credible testimony, the father has identified schools and . . . medical and mental health providers for the children in Florida. Both paternal aunts work in healthcare and have grown children of their own and, thus, have experience in caretaking. They are well versed in the needs of

the children, the children's specific issues, and what resources they require." On the basis of these findings, the court concluded that the cause for commitment no longer existed.

The court next determined that the evidence "clearly demonstrates that revocation of the commitment and reunification with the father with [S] as coguardian is in the best interest[s] of the children." The court found that the father resides with his mother and S in a five bedroom home owned by the father's brother and located in Palm Coast, Florida.[8] The court noted that the father's brother has indicated that the father, the children, and S can live in the home indefinitely.

The court noted that the father had maintained contact with the children and, in March, had traveled with S and K for an extended visit with the children. The department check-ins during the visit revealed that the children were safe and "appeared to be having a great time with their father and their aunts." The court found that B reported to her therapist that she would like to move to Florida with her father and that A and D both reported that they "really enjoyed spending time with their father and aunts."

The court noted that S had traveled with the father from Florida for the hearing and indicated that "she was fully able to help take care of the children." The court found that S "presented as a willing and capable coguardian committed to supporting the father in the raising of the children." The court commended S and K for "their willingness to assist in this proceeding and to take on the responsibilities along with the father of raising the three children."

With respect to the respondent, the court found that she "is not a viable resource for [the] children." Furthermore, the court credited Tecza's testimony that the

[8] The court found that K lives nine miles away from the father and S.

children's foster family, with whom the children are bonded, "is not a permanent resource because [the respondent] has engaged in harassing behavior toward the foster family, including by sending multiple unwanted text message and [making] phone calls sometimes more than once per day." The court found this behavior consistent with information contained in the department's social study that indicates that the respondent had sent "repeated harassing and sometimes threatening communications to various people involved in this case."[9] The court found that the respondent's "mental health appears to be decompensating," noting that she was assisted at trial by a guardian ad litem because of competency concerns raised by her attorney. The court also noted that the respondent left the hearing and refused to return.[10]

On the basis of the foregoing, the court found by a fair preponderance of the evidence that the cause for commitment no longer existed and that revocation of commitment was in the best interests of the children. As to the motions to amend the permanency plan, the court found that it was in the best interests of the children to amend the plan to reunification of the children with the father, reinstatement of guardianship in the father, and the vesting of coguardianship in S. The court found that the petitioner and the father had proven that S is "a suitable and worthy guardian," and that awarding her coguardianship is in the best interests of the children. No motion for stay was filed and,

[9] The court did not credit uncorroborated allegations made by the respondent as to the father.

[10] Noting that the respondent had, in passing, challenged the father's paternity, the court stated: "Although I don't believe it's necessary for me to substantively address [the respondent's] paternity claims in this hearing, I will note that the father is on the birth certificate of all three children. And based on the social worker's testimony, which I credit, [the respondent] never challenged paternity prior to [the department's] involvement in this most recent case, which began, as I indicated, in June of 2020."

accordingly, the children have moved to Florida. This appeal followed.

On appeal, the respondent claims that the trial court improperly determined that the compact does not apply under the facts of this case. Specifically, the respondent argues: "Given the unique facts of this case, where the petitioner had sought to terminate the parental rights of both the respondent and the father, the father was deemed not fit to parent independently, and the out-of-state paternal aunt of the children was appointed as a mandatory and necessary coguardian to assist the unfit father with the care of the children, the court was required to apply the . . . compact, and, by failing to do so, it acted in contravention of the statutory directives."[11] The petitioner responds that, "by its plain language, and as construed by our Supreme Court, the [compact] only applies when a child is sent, brought, or caused to be sent or brought, into another state for placement in foster care or as a preliminary to a possible adoption." Because the children were not sent into Florida for placement in foster care or as a preliminary to a possible adoption, the petitioner maintains that the

[11] Repeatedly in her principal appellate brief, the respondent refers to the father as "the unfit father" and asserts a lack of fitness as one reason for application of the compact. The petitioner responds that the argument that the father is an unfit parent lacks merit. Our review of the record reveals that the trial court found that the "father has cognitive limitations that prevent him from caring for the children independently," but it did not ever use the word unfit. To the contrary, in concluding that the cause for commitment no longer exists, the court found that the "[f]ather has demonstrated that he can provide a safe and stable home and . . . has put himself in a position where he can support the children." Moreover, the court credited the testimony of the department's social worker that the father had identified schools and medical and mental health providers for the children. Finally, the court concluded that any concerns regarding the father's limitations were alleviated by the addition of his sisters as familial support, particularly S's willingness to serve as coguardian. Thus, we reject the respondent's contention that the court's recognition that the father has cognitive limitations amounts to an implicit finding by the trial court that the father is "unfit."

compact is not applicable under the facts of this case. We agree with the petitioner.

We first set forth our standard of review. The respondent's claim concerning the application of the compact requires this court to ascertain whether § 17a-175 applies under the facts of this case, which is a question of statutory interpretation subject to plenary review. See *In re Emoni W.*, 305 Conn. 723, 733, 48 A.3d 1 (2012). "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. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . Importantly, ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation. . . . In other words, statutory language does not become ambiguous merely because the parties contend for different meanings." (Internal quotation marks omitted.) *In re Alizabeth L.-T.*, 213 Conn. App. 541, 553–54, 278 A.3d 547 (2022).

As background, "Connecticut adopted the [compact] in 1967 and codified it as § 17a-175. All fifty states, the

District of Columbia and the U.S. Virgin Islands have enacted the compact." *In re Yarisha F.*, 121 Conn. App. 150, 156, 994 A.2d 296 (2010). Article I of the compact provides in relevant part that "[i]t is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that . . . (a) [e]ach child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care. . . ." General Statutes § 17a-175, art. I (a).

General Statutes § 17a-175, article III (a), provides: "No sending state shall send, bring, or cause to be sent or brought into any other party state any child *for placement in foster care or as a preliminary to a possible adoption* unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein."[12] (Emphasis added.)

We conclude that the relevant language in § 17a-175 is plain and unambiguous. By its terms, the compact's

[12] General Statutes § 17a-175, article II, provides in relevant part: "As used in this compact . . .

"(b) 'Sending agency' means a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency or other entity which sends, brings, or causes to be sent or brought any child to another party state.

"(c) 'Receiving state' means the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local public authorities or for placement with private agencies or persons.

"(d) 'Placement' means the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective or epileptic or any institution primarily educational in character, and any hospital or other medical facility."

applicability is limited to the out-of-state placement of children "*in foster care or as a preliminary to a possible adoption . . . .*" General Statutes § 17a-175, art. III (a). The ordinary meaning of that phrase does not encompass the court's action in the present case in revoking the commitment, reunifying the children with their father, and appointing S as coguardian.[13] The children were not sent into Florida for placement in foster care or as a preliminary to a possible adoption. To the contrary, the children were reunified with their father, who resides in Florida. As our Supreme Court has stated, "[c]hildren in the care of their own parents are not in 'foster care' in any ordinary sense of that phrase, and parents are not required to adopt their own children." *In re Emoni W.*, supra, 305 Conn. 734–36. We are not persuaded that the father's cognitive limitations that occasioned the appointment of a coguardian for the children brings the present situation within the reach of the statute. The appointment of the coguardian did not convert the reunification of the children with the father into a placement "in foster care or as a preliminary to a possible adoption."

Contrary to the respondent's assertions, this court's decision in *In re Yarisha F.*, supra, 121 Conn. App. 150, does not compel a contrary conclusion. In that case, this court considered, as a matter of first impression, whether, in light of § 17a-175, the trial court lacked "authority to transfer guardianship of the child to [the child's] great-grandmother in Florida without a supporting interstate compact study report from a suitable

[13] The respondent argues that, "[r]ather than taking but one sentence from the entirety of the [compact], this court should consider the whole of the statute, its purpose, and the legislature's directive to construe it liberally." See General Statutes § 17a-175, art. X ("[t]he provisions of this compact shall be liberally construed to effectuate the purposes thereof"). We cannot, however, construe the statute in the manner suggested by the respondent, as that construction would render the express limitation in article III meaningless.

authority in that state." Id., 155. The petitioner had filed a petition to terminate the respondent mother's parental rights. Id., 152–53. The child's mother was the sole respondent because the child's father was deceased. Id., 153 n.1. Prior to adjudication of the petition, the child's maternal grandmother, a Florida resident, had intervened and moved that the child's maternal great-grandmother, also a Florida resident, be appointed as guardian for the child.[14] Id., 153. The termination petition and the motion to transfer guardianship were consolidated for trial. Id. Following trial, the trial court granted the motion to transfer guardianship to the child's great-grandmother, finding that she was a worthy and suitable caretaker for the child. Id. "The court ordered that the guardianship and placement would become effective following (1) receipt of a pending interstate compact study of the great-grandmother's suitability and (2) six months of visitation between the great-grandmother and the child. In response to further motions, the court clarified its judgment to hold that, in light of the evidence before it, the transfer of guardianship would become effective upon receipt of the interstate compact study, even if that study contained a negative evaluation of the great-grandmother." Id. The petitioner subsequently filed a motion to open the judgment and reopen evidence to present newly discovered evidence. Id., 155. The commissioner offered the results of the completed interstate compact study, which did not support placement with the great-grandmother. Id. The court denied the commissioner's motion. Id.

[14] The intervenor, the child's grandmother, earlier had presented herself as a guardian and possible placement for the child. *In re Yarisha F.*, supra, 121 Conn. App. 154. "The [petitioner's] permanency plan initially called for the intervenor to take custody of the child as her guardian. Accordingly, the [petitioner] requested that Florida complete a study of the intervenor and her home in Florida, a home that she shared with her mother, the child's great-grandmother. Florida approved this placement, but the intervenor subsequently failed a drug test taken at the request of the [petitioner]." Id., 154 n.5.

On appeal in *In re Yarisha F.*, this court first recognized that, "[a]lthough Connecticut courts have rarely had an occasion to apply the compact, the majority of jurisdictions that have considered the issue have concluded that the compact prohibits courts from placing children out of state prior to the appropriate notification under article III (d)." Id., 157–58. This court noted that "[t]his prohibition has been applied to intrafamily placements" and cited cases involving placements of children with their extended family members. Id., 158. This court determined that the trial court's placement of the child in Florida with the child's great-grandmother without approval from Florida authorities contravened the directives of the statute. Id., 165. Specifically, it rejected the notion that the trial court could rely on its independent determination of the best interest of the child, explaining that "[t]he conditions for placement set forth in article III of the [c]ompact are designed to provide complete and accurate information regarding children and potential adoptive parents from a sending state to a receiving state and to involve public authorities in the process in order to ensure children have the opportunity to be placed in a suitable environment." (Internal quotation marks omitted.) Id., 164. Accordingly, this court determined that the trial court improperly transferred guardianship to the child's great-grandmother. Id., 165.

The respondent argues that the appointment of S as coguardian of the children requires the application of *In re Yarisha F.* We conclude that the facts of *In re Yarisha F.*, are substantially different from those of the present case and, therefore, that decision is not controlling here. In *In re Yarisha F.*, following the filing of, and consolidated trial on, a petition to terminate the respondent mother's parental rights and a motion to transfer guardianship, the trial court placed the child in Florida with, and transferred guardianship to, the

child's great-grandmother. Id., 153. This placement of the child with a member of the child's extended family was encompassed within the categories of "placement in foster care or as a preliminary to a possible adoption . . . ." General Statutes § 17a-175, art. III (a). Rather than order the placement effective only on receipt of a supporting interstate compact study, the trial court improperly ordered the placement effective on receipt of the study regardless of its outcome. *In re Yarisha F.*, supra, 153.

Although the present case involves the vesting of coguardianship in a member of the children's extended family, that ruling was not made disconnected to a parental placement. Rather, it was made in conjunction with the reunification of the children with their father and the reinstatement of his guardianship, which rulings, as we have previously discussed, fall outside the express provisions of the statute. Moreover, although the respondent emphasizes that the petitioner previously had proposed a permanency plan of termination of parental rights and adoption, the petitioner thereafter amended the proposed course of action regarding the children and proposed the permanency plan of reunification with the father and, in approving the reunification plan, the trial court found that the father had "demonstrated that he can provide a safe and stable home and . . . has put himself in a position where he can support the children." Thus, the present case is procedurally different from *In re Yarisha F.*, where the commissioner filed and pursued a petition for the termination of the sole remaining parent's parental rights.

Our reading of the compact as inapplicable under the facts of the present case is supported by our Supreme Court's decision in *In re Emoni W.*, supra, 305 Conn. 723. In that case, the court considered whether the compact applies to the placement of children with an out-of-state noncustodial parent. Id., 726. The children

were removed from the respondent mother's home under a ninety-six hour hold after she was arrested and charged with drug related and other offenses. Id., 727. The children's father, who lived in Pennsylvania, sought to have the children live with him. Id., 727–28. Following oral argument, the trial court determined that § 17a-175 applied to the placement of children with an out-of-state, noncustodial parent, and the father appealed. Id., 728.

On appeal in *In re Emoni W.*, supra, 305 Conn. 734, our Supreme Court concluded that "the ordinary meaning of the phrase 'for placement in foster care or as a preliminary to a possible adoption' as used in § 17a-175, article III (a), does not encompass placement with a noncustodial parent." The court explained that "[c]hildren in the care of their own parents are not in 'foster care' in any ordinary sense of that phrase, and parents are not required to adopt their own children." Id., 734–36.

Rejecting the petitioner's claim that the court's determination was inconsistent with the overall purpose of the statute, the court reasoned that, although "the drafters reasonably *could have* applied the compact to out-of-state parents, nothing in the express language of § 17a-175 indicates that that is what they actually did. Moreover, it is reasonable to conclude that the drafters determined that the statute should not be applied to out-of-state parents in light of the constitutionally based presumptions that parents generally are fit and that their decisions are in the child's best interests. . . . Also . . . the petitioner has the authority and the responsibility to investigate whether the placement of a particular child with an out-of-state parent would be consistent with the public policy goals underlying the compact when the child is under the petitioner's care and supervision and there is evidence rebutting the

presumption of fitness."[15] (Citations omitted; emphasis in original.) Id., 736–37.

The court rejected the petitioner's reliance on article V of § 17a-175, which "provides that the 'sending agency' retains jurisdiction over children who have been placed pursuant to the statute until certain events occur." Id., 738. The court explained: "[T]here is nothing in the language of § 17a-175 that suggests that the 'sending agency' is authorized to apply the provisions of the compact to an out-of-state parent in the first instance. Moreover, it is apparent that the provisions of § 17a-175, article V, were designed to apply to cases in which a child is in foster care or is going to be adopted. For example, it seems highly unlikely that the drafters would have intended that agencies, like the petitioner in the present case, would 'continue to have financial responsibility for support and maintenance of the child during the period of the placement' when a parent obtains custody of the child." Id.

Finally, the court in *In re Emoni W.* rejected the petitioner's contention that the trial court's interpretation of § 17a-175 was inconsistent with the regulations that implement the compact. Id., 739–40. Our Supreme Court explained: "Article VII of § 17a-175 provides in relevant part that '[t]he executive head of each jurisdiction party to this compact shall designate an officer who . . . acting jointly with like officers of other party jurisdictions, shall have power to promulgate rules and regulations to carry out more effectively the terms and provisions of this compact.' Pursuant to this provision, the Association of Administrators of the Interstate Compact on the Placement of Children (association) promulgated a regulation that provides in relevant part: '[I]f

[15] The court in *In re Emoni W.* also rejected the petitioner's argument that the phrase " 'placement in foster care' " was "clearly intended to encompass any placement by the court." (Emphasis omitted.) *In re Emoni W.*, supra, 305 Conn. 737.

[twenty-four] hour a day care is provided by the child's parent(s) by reason of a court-ordered placement (and not by virtue of the parent-child relationship), the care is foster care.' Association of Administrators of the Interstate Compact on the Placement of Children Regulation 3 (5) (June 2010). Regulation 3 (6) (b) of the association's regulations provides: 'The [c]ompact does not apply whenever a court transfers the child to a noncustodial parent with respect to whom the court does not have evidence before it that such parent is unfit, does not seek such evidence, and does not retain jurisdiction over the child after the court transfers the child.' " Id. The court concluded that, even if it were to assume that regulations generally have the force of law, "association regulation[s] 3 (5) and (6) (b) are invalid because they impermissibly expand the scope of article III of § 17a-175." Id., 740.

Our Supreme Court's decision in *In re Emoni W.* supports affirming the decision of the trial court in the present case. The respondent seeks to distinguish *In re Emoni W.* on the basis that the petitioner did not pursue the termination of the respondent's parental rights in that case. The respondent argues that the compact is applicable here because, in contrast to *In re Emoni W.*, the father's "parental rights had been diminished by a court." In support of this argument, the respondent relies on a footnote in *In re Emoni W.*, in which our Supreme Court emphasized that it "express[ed] no opinion . . . as to whether the compact applies to placements by a court with a parent whose parental rights have been diminished or terminated by a court." *In re Emoni W.*, supra, 305 Conn. 735 n.8. We cannot construe our Supreme Court's statement in a footnote, in which it "express[ed] no opinion" as to whether the compact would apply in factual situations not before it and which was made in the context of distinguishing case law from other jurisdictions, to

expand the reach of the statute. Therefore, we decline the respondent's invitation to rely on any claimed diminution in the father's rights as a basis for application of the compact.

Accordingly, we conclude that the trial court properly determined that the compact does not apply to the present case.

The judgments are affirmed.

In this opinion the other judges concurred.

IN RE KHARM A.*
(AC 45968)

Alvord, Moll and Seeley, 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 child. She claimed that the trial court erroneously concluded that the Department of Children and Families had made reasonable efforts at reunification pursuant to statute (§ 17a-112 (j) (1)). *Held* that, because the respondent mother challenged only one of the two separate bases for upholding the trial court's determination that the requirements of § 17a-112 (j) (1) had been satisfied, the mother's appeal was moot because there was no practical relief that this court could provide: although the trial court found both that the department made reasonable efforts to reunify the mother with her child and that the mother was unable or unwilling to benefit from reunification efforts, in her principal appellate brief, the mother challenged only the court's finding that the

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

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, 851; 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.

department made reasonable efforts to reunify her with her child; moreover, although her statement of issues and a heading in her brief referenced the court's finding that she was unable or unwilling to benefit from reunification efforts, the argument section of her brief, which was contained in two and one-half pages, did not provide legal analysis on this point.

Argued March 22—officially released April 13, 2023**

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 Haven, Juvenile Matters, and tried to the court, *Conway*, *J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Appeal dismissed.*

Caroline E. Lovallo, certified legal intern, with whom was *Joshua D. Michtom*, assistant public defender, for the appellant (respondent mother).

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

Opinion

ALVORD, J. The respondent mother, Letishag A., appeals from the judgment of the trial court terminating her parental rights with respect to her minor child, K.[1] On appeal, she claims that the court erroneously concluded that the Department of Children and Families (department) had made reasonable efforts at reunification, pursuant to General Statutes § 17a-112 (j) (1).

** April 13, 2023, 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 the respondent father, Kyle J., who has not appealed from that judgment. We hereinafter refer to the respondent mother as the respondent and to Kyle J. by name.

The respondent does not brief a claim that the court erred in its additional conclusion that she was unable or unwilling to benefit from reunification efforts. Because the respondent challenges only one of the two bases for the court's determination that § 17a-112 (j) (1) had been satisfied, we conclude that the respondent's appeal is moot.[2]

The following facts, which were found by the trial court, and procedural history are relevant to this appeal. Prior to K's birth, the respondent and Kyle J. had two older children, Z and P. In 2017, Z, then five weeks old, was subjected to extreme physical abuse while in the care of the respondent and Kyle J.[3] The respondent's and Kyle J.'s parental rights as to Z were terminated in

[2] The attorney for the minor child filed a statement adopting the brief of the petitioner, the Commissioner of Children and Families, in this appeal.

[3] In its September 2, 2022 memorandum of decision terminating the respondent's and Kyle J.'s parental rights as to K, the trial court quoted its factual findings from its June 28, 2021 written decision in which it terminated the respondent's and Kyle J.'s parental rights as to P and committed K to the custody of the petitioner, the Commissioner of Children and Families. "Specifically, on or about July 14, 2017, five week old [Z] sustained a left mandibular (jaw) fracture, left facial bruising, a liver laceration, bilateral eye hemorrhages, fractures of his left femur and left tibia (lower leg bone) and multiple rib fractures. [The department] [learned] of [Z's] injuries fortuitously: [Z] and [the respondent and Kyle J.] failed to appear for a scheduled pediatric appointment on or about July 14, 2017. The pediatrician's office notified [the department] of the family's no show and on the morning of July 14, 2017, the assigned [department] social worker proceeded to the family's residence to assist in transporting the child and parents to the pediatrician's office. The [department] social worker observed [Z] to have a swollen face, and the social worker checked to see if [Z] was still breathing. After speaking to the [respondent and Kyle J.], the social worker called 911 and [Z] was transported by ambulance to the hospital.

The [respondent and Kyle J.] contend that in the early morning [hours] of July 14, [Z] accidentally fell to the floor from [Kyle J.'s] arms after the swaddling blanket unraveled and that during the fall [Z's] head hit the leg of the bassinet. Dr. Lisa Pavlovic, an expert in child abuse pediatrics, credibly opined that [the respondent and Kyle J.'s] explanation does not plausibly explain [Z's] injuries. Dr. Pavlovic credibly testified that lacerations of the liver are usually caused by blunt force trauma and Dr. Pavlovic credibly opined that [Z] was a victim of severe physical abuse."

2019. P was committed to the care and custody of the petitioner, the Commissioner of Children and Families, in March, 2019.

K was born in October, 2020, and the petitioner filed a motion for an order of temporary custody a few days following her birth, which was granted ex parte that same day. On October 15, 2020, the petitioner filed a neglect petition as to K, and the contested hearing on the order of temporary custody was consolidated with the adjudicatory phase of the neglect petition. After a hearing, the court sustained the order of temporary custody and adjudicated K neglected. The dispositional phase of the neglect petition as to K was consolidated with the petition for the termination of the respondent's and Kyle J.'s parental rights as to P. Following a hearing, the court, *Conway, J.*, terminated the respondent's and Kyle J.'s parental rights as to P and committed K to the custody of the petitioner. Since her discharge from the hospital following her birth, K has been in the care of her foster mother, who is also the adoptive mother of Z and the pre-adoptive foster mother of P.

On December 3, 2021, the petitioner filed a petition for the termination of the respondent's and Kyle J.'s parental rights as to K. As to the respondent, the petition alleged the grounds of failure to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B) (i) and (E).[4] On July 26, 2022, the court held

[4] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (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 . . . [or] (E) 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 trial on the petition. The respondent was absent at the scheduled start of the trial but appeared approximately one hour after it began. The petitioner presented the testimony of two social workers with the department, Kelly Stratton and James Roth, and offered into evidence fifteen exhibits, which were admitted. The respondent offered into evidence one exhibit, which was admitted, and did not present any testimony.

In its September 2, 2022 memorandum of decision, the court, *Conway*, *J.*, found that the respondent, "as she has with her other children, remained consistent in attending supervised visits. She is appropriate at the supervised visits and attentive to [K's] needs and interests. [The department] attempted to refer [the respondent] and [K] to CT Youth Resolution, a community based agency that offers parenting education services and supervised visitation sessions. [The respondent] refused to sign the agency's standardized release form to permit CT Youth Resolution, in the event of a medical emergency, to contact emergency medical personnel and if needed to have [K] transported via ambulance to [an] emergency medical treatment center. A second attempt was made to have the respondent . . . work with another community agency, Qualified Parent Center, but for similar reasons [the respondent] would not engage with the provider.

"When the assigned [department] social worker discussed with [the respondent] what needed to be addressed for reunification to be possible, namely beneficial and documented mental health treatment, [intimate partner violence] treatment, [the respondent's] prior substance use and the physical abuse of Z, [the

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 . . . ."

respondent] denied any need for treatment or services. [The respondent] insists [the department] kidnapped all three of her children and she exhibits no insight as to why [K] is not in her care nor does she hold herself or [Kyle J.] accountable for the extreme physical abuse of Z in 2017." (Footnote omitted.) On the basis of these findings, the court found that (1) the department had made reasonable efforts at reunification and (2) the respondent was unable or unwilling to benefit from those efforts at reunification.

With respect to the statutory grounds for termination alleged in the petition, the court found that the respondent had failed to achieve an appropriate degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of the child, she could assume a responsible position in K's life. Specifically, the court found that, although the respondent "has consistently attended supervised visits with [K] and is attentive to [K] during said visits, [the respondent] has not engaged in documented treatment that meaningfully addresses the reasons why [K] was removed from her care at birth and why [K] has remained out of [the respondent's] care for almost two years. To reiterate [the respondent's] issues and lack of progress over the past two years: [the respondent] has engaged in long-standing and unaddressed [intimate partner violence] behaviors, [the respondent] repeatedly refused to engage in parenting programs—a critical intervention which may have given [the respondent] the necessary tools to someday provide [K] with a physically safe environment and which may have bestowed in [the respondent] an ability and the skills to be a responsible entity in [K's] life, and [the respondent] has not engaged in documented, beneficial mental health treatment. As reflected in [the court's June 28, 2021 written decision in which it terminated the respondent's and Kyle J.'s parental rights as to P

and committed K to the custody of the petitioner], as far back as November, 2020, for parental rehabilitative purposes, it was recommended that the respondent . . . receive protracted and effective psychotherapy with a seasoned professional. Psychologist . . . Madeleine Leveille conducted a court-ordered psychological evaluation of the respondent . . . and in November, 2020, Dr. Leveille credibly opined the following: '[The respondent] would need to have weekly psychotherapy for a period of two years to modify her maladaptive tendencies towards avoidance, social distancing, and mistrust. This individual psychotherapy could address the [domestic] violence issues in [the respondent's] life as well as her maladaptive personality tendencies. Given these personality tendencies, [the respondent] would be a challenging client, even for a seasoned professional who has experience working with individuals who are dually diagnosed with a substance use disorder (active or in remission) and a personality disorder. Given that [the respondent] has not engaged in psychotherapy for any extended period of time, it is highly likely that she will not follow through [on] this recommendation for individual psychotherapy.' "[5] The court concluded that, "until and unless [the respondent] successfully engages in the recommended mental health

[5] The respondent had submitted into evidence a document that indicated that she was discharged from Cornell Scott Hill Health Corporation—Dixwell Behavioral Health by Christina Lapierre, a licensed clinical social worker (LCSW), with a checked box next to "Successful completion of treatment/graduation." The court noted that the assigned department social worker had no prior knowledge of the document until the morning of the termination of parental rights trial. The court further found that "[n]o start date is reflected and the respondent . . . provided no testimony, from herself or from anyone else, as to the type and length of treatment or the identified issues or treatment goals that [the document] references as 'successful.' " (Footnotes omitted.) The court concluded: "What treatment work [the respondent] and LCSW Lapierre may or may not have engaged in and over what period of time remains unknown. Moreover, whatever level of progress [the respondent] achieved in her work with LCSW Lapierre and how said progress may or may not have impact on [the respondent's] caregiving capabilities as to [K] also is not discernable."

treatment articulated above, [the respondent's] 'asociality, paranoid thinking, stubbornness and irritability, [which] are aspects of her underlying personality disorder' . . . render [the respondent] incapable of parenting [K] or assuming a responsible position in [K's] life." Accordingly, the court found that the respondent had failed to rehabilitate pursuant to § 17a-112 (j) (3) (B) (i) and (E).

In the dispositional phase of the proceedings, the court made findings as to each of the criteria set forth in § 17a-112 (k) and concluded that the termination of the respondent's parental rights was in K's best interest. Accordingly, the court rendered judgment terminating the respondent's and Kyle J.'s parental rights as to K and appointing the petitioner as K's statutory parent. This appeal followed.

On appeal, the respondent claims that the trial court erred in concluding that the department had made reasonable efforts to reunify K with the respondent. Specifically, the respondent argues that the department should have "tr[ied] again to engage her with services" once it "knew" that she was no longer in a relationship with or living with Kyle J. The petitioner responds that the respondent's "challenge to the trial court's finding that the department made reasonable reunification efforts is moot because she fails to also challenge the trial court's finding that she was unable or unwilling to benefit from reunification efforts—an independent basis for satisfying the efforts element set forth in § 17a-112 (j) (1)." We agree that the respondent's claim is moot because there is no practical relief that this court can afford her with respect to her claim.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . .

Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . A case is considered moot if [the] court cannot grant the appellant any practical relief through its disposition of the merits . . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Internal quotation marks omitted.) *In re A'vion A.*, 217 Conn. App. 330, 354, 288 A.3d 231 (2023).

Section 17a-112 (j) (1) provides in relevant part that the Superior Court "may grant a petition [for termination of parental rights] . . . if it finds by clear and convincing evidence that . . . the [department] has made reasonable efforts to locate the parent and to reunify the child with the parent . . . *unless* the court finds . . . that the parent is unable or unwilling to benefit from reunification efforts . . . ." (Emphasis added.) "In construing that statutory language, our Supreme Court has explained that, [b]ecause the two clauses are separated by the word unless, this statute plainly is written in the conjunctive. Accordingly, the department must prove *either* that it has made reasonable efforts to reunify *or*, *alternatively*, that the parent is unwilling or unable to benefit from reunification efforts. . . . [E]ither showing is sufficient to satisfy this statutory element. . . .

"Because either finding, standing alone, provides an independent basis for satisfying § 17a-112 (j) (1) . . . in cases in which the trial court concludes that *both* findings have been proven, a respondent on appeal must demonstrate that both determinations are improper. If the respondent fails to challenge either one of those independent alternative bases . . . the trial court's ultimate determination that the requirements of § 17a-112 (j) (1) were satisfied remains unchallenged and intact. . . . In such instances, the appeal is moot, as

resolution of a respondent's claim of error in her favor could not [afford] her any practical relief." (Citations omitted; emphasis in original; internal quotation marks omitted.) *In re A'vion A.*, supra, 217 Conn. App. 354–55; see also, e.g., *In re Jorden R.*, 293 Conn. 539, 557, 979 A.2d 469 (2009).

In the present case, the court found that the department had made reasonable efforts to reunify the respondent with K *and* that the respondent was unable or unwilling to benefit from reunification efforts. In her principal appellate brief, the respondent challenges the court's finding that the department made reasonable efforts to reunify her with K. Although her statement of issues and a heading in her brief reference the court's finding that she was unable or unwilling to benefit from reunification efforts, the argument section of her brief, which is contained in two and one-half pages, does not provide legal analysis on this point. See, e.g., *Stubbs* v. *ICare Management, LLC*, 198 Conn. App. 511, 529, 233 A.3d 1170 (2020) (deeming claim abandoned because it was only referenced in statement of issues, introduction, and heading of brief).[6] Rather, her argument solely addresses the reasonable efforts determination.

Because the respondent challenges only one of the two separate and independent bases set forth in § 17a-112 (j) (1), there is no practical relief that this court can afford her with respect to her claim. See, e.g., *In re Isabella Q.*, 217 Conn. App. 837, 847, A.3d

[6] The respondent also includes in her statement of issues a claim that there was insufficient evidence to support the trial court's finding that the respondent failed to rehabilitate. As the petitioner notes in her brief, the respondent did not brief this claim and, thus, it is deemed abandoned. See *Russo* v. *Thornton*, 217 Conn. App. 553, 569 n.21, A.3d (2023) ("[when] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned" (internal quotation marks omitted)).

(2023); *In re Natalia M.*, 190 Conn. App. 583, 588, 210 A.3d 682, cert. denied, 332 Conn. 912, 211 A.3d 71 (2019).

The appeal is dismissed.

In this opinion the other judges concurred.

KENNETH G. WOLFEL, JR., ET AL. *v.* LAWRENCE C. WOLFEL
(AC 44316)

Prescott, Cradle and Suarez, Js.

Syllabus

The plaintiffs, K and R, appealed to the Superior Court from the decree of the Probate Court holding that they violated their fiduciary duties as cotrustees of a trust and ordering them to reimburse the defendant, their brother, for his share of certain trust assets. V had established the trust for the equal benefit of her three sons, K, R, and the defendant. All three sons were beneficiaries of the trust. After V's death, the plaintiffs were to hold their respective shares and the defendant's share in three separate trusts. The three separate trusts were never created and the plaintiffs continued to administer the single trust as they had before V's death. The defendant filed a petition for an accounting of the trust in the Probate Court, which that court granted. Following a hearing, the Probate Court issued a decree finding that the plaintiffs' accounting was substantially deficient and that they had violated their fiduciary duties as trustees by using trust assets to fund their personal business endeavors and interests. The Probate Court ordered the plaintiffs to reimburse the defendant for his equal share of the trust assets. The plaintiffs appealed from the Probate Court's decree to the Superior Court, claiming, inter alia, that they had returned certain funds to the trust. Following a trial de novo, the Superior Court concluded that the plaintiffs breached their fiduciary duties and, after determining that the three beneficiaries had shared unequally in the trust assets, entered orders to equalize their shares and to terminate the trust. On the plaintiffs' appeal to this court, *held*:

1. The plaintiffs' claim that the Superior Court exceeded its authority by addressing issues that they did not raise in their appeal from the Probate Court's decree was unavailing: the Superior Court, sitting as the Probate Court, as it was required to do, conducted a trial de novo on the plaintiffs' accounting and on the challenges to the accounting asserted by the defendant and rendered judgment resolving the issues related to the

trust, addressing those issues that were necessary and proper for a determination of the parties' claims pertaining to the accounting.

2. The Superior Court did not err in finding that K failed to prove that he paid certain amounts into the trust in order to reimburse it for distributions made to him for his personal benefit: in its memorandum of decision, the court discussed in detail the evidence that the plaintiffs presented in support of their claims that they reimbursed the trust for distributions they had received and, after weighing that evidence, concluded that the plaintiffs had failed to prove that K reimbursed the trust in an amount sufficient to cure most of the self-dealing distributions made to him from the trust; moreover, although the plaintiffs asserted six grounds on which the court should have concluded that K reimbursed the trust in the amount that they claimed, the substance of each of their arguments was essentially the same, namely, that the evidence they presented was unrebutted by the defendant, the court was not required to credit the plaintiffs' evidence even if it was unrebutted; accordingly, this court was not left with the definite and firm conviction that a mistake had been committed.

Argued January 31—officially released April 18, 2023

Procedural History

Appeal from the decree of the Probate Court for the district of Newington holding that the plaintiffs breached their fiduciary duties as trustees of a trust and ordering them to reimburse the defendant for his share of certain trust assets, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Hon. Joseph M. Shortall*, judge trial referee; judgment reversing in part the Probate Court's decree, from which the plaintiffs appealed to this court; thereafter, Richard J. Margenot, the successor administrator of the Estate of Lawrence C. Wolfel, was substituted as the defendant. *Affirmed.*

Michael P. Kaelin, for the appellants (plaintiffs).

Terence J. Gallagher, with whom, on the brief, was *Patrick L. Poeschl* for the appellee (substitute defendant).

Opinion

CRADLE, J. This action stems from a dispute between three brothers, Kenneth G. Wolfel, Jr. (Kenneth), Rodney J. Wolfel (Rodney), and Lawrence C. Wolfel (Lawrence),[1] regarding their respective shares in assets set aside in the Wolfel Family Trust (trust), which was created by their mother, Vera Wolfel. The plaintiffs, Kenneth and Rodney, appeal from the judgment of the Superior Court affirming in part and reversing in part the decree of the Probate Court holding that they, as cotrustees of the trust, violated their fiduciary duties and ordering them to reimburse Lawrence, the defendant, for his equal share of the trust assets. On appeal, the plaintiffs claim that the Superior Court (1) exceeded its authority by addressing issues that they did not raise in their appeal from the decree of the Probate Court, and (2) erroneously found that Kenneth failed to prove that he had paid $552,271 into the trust to reimburse it for distributions made to him for his personal benefit. We disagree and, accordingly, affirm the judgment of the Superior Court.

The following facts, as set forth by the Superior Court in its memorandum of decision, and procedural history are relevant to our resolution of this appeal. In December, 2000, Vera Wolfel established the trust for the equal benefit of her three sons, Kenneth, Rodney and Lawrence. All three sons were beneficiaries of the trust, and Kenneth and Rodney were the named trustees of the trust.[2]

[1] While this appeal was pending, Lawrence died. On December 16, 2022, Richard J. Margenot, the successor administrator of Lawrence's estate, was substituted as the defendant.

[2] The sole asset of the trust initially was Vera Wolfel's residential property located in Greenwich, the appraised value of which, at the time the trust was executed, was $1,150,000. That property sold in 2002 for $1,695,000. In 2003, the sale of another property located in Plainville resulted in an addition of $275,000 to the trust. In 2012, after Vera Wolfel's death in 2011, $1,000,000 in life insurance proceeds also were added to the trust.

Pursuant to the terms of the trust, the plaintiffs, as trustees, were authorized to "pay or apply all or any part of the net income and principal" to or for the benefit of Vera Wolfel's descendants "for any such eligible beneficiary's maintenance in health and reasonable comfort, complete education (including preparatory, college, postgraduate and professional training), or support in any such eligible beneficiary's accustomed manner of living . . . ." Although the plaintiffs were afforded extensive "[m]anagement [p]owers," the trust conferred the authority to make discretionary distributions to an independent trustee, which was defined in the trust as a trustee who is "not a current eligible income beneficiary of [the] trust" or a descendant of Vera Wolfel. Although the plaintiffs were empowered to appoint an independent trustee, they never did.

The trust was to continue until the death of Vera Wolfel, at which time it was to terminate, and the plaintiffs were to divide any assets in the trust into "separate shares, per stirpes, with respect to [her] then living descendants . . . ." When Vera Wolfel died on December 24, 2011, her "then living descendants" were her three sons. The plaintiffs were to hold their respective shares and the defendant's share in three separate trusts, and apply the net income and principal for the benefit of the beneficiary of each trust for his "maintenance in health and reasonable comfort, complete education (including preparatory, college, postgraduate and professional training), or support in any such eligible beneficiary's accustomed manner of living . . . ." These separate trusts were never created and the plaintiffs continued to administer the single trust as they had before Vera Wolfel's death.

On March 31, 2014, the Probate Court granted a petition for an accounting of the trust filed by the defendant, and ordered the plaintiffs to file an accounting of their activities as trustees of the trust, from December 19,

2000, to September, 2014. On December 31, 2014, the plaintiffs filed a revised accounting.[3] On November 2, 2015, following a hearing on the plaintiffs' accounting, the Probate Court issued a decree, finding, inter alia, that the accounting filed by the plaintiffs was substantially deficient and that they had violated their fiduciary duties as trustees "as they used the trust assets to fund their own personal business endeavors and interests . . . ." The Probate Court found that the plaintiffs had submitted no evidence supporting their claims that Kenneth had reimbursed the trust in the amount of $552,271 or that Rodney had reimbursed the trust in the amount of $789,795.95, for the distributions made to them in violation of the terms of the trust because they were not approved and made by an independent trustee. The Probate Court determined that each beneficiary was entitled to $1,153,783.22, as his equal share of the trust assets, but that Lawrence had received only $647,766.55.[4] Accordingly, the Probate Court concluded that Lawrence had been underpaid $506,016.67 of his equal share of the trust assets and ordered the plaintiffs to pay Lawrence the $137,136.13 balance of the trust funds and an additional amount of $368,880.54.

On December 2, 2015, the plaintiffs filed an appeal of the decree of the Probate Court with the Superior Court, alleging that, by way of reimbursement to the trust, Kenneth returned at least $552,271 to the trust

[3] In its decree, the Probate Court explained that the revised accounting was necessary because, "despite the voluminous amount of documentation contained within a five inch binder in support of the accounting, it was clear that the documentation failed to support the transactions claimed in the accounting . . . ."

[4] Although the Probate Court did not indicate when or why Lawrence had received distributions in this amount, the accounting reflects that he received $333,333.33 as his one-third share of the proceeds of Vera Wolfel's life insurance policy in February, 2012, and various smaller disbursements for personal and medical bills and charges. None of the parties have, at any point, challenged the propriety or accuracy of the amount of the distributions to Lawrence.

and Rodney returned at least $789,795 to the trust; they did not make any unauthorized or improper payments from the trust; they were entitled to fees for the duties they performed as trustees; the defendant was not entitled to a payment in the amount of $506,016.67 from the trust; the defendant was not entitled to any payments from their personal assets; and that the Probate Court did not have the legal authority or jurisdiction to order them to make any payments from their personal assets.

On September 17, 2020, following a trial de novo, the Superior Court issued a memorandum of decision in which it found, inter alia, that the plaintiffs breached their fiduciary duties by violating the trust's explicit direction to divide the assets into three separate trusts following the death of Vera Wolfel, thereby allowing them to "continue having access to the entire corpus in existence at that time for the purpose of financing their own personal and business interests"; failing to appoint an independent trustee; and engaging in "self-dealing transactions, including undocumented and unsecured 'loans' to support their personal and commercial interests, without participation by an independent trustee and without regard to their effect on the financial health of the trust or [the defendant's] interest as a beneficiary." The Superior Court concluded that the plaintiffs "treated the trust as a deep well into which they could dip their bucket of financial wants whenever it suited them." The court found that Rodney made payments into the trust accounts sufficient to cure most of the self-dealing distributions made from the trust for his personal benefit but that Kenneth failed to make payments to the trust sufficient to cure more than a small portion of the self-dealing distributions made to him from the trust. The Superior Court concluded that the three beneficiaries had shared unequally in the trust assets and entered orders to equalize their shares. The

Superior Court also ordered that the trust be terminated. This appeal followed.

I

The plaintiffs first claim that the Superior Court exceeded its authority by addressing issues that they did not raise in their appeal from the decree of the Probate Court. Specifically, the plaintiffs argue that, instead of "limiting its decision to whether the Probate Court correctly decided [that the] plaintiffs failed to prove that Kenneth deposited $552,271 into the trust and that Rodney deposited $789,795.95 into the trust, and correctly ordered the plaintiffs to pay [the defendant] $137,136.13 from the assets of the trust and $368,880.54 from the plaintiffs' personal assets, the Superior Court performed its own calculations of how much [the plaintiffs] deposited into the trust, and then decided to 'equalize' the payments from the trust and to 'terminate' the trust when no party requested this relief in the pleadings in the Superior Court." According to the plaintiffs, "[t]his clearly exceeded the Superior Court's statutory authority as a matter of law."[5] We disagree.

"An appeal from a Probate Court to the Superior Court is not an ordinary civil action. . . . When entertaining an appeal from an order or decree of a Probate Court, the Superior Court takes the place of and sits as the court of probate. . . . In ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or common law jurisdiction, but of a Probate Court. . . .

"The function of the Superior Court in appeals from a Probate Court is to take jurisdiction of the order or decree appealed from and to try that issue de novo.

[5] We note that neither party challenges the accuracy of the Superior Court's mathematical calculations.

. . . Thereafter, upon consideration of all evidence presented on the appeal which would have been admissible in the [P]robate [C]ourt, the [S]uperior [C]ourt should exercise the same power of judgment which the [P]robate [C]ourt possessed and decide the appeal as an original proposition unfettered by, and ignoring, the result reached in the [P]robate [C]ourt." (Citations omitted; internal quotation marks omitted.) *Kerin* v. *Stangle*, 209 Conn. 260, 263–64, 550 A.2d 1069 (1988).

General Statutes § 45a-186, which governs probate appeals does, however, provide an exception where a trial de novo is not required. Section 45a-186 (d) provides in relevant part: "An appeal from a decision rendered in any case after a recording of the proceedings is made under . . . section 51-72 or 51-73, shall be on the record and shall not be a trial de novo." In the present case, the parties do not dispute that no record was made before the Probate Court. The absence of a record required a trial de novo. See *Silverstein* v. *Laschever*, 113 Conn. App. 404, 409, 970 A.2d 123 (2009). The plaintiffs do not dispute this.

The plaintiffs nevertheless argue that, "instead of only addressing the issues that were presented for review on the appeal to the Superior Court, the Superior Court decided this case as if it was an original accounting proceeding brought in the Superior Court. In essence, the Superior Court decided this case as if it was a 'retrial' of the original accounting proceeding rather than an 'appeal' on the specific issues presented in the appeal complaint, and rendered its own decision on the plaintiffs' accounting rather than reviewing the correctness of the Probate Court's decisions on the issues presented in the appeal to the Superior Court." The plaintiffs' argument belies the well settled principle that "[a]n appeal from probate is not so much an appeal as a trial de novo with the Superior Court sitting as a Probate Court and restricted by a Probate Court's

jurisdictional limitations." (Internal quotation marks omitted.) *Gardner* v. *Balboni*, 218 Conn. 220, 225, 588 A.2d 634 (1991); see also *Kerin* v. *Stangle*, supra, 209 Conn. 264; *Baskin's Appeal from Probate*, 194 Conn. 635, 641, 484 A.2d 934 (1984); *Prince* v. *Sheffield*, 158 Conn. 286, 298–99, 259 A.2d 621 (1969).

The plaintiffs' argument that the Superior Court was limited in its review of the decree of the Probate Court to the claims of error set forth in their appeal from that decree reflects a misunderstanding of the distinction between a trial de novo and appellate de novo review. Contrary to the plaintiffs' argument, the Superior Court does not sit as an appeals court that determines the correctness of the decree of the Probate Court. Although "[t]he Superior Court may not consider or adjudicate issues beyond the scope of those proper for determination by the order or decree attacked"; (internal quotation marks omitted) *Jackson* v. *Drury*, 191 Conn. App. 587, 607, 216 A.3d 768, cert. denied, 333 Conn. 938, 218 A.3d 1050 (2019); the Superior Court did not do so in the present case. The Superior Court, sitting as the Probate Court, as it was required to do, conducted a trial de novo on the accounting filed by the plaintiffs and the challenges to the accounting asserted by the defendant, and rendered judgment resolving the issues related to the trust. In so doing, the Superior Court did not improperly enlarge the scope of the issues of the appeal but, rather, addressed those issues that were necessary and proper for a determination of the parties' claims pertaining to the accounting of the trust.[6] Indeed,

[6] Moreover, we note that the plaintiffs' claims regarding the amounts they alleged to have deposited into the trust and whether Lawrence was entitled to a payment of $506,016.67 necessarily required the Superior Court to perform its own calculations based on the evidence presented in the trial de novo.

We further note that, in the prayer for relief of their appeal to the Superior Court, the plaintiffs asked not only that the Superior Court reverse the decree of the Probate Court but also that the Superior Court "provide such other and further relief as the court deems just and equitable." On the basis

the plaintiffs have failed to identify any actions taken by the Superior Court in adjudicating the propriety of the revised accounting or in ordering appropriate relief to remedy the breaches of fiduciary duty it found had occurred that the Probate Court could not have taken itself. Accordingly, the plaintiffs' claim that the Superior Court exceeded its authority is without merit.

II

The plaintiffs also claim that the court erred in finding that Kenneth failed to prove that he paid $552,271 into the trust to reimburse it for distributions made to him for his personal benefit. We disagree.

"It is well established that [a] finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record. . . . 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 authority, when reviewing the findings of a judge, is circumscribed by the deference we must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence. . . . The question for this court . . . is not whether it would have made the findings the trial court did, but whether in view of the evidence and pleadings in the whole record it is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *J. M.* v. *E. M.*, 216 Conn. App. 814, 820–21, 286 A.3d 929 (2022).

of that request, the Superior Court did not exceed its authority in terminating the trust, which, after the execution of its orders, would become insolvent.

"Once a [fiduciary] relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. . . . Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence." (Internal quotation marks omitted.) *Crandle* v. *Connecticut State Employees Retirement Commission*, 342 Conn. 67, 100, 269 A.3d 72 (2022). The existence of a fiduciary duty is not disputed in the present case.

Following the trial in this case, the Superior Court issued a thorough memorandum of decision in which it discussed in detail the evidence presented by the plaintiffs in support of their claims that they reimbursed the trust for distributions they had received. After weighing that evidence, the Superior Court concluded that the plaintiffs proved, by clear and convincing evidence, that Kenneth reimbursed the trust only $66,100, not $552,271.

The plaintiffs assert six grounds on which the Superior Court should have concluded that Kenneth proved that he reimbursed the trust in the amount of $552,271.[7] We need not address each of the plaintiffs' arguments separately because the substance of each argument is essentially the same, namely, that they met their burden

[7] Specifically, the plaintiffs argue that (1) they introduced contemporaneous business records to prove that Kenneth paid $552,271 into the trust; (2) their expert witness confirmed that Kenneth made each of the claimed deposits based on commonly accepted accounting procedures; (3) the defendant did not introduce any evidence to impeach or rebut the evidence they presented; (4) Kenneth testified that there was a connection between him and Wilde Enterprises Corporation, an entity referred to as "WEC" on attachments to the accounting, which was listed as having made deposits into the trust; (5) they should be credited for the deposit of life insurance proceeds; and (6) they presented evidence that Kenneth made certain deposits into the trust account, not his own personal account.

of proving Kenneth's repayment of trust funds because the evidence that they presented was unrebutted by the defendant. This argument ignores the well established principles that the plaintiffs, as the fiduciaries in this case, bore the burden of proving by clear and convincing evidence the propriety of their administration of the trust; see id., 100; and the court was entrusted to weigh the evidence presented and to determine which evidence to accept or reject. *Cusano* v. *Lajoie*, 178 Conn. App. 605, 609, 176 A.3d 1228 (2017). The court was not required to credit the evidence presented by the plaintiffs, even if it was unrebutted.[8] Accordingly, we are not left with the definite and firm conviction that a mistake has been committed and we reject the plaintiffs' claim that the court's finding that they failed to prove that Kenneth reimbursed the trust in the amount of $552,271 was clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

BRIAN FITZGERALD ET AL. *v.* CITY OF BRIDGEPORT ET AL.
(AC 45114)

Bright, C. J., and Suarez and Clark, Js.

Syllabus

The plaintiffs, various members of the Bridgeport Police Department, sought injunctive relief and a declaratory judgment that certain defendants, the city of Bridgeport, G, the mayor of Bridgeport, D, the personnel director

[8] To the extent that the plaintiffs contend that the accounting or the various attachments to the accounting constitute evidence of Kenneth's payments to the trust, this argument misses the mark. The accounting is not evidence of those payments. It is simply evidence that someone listed those payments on the accounting. To prove their claim, the plaintiffs needed to present evidence of the actual payments. The court found that they did not.

of the city, and P, the chief of police of the city, failed to follow the civil service provisions of the Bridgeport City Charter in appointing the defendant R to the position of assistant police chief. Following a bench trial, the trial court granted the plaintiffs' request for declaratory relief, finding that the city, G, and P, failed to adhere to the city charter and to the rules of the defendant Bridgeport Civil Service Commission in appointing R to the position. The trial court declined to grant any injunctive relief. On appeal to this court, the defendants claimed, inter alia, that the trial court erred in concluding that D had not followed proper civil service procedures pursuant to the city charter before R was appointed to the assistant police chief position. Following oral arguments in this appeal, R voluntarily retired from the police department. In light of R ceasing to serve in the position at issue, the defendants now claimed that the appeal was moot and that vacatur of the trial court's judgment was warranted. *Held* that the defendants' appeal was dismissed as moot and the trial court's judgment was vacated: in light of the relief requested in this appeal, R's retirement made it impossible for this court to grant any practical relief; moreover, contrary to the plaintiffs' claim that the case was not moot because the trial court's ruling was not conditioned in any manner on R's occupancy of the position, the plaintiffs confined their request for relief to declaratory and injunctive relief, the trial court's declaratory judgment was limited to a declaration that the city, G and P failed to adhere to the city charter and to the rules of the commission when appointing R to the position of assistant police chief, the plaintiffs did not cross-appeal the court's denial of injunctive relief or the scope of the declaratory judgment, and an opinion from this court reviewing the trial court's judgment declaring unlawful R's appointment would amount to an advisory opinion, which this court does not render; moreover, vacation of the judgment was appropriate under the circumstances of this case because the defendants did not cause the appeal to be moot, as R voluntarily retired from the position at issue, and the trial court, in its decision, interpreted various city charter provisions in a way that might require the city and its public officials to undertake new and potentially functionally impossible measures to fill vacancies and to certify lists for noncompetitive positions, and, thus, the equities of this case warranted vacating the court's judgment to prevent it from spawning potential legal consequences and to preserve the rights of all parties.

Argued October 12, 2022—officially released April 18, 2023

Procedural History

Action seeking, inter alia, a declaratory judgment that the named defendant et al. failed to follow certain civil service provisions in appointing the defendant Rebecca Garcia to the position of assistant police chief, brought

to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Stevens*, *J.*; judgment declaring that the named defendant et al. failed to adhere to the charter and the rules of the defendant Bridgeport Civil Service Commission in appointing the defendant Rebecca Garcia to the position of assistant police chief, from which the defendants appealed to this court. *Appeal dismissed*; *judgment vacated.*

James J. Healy, with whom, on the brief, was *John P. Bohannon*, *Jr.*, deputy city attorney, for the appellants (defendants).

Thomas W. Bucci, for the appellees (plaintiffs).

Opinion

CLARK, J. The plaintiffs, Brian Fitzgerald, Steven Lougal, and Roderick G. Porter, captains in the Bridgeport Police Department (police department), and Anthony S. Armeno, deputy chief of the police department, commenced this action against the city of Bridgeport (city) and five other defendants,[1] seeking injunctive relief and a declaratory judgment that the defendants failed to follow the civil service provisions of the Bridgeport City Charter (city charter) in appointing Captain Rebeca Garcia to the position of assistant police chief of the police department.[2] Following a bench trial, the

[1] The plaintiffs also named as defendants the Bridgeport Civil Service Commission; Joseph Ganim, in his official capacity as mayor of the city; David J. Dunn, in his official capacity as the personnel director of the city; A.J. Perez, in his official capacity as chief of police of the police department; and Rebeca Garcia. We refer to the named parties collectively as the defendants, and individually by name when appropriate.

[2] On January 20, 2023, following oral arguments in this case, the plaintiffs notified this court that Porter had been appointed to the position of chief of police for the city. This appointment meant that Porter had now become a defendant in his official capacity because he succeeded Perez, who was sued in his official capacity as chief of police. Nevertheless, Porter indicated that he "remains a party-plaintiff on the defendants' appeal because of his overriding interest in preventing violations of the civil services provision of the [city charter]" despite it being unlikely that he will seek appointment to the position of assistant police chief in the future.

trial court granted the plaintiffs' request for declaratory relief and declared that the city, Mayor Joseph Ganim, and Chief of Police A.J. Perez failed to adhere to the city charter and rules of the Bridgeport Civil Service Commission (commission) when appointing Garcia to the assistant police chief position on December 18, 2019. The court declined to grant the plaintiffs any injunctive relief.

On appeal, the defendants claim, among other things, that the court erred in concluding that David J. Dunn, the city's personnel director, had not conducted a "proper noncompetitive examination" pursuant to § 211 of the city charter before Garcia was appointed to the assistant police chief position. After oral arguments in this appeal, however, Garcia ceased serving in the assistant police chief position due to her retirement from the police department. In light of this development, the defendants now claim that the appeal is moot and that vacatur of the trial court's judgment is warranted. We agree with the defendants, dismiss the appeal as moot, and vacate the judgment of the trial court.[3]

We begin by setting forth the legal principles at play. "[M]ootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve before we may reach the merits of an appeal." (Internal quotation marks omitted.) *CT Freedom Alliance, LLC* v. *Dept. of Education*, 346 Conn. 1, 12, 287 A.3d 557 (2023). "It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the

[3] In an order dated December 12, 2022, this court provided the parties with an opportunity to submit supplemental briefing on the questions of mootness and vacatur. The parties submitted their supplemental briefs on February 14, 2023.

determination of which no practical relief can follow." (Internal quotation marks omitted.) *Feehan* v. *Marcone*, 331 Conn. 436, 486, 204 A.3d 666, cert. denied, U.S. , 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019). "An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal." (Internal quotation marks omitted.) *Connecticut Coalition Against Millstone* v. *Rocque*, 267 Conn. 116, 125–26, 836 A.2d 414 (2003).

The plaintiffs disagree with the defendants that this appeal has been rendered moot by Garcia's retirement. Specifically, the plaintiffs argue that the case is not moot because the "[t]he court's ruling was not conditioned in any manner on . . . Garcia's occupancy of the position." They maintain that "[t]he sanctity of the civil service system was the paramount issue in the litigation" and that the "court ruled on the manner in which . . . Garcia was appointed to the position."[4]

Although that may be true, the plaintiffs' argument overlooks an important jurisdictional requirement. "An essential prerequisite to the court's jurisdiction over a declaratory judgment action is that 'the determination of the controversy must be capable of resulting in practical relief to the complainant.' " *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, 198 Conn. App. 392, 421, 234 A.3d 111 (2020). "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." (Internal quotation marks omitted.) *In re Emma F.*, 315 Conn. 414, 423–24, 107 A.3d 947 (2015).

In their operative complaint, the plaintiffs confined their request for relief to declaratory and prospective

[4] The plaintiffs do not argue that any exception to the mootness doctrine applies.

injunctive relief. After alleging that the city, the commission, Ganim, Perez, and Dunn failed to follow both the city charter and the rules of the commission in appointing Garcia to said position, the plaintiffs prayed for relief "barring . . . Garcia from serving in the position of assistant police chief until further order of the court" and "declaring . . . the appointment of . . . Garcia to the position of assistant police chief . . . null and void. . . ."[5] They did not seek damages or any other relief beyond declaratory and injunctive relief. Moreover, the court denied the plaintiffs' request for injunctive relief on the ground that "such relief is only available through a quo warranto action under General Statutes § 52-491, and none of the plaintiffs have asserted the requisite qualifications to assert a quo warranto claim." Although the plaintiffs sought broad declarations, including a declaration mandating that the assistant chief of police position be filled pursuant to the classified service provision of the city charter; see footnote 5 of this opinion; no such order was entered by the trial court. Rather, the court's declaratory judgment was limited to a declaration that the city, Ganim, and Perez failed to adhere to the city charter and the rules

[5] The plaintiffs' prayer for relief provided: "WHEREFORE, the plaintiff requests that the court grant the plaintiff the following relief . . . [a] temporary injunction barring . . . Garcia from serving in the position of assistant police chief until further order of the court"; "[a] temporary and permanent injunction barring [the city, the civil service commission, Ganim, Perez, and Dunn] from making any appointments to the position of assistant police chief until the position of assistant police chief is filled in keeping with the city charter requirements for making appointments to positions in the classified service of the Bridgeport civil service system"; "[a] declaratory judgment declaring that the position of assistant police chief is a position that must be filled pursuant to the civil service provisions of the . . . city charter for appointments to the [city's] classified service"; "[a] declaratory judgment declaring that the appointment of . . . Garcia to the position of assistant police chief is null and void because [the city, Ganim, and Perez] failed to follow the civil service provisions of the . . . city charter for making her appointment to the position of assistant police chief"; "[c]osts"; and "[s]uch other and further relief as may be appropriate."

of the commission when appointing Garcia to the position of assistant police chief. The plaintiffs did not cross-appeal the court's denial of injunctive relief or the scope of the court's declaratory judgment.

In light of the nature of the relief at issue in this appeal, Garcia's retirement makes it impossible for this court to grant any practical relief to the plaintiffs. An opinion from this court reviewing the trial court's judgment declaring unlawful Garcia's appointment would amount to an advisory opinion. It is well established, however, that this court does "not render advisory opinions. . . . [W]here the question presented is purely academic, we must refuse to entertain the appeal." (Internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, 331 Conn. 711, 737, 207 A.3d 493 (2019). We, therefore, conclude that this appeal has become moot and must be dismissed.

That brings us to the question of vacatur. The equitable remedy of vacatur is rooted in this court's supervisory authority; *State* v. *Charlotte Hungerford Hospital*, 308 Conn. 140, 143, 60 A.3d 946 (2013); and is commonly employed in circumstances when a judgment, unreviewable because of mootness, is likely to spawn legal consequences. See *Private Healthcare Systems, Inc.* v. *Torres*, 278 Conn. 291, 303, 898 A.2d 768 (2006). Our courts generally have followed the federal courts' approach in determining when vacatur is appropriate; see *In re Emma F.*, supra, 315 Conn. 430; and our Supreme Court's decision in *State* v. *Charlotte Hungerford Hospital*, supra, 308 Conn. 143–44, sheds some light on that approach. In *Charlotte Hungerford Hospital*, the defendant hospital appealed from a judgment of the trial court requiring it to comply with a subpoena duces tecum issued by the claims commissioner. Id., 142. This court affirmed the trial court's judgment, and the hospital filed a petition for certification to appeal with our Supreme Court, which was granted. Id. After

the certification petition was granted, the underlying case was settled and the state no longer sought to enforce the subpoena. Id. Our Supreme Court concluded that those events rendered the appeal moot and, sua sponte, dismissed the appeal. Id.

Our Supreme Court also vacated the judgments of this court and the trial court. Id., 143. The court determined that vacatur was appropriate because the hospital "was not responsible for the mootness of its . . . appeal" and because the judgments, which were now unreviewable, "may have preclusive effects against the hospital in subsequent litigation." Id. In reaching this conclusion, our Supreme Court looked to United States Supreme Court case law, which explains that vacatur of a mooted case " 'clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.' " Id., 143, quoting *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40, 71 S. Ct. 104, 95 L. Ed. 36 (1950). Our Supreme Court observed that vacatur is the " 'ordinary practice' " in the federal courts but that they have limited vacatur in settled cases. *State* v. *Charlotte Hungerford Hospital*, supra, 308 Conn. 144–45. Nevertheless, the court determined that the settlement in that case did not preclude vacatur because the legal principles warranting that limitation were not present in that case because the hospital did not voluntarily forfeit its appeal by participating in the settlement between the state and the claimant, and that the settlement was " 'happenstance' " with respect to the hospital. Id., 145.

In distilling these principles, it is clear that, when a case becomes moot on appeal, this court is not automatically compelled to simply dismiss the appeal: it retains jurisdiction to exercise its supervisory authority to

vacate the trial court's judgment and remand with direction to dismiss the underlying case as moot. See *American Tax Funding, LLC* v. *Design Land Developers of Newtown, Inc.*, 200 Conn. App. 837, 851, 240 A.3d 678 (2020); see also *Russman* v. *Board of Education*, 260 F.3d 114, 121 (2d Cir. 2001). It bears reiterating that in federal cases, which our courts look to for guidance with respect to the law of vacatur, "[w]hen a civil case becomes moot pending appellate adjudication, 'the established practice in the federal system is to reverse or vacate the judgment below and remand with a direction to dismiss.' *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)." *Hassoun* v. *Searls*, 976 F.3d 121, 125 (2d Cir. 2020). Of course, whether to vacate the trial court's judgment or simply dismiss the appeal, leaving the court's judgment intact, depends on the equities of the case. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994); see also *Cracco* v. *Vance*, 830 Fed. Appx. 43, 45 (2d Cir. 2020) ("[t]o determine whether vacatur is appropriate, we must look at the equities of the individual case" (internal quotation marks omitted).

In the present case, the court declared that the city, Ganim, and Perez "failed to adhere to the . . . city charter and rules of the . . . commission when appointing . . . Garcia to the position of assistant chief of police. . . ." None of those parties, however, bear responsibility for mooting this appeal. See *Hassoun* v. *Searls*, supra, 976 F.3d 131 ("[t]he touchstone of our analysis is [t]he appellant's fault in causing mootness" (internal quotation marks omitted)). These defendants did not terminate Garcia's employment to avoid appellate review or otherwise remove her from that position. Instead, Garcia's voluntary retirement after a long career with the police department mooted the case. Thus, it would be inequitable under these

circumstances to force the city, Ganim, and Perez to acquiesce in the trial court's judgment by the " 'vagaries of circumstance.' "[6] *State* v. *Charlotte Hungerford Hospital*, supra, 308 Conn. 144.

Additionally, vacating the court's judgment would prevent it from spawning any potential legal consequences. The court, in its decision, interpreted various city charter provisions in a way that might require the city and its public officials to undertake new—and, in the defendants' view, "functionally impossible"—measures in filling vacancies and certifying lists for various noncompetitive jobs. Because the court's judgment could have legal consequences in future litigation, the judgment should be vacated so that the rights of all parties are preserved. See *State* v. *Charlotte Hungerford Hospital*, supra, 308 Conn. 146 ("[t]he hospital could well be precluded from contesting the state's interpretation of [General Statutes] § 4-151 (c) in any future litigation"); *State* v. *Boyle*, 287 Conn. 478, 490, 949 A.2d 460 (2008) ("the Appellate Court's judgment will spawn legal consequences"); *American Tax Funding, LLC* v. *Design Land Developers of Newtown, Inc.*, supra, 200 Conn. App. 851–52 ("[v]acating the judgment would prevent it from spawning legal consequences and would clear the path for future relitigation of the issues"). In short, the equities of this case warrant vacatur.

The appeal is dismissed and the judgment is vacated.

In this opinion the other judges concurred.

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[6] We note that, although the plaintiffs also named Garcia as a defendant in the action (presumably given her interests in the outcome of it), the plaintiffs' complaint does not center on any of Garcia's conduct.

GERARDO TREJO *v.* YALE NEW HAVEN HOSPITAL, INC.
(AC 45207)

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

Syllabus

The plaintiff, a former resident in the defendant hospital's vascular surgery residency program, sought to recover damages for alleged gender and sexual orientation discrimination and for retaliation in violation of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.). The defendant filed a motion for summary judgment, arguing, inter alia, that on the basis of the plaintiff's own deposition testimony and other evidence, there was no genuine issue of material fact and that the defendant was entitled to judgment as a matter of law. After hearing oral arguments, the trial court issued a memorandum of decision granting the defendant's motion, concluding that the plaintiff failed, as a matter of law, to meet his burden to establish a prima facie case of employment discrimination on the basis of his gender or sexual orientation. The court also found that, even if the plaintiff had satisfied his burden of establishing a prima facie case, the defendant presented extensive, uncontroverted evidence of a legitimate, nondiscriminatory reason for his discharge—namely, the plaintiff's persistent performance difficulties and low standardized exam scores—that the plaintiff could not show was pretextual. The court also rejected the plaintiff's retaliation claim on the basis that there was no evidence that the plaintiff complained about sexual orientation or gender discrimination before he received his notice that his employment had been terminated. On the plaintiff's appeal to this court, *held* that the judgment of the trial court was affirmed; the trial court aptly addressed the arguments raised in this appeal, and this court adopted the trial court's thorough and well reasoned memorandum of decision as a proper statement of the facts and the applicable law on the issues.

Argued February 9—officially released April 18, 2023

Procedural History

Action to recover damages for, inter alia, alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Rosen, J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

James V. Sabatini, with whom, on the brief, was *Zachary T. Gain*, for the appellant (plaintiff).

Sarah R. Skubas, with whom, on the brief, was *Jessica L. Murphy*, for the appellee (defendant).

Opinion

PER CURIAM. In this employment discrimination action, the plaintiff, Gerardo Trejo, appeals from the summary judgment rendered by the trial court in favor of his former employer, the defendant, Yale New Haven Hospital, Inc. On appeal, the plaintiff claims that the court erred in granting the defendant's motion for summary judgment. We affirm the judgment of the trial court.

On or about June 20, 2017, the plaintiff filed a complaint against the defendant with the Connecticut Commission on Human Rights and Opportunities (commission). On February 20, 2019, the commission released its jurisdiction over the plaintiff's complaint, and the plaintiff commenced this action in the Superior Court on May 20, 2019. In his three count complaint brought pursuant to the Connecticut Fair Employment Practices Act (act), General Statutes § 46a-51 et seq., the plaintiff claimed that the defendant violated the act by discriminating against him on the basis of his gender and sexual orientation and by retaliating against him for making complaints regarding sexual orientation and gender discrimination. In support of his claims, the plaintiff alleged, inter alia, that on or about July 1, 2013, he began as a resident in the defendant's vascular surgery residency program. He alleged that he is a homosexual man and that Timur Sarac, the defendant's chief of vascular surgery, was aware of the plaintiff's sexual orientation and "treated [him] differently than other residents, especially heterosexual male residents." The plaintiff alleged that, in November, 2015, he emailed

Rosemary Fisher, a liaison between the residency program and the program's accreditation agency, and "complained about how he was being treated in his residency."

The plaintiff further alleged that, starting in 2016, the defendant "placed [him] on a remediation program." He alleged that, between June, 2016, and April, 2017, he met with Stephen Huot, a medical doctor employed by the defendant, on at least five occasions and that, during each meeting, the plaintiff stated "that he believed that he was being treated discriminatorily and that . . . Sarac had a preference toward the heterosexual male residents in the operating room." Specifically, the plaintiff averred that Sarac once asked him during a surgery if he had ever played T-ball as a kid and then laughed at the plaintiff and remarked, "of course you wouldn't." The plaintiff also alleged that Jonathan Cardella, a medical doctor employed by the defendant, behaved in a homophobic manner toward him by, inter alia, "regularly shout[ing] homophobic slurs during surgery." The plaintiff alleged that, on or about April 12, 2017, the defendant presented him with a letter stating that his contract would end on June 30, 2017. He alleged that his employment was in fact terminated on or about June 30, 2017. As a result, he alleged that the defendant violated the act by discriminating against him on the basis of gender and sexual orientation and by retaliating against him for making complaints regarding sexual orientation and gender discrimination in the workplace.

On August 19, 2019, the defendant filed its answer and special defenses to the plaintiff's complaint. On April 30, 2021, the defendant filed a motion for summary judgment and an accompanying memorandum of law arguing, inter alia, that on the basis of the plaintiff's own deposition testimony and other evidence, there was no genuine issue of material fact and that the defendant was entitled to judgment as a matter of law.

In particular, the defendant argued that during the plaintiff's third year of his residency, "he was placed on a remediation plan to address clinical, academic, and administrative deficiencies. Various physicians found the plaintiff's performance to be very concerning, including many whom the plaintiff does not allege harbor any discriminatory animus. The plaintiff's deficiencies included repeatedly scoring very low on national standardized tests that were objectively prepared and scored by a third party. Ultimately, after nearly four years in the residency training program, the [defendant] dismissed the plaintiff from the program due to his persistent performance issues."

The defendant argued that the plaintiff's discrimination claims failed under the *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (*McDonnell Douglas*) burden shifting framework,[1] which our courts have employed in assessing claims of discrimination under the act, because "(1) the plaintiff cannot establish the fourth prong of his prima facie case requiring the existence of evidence giving rise to an inference of discrimination; and (2) there is no evidence that the [defendant's] legitimate nondiscriminatory reason for the plaintiff's dismissal—

[1] Under the *McDonnell Douglas* burden shifting analysis, the employee must "first make a prima facie case of discrimination. . . . The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Internal quotation marks omitted.) *Rossova* v. *Charter Communications, LLC*, 211 Conn. App. 676, 684–85, 273 A.3d 697 (2022). "In order for the employee to first make a prima facie case of discrimination, the plaintiff must show: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the position; (3) the plaintiff suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discrimination." (Internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73, 111 A.3d 453 (2015).

repeated performance deficiencies—was merely a pretext for discrimination." As to the plaintiff's retaliation claim, the defendant argued that the claim fails because the plaintiff "cannot establish . . . a causal connection between his protected activity and his dismissal, as his performance deficiencies were evaluated and addressed long before he engaged in protected activity" and because "there is no evidence that the [defendant's] nonretaliatory reason for his dismissal is pretextual."

On August 16, 2021, the plaintiff filed his objection to the defendant's motion for summary judgment, in which he argued that genuine issues of material fact existed, and, consequently, the defendant's motion should be denied. On September 3, 2021, the defendant filed its reply.

The court heard oral arguments on the defendant's motion for summary judgment on October 25, 2021. On December 14, 2021, the court issued a memorandum of decision granting the defendant's motion. In its decision, the court concluded that the plaintiff failed, as a matter of law, to meet his burden to establish a prima facie case of employment discrimination on the basis of his gender or sexual orientation. The court also found that, even if the plaintiff had satisfied his burden of establishing a prima facie case, the defendant presented extensive, uncontroverted evidence of a legitimate, nondiscriminatory reason for his discharge—namely, the plaintiff's persistent performance difficulties and low standardized exam scores—that the plaintiff could not show was pretextual. The court also rejected the plaintiff's retaliation claim on the basis that there was no evidence that the plaintiff complained about sexual orientation or gender discrimination before he received his nonrenewal notice. The plaintiff timely appealed from the court's judgment.

On appeal, the plaintiff claims that the court improperly granted the defendant's motion for summary judgment. On the basis of our examination of the record, and the briefs and arguments of the parties, and applying the well established principles that govern our review of a court's decision to grant a motion for summary judgment in cases alleging violations of the act; see *Stubbs* v. *ICare Management, LLC*, 198 Conn. App. 511, 520–22, 233 A.3d 1170 (2020); we conclude that the judgment of the trial court should be affirmed. See, e.g., *Luth* v. *OEM Controls, Inc.*, 203 Conn. App. 673, 252 A.3d 406 (2021). Because the court's memorandum of decision aptly addresses the plaintiff's arguments, we adopt its thorough and well reasoned decision as a proper statement of the facts and applicable law on these issues. See *Trejo* v. *Yale New Haven Hospital, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-19-6112326-S (December 14, 2021) (reprinted at 218 Conn. App. 787, A.3d). It would serve no useful purpose to repeat the discussion contained therein. See, e.g., *U.S. Bank Trust, N.A.* v. *Dallas*, 213 Conn. App. 483, 487, 278 A.3d 1138 (2022); *Luth* v. *OEM Controls, Inc.*, supra, 203 Conn. App. 677; *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, 170 Conn. App. 79, 81, 153 A.3d 687 (2017).

The judgment is affirmed.

APPENDIX

GERARDO TREJO *v.* YALE NEW HAVEN HOSPITAL, INC.*

Superior Court, Judicial District of Hartford
File No. CV-19-6112326-S

Memorandum filed December 14, 2021

Proceedings

Memorandum of decision on defendant's motion for summary judgment. *Motion granted.*

Zachary T. Gain, for the plaintiff.

Sarah R. Skubas and *Jessica L. Murphy*, for the defendant.

Opinion

ROSEN, J.

INTRODUCTION

In this action, the plaintiff, a gay man, alleges that he was wrongfully terminated from the defendant's vascular surgery residency program based on his sexual orientation and gender, and retaliation, in violation of the Connecticut Fair Employment Practices Act (CFEPA), General Statutes § 46a-51 et seq. On April 30, 2021, the defendant moved for summary judgment, asserting that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. For the reasons set forth below, the defendant's motion is granted.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On May 30, 2019, the plaintiff, Gerardo Trejo, filed a three count complaint under CFEPA (complaint)

* Affirmed. *Trejo* v. *Yale New Haven Hospital, Inc.*, 218 Conn. App. 781, A.3d (2023).

against the defendant, Yale New Haven Hospital, Inc. In the first count of his complaint, the plaintiff alleges gender discrimination in violation of CFEPA based on sex stereotyping. In the second count, he alleges sexual orientation discrimination in violation of General Statutes § 46a-81[a]. The third count alleges retaliation in violation of General Statutes § 46a-60 (a) (4). On February 20, 2019, the plaintiff received a release of jurisdiction on his complaint against the defendant with the Connecticut Commission on Human Rights and Opportunities.

On April 30, 2021, the defendant filed a motion for summary judgment and accompanying memorandum on the grounds that, based on the plaintiff's own deposition testimony, affidavits and exhibits, there is no genuine issue of material fact and that the defendant is entitled to judgment as a matter of law.

In his memorandum in opposition filed on August 16, 2021,[1] the plaintiff argues that issues of intent cannot properly be decided on summary judgment. In support of his motion the plaintiff submits additional evidence from the parties' depositions and email records. The defendant filed a reply on September 3, 2021, and the court heard oral argument by remote hearing on October 25, 2021.

The record reveals the following facts, which are undisputed unless otherwise indicated. The plaintiff began his vascular surgery residency program with the defendant on or about July 1, 2013. Complaint ¶ 6; Answer ¶ 6. As a resident, the plaintiff was both a trainee and the defendant's employee. See Trejo Deposition 98. The defendant's vascular residency program

[1] The defendant objected to the plaintiff's opposition papers to the motion for summary judgment as untimely. The court overrules the defendant's objection and has considered all of the parties' submissions on summary judgment.

was then a six year program. Trejo Deposition 72. Each year of the residency, residents receive a one year agreement of appointment letter with no guarantee for continued employment beyond the end of that postgraduate year. Trejo Deposition 73–74, 80; see Defendant's Motion for Summary Judgment, Ex. 15.

A number of the defendant's employees were responsible for evaluating the plaintiff's performance during his residency, including, among others, Dr. Jack Contessa (Graduate Medical Education Specialist), Dr. Timur Sarac (Program Director), Dr. Jonathan Cardella (Assistant Program Director), Dr. Rosemarie Fisher (Designated Institutional [Official] [DIO] until 2016), Dr. Stephen Huot (DIO as of 2016), Dr. Bauer Sumpio, Dr. Kristine Orion, Dr. Cassius Chaar, Dr. Walter Longo, and Dr. Bart Muhs. Cardella Affidavit ¶ 8; Trejo Deposition 103, 106. A Clinical Competency Committee (CCC) consisting of three faculty members and a coordinator also reviews residents' performance twice per year. Cardella Affidavit, Ex. A.

In his deposition, the plaintiff details two early incidents in which Dr. Sarac criticized him for failing to complete required notes or to log hours within the required time frame. Trejo Deposition 133–34, 139; see also Plaintiff's Memorandum in Opposition, p. 7; Defendant's Motion for Summary Judgment, Ex. 7. In one example from February, 2015, the plaintiff acknowledges that he had been late to record notes but felt that the defendant's expectations were unreasonable. Trejo Deposition 134–35. In another instance in November, 2015, the plaintiff received an email from Anne Manzione, the defendant's program coordinator, stating that he was five months behind on logging his hours, followed by an email from Dr. Sarac telling him they would have a meeting to discuss. The plaintiff asserts that he was actually five weeks behind on notes, and other residents had told him they were "a little bit" behind

and did not receive emails from Dr. Sarac. Trejo Deposition 143. The plaintiff felt that Dr. Sarac was looking for an opportunity to chastise him. Id. The plaintiff also testified generally that Dr. Sarac would call his patient presentations "weak" and called him a "weak resident" but does not specify when these comments were made. Trejo Deposition 365.[2]

The plaintiff alleges that in November, 2015, he emailed Dr. Fisher to complain about how he was being treated during his residency. Complaint ¶ 16; Answer ¶ 16. The plaintiff sent an email in December, 2015, to Dr. Fisher, asking to meet to discuss his interactions with Dr. Sarac and mentioning other residents' concerns about the direction of the vascular surgery residency program. Plaintiff's Memorandum in Opposition, Ex. 4.

The plaintiff further alleges that, at some point in February, 2016,[3] Dr. Sarac asked the plaintiff during surgery if he had played tee ball as a kid, then laughed and said, "of course you wouldn't." Complaint ¶ 37. Dr. Sarac made this comment while describing to the plaintiff how to choke up on a needle. Huot Affidavit ¶ 14; Trejo Deposition 245–46.

On February 15, 2016, four doctors involved in evaluating the plaintiff held a meeting to discuss the plaintiff's clinical competency scores on the Accreditation Council for Graduate Medical Education (ACGME) milestone

[2] The plaintiff's complaint also alleges that Dr. Cardella referred to the plaintiff as girly and weak; Complaint ¶ 48; and alleges additional comments were made by "defendant." The plaintiff was uncertain if, when, or by whom these comments allegedly were made. See Trejo Deposition 419. For the purposes of a hearsay determination; see Defendant's Motion for Summary Judgment, pp. 19, 23; it is unclear whether these comments were made to the plaintiff or heard by third parties and communicated to the plaintiff. See Huot Deposition 33.

[3] The complaint does not specify when this event occurred; the plaintiff testified to the February, 2016, date at his deposition. See Trejo Deposition 245–46.

criteria.[4] Cardella Affidavit ¶ 9, Ex. B. According to the meeting notes, this was not the first time that concerns were raised about the plaintiff's ability to meet the program requirements. Cardella Affidavit, Ex. B. In the plaintiff's first two residency years, his milestone evaluation scores were appropriate for his year level; Trejo Deposition 127; but in his third year, his scores were "suboptimal." Cardella Affidavit, Ex. B. His standardized exam scores were also below expectations for his residency level. Cardella Affidavit ¶ 10. All vascular surgery residents are required to take the American Board of Surgery Vascular Surgery In-Training Examination (VSITE), a national, standardized exam used to assess resident knowledge and assess preparedness for board exams. Fisher Affidavit ¶ 6; Trejo Deposition 120. On the plaintiff's first VSITE in 2014, he scored a 37% compared to the average score of 72%. Fisher Affidavit ¶ 6, Ex. A. All four years of the plaintiff's VSITE scores were below all other vascular residents at the hospital with the exception of 2017, when the plaintiff's score was the second lowest by two points. Cardella Affidavit ¶ 10, Ex. C. The plaintiff's scores were also low compared to residents outside the hospital; for example, in 2015, the plaintiff's score was three standard deviations below the mean for all vascular surgery residents nationwide. See Defendant's Motion for Summary Judgment, Ex. 9.

On the evening of April 8, 2016, the plaintiff was taking "chief call," meaning he was responsible for overseeing patient care in the service. Cardella Affidavit ¶¶

[4] The ACGME is an oversight body that accredits most, if not all, resident and fellowship training positions for physicians. Huot Deposition 8. The ACGME "establishes nationalized educational standards . . . as well as various qualifications, evaluative standards and processes, including the formation of a Clinical Competency Committee." Huot Affidavit ¶ 6. The defendant's CCC is made up of Drs. Cardella, Chaar, and Orion. Defendant's Motion for Summary Judgment, p. 10. "Milestones are knowledge, skills, attitudes, and other attributes for each of the ACGME competencies organized in a developmental framework from less to more advanced." Cardella Affidavit, Ex. A.

7, 12. An intern at the hospital called the plaintiff to report that a patient's condition had worsened. The plaintiff spoke with a nurse on the phone but failed to go to the hospital to assist and check on the patient or to notify the attending physician on call. Cardella Affidavit ¶ 12; Trejo Deposition 172–73. The patient eventually went into cardiac arrest and later died, an outcome that may not have been avoidable. Cardella Affidavit ¶ 12, Ex. D; Trejo Deposition 172–73. The plaintiff disagrees that his actions were "inappropriate" but acknowledges that he should have come to the hospital to check on the patient. Trejo Deposition 172. As a result of this and other "lapse[s] in judgment," the plaintiff received a low milestone "integrity" score, which he disputed. Cardella Affidavit ¶ 12, Ex. D.

Concerned about the plaintiff's progress, in the spring of 2016, the plaintiff was placed on a remediation plan. Cardella Affidavit ¶ 13. This decision was made by Drs. Fisher, Longo, Contessa, Cardella, and Sarac. Id.; Trejo Deposition 175. The plan was written by Drs. Cardella, Sarac, and Contessa with input from all of the team present. Cardella Affidavit ¶ 13; Fisher Affidavit ¶ 8. As part of the plan, Dr. Sumpio was appointed as the plaintiff's mentor. Cardella Affidavit ¶ 13. The plan was reviewed with the plaintiff at a meeting on June 22, 2016. Cardella Affidavit, Ex F. The plaintiff was warned that if he did not show improvement during remediation, he could be terminated. Trejo Deposition 174–75. The plan included how written and oral mock exams would be conducted to measure his progress. Defendant's Motion for Summary Judgment, Ex. 12.

In August, 2016, the plaintiff met with Dr. Huot, the DIO at that time, to discuss the remediation program. Huot Affidavit ¶ 9. In that meeting, the plaintiff relayed to Dr. Huot Dr. Sarac's comments about whether the plaintiff had played tee ball as a child. Huot Affidavit ¶ 13; Trejo Deposition 245–46. Dr. Huot shared with

the plaintiff that he is also gay and asked him if he had concerns about his identity in the program; the plaintiff responded that he did not. Huot Deposition 20. Dr. Huot specifically asked the plaintiff if he thought he was being mistreated because he was gay, which the plaintiff denied. Huot Affidavit ¶¶ 13, 14; Trejo Deposition 245.

The plaintiff testified that in the fall of 2016, Dr. Sarac once stated during a surgery that only "real men" or "real surgeons" could operate on the patient when the plaintiff was in the operating room as a backup, and Dr. Sarac would not permit the plaintiff to participate in the surgery. Trejo Deposition 365–66.[5] The plaintiff claims that Drs. Cardella and Sarac favored heterosexual residents in the operating room. Following this incident, the plaintiff testified that Dr. Sarac gave a male heterosexual medical student tasks to complete, which the plaintiff believes was intended to make him feel emasculated. Trejo Deposition 366. In describing a similar incident involving Dr. Cardella, the plaintiff testified that the doctor spoke to the medical students about sports during the procedure. Trejo Deposition 358–60.

The plaintiff also alleges that Dr. Cardella made homophobic comments during surgery and called the plaintiff a number of derogatory names. Complaint ¶¶ 35, 48. The plaintiff testified to only one specific, allegedly homophobic comment involving the word "cocksucker." Trejo Deposition 353–54. The plaintiff knew that "[Dr. Cardella] routinely used the word 'cocksucker' aimed at patients, aimed at devices that fractured or devices that didn't work. I mean, it was essentially part of his routine vocabulary." Id., 354. In one incident that he believes occurred around November, 2016, Dr. Cardella muttered the word under his breath at a volume only the plaintiff could hear. When

[5] Earlier in his deposition the plaintiff testified that it was Dr. Cardella who made the "real surgeons" comment. Trejo Deposition 356.

asked at his deposition if the comment was directed at him, the plaintiff replied, "yes," and then elaborated: "To be honest, I think he was angry with the way that the case was going. I, you know, I don't remember if I made a mistake or if I didn't hold one of the sutures the way that he wanted me to hold it. And I think he—he reacted, and he took his anger out on me by muttering it." Id.

During a January 10, 2017 meeting of the CCC the possibility of the plaintiff's contract not being renewed was raised for the first time. Cardella Affidavit ¶ 17, Ex. J. The plaintiff's scores on all three written mock exams were not to the level expected given his years of experience. Cardella Affidavit, Exs. I, L. The plaintiff felt the exams were unfair and too long to complete. Trejo Deposition 199; Cardella Affidavit ¶ 18, Ex. K. The plaintiff felt that "the remediation program was really aimed at trying to get [him] to fail. And that none of the metrics at which [he] was being graded were in any way actually shaped to help [him]." Trejo Deposition 199.

The remediation period concluded at the end of January, 2017, and on February 14, 2017, the CCC, along with Drs. Contessa and Sumpio, met to discuss the plaintiff's suboptimal progress and performance. Cardella Affidavit, Ex. L. The group considered making the nonrenewal determination at that time but decided to wait until the plaintiff's March, 2017 VSITE scores could be reviewed. Id.; Huot Affidavit ¶ 11. The VSITE scores represent an objective measure of academic skill and are graded by a third party. Fisher Affidavit ¶ 6. Drs. Sarac and Cardella met with the plaintiff to discuss this decision and the potential consequences and to provide him with advice on areas to review. Cardella Affidavit, Ex. M.

The plaintiff, then a fourth year resident, scored a 364 on the March, 2017 VSITE, while the average third

year resident scored a 494. Defendant's Motion for Summary Judgment, Ex. 13; Trejo Deposition 215–17. The CCC met on April 4, 2017, to evaluate the plaintiff in light of his VSITE scores. Cardella Affidavit ¶ 21. Based on the plaintiff's "persistent deficiencies," the CCC and program director recommended nonrenewal, ending the plaintiff's residency effective June 30, 2017. Cardella Affidavit, Ex. N. In reaching their decision, the group reviewed "evaluations before and after the remediation plan, participation and progress in completing the remediation plan, [VSITE] exam scores, [and] milestone progression" and identified "persistent deficiencies in academic performance, administrative responsibilities and clinical performance." Cardella Affidavit, Ex. N. The CCC reached a unanimous decision to recommend dismissal. Cardella Affidavit ¶ 21, Ex. N. The plaintiff was given the option to resign, which would have eliminated the record of nonrenewal of contract or dismissal, which he rejected. Huot Affidavit ¶ 16. Dr. Huot reviewed the group's decision and agreed with the outcome. Huot Affidavit ¶ 11.

Upon receiving the nonrenewal notice, the plaintiff expressed concerns about discrimination during his residency to Drs. Fisher and Huot. Huot Affidavit, Ex. B. Dr. Huot asked the plaintiff if he could share any examples of discrimination that he experienced in interactions with Dr. Sarac and others, and the plaintiff again mentioned the tee ball story. Huot Affidavit, Ex. B. The plaintiff also "ha[d] other concerns related to his remediation program and fe[lt] that he ha[d] not been treated fairly in that process, for other reasons." Id. In an in-person meeting around the same time with Drs. Fisher and Huot, the plaintiff told Dr. Huot for the first time about Dr. Cardella's use of the word "cocksucker," but does not recall whether the plaintiff stated it was directed at him. Huot Deposition 29–32.

The plaintiff filed a formal grievance of his dismissal. The grievance committee upheld his dismissal. Defendant's Motion for Summary Judgment, Ex. 16. Following an appeal of the grievance committee's decision, the defendant's Chief Medical Officer also upheld the decision. Id.

The following additional facts relate to the plaintiff's retaliation claim. As part of the accreditation process, the ACGME conducts yearly anonymous surveys of residents and physicians for program feedback. Huot Affidavit ¶ 7. At some point before the plaintiff was placed on remediation, he provided comments to the ACGME during one of the ACGME's hospital site visits. Trejo Deposition 235. The plaintiff commented to the ACGME about duty hours, not having enough time to study due to those hours, that he had not received evaluations, and that vascular rotations were being taken away from the vascular residents and given to the general surgery residents. Trejo Deposition 240–41. In April, 2016,[6] the plaintiff met with Dr. Fisher and stated that he was concerned that he was being mistreated or retaliated against "because of the ACGME site visit." Id.; Fisher Affidavit ¶ 9. The plaintiff did not feel it was discrimination at that time[7] and was instead concerned that his anonymous comments had been traced back to him and that he was being targeted as a result. See Trejo Deposition 235, 239–40. Similarly, in or about August, 2016, the plaintiff told Dr. Huot that he felt he was being treated harshly because of his comments to the ACGME site visitor. Huot Affidavit ¶ 9. At no time during Drs. Fisher's and Huot's conversations with the plaintiff did he state that he was being discriminated against due

[6] In his deposition, the plaintiff testified that he believes the meeting occurred in "maybe June or July" of 2016. Trejo Deposition 235.

[7] The plaintiff testified: "I want to say I even said, I don't think I'm being discriminated against, but something—I'm definitely being mistreated here." Trejo Deposition 240.

to his sexual orientation or gender. Fisher Affidavit ¶ 10; Huot Affidavit ¶ 13 ("[w]hen I asked him in August of 2016, the plaintiff explicitly denied feeling discriminated against").

DISCUSSION

I

Standard of Review

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414–15, 195 A.3d 664 (2018). "The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) *Doe* v. *West Hartford*, 328 Conn. 172, 191–92, 177 A.3d 1128 (2018).

"Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 228, 116 A.3d 297 (2015). "It is axiomatic that in order to successfully oppose a motion for summary judgment by raising a genuine issue of

material fact, the opposing party cannot rely solely on allegations that contradict those offered by the moving party, whether raised at oral argument or in written pleadings; such allegations must be supported by counteraffidavits or other documentary submissions that controvert the evidence offered in support of summary judgment." *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 178, 73 A.3d 742 (2013). "[F]actual assertions based on inadmissible hearsay are insufficient for purposes of opposing a motion for summary judgment . . . ." *Jaiguay* v. *Vasquez*, 287 Conn. 323, 363, 948 A.2d 955 (2008).

"Although the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Perez* v. *Metropolitan District Commission*, 186 Conn. App. 466, 476, 200 A.3d 202 (2018). "[E]ven with respect to questions of motive, intent and good faith, the party opposing summary judgment must present a factual predicate for his argument in order to raise a genuine issue of fact." (Internal quotation marks omitted.) *Voris* v. *Middlesex Mutual Assurance Co.*, 297 Conn. 589, 603, 999 A.2d 741 (2010).

II

Disparate Treatment

Connecticut prohibits discrimination in employment based on, inter alia, an individual's sexual orientation; General Statutes § 46a-81c; and on an individual's sex. General Statutes § 46a-60 (b). " '[D]isparate treatment'

simply refers to those cases where certain individuals are treated differently than others." *Levy* v. *Commission on Human Rights & Opportunities*, 236 Conn. 96, 104, 671 A.2d 349 (1996). "The framework this court employs in assessing disparate treatment discrimination claims under Connecticut law was adapted from the United States Supreme Court's decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny. . . . We look to federal law for guidance on interpreting state employment discrimination law, and the analysis is the same under both. . . . Under this analysis, the employee must first make a prima facie case of discrimination. . . . In order for the employee to first make a prima facie case of discrimination, the plaintiff must show: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the position; (3) the plaintiff suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discrimination. . . . The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . This burden is one of production, not persuasion; it can involve no credibility assessment. . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Citations omitted; internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73–74, 111 A.3d 453 (2015).

"The burden of proof that must be met to permit an employment-discrimination plaintiff to survive a summary judgment motion at the prima facie stage is de minim[i]s. . . . Since the court, in deciding a motion for summary judgment, is not to resolve issues of fact, its determination of whether the circumstances giv[e]

rise to an inference of discrimination must be a determination of whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive." (Citation omitted; internal quotation marks omitted.) *Chambers* v. *TRM Copy Centers Corp.*, 43 F.3d 29, 37–38 (2d Cir. 1994). "Though caution must be exercised in granting summary judgment where intent is genuinely in issue . . . summary judgment remains available to reject discrimination claims in cases lacking genuine issues of material fact." (Citation omitted.) Id., 40. Courts "must . . . carefully distinguish between evidence that allows for a reasonable inference of discrimination and evidence that gives rise to mere speculation and conjecture. . . . [A]n inference is not a suspicion or a guess." (Internal quotation marks omitted.) *Bickerstaff* v. *Vassar College*, 196 F.3d 435, 448 (2d Cir. 1999), cert. denied, 530 U.S. 1242, 120 S. Ct. 2688, 147 L. Ed. 2d 960 (2000). "Judicial circumspection is particularly warranted in the context of academic decisions concerning medical competency. Put simply, courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine." (Internal quotation marks omitted.) *Gupta* v. *New Britain General Hospital*, 239 Conn. 574, 595, 687 A.2d 111 (1996).

In its motion for summary judgment, the defendant argues that the plaintiff has failed to prove that he was discriminated against on the basis of his sexual orientation or gender. It asserts that there are no genuine issues of material fact in light of the plaintiff's deposition testimony and that it is entitled to judgment as a matter of law. The defendant challenges specifically the fourth element of the prima facie case: whether the plaintiff's termination occurred in context giving rise to an inference of discrimination. Additionally, it argues that the plaintiff has failed to show that the defendant's

legitimate, nondiscriminatory reason for terminating the plaintiff—repeated, documented performance deficiencies—is pretext.[8]

In his opposition to the motion for summary judgment, the plaintiff argues that, in light of comments from two key decision makers and alleged unfair treatment, he has submitted sufficient evidence of discrimination to survive summary judgment. The plaintiff argues that a material question of intent remains, which cannot properly be decided on summary judgment.[9]

As the defendant has argued only that the plaintiff has failed to establish an inference of discrimination, the court will assume for purposes of the summary judgment motion that the first three factors of the plaintiff's prima facie case have been met.[10] In light of the

[8] In its reply, the defendant argues that the plaintiff's gender discrimination claim also fails because the plaintiff testified at his deposition that he does not believe he was discriminated against because of his gender. Defendant's Reply, p. 8. The plaintiff testified that he does not think Dr. Sarac discriminated against him for being male and does not know if Dr. Cardella did. Trejo Deposition 350–51. He further testified that the comments that Dr. Sarac made were specific to his mannerisms or behavior, which were unlike how other males might be expected to behave. Id. The totality of the plaintiff's deposition supports his belief that he was discriminated against because of sex stereotyping. "Sex stereotyping [by an employer] based on a person's gender non-conforming behavior is impermissible discrimination. . . . That is, individual employees who face adverse employment actions as a result of their employer's animus toward their *exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim* . . . ." (Emphasis added; internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Hartford*, 138 Conn. App. 141, 163, 50 A.3d 917, cert. denied, 307 Conn. 929, 55 A.3d 570 (2012).

[9] The plaintiff also argues that "McDonnell Douglas and Price Waterhouse are analytical tools and nothing more," and instead articulates a legal standard citing to the Seventh Circuit in a case under 42 U.S.C. § 1981 and Illinois state law. Plaintiff's Memorandum in Opposition, p. 11. Given the extensive Connecticut appellate precedent employing the *McDonnell-Douglas* framework, the court will utilize that approach.

[10] The defendant does not concede that the plaintiff has satisfied the other elements of his prima facie case, particularly that he was qualified for the position. Defendant's Motion for Summary Judgment, p. 17 n.12.

overlap between the evidence and analysis applicable to the plaintiff's first and second counts of disparate treatment, the court will discuss them together.

Viewing the evidence in the light most favorable to the plaintiff, the court finds that the plaintiff has failed to meet his burden to establish a prima facie case of employment discrimination on the basis of his gender or sexual orientation. The essence of the plaintiff's discrimination claim centers on alleged homophobic remarks from two doctors involved in the defendant's residency and his allegations that he was treated unfairly in the program. In his deposition, the plaintiff explicitly stated that he is only alleging that two of his supervising doctors, Drs. Cardella and Sarac, discriminated against him. Trejo Deposition 345–46.

A

Plaintiff's Prima Facie Case

1

Discriminatory Comments

"[S]tray remarks, even if made by a decision maker, do not constitute sufficient evidence [to support] a case of employment discrimination. . . . Verbal comments constitute evidence of discriminatory motivation when [an employee] demonstrates that a nexus exists between the allegedly discriminatory statements and [an employer's] decision to discharge [the employee]." (Citation omitted; internal quotation marks omitted.) *Hartford* v. *Commission on Human Rights & Opportunities*, 208 Conn. App. 755, 773, 267 A.3d 883 (2021). "[T]he task is . . . to assess the remarks' tendency to show that the [decision maker] was motivated by assumptions or attitudes relating to the protected class. . . . Courts have found the following factors relevant to such a determination: (1) who made the remark, i.e., a [decision maker], a supervisor, or a low-level

coworker; (2) when the remark was made in relation to the employment decision at issue; (3) the content of the remark, i.e., whether [the finder of fact] could view the remark as discriminatory; and (4) the context in which the remark was made, i.e., whether it was related to the [decision-making] process." (Internal quotation marks omitted.) Id., 774.

Even if taken as true, the alleged discriminatory comments fail to satisfy the plaintiff's burden to show that his termination occurred in circumstances giving rise to an inference of discrimination. "In the absence of a clearly demonstrated nexus to an adverse employment action, stray workplace remarks are insufficient to defeat a summary judgment motion." (Internal quotation marks omitted.) *Hasemann* v. *United Parcel Service of America, Inc.*, United States District Court, Docket No. 3:11-cv-554 (VLB) (D. Conn. February 26, 2013). The alleged remarks in this case were made by two of fourteen decision makers, whose decision was informed by years of evaluations from doctors and nurses from around the hospital. See *Hartford* v. *Commission on Human Rights & Opportunities*, supra, 208 Conn. App. 777 (to succeed on claim that one employee's discriminatory animus influenced others to mistreat or unfairly evaluate employee, plaintiff must establish causal connection between their remarks and decision to terminate).

The plaintiff's testimony establishes that the earliest comment occurred months before the plaintiff was placed on a remediation plan and over a year before he was terminated. Even the later comments were not made in close temporal proximity to the plaintiff's April, 2017 termination notice. Although there is no bright-line time frame, "the more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination." *Tomassi* v. *Insignia Financial Group*,

Inc., 478 F.3d 111, 115 (2d Cir. 2007), abrogated on other grounds by *Gross* v. *FBL Financial Services, Inc.*, 557 U.S. 167, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009).

The circumstances in which the comments were made also bear on whether they were motivated by discrimination. The plaintiff testified that the word "cocksucker" was part of Dr. Cardella's routine vocabulary, was only potentially directed at the plaintiff on one occasion, and that Dr. Cardella would also direct the word at patients and inanimate objects out of frustration. Trejo Deposition 354. Though the word itself could be considered homophobic in origin by a fact finder, the plaintiff adduced no evidence that it was used in a discriminatory manner toward the plaintiff. See *Asante-Addae* v. *Sodexo, Inc.*, United States District Court, Docket No. 3:13-CV-00489 (VLB) (D. Conn. March 31, 2015) (comments did not support inference of discrimination in adverse employment action where "without any additional facts or context, it would require a series of logical leaps to construe [the] statements in the manner [the plaintiff] apparently has"), aff'd, 631 Fed. Appx. 68 (2d Cir. 2016).

Additionally, as to the context in which the remark was made, it was uttered in a "setting of being frustrated or upset in an operative environment." Huot Deposition 29. The plaintiff stated, "[t]here are plenty of surgeons who use derogatory terms in the operating room." Trejo Deposition 354. Though Dr. Cardella's word choice was unprofessional and inappropriate, the evidence does not support an inference that his comment was connected to the nonrenewal decision. Nor does the plaintiff connect the "real men" or "real surgeons" comments to the group decision-making process. See *Hasemann* v. *United Parcel Service of America, Inc.*, supra, United States District Court, Docket No. 3:11-cv-554 (VLB) (though comments could be viewed as discriminatory by reasonable juror, no inference of discrimination

where comments were not made in relation to employment decision or decision-making process). "The relevance of discrimination-related remarks does not depend on their offensiveness, but rather on their tendency to show that the decision-maker was motivated by assumptions or attitudes relating to the protected class." *Tomassi* v. *Insignia Financial Group, Inc.*, supra, 478 F.3d 116.

As to the tee ball comment, the evidence shows that when the plaintiff relayed his concerns to Dr. Huot, Dr. Huot specifically asked the plaintiff whether he felt he was being discriminated against because of his sexual orientation. The plaintiff said no. Fisher Affidavit ¶ 10; Huot Affidavit ¶ 14; Huot Deposition 20; Trejo Deposition 245–46.[11] It was during that meeting that Dr. Huot shared with the plaintiff that he is also homosexual, to identify himself as an ally. Huot Affidavit ¶ 13. In this meeting, the plaintiff specifically disavowed any feeling that he was being discriminated against on the basis of his sexual orientation. In addition, there is no evidence of a temporal or logical connection between the comments and the adverse employment decision. According to the plaintiff, the tee ball incident occurred in February, 2016, over a year before the nonrenewal decision.

Viewing the evidence in the light most favorable to the plaintiff and assuming the allegations regarding these comments are true, a reasonable jury would find that they are insufficient to meet the plaintiff's burden to show an inference of discrimination in his termination.

[11] The complaint alleges that the plaintiff "was not sure but there had been many explicit comments made that were very homophobic and pejorative in nature"; Complaint ¶ 34; but the plaintiff did not adduce admissible evidence supporting those allegations. See *GMAC Mortgage, LLC* v. *Ford*, supra, 144 Conn. App. 178 (party opposing summary judgment motion cannot rely solely on allegations in pleadings that contradict those offered by moving party).

2

Unfair Treatment

"Allegations of unfair treatment directed at a member of a protected class do not create a fact issue for trial absent a basis to conclude that that unfair treatment arose *because of* the victim's membership in that class." (Emphasis in original.) *Hoag* v. *Fallsburg Central School District*, 279 F. Supp. 3d 465, 483 (S.D.N.Y. 2017).

The plaintiff alleges that he was deprived of opportunities and recognition given to other similarly situated employees because of his gender and sexual orientation. Complaint, Count One, ¶ 54 (b); Count Two, ¶ 57 (b). He also alleges that the defendant treated him adversely compared to similarly situated employees on the basis of his sexual orientation. Complaint, Count Two, ¶ 57 (g). The plaintiff alleges that he was treated unfairly during his residency program by, among other things, being given unrealistic assignments, being punished for behavior other residents engaged in but for which they were not punished, being taken off critical rotations, and not receiving key feedback. See Plaintiff's Memorandum in Opposition, p. 12.

These allegations do not contribute to an inference of discriminatory intent on the part of the defendant or its employees because the plaintiff did not show how his treatment or the expectations imposed on him differed from any of the other vascular residents. Ordinarily, "a litigant may present circumstantial evidence from which an inference may be drawn that similarly situated individuals were treated more favorably than [he] was. . . . To be similarly situated, the individuals with whom [the plaintiff] attempts to compare [himself] must be similarly situated in all material respects." (Citation omitted; internal quotation marks omitted.) *Luth* v. *OEM Controls, Inc.*, 203 Conn. App. 673, 681, 252 A.3d 406 (2021). The plaintiff provides no specific

comparator nor anything other than vague hearsay statements of others to show that other residents made the same recordkeeping errors and were not punished. See *Alvarez* v. *Middletown*, 192 Conn. App. 606, 618, 218 A.3d 124 (no material issue of fact raised where plaintiff did not dispute performance deficiencies but claimed others had same deficiencies and were not discharged, yet failed to provide evidence to substantiate assertion), cert. denied, 333 Conn. 936, 218 A.3d 594 (2019); *Harris* v. *Dept. of Correction*, 154 Conn. App. 425, 432–33, 107 A.3d 454 (2014) (no material issue of fact as to inference of discrimination where plaintiff failed to offer evidence to demonstrate other employee was punished less for same offense or that had similar disciplinary record), cert. denied, 315 Conn. 925, 109 A.3d 921 (2015). There is no factual basis from which a jury could conclude that the plaintiff was being singled out in a discriminatory manner on the basis of his gender or sexual orientation.

Similarly, the plaintiff's claims that he was taken off key rotations and was not provided enough opportunities to rotate in vascular surgery in the 2015-16 program year—which he speculates Dr. Sarac had "something to do with"—are hollow absent a basis of comparison. This is particularly true because the plaintiff acknowledges that there was a neutral reason why Dr. Sarac may have wanted changes to the schedule—to enable general surgery residents to rotate in the vascular surgery program. See Trejo Deposition 148. General complaints about the fairness of the residency program are insufficient to raise an inference of discrimination without a connection to the plaintiff's protected class status. See *McGuire-Welch* v. *House of the Good Shepherd*, 720 Fed. Appx. 58, 61 (2d Cir. 2018) (plaintiff's complaint of unfair treatment and antagonistic behavior by supervisor did not satisfy burden to show discrimination).

The defendant produced evidence of concerns raised by multiple surgeons regarding the plaintiff's ability to complete surgical procedures. See Cardella Affidavit ¶¶ 8, 9, 12; Cardella Deposition 31–32; Fisher Affidavit ¶ 6. The plaintiff has not provided evidence from which a reasonable jury could determine that the plaintiff was not chosen to participate in surgery—for example, on the occasion following the "real surgeons" comment—for reasons other than the deficiencies in his performance. See *Andrade* v. *Lego Systems, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-14-6053523-S (January 26, 2018) (reprinted at 188 Conn. App. 655, 666–68, 205 A.3d 810) (plaintiff's claim that denial of opportunities harmed his performance does not give rise to inference of discrimination where plaintiff provided no evidence that similarly situated employees were on performance plans or had same documented performance issues), aff'd, 188 Conn. App. 652, 205 A.3d 807 (2019), cert. denied, 331 Conn. 921, 205 A.3d 567 (2019). Because the plaintiff failed to provide any evidence concerning other residents he claims were favored, there is no factual basis on which a jury could determine that he was treated differently because of his sexual orientation or gender.

The plaintiff's subjective belief that the remediation plan was designed for him to fail also cannot create a genuine issue of material fact to preclude summary judgment. The evidence shows that the defendant created and altered the remediation process in order to help the plaintiff succeed. When the plaintiff felt he was being evaluated too harshly by Dr. Cardella in his remediation exams; Huot Affidavit ¶ 10; the defendant agreed to have Dr. Contessa attend the remaining two thirds of the plaintiff's oral exams. Cardella Affidavit ¶ 15; Trejo Deposition 192. Additionally, in response to this concern, Dr. Huot reviewed the process as well as feedback from other doctors to ensure the ACGME

process was being followed. Huot Affidavit ¶ 10. While the plaintiff speculates that Dr. Cardella added questions to each exam in an effort to prevent him from finishing; Trejo Deposition 199; he offers no evidence to substantiate this assumption. By contrast, the defendant shows that Dr. Cardella included repeat questions in an effort to provide the plaintiff with an opportunity to improve his score. Cardella Affidavit ¶ 15, Ex. N. Moreover, he was not penalized for leaving questions unanswered yet still scored below target. Cardella Affidavit, Ex. L; see *Agosto* v. *Premier Maintenance, Inc.*, 185 Conn. App. 559, 584, 197 A.3d 938 (2018) (finding that plaintiff's failure to adduce evidence showing he was treated less favorably than other employees, and where employer actually gave plaintiff preferential treatment, weighed against inference of discrimination). The plaintiff's conjecture cannot create a genuine issue of material fact in light of the defendant's evidence.

Finally, the plaintiff's claims of being treated unfairly are undercut by his testimony that other residents outside his protected class also felt they were treated unfairly by Drs. Cardella and Sarac. See Trejo Deposition 255 ("it's my understanding that there were plenty of residents who had issues with Dr. Sarac, and now Dr. Cardella after I left"). The plaintiff testifies that "Lindsey," a female, heterosexual resident in his program, also "felt specifically targeted by Dr. Sarac"; id.; and the complaint alleges that certain female residents complained to the defendant about Dr. Sarac. Complaint ¶ 19. To the plaintiff's knowledge, none of the other residents who felt that they were treated unfairly were homosexual. Trejo Deposition 256. Two other residents made complaints to Dr. Huot that they were unhappy with Dr. Sarac shouting in the workplace. Huot Deposition 26, 28. "Conduct that is offensive but that is directed at and impacts members of protected classes

equally is not actionable . . . . Put bluntly, the equal opportunity harasser escapes the purview of . . . liability." (Internal quotation marks omitted.) *Sherman* v. *Fivesky, LLC*, United States District Court, Docket No. 19-cv-8015 (LJL) (S.D.N.Y. May 5, 2020).

The plaintiff cannot create a genuine issue of material fact based on mere speculation, unsubstantiated by evidence. "Although the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Perez* v. *Metropolitan District Commission*, supra, 186 Conn. App. 476. Even viewing all of the facts in the light most favorable to the plaintiff, a reasonable jury could not find an inference of discrimination in the circumstances of his nonrenewal based upon the evidence provided. Accordingly, the defendant has shown that there is no genuine issue of material fact and that the plaintiff has failed to establish his prima facie case as a matter of law. Further, even if the plaintiff satisfied his burden to establish his prima facie case, the defendant has presented a legitimate, nondiscriminatory reason for his discharge.

B

Employer's Reason for Nonrenewal

"The employer may . . . rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question." (Internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*,

supra, 316 Conn. 74. "Where an employment relationship is primarily educational, courts from the Supreme Court, various Courts of Appeal, state courts and trial courts have recognized that judges and juries are singularly unequipped to review judgments about professional qualification." *Abdel-Raouf* v. *Yale University*, United States District Court, Docket No. 3:12CV776 (HBF) (D. Conn. February 18, 2015); see *Gupta* v. *New Britain General Hospital*, supra, 239 Conn. 594 ("we approach with caution, and with deference to academic decisionmaking, the plaintiff's challenge to the motivation of the hospital in terminating his residency").

Even if the plaintiff has made his prima facie case, the defendant has provided a legitimate, nondiscriminatory reason for the plaintiff's discharge, supported by extensive, uncontroverted evidence. The defendant's evidence shows that the plaintiff was placed on a remediation program to attempt to help him improve clinical and performance deficiencies in order to eventually pass the boards and become a safe and competent vascular surgeon. The plaintiff's performance issues persisted throughout the remediation process, evidenced by the evaluations of multiple doctors as well as his scores on standardized exams.

The record contains substantial evidence proffered by the defendant sufficient to support a legitimate, nondiscriminatory reason for the CCC's decision—that the plaintiff's performance difficulties persisted and that his scores on standardized exams were below expectations. The evidence also shows documented performance deficiencies before any of the alleged discriminatory acts. In light of the special deference afforded to employers who train medical professionals, even if the plaintiff had established a prima facie case, the defendant met its burden to rebut any inference of discrimination. The plaintiff provided no contradictory evidence beyond his own opinion or speculation.

C

No Showing of Pretext

"To prove pretext, the plaintiff may show . . . that [the defendant's] reason is not worthy of belief or that more likely than not it is not a true reason or the only true reason for [the defendant's] decision to [terminate the plaintiff's employment] . . . . Of course, to defeat summary judgment . . . the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors. . . . A plaintiff may show pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable [fact finder] could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." (Citation omitted; internal quotation marks omitted.) *Stubbs* v. *ICare Management, LLC*, 198 Conn. App. 511, 522–23, 233 A.3d 1170 (2020). "When a party opposing a motion for summary judgment has failed to provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact concerning intent, summary judgment is appropriate." *Tuccio Development, Inc.* v. *Neumann*, 114 Conn. App. 123, 130, 968 A.2d 956 (2009).

In his complaint, the plaintiff alleges that "[a]ny and all excuses to be offered by the defendant to explain the termination decision would be a pretext to mask unlawful discrimination and/or retaliation." Complaint ¶ 51. In response, the defendant argues that there is no evidence that its reason for his dismissal was a pretext for discrimination.

The plaintiff has not met his burden to show that the defendant's nondiscriminatory reason for his dismissal

is pretext to hide illegal motivations. The plaintiff has only alleged discriminatory animus on the part of only two doctors, Sarac and Cardella. As discussed above, the decision to terminate the plaintiff was made or approved by the multiple members of the CCC, the institution's DIO, and the plaintiff's mentor, and in the end was ratified by fourteen individuals. The plaintiff has provided no evidence to show that the decision was infected by discriminatory animus or that these two doctors had control over the outcome of the CCC's review of the plaintiff's performance. In fact, Dr. Cardella, along with other CCC members, felt strongly that the plaintiff should be dismissed as of the January 10, 2017 CCC meeting but was persuaded by others to withhold the decision pending the VSITE scores. Cardella Affidavit ¶ 19; Huot Affidavit ¶ 11. Courts decline to find an inference of discrimination in an adverse employment decision where the decision was made by multiple actors and the plaintiff cannot show that the group was influenced by a member's alleged discriminatory animus. See *Cerutti* v. *BASF Corp.*, 349 F.3d 1055, 1066 (7th Cir. 2003) (in multiple decision maker cases, plaintiff must "present evidence from which a reasonable jury could infer that [the allegedly discriminatory decision makers'] prejudicial views influenced their fellow panel members to such a degree that it resulted in their being terminated"), overruled in part on other grounds by *Ortiz* v. *Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016); *Hussain* v. *Federal Express Corp.*, 657 Fed. Appx. 591, 595 (7th Cir. 2016) ("[w]hen a hiring decision is made by a committee that is untainted by the bias of one of its members, the causal link between that prejudice and the adverse employment action is severed" (internal quotation marks omitted)); *Champion* v. *New York State Office of Parks, Recreation & Historic Preservation*, 500 F. Supp. 3d 26, 47 (S.D.N.Y. 2020)

(gender discrimination claim undermined by employer's process involving multiple decision makers); *Abdel-Raouf* v. *Yale University*, supra, United States District Court, Docket No. 3:12-CV-776 (HBF) (no inference of discrimination in part because decision to terminate was made by committee and based upon summaries of all attendings' evaluations); *Anaya* v. *Donahoe*, United States District Court, Docket No. 08 CV 3842 (ALC) (E.D.N.Y. August 26, 2011) (no inference of discrimination where plaintiff only believed one member of committee had discriminatory animus against him); *Jalal* v. *Columbia University*, 4 F. Supp. 2d 224, 239 (S.D.N.Y. 1998) (no inference that group was influenced by committee member's alleged discrimination where each member already "had grave reservations about the quality of [plaintiff's] work").

Further, the decision was made based upon negative evaluations of the plaintiff over the course of his residency, which included feedback from doctors the plaintiff worked with across the hospital. See *Beards* v. *Bronx-Care Health System*, United States District Court, Docket No. 18 Civ. 12216 (PAE) (S.D.N.Y. February 23, 2021) ("[w]here multiple evaluators express dissatisfaction with an employee's performance, that undercuts the inference that the ultimate decision-maker acted out of discrimination"); *Sotomayor* v. *New York*, 862 F. Supp. 2d 226, 259 (E.D.N.Y. 2012) ("[a] discriminatory inference can be rebutted when multiple evaluators all express dissatisfaction with the plaintiff's performance"), aff'd, 713 F.3d 163 (2d Cir. 2013).

The plaintiff has provided no evidence to respond to the defendant's extensive documentation of his performance issues. Additionally, concerns about the plaintiff's clinical competencies and academic knowledge existed before any of the allegedly discriminatory events occurred. These academic deficiencies are in part evidenced by his scores on standardized exams scored by third parties outside of the hospital. Further

refuting any finding of irregularity or inconsistency in their actions, the defendant's evidence shows that its actions were not unusual. The hospital has placed others on remediation plans, some of whom did not successfully complete their remedial period, and at least nineteen residents have resigned in lieu of contract nonrenewal due to performance issues since 2015. Cardella Deposition 42; Huot Affidavit ¶ 16. This included at least one other man in the plaintiff's same program, and none of these residents lodged discrimination claims. Huot Affidavit ¶ 16.

There is insufficient evidence from which a jury could determine that the circumstances surrounding the plaintiff's nonrenewal could give rise to an inference of discrimination. The defendant offered extensive evidence that belies any such inference. The plaintiff has produced no evidence in response that raises a genuine issue of material fact. Accordingly, summary judgment is granted on the disparate treatment claims.

III

Retaliation

"A prima facie case of retaliation requires a plaintiff to show (1) that he or she participated in a protected activity that is known to the defendant, (2) an employment action that disadvantaged the plaintiff and (3) a causal relation between the protected activity and the disadvantageous employment action. . . . The term protected activity refers to action taken to protest or oppose statutorily prohibited discrimination. . . . The law protects employees in the filing of formal charges of discrimination as well as in the making of informal protests of discrimination, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of [coworkers] who have filed formal charges." (Citations omitted; internal

quotation marks omitted.) *Agosto* v. *Premier Maintenance, Inc.*, supra, 185 Conn. App. 587.

"Once a prima facie case of retaliation is established, the burden of production shifts to the employer to demonstrate that a legitimate, [nondiscriminatory] reason existed for its action. . . . If the employer demonstrates a legitimate, nondiscriminatory reason, then [t]he burden shifts . . . back to the plaintiff to establish, through either direct or circumstantial evidence, that the employer's action was, in fact, motivated by discriminatory retaliation." (Internal quotation marks omitted.) *Luth* v. *OEM Controls, Inc.*, supra, 203 Conn. App. 690.

In the third count of the plaintiff's complaint, he alleges retaliation in violation of § 46a-60 (a) (4), claiming that he was terminated "as a result of the plaintiff's complaints opposing sexual orientation and gender discrimination in the workplace." Complaint, Count Three, ¶ 60 (a).

In its motion for summary judgment, the defendant argues that none of the plaintiff's pre-dismissal concerns constitute protected activity under CFEPA, there is no causal connection, and the [defendant] has articulated a legitimate, nondiscriminatory reason for his dismissal. In response, the plaintiff argues that he engaged in a protected activity by bringing complaints about his treatment to individuals within the defendant's organization.

The plaintiff fails to meet his burden to establish a case of retaliation because he offered no evidence that he engaged in a protected activity.[12] The plaintiff's comments to the ACGME do not amount to a protected

[12] The complaint alleges that "[d]uring each meeting, the plaintiff stated that he believed that he was being treated discriminatorily and that Dr. Sarac had a preference toward the heterosexual male residents in the operating room." Complaint ¶ 29. Paragraph 39 alleges that the plaintiff and two other residents met with Dr. Huot to discuss "what the plaintiff believed were discriminatory actions taken against him." The plaintiff's deposition

activity because they were not an "action taken to protest or oppose statutorily prohibited discrimination." (Internal quotation marks omitted.) *Agosto* v. *Premier Maintenance, Inc.*, supra, 185 Conn. App. 587. The plaintiff testified that he was concerned with duty hours, not having enough time to study due to those hours, that he had not received evaluations, and that vascular rotations were being taken away from the vascular residents and given to the general surgery residents "because of the politics of the department." Trejo Deposition 240–41. The plaintiff did not tell the ACGME that he felt he was being treated differently because of his sexual orientation or gender or any other statutorily prohibited reason. Trejo Deposition 241. None of these comments constitute a protected activity under the law. "We have repeatedly held that generalized grievances about an unpleasant or even harsh work environment, without more, do not reasonably alert an employer of *discriminatory* conduct and therefore fail to rise to the level of protected activity." (Emphasis in original.) *Green* v. *Mount Sinai Health System, Inc.*, 826 Fed. Appx. 124, 125 (2d Cir. 2020); see also *Rojas* v. *Roman Catholic Diocese of Rochester*, 660 F.3d 98, 108 (2d Cir. 2011) (any complaints made by plaintiff were generalized and therefore could not be protected activity for retaliation claim), cert. denied, 565 U.S. 1260, 132 S. Ct. 1744, 182 L. Ed. 2d 530 (2012).

There is no evidence that the plaintiff complained about sexual orientation or gender discrimination before he received his nonrenewal notice.[13] Both Dr.

testimony, however, undercuts this allegation. As noted above, the plaintiff did not meet the defendant's evidence with admissible evidence supporting these allegations.

[13] Complaints made after the nonrenewal notice cannot form the basis of a claim for retaliation because the dismissal decision had already been made. Though "[t]here is no bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between [protected activity] and an allegedly retaliatory action"; (internal quotation marks omitted) *Ayantola* v. *Board of Trustees of Technical Colleges*, 116 Conn. App. 531, 539, 976 A.2d 784 (2009); as a point of logic,

Fisher and Dr. Huot were surprised to hear the plaintiff's concerns of discrimination following the notice, particularly in light of the plaintiff's prior disavowals of any discrimination. Fisher Affidavit ¶ 10; Huot Affidavit ¶ 14.

Even if the plaintiff's allegations regarding his complaints prior to his nonrenewal were not directly contradicted by his own testimony, the plaintiff nonetheless has failed to meet his burden for a claim of retaliation because the employer has given a legitimate, nondiscriminatory reason for his dismissal that the plaintiff cannot show is pretext. Accordingly, the defendant's motion for summary judgment is granted as to the retaliation claim.

CONCLUSION

For all of the foregoing reasons, the defendant's motion for summary judgment is granted in its entirety.

C. D. *v.* C. D.*
(AC 44784)

Bright, C. J., and Moll and Cradle, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and entering certain orders regarding child support, alimony and custody of the parties' minor children. *Held*:

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the protected activity should come first in order to be the cause of the retaliatory action. See *Krahm* v. *Fairfield*, Superior Court, judicial district of Fairfield, Docket No. CV-04-4000006-S (October 1, 2009) ("[t]o be actionable retaliation, the adverse employment action must occur *after* the plaintiff engages in a protected activity" (emphasis in original)).

* 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, 851; 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.

Furthermore, in accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to use the parties'

1. The defendant's claim that the trial court's judgment dissolving the parties' marriage was inconsistent with the court's subsequent articulations of that decision was unavailing: in articulating that it had relied in part on its pretrial observations of the parties in rendering judgment, the court did not deprive the defendant of notice and a meaningful opportunity to be heard regarding those observations, as it was self-evident that the court would observe the parties during pretrial proceedings and carry those observations over into the trial, and the court was not required to alert the defendant that it would take its prior observations of the parties into account in rendering judgment; moreover, the court's articulation that the plaintiff's receipt of certain pretrial payments from the defendant contributed to the court's decision not to award periodic alimony was not inconsistent with the lack of mention of those payments in the court's judgment, the articulation having operated to clarify the basis of the court's alimony orders; furthermore, contrary to the defendant's assertion that the court incorrectly relied on the plaintiff's receipt of those pretrial payments in entering its alimony orders, both payments constituted advance property distributions that the court was required to consider, pursuant to statute (§ 46b-82), in making its alimony determination.
2. The trial court's factual findings concerning an incident between the parties at the marital residence that resulted in the defendant's arrest were not clearly erroneous, as the defendant claimed: the court's findings were supported by the plaintiff's testimony, which the court credited, that she feared for the parties' lives and those of their minor children during the incident, and, on the basis of the record, this court was not left with a definite and firm conviction that a mistake had been committed; moreover, even if there was no independent evidence corroborating the plaintiff's testimony, as the defendant contended, the lack of corroborating evidence did not impugn the court's credibility determinations, which this court declined to reweigh on appeal.
3. The defendant could not prevail on his claim that the trial court committed error in entering custody orders that improperly limited his visitation with the parties' minor children: the court's visitation orders were adequately supported by testimony from the parties and the children's guardian ad litem, who had significant concerns about the defendant's ability to care for the children because of his unrelenting desire to see the plaintiff punished for purportedly falsifying details of the incident that led to his arrest and his unsubstantiated belief that the plaintiff wanted to cause him serious harm; moreover, the court's finding that the defendant did not have the ability to take care of the children and to act in their best interests was not clearly erroneous, as he contended, but was buttressed by his own testimony as well as that of the guardian ad litem.

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full names or to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

4. The trial court improperly delegated its judicial authority to nonjudicial entities when it authorized the children's therapeutic counselors to determine whether to afford the defendant access to the children's private therapy records: pursuant to statute (§ 46b-56 (g)), the defendant, as the noncustodial parent, was entitled to access those records subject only to the court's denying him the right to access those records for good cause shown.

5. The trial court abused its discretion in ordering the defendant to pay child support to the plaintiff without first determining the presumptive support amount, as required by the regulations (§ 46b-215a-1 et seq.) governing child support: despite having had the parties' financial affidavits before it, the court did not determine, on the record, the presumptive support amount before it decided that application of the child support guidelines would be inequitable or inappropriate and that a deviation from the guidelines was warranted in light of the existence of one of the deviation criteria, namely, the defendant's earning capacity; moreover, because the child support award was severable from the court's other financial orders, this court ordered the trial court on remand to reconsider all of its child support orders to ensure that the total award will be proper in all respects.

Argued January 10—officially released April 18, 2023

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain and transferred to the judicial district of Hartford, where the defendant filed a cross complaint; thereafter, the case was tried to the court, *M. Murphy, J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *M. Murphy, J.*, issued articulations of its decision. *Reversed in part*; *further proceedings*.

Steven R. Dembo, with whom, on the brief, were *Caitlin E. Kozloski*, *Seth J. Conant* and *P. Jo Anne Burgh*, for the appellant (defendant).

John F. Morris, for the appellee (plaintiff).

Opinion

MOLL, J. The defendant, C. D., appeals from the judgment of the trial court dissolving his marriage to the

plaintiff, C. D. On appeal, the defendant claims that the court erred in (1) issuing an articulation that is inconsistent with the dissolution judgment and/or a prior articulation, (2) depriving him of notice and a meaningful opportunity to be heard with respect to the court's consideration of its pretrial observations of the parties, (3) making clearly erroneous factual findings regarding an incident between the parties, (4) entering custody orders limiting his visitation with the parties' minor children without an evidentiary basis, (5) delegating its judicial authority to nonjudicial entities by authorizing the children's therapeutic counselors to determine whether to provide him with access to the children's private therapy records, and (6) entering a child support award that deviated from the child support guidelines, as set forth in § 46b-215a-1 et seq. of the Regulations of Connecticut State Agencies (guidelines), without first determining the presumptive support amount pursuant to the guidelines.[1] We conclude that the court committed error only in delegating its judicial authority to nonjudicial entities regarding the children's private therapy records and in entering the child support award. We further conclude that the child support award is severable from the court's other financial orders, although our reversal of the child support award will require the court on remand to reconsider all of the child support orders. Accordingly, we reverse the judgment of the trial court only as to (1) the order delegating the court's judicial authority to nonjudicial entities regarding the children's private therapy records and (2) the child support orders, and we affirm the judgment in all other respects.

The following facts, which are not in dispute, and procedural history are relevant to our resolution of this

[1] For ease of discussion, we address the defendant's claims in a different order than they are set forth in his principal appellate brief and in the supplemental brief that he filed in this appeal.

appeal. The parties were married in 2005. Two children were born of the marriage, one in 2008 and the other in 2013. In the months leading up to April 24, 2018, the parties' marriage had been breaking down. On April 24, 2018, an incident occurred in the parties' marital home (April 24, 2018 incident) that resulted in emergency services, including the Hartford Police Department, responding and transporting the defendant to a local hospital. After leaving the hospital, the defendant was arrested and charged with, inter alia, kidnapping in the first degree in violation of General Statutes § 53a-92 and assault in the third degree in violation of General Statutes § 53a-61.[2]

On May 8, 2018, the plaintiff commenced the present dissolution action against the defendant on the ground that the parties' marriage had broken down irretrievably. On June 1, 2018, the defendant filed an answer to the plaintiff's complaint, as well as a cross complaint alleging that (1) the parties' marriage had broken down irretrievably and (2) the plaintiff had committed adultery. The matter was tried to the court, *M. Murphy*, *J.*, over the course of four total days in February and October, 2020. On October 30, 2020, after the close of evidence, the parties' trial counsel presented closing arguments. On December 15, 2020, the defendant filed a motion to open the evidence to offer two additional exhibits. On February 5, 2021, without objection, the court granted the defendant's motion to open and admitted the two additional exhibits in full into the record. Thereafter, the parties filed their operative proposed orders.

On June 1, 2021, the court issued a memorandum of decision dissolving the parties' marriage on the ground that the marriage had broken down irretrievably, with

[2] In November, 2019, the state nolled the criminal charges and, thereafter, the trial court, *Baldini*, *J.*, dismissed them.

the court finding both parties equally responsible for the breakdown of the marriage.[3] The court, inter alia, (1) awarded the plaintiff sole legal and physical custody of the children and adopted a parenting plan, (2) awarded the plaintiff $300 per week in child support, (3) ordered that, in the event that the children received therapeutic counseling, "the [children's] counselor(s) shall decide based on their professional requirements whether either parent shall have access to the children's private therapy records," (4) awarded no alimony to either party, except insofar as to protect the integrity of its order designating the plaintiff as the surviving spouse on the defendant's retirement plans,[4] and (5) entered property distribution orders that included awarding the plaintiff 15 percent of the gross amount, reduced by taxes, of any monetary award received by the defendant as a result of a separate arbitration proceeding and/or an attendant lawsuit concerning the termination of his employment with the state of Connecticut. This appeal followed. Additional facts and procedural history will be set forth as necessary.

We begin by setting forth the well settled standard of review in family cases. "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

[3] The court determined that the defendant had failed to meet his burden of proof to establish that the plaintiff had committed adultery.

[4] In the dissolution judgment, taking into account the factors set forth in General Statutes § 46b-82, the court "[made] no order of alimony payable to either party by the other" except as provided in a subsequent section of the decision concerning retirement/pension assets. As the court explained in that subsequent section, "[t]he court has considered the possibility that, if the defendant has remarried at the time of his retirement, his spouse could object to the designation of the plaintiff as a coparticipant and an alternate payee, and, under the provisions of the plan, such objection would prevent the plan from permitting the plaintiff's designation as a coparticipant/alternate payee. Therefore, the court orders $1 per year of alimony to the plaintiff, modifiable only to enforce the rights of this provision."

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." (Internal quotation marks omitted.) *L. L.* v. *M. B.*, 216 Conn. App. 731, 739, 286 A.3d 489 (2022).

I

We first address the defendant's claims concerning an articulation that the trial court issued on March 8, 2023 (March 8, 2023 articulation). The defendant contends that the March 8, 2023 articulation (1) is inconsistent with the dissolution judgment and/or a prior articulation issued by the court on February 16, 2023 (February 16, 2023 articulation), and (2) establishes that the court deprived him of notice and a meaningful opportunity to be heard regarding the court's reliance on its pretrial observations of the parties in rendering the dissolution judgment. These claims are unavailing.

The following additional facts and procedural history are relevant to our resolution of the defendant's claims. On June 20, 2018, the parties executed a stipulation providing in relevant part that "[t]he [defendant] shall pay to the [plaintiff] the amount of $8000 to be used toward her attorney's fees and/or relocation costs. This money shall be an advanced distribution of the final

property settlement to the [plaintiff] at the time of final judgment and shall be the law of the case." The court, *Olear*, *J.*, approved the stipulation on the same day. On January 29, 2019, in adjudicating several motions filed by the parties, the court, *M. Murphy*, *J.*, ordered in relevant part that "[the] defendant's [trial] counsel shall release $10,000 of [certain escrowed funds] to [the] plaintiff's [trial] counsel as trustee. An accounting of this transaction shall be kept so it can be considered when the matter goes to judgment. [The] defendant reserves the right to argue that this amount be applied to any potential distribution at the time of final judgment." The dissolution judgment does not expressly mention the $8000 payment or the $10,000 payment.

In his briefs to this court, the defendant contended that the trial court committed error in failing to account for the $8000 payment and the $10,000 payment in rendering the dissolution judgment. On February 9, 2023, we ordered, sua sponte, the court to articulate whether, in rendering the dissolution judgment, it had considered (1) the June 20, 2018 order insofar as the order provided that the $8000 payment constituted an advanced distribution to the plaintiff of the final property settlement, and (2) the January 29, 2019 order insofar as the order provided that the defendant reserved the right to argue that the $10,000 payment should be applied to any potential distribution at the time of final judgment. Thereafter, the court issued the February 16, 2023 articulation, which stated in relevant part that, "[i]n reaching its decision, the trial court considered all the evidence and legal arguments presented at trial. The trial court also considered the relevant prior court orders . . . in reaching its decision." On February 16, 2023, we ordered, sua sponte, the court to articulate further its consideration of both payments in rendering the dissolution judgment.[5]

[5] The February 16, 2023 order directed the court to articulate the following: "(1) Whether, in rendering the judgment of dissolution, the court credited

Thereafter, the court issued the March 8, 2023 articulation, which provided that, in rendering the dissolution judgment, it had accounted for the $8000 payment and the $10,000 payment. As to the $8000 payment, the court stated that it had "observed the parties at multiple pendente lite hearings and at the dissolution trial. The trial court fashioned a division of marital assets that was equitable, looking at the entire mosaic of marital assets available to be divided. For example, the court did not order alimony to the plaintiff, in part, because the court was aware that the plaintiff had received other assets, including pendente lite distributions from the marital estate in the amount of $8000 and $10,000. The plaintiff requested alimony in her proposed orders . . . which the court denied because the court considered that the plaintiff had received up-front pendente lite distributions. The court was also aware that the defendant was spending marital assets for his divorce case and his criminal legal expenses, which were appropriate and necessary expenses, but required some equalization for the plaintiff. The pendente lite distributions to the plaintiff allowed some equalization before judgment. . . .

"[I]n light of the court's other orders, including the pendente lite distributions, the court minimized the

the defendant for the $8000 payment designated in the June 20, 2018 order as 'an advanced distribution of the final property settlement to the [plaintiff] at the time of final judgment' and, if so, where that credit is reflected in the judgment. If the court did not credit the defendant for the $8000 payment, then the court is ordered to articulate its basis for not crediting the defendant for the payment.

"(2) Whether, in rendering the judgment of dissolution, the court credited the defendant for the $10,000 payment identified in the January 29, 2019 order and, if so, where that credit is reflected in the judgment. If the court did not credit the defendant for the $10,000 payment, then the court is ordered to articulate its basis for not crediting the defendant for the payment, including whether the court's decision was based on a determination that the defendant had failed to exercise his reserved right to argue 'that this amount be applied to any potential distribution at the time of final judgment.' "

plaintiff's share of any settlement from the defendant's lawsuit against his employer. Although the court found that the lawsuit settlement was part of the marital estate, and the defendant had prevailed at arbitration, the court awarded the plaintiff only a 15 percent share of any proceeds after taxes. This decision was based on the distribution of other amounts to the plaintiff, including the pendente lite distributions, rather than giving her a larger share of any lawsuit proceeds." (Citation omitted; footnote omitted.) As to the $10,000 payment, the court stated that, "for the reasons mentioned [by the court in addressing the $8000 payment], the court considered the pendente [lite] distribution of $10,000 to the plaintiff in its judgment. Regardless, the defendant failed to exercise his reserved right to argue that the $10,000 pendente lite amount should be applied to any potential distribution at the time of judgment." On March 9, 2023, we issued an order, sua sponte, permitting the parties to file simultaneous supplemental briefs responding to the March 8, 2023 articulation. The defendant filed a supplemental brief, but the plaintiff did not.

On the basis of his supplemental brief, the defendant has abandoned his claim that the court failed to consider the $8000 payment and the $10,000 payment; indeed, any such claim is belied by the March 8, 2023 articulation. Instead, the defendant contends that the March 8, 2023 articulation is inconsistent with the dissolution judgment and/or the February 16, 2023 articulation because the March 8, 2023 articulation indicates that, in rendering the dissolution judgment, the court (1) "relied on its subjective observations or impressions formed before trial"; (emphasis omitted); and (2) considered the $8000 payment and $10,000 payment in declining to award alimony to the plaintiff. In the alternative, the defendant asserts that, on the basis of the March 8, 2023 articulation, the court deprived him of

notice and an opportunity to be heard vis-à-vis its reliance on its observations of the parties during pretrial proceedings in rendering the dissolution judgment.[6] We are not persuaded.

It is well settled that "[a]n articulation is not an opportunity for a trial court to substitute a new decision nor to change the reasoning or basis of a prior decision." *Koper* v. *Koper*, 17 Conn. App. 480, 484, 553 A.2d 1162 (1989). Insofar as we must construe the dissolution judgment and the court's articulations, our review is plenary. See *Anketell* v. *Kulldorff*, 207 Conn. App. 807, 821, 263 A.3d 972 ("[b]ecause [t]he construction of a judgment is a question of law for the court . . . our review . . . is plenary" (internal quotation marks omitted)), cert. denied, 340 Conn. 905, 263 A.3d 821 (2021).

The defendant maintains that the dissolution judgment and the February 16, 2023 articulation reflect that, in rendering the dissolution judgment, the court relied solely on the court's prior orders, as well as the evidence and arguments presented at trial,[7] creating a conflict

[6] The defendant also claims that the court's finding in the March 8, 2023 articulation that he "failed to exercise his reserved right to argue that the $10,000 pendente lite amount should be applied to any potential distribution at the time of judgment" is clearly erroneous. Assuming arguendo that this finding is clearly erroneous, the error is harmless. "[W]here . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's [fact-finding] process, a new hearing is required." (Internal quotation marks omitted.) *Autry* v. *Hosey*, 200 Conn. App. 795, 801, 239 A.3d 381 (2020). As the court articulated, it considered the $10,000 payment in rendering the dissolution judgment. Thus, whether the defendant exercised his reserved right to argue vis-à-vis the $10,000 payment is of no moment.

[7] At the beginning of the dissolution judgment, the court identified the four trial dates, along with a hearing held on February 5, 2021, on the defendant's motion to open the evidence and stated that it had "considered all the evidence presented, the provisions of [several statutes], and the provisions of the [guidelines]." In the February 16, 2023 articulation, the court stated that, in rendering the dissolution judgment, it had "considered

with the court's statement at the outset of the March 8, 2023 articulation that it had "*observed the parties at multiple pendente lite hearings* and at the dissolution trial." (Emphasis added.) The defendant reads too much into this statement. It is self-evident that the court observed the parties during pretrial proceedings and carried over its observations of them into the trial. We do not construe the court's omission of that obvious statement from the dissolution judgment or from the February 16, 2023 articulation, or the court's inclusion thereof in the March 8, 2023 articulation, to result in inconsistent decisions. Likewise, we also reject the defendant's alternative contention that the court deprived him of notice and a meaningful opportunity to be heard regarding its consideration of its pretrial observations of the parties. Simply put, the court was not required to alert the defendant that it would take into account its prior observations of the parties when rendering the dissolution judgment.[8]

The defendant also posits that there are inconsistencies between the dissolution judgment and the March 8, 2023 articulation with respect to the issue of alimony.[9] The defendant maintains that the dissolution judgment makes no mention of the $8000 payment and the $10,000 payment vis-à-vis the alimony orders, whereas the March 8, 2023 articulation reflects that the plaintiff's receipt of those payments contributed to the court's decision not to award periodic alimony to her. We do not view these differences as creating an inconsistency between the dissolution judgment and the March 8, 2023 articulation; rather, we conclude that the March 8, 2023 articulation operates to clarify further the basis

all the evidence and legal arguments presented at trial . . . [and] the relevant prior court orders . . . ."

[8] Moreover, nothing in the March 8, 2023 articulation suggests that the court's pretrial observations of the parties were detrimental to the defendant.

[9] The February 16, 2023 articulation is silent as to alimony.

of the court's alimony orders. See *Sabrina C.* v. *Fortin*, 176 Conn. App. 730, 750, 170 A.3d 100 (2017) ("[t]he purpose of an articulation is to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal" (internal quotation marks omitted)).

The defendant further appears to assert that the court could not have relied on the plaintiff's receipt of the $8000 payment and the $10,000 payment in entering its alimony orders because both payments constituted advanced property distributions. We disagree. In determining alimony in the dissolution judgment, the court cited General Statutes § 46b-82, which provides in relevant part that, "[i]n determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider . . . the award, if any, which the court may make pursuant to [General Statutes §] 46b-81," which concerns the division of marital property. General Statutes § 46b-82 (a); see *McRae* v. *McRae*, 129 Conn. App. 171, 187, 20 A.3d 1255 (2011) (stating that § 46b-82 (a)[10] "expressly provides" that, in determining alimony, trial court shall consider award, if any, court may make pursuant to § 46b-81). Thus, when resolving the issue of alimony, the court did not err in taking into account that the plaintiff had received the $8000 payment and the $10,000 payment.[11] See, e.g., *Cunningham* v. *Cunningham*, 140 Conn. App. 676, 689, 59 A.3d 874 (2013) (trial court did not abuse its discretion in awarding periodic alimony to plaintiff, which

[10] Section 46b-82 (a) was amended by No. 13-213, § 3, of the 2013 Public Acts, which made changes to the statute that are not relevant here. Accordingly, our reference here is to the current revision of the statute.

[11] Notably, the defendant does not explain how he was harmed by the court's alimony orders, which awarded no alimony to the plaintiff beyond the nominal sum of $1 annually awarded to protect the integrity of the court's order designating the plaintiff as the surviving spouse on the defendant's retirement plans. See footnote 4 of this opinion.

was crafted, inter alia, in light of court's award of income-producing property to plaintiff).

In sum, we reject the defendant's claims of error stemming from the March 8, 2023 articulation.

II

We next address the defendant's claim that the trial court made clearly erroneous factual findings regarding the April 24, 2018 incident. This claim fails.

In the dissolution judgment, the court found in relevant part as follows. "[T]here was an incident between the [defendant] and [the plaintiff] that occurred on April 24, 2018, at their home. . . . On the afternoon of April 24, 2018, their daughter injured her knee, and the [plaintiff] took the daughter to the emergency department to be evaluated. The daughter returned to the home on crutches. The parties agree that they ended up that evening in the basement of their home after their children were asleep. Their respective accounts diverge from here, however.

"The defendant testified that he called the plaintiff to the basement by using a ruse involving a concocted story about ants in the pantry near the basement stairs. He testified that he wanted to discuss their marriage in the basement because he was concerned the plaintiff would argue loudly and wake the children. The plaintiff testified that she was working on the couch, preparing for a meeting the next day at work, when the defendant asked her to inspect a recurrence of an ant infestation in the pantry near the basement. The plaintiff testified that, when she reached him, the defendant forced her against her will down the basement stairs. She testified that she was alarmed to see duct tape hanging from pipes in the basement.[12] She feared that the defendant

[12] The plaintiff further testified that the defendant bound her with the duct tape while they were in the basement. The defendant testified that he never bound the plaintiff with the duct tape, which, according to the defendant, the plaintiff had planted in the basement to incriminate him.

intended to hurt her. The defendant admits there were no ants, but he denies he was violent toward the plaintiff. The court did not find the defendant's explanation of the events in the basement that evening credible.

"Eventually the parties left the basement and returned to the first floor and sat at the kitchen table. The defendant claims that the plaintiff was in contact with her paramour during the evening's events, and, therefore, she was not in distress. The court does not find that the defendant met his burden of proof that the plaintiff was in contact with her friend throughout the evening's events.

"The plaintiff testified that the defendant was drinking alcohol and talking to his mother about what was occurring at the house while his gun sat on the kitchen table. Both parties testified later in the trial that they own guns, which were stored in the house. The plaintiff testified that she feared the defendant was suicidal based on his conversation with his mother and because of the breakdown of the marriage and his accusations about the plaintiff's infidelity. The court finds that the plaintiff was credible when she testified that she feared for the lives of herself, her children, and the defendant. The court finds credible the plaintiff's testimony that she looked for an opportunity to escape from the house and the defendant. The plaintiff eventually ran from the house and called 911. At this point in their narratives, the parties' testimony again became consistent. They agree that the emergency services responded, including the Hartford Police Department, and, after negotiating with him, the defendant came out of the house and left in an ambulance. The children remained asleep until [the plaintiff] entered the house accompanied by the police and woke the children.

"After the events on April 24, 2018, the defendant was arrested, but the charges against him were eventually

dismissed. The defendant views the dismissal of the charges as complete vindication that the events described by the plaintiff did not occur. Criminal charges must be proved beyond a reasonable doubt; the state prosecutor declined to prosecute the case. Civil cases, as in family court, are subject to a standard of proof that is based on a preponderance of the evidence. This court finds that, based on the evidence before it, the plaintiff's version of the events of April 24, 2018, have been proven by a fair preponderance of the evidence. The defendant testified that he suspected the plaintiff was committing adultery, which upset him. He testified that he was not impaired by alcohol and simply wanted to talk to [the plaintiff] and that, if she truly thought that he was a danger to their children, she would not have fled the house and left the children with him. The court finds [that] the defendant's testimony about the events of that evening is convoluted, self-serving, and not credible. The court finds that the plaintiff genuinely feared the defendant that night and her decisions to flee the house and seek help were reasonable."[13] (Footnote added.)

Later in the dissolution judgment, in denying a request by the defendant for an order requiring the plaintiff to reimburse him for an early distribution from his retirement account, plus tax penalties and lost interest, the court found "that the defendant was responsible for the incident on April 24, 2018, and he is responsible for the ensuing legal fees he incurred in his defense." Additionally, in awarding the plaintiff a portion of any monetary award received by the defendant from his employment related arbitration and/or attendant lawsuit, the court found "that the plaintiff is not at fault for the defendant's legal or employment issues."

[13] Notwithstanding its findings regarding the April 24, 2018 incident, the court determined that the plaintiff had not demonstrated that there had been "long-standing domestic violence" before and during the parties' marriage.

The defendant asserts that the court improperly credited the plaintiff's testimony regarding the April 24, 2018 incident because (1) there was "objective evidence"[14] that refuted the plaintiff's testimony, and (2) there was no independent evidence corroborating the plaintiff's testimony. The defendant contends that, in light of the entire record, we should be left with the definite and firm conviction that the court committed error. We are not persuaded.

"[T]he sifting and weighing of evidence is peculiarly the function of the trier [of fact]. [N]othing in our law is more elementary than that the trier [of fact] is the final judge of the credibility of witnesses and of the weight to be accorded to their testimony. . . . The trier has the witnesses before it and is in the position to analyze all the evidence. The trier is free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Anketell* v. *Kulldorff*, supra, 207 Conn. App. 828. We decline the defendant's invitation to usurp the trial court's fact-finding function by reevaluating the court's credibility determinations and by reweighing the evidence in the defendant's favor on appeal. See *Pennymac Corp.* v.

[14] The defendant cites three portions of the plaintiff's testimony that, as he posits, were contradicted by "objective evidence" in the form of exhibits that the court had admitted in full into the record. First, the defendant argues that the plaintiff's testimony that the defendant was drunk during the April 24, 2018 incident was refuted by a hospital record reflecting that the defendant had no alcohol in his system on the basis of an alcohol breath test administered to him several hours following the April 24, 2018 incident. Second, the defendant argues that the plaintiff's testimony that he had bound her with duct tape while the parties were in the basement during the April 24, 2018 incident was undermined by reports created by the division of scientific services of the Department of Emergency Services and Public Protection indicating that the defendant's DNA was not found on the duct tape samples submitted for testing. Third, the defendant argues that the plaintiff's testimony that she was unable to send text messages during the April 24, 2018 incident because she was bound by duct tape was contradicted by telephone records reflecting that text messages were sent to and from the plaintiff's cell phone during that time.

Tarzia, 215 Conn. App. 190, 206, 281 A.3d 469 (2022) ("[t]he court was free to discredit or find unpersuasive the defendant's evidence, and we decline the defendant's invitation to reweigh the evidence in his favor on appeal"); *Wheeler* v. *Foster*, 44 Conn. App. 331, 335, 689 A.2d 523 (1997) (rejecting plaintiff's challenge to trial court's factual findings when "[t]he thrust of the plaintiff's argument is no more than an assertion that the trial court should have credited the plaintiff's evidence and found in his favor"). Moreover, assuming arguendo that the plaintiff's testimony was not corroborated,[15] the lack of corroborating evidence does not impugn the court's credibility determinations. See *Slack* v. *Greene*, 294 Conn. 418, 430, 984 A.2d 734 (2009) ("[t]he credibility of a witness is a matter for the [trier of fact] and, except in rare instances, there is no requirement that a [witness'] testimony be corroborated by other evidence" (internal quotation marks omitted)).

In sum, we conclude that the court's findings regarding the April 24, 2018 incident are not clearly erroneous because they are supported by the plaintiff's testimony as credited by the court, and, on the basis of the record, we are not left with a definite and firm conviction that a mistake has been committed.

III

We now turn to the defendant's two claims concerning the nonfinancial orders entered in the dissolution judgment. The defendant asserts that the trial court

[15] The record contains evidence corroborating some of the plaintiff's testimony regarding the April 24, 2018 incident. For instance, the plaintiff testified that, during the April 24, 2018 incident, the defendant physically assaulted her, inter alia, by grabbing her by the throat and strangling her. According to a police report generated in connection with the April 24, 2018 incident, which was admitted in full into the record, a police officer with whom the plaintiff spoke after she had exited the parties' home "observe[d] several scratches on the right side of [the plaintiff's] face, and visible red marks on her neck that were consistent with [the] statements [that the plaintiff] made."

committed error in (1) entering custody orders that limited his visitation with the children without an evidentiary basis and (2) delegating its judicial authority to nonjudicial entities by authorizing the children's therapeutic counselors to determine whether to afford him access to the children's private therapy records. We address each claim in turn.

A

The defendant contends that there is no evidence in the record supporting the "draconian limitations" imposed by the court vis-à-vis his visitation with the children. We are not persuaded.

"[General Statutes §] 46b-56 provides the legal standard for determining child custody issues. The statute requires that the court's decision serve the child's best interests. . . . The controlling principle in a determination respecting custody is that the court shall be guided by the best interests of the child. . . . Our Supreme Court has consistently held in matters involving child custody . . . that while the rights, wishes and desires of the parents must be considered it is nevertheless the ultimate welfare of the child [that] must control the decision of the court. . . . In making this determination, the trial court is vested with broad discretion which can . . . be interfered with [only] upon a clear showing that that discretion was abused. . . . Thus, a trial court's decision regarding child custody must be allowed to stand if it is reasonably supported by the relevant subordinate facts found and does not violate law, logic or reason. . . . Under [General Statutes (Rev. to 2019)] § 46b-56 (c),[16] the court, in determining

[16] "General Statutes [Rev. to 2019] § 46b-56 (c) provides: 'In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of the following factors: (1) The temperament and developmental needs of the child; (2) the capacity and the disposition of the parents to understand and meet the needs of the child; (3) any relevant and material information obtained from the child,

custody, must consider the best interests of the child and, in doing so, may consider, among other factors, one or more of the sixteen factors enumerated in the provision.

"[T]he authority to exercise the judicial discretion [authorized by § 46b-56] . . . is not conferred [on] this court, but [on] the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one [that] discloses a clear abuse of discretion can warrant our interference." (Citations omitted; footnote in original; internal quotation marks omitted.)

including the informed preferences of the child; (4) the wishes of the child's parents as to custody; (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (8) the ability of each parent to be actively involved in the life of the child; (9) the child's adjustment to his or her home, school and community environments; (10) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (11) the stability of the child's existing or proposed residences, or both; (12) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (13) the child's cultural background; (14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child; (15) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (16) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b. The court is not required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision.' " *Coleman* v. *Bembridge*, 207 Conn. App. 28, 48–49 n.10, 263 A.3d 403 (2021).

Coleman v. *Bembridge*, 207 Conn. App. 28, 47–49, 263 A.3d 403 (2021).

The following additional facts are relevant to our resolution of this claim. At trial, the court heard testimony from the plaintiff, the defendant, and the guardian ad litem for the children, Attorney Rhonda Morra. The plaintiff testified in relevant part as follows. The plaintiff believed that the children love the defendant and that, prior to the April 24, 2018 incident, the defendant "was the best dad he knew how to be at that time" and was a "better father [than] he was a husband." As a result of the April 24, 2018 incident, however, the plaintiff (1) believed that the defendant resented her, (2) was concerned for the safety of herself and the children, and (3) could not "say with any certainty that [the defendant] wouldn't harm any of us." To the plaintiff's knowledge, the defendant took no accountability for the April 24, 2018 incident. The plaintiff did not want to keep the children separated from the defendant; however, she did not believe that the defendant was capable of fostering a relationship between herself and the children, and "as long as [the defendant] . . . maintain[ed] [that he had] done nothing wrong, it [was] going to hurt the kids even more [than] they [were] hurt now." In her operative proposed orders, the plaintiff requested sole legal and physical custody of the children.

The defendant testified in relevant part as follows. The defendant believed that the plaintiff had attempted to foster a relationship between himself and the children, he was capable of positively supporting the plaintiff's role as a mother, and he disagreed with the notion that the parties could not communicate to reach mutually agreeable decisions regarding the children. The defendant maintained, however, that he and the children were "victimized" on the night of April 24, 2018, and that the plaintiff must be held accountable for falsifying the details of the April 24, 2018 incident. The

defendant took no responsibility for the April 24, 2018 incident because it did not occur as described by the plaintiff; rather, he believed that the plaintiff, motivated by a desire to (1) conceal her alleged affair, (2) obtain sole ownership of the parties' assets, and (3) receive a larger share of an inheritance from her mother, concocted her version of the April 24, 2018 incident as a pretext to summon the police in the hope that the police would kill him[17] and the children. In addition, in 2020, the defendant fell ill after eating a birthday cake baked for him by his daughter, leading him to believe that the plaintiff had attempted to poison him. When asked by the plaintiff's trial counsel whether he could "get over this [conflict]," the defendant responded: "Can I get over [a murder attempt], can I get over that [the plaintiff] ha[d] [been] given a free pass for trying to kill me and the children by using a SWAT team? It's very hard to get over, I've managed my emotions very well . . . . I still go to therapy, I still do everything I can to get past this . . . ."

In the summer of 2020, the defendant publicly shared his views on the April 24, 2018 incident, maligning the plaintiff, while participating in an interview for a radio talk show, which was recorded in two separate parts, and by posting comments on Facebook. During the first part of the interview, some listeners posted online comments, including comments stating that "[h]e gotta put [some] money on [the plaintiff's] head" and "[the plaintiff] dead wrong why you ain't beat her ass." The defendant did not recognize the commenters and could not control their ability to comment; however, once aware of the offensive comments, he asked the radio host to delete them. Furthermore, although any potential threat to the plaintiff or to the children would have

[17] The defendant, who is Black, testified that he and the plaintiff had spoken in the past about racial profiling and fears of the defendant being killed by the police.

been concerning to him, he did not solicit or encourage any threats in partaking in the interview.

In addition, the defendant posted comments on Facebook that, among other things, he was "falsely accused of horrific crimes," as "the mountain of evidence support[ed] that [the] phony complainant was involved in a secret extramarital affair with a criminal . . . [and] [the defendant's] disclosure of the affair to a family member prompted [the complainant] to lash out by making a fake 911 call . . . in an attempt to have a SWAT team kill [him] to stop more disclosures of her affair."[18] When asked by the plaintiff's trial counsel whether he thought that the children would be adversely affected by the Facebook post, the defendant, in addition to questioning whether the children would ever be exposed to the post, responded that, "[i]f [his] children were aware of the truth, [he did] not believe it would have an adverse [effect]." In addition, the defendant believed that the plaintiff had published "far more devastating information online [than] [he] ever did about her, [a]nd everything [he] said was the truth." In his operative proposed orders, the defendant requested sole legal and physical custody of the children.

The guardian ad litem testified in relevant part as follows. She recommended that the court award the plaintiff sole legal and physical custody of the children because she believed that (1) the plaintiff had met the children's needs as their primary caregiver since the beginning of the dissolution matter, and (2) the parties were incapable of communicating effectively to ensure that the children's needs were being met. She also recommended a parenting plan providing that (1) the defendant would have visitation two days per week for two hours per day, unsupervised for the first one and

[18] The Facebook post was admitted in full into the record.

one-half hours and supervised for the remaining one-half hour, (2) the defendant was required to engage in reunification therapy with the children, (3) following the completion of the first reunification therapy session, the defendant would have increased unsupervised visitation, and (4) after eight weeks, the parties would be required to work with the reunification therapist to determine an appropriate expansion of the defendant's visitation rights. In light of the defendant's testimony at trial, however, she did not oppose initially limiting the defendant to supervised visitation only. In addition, she was concerned that the defendant, without a reunification therapist, would make harmful statements to the children when he was unsupervised.

In fashioning her custody recommendations, the guardian ad litem took into account a myriad of factors, including the children's relationship with the parties, the ability of the parties to meet the children's physical and developmental needs, the ability and the willingness of each party to facilitate and to encourage a continuing relationship with the other party, and any manipulative or coercive behavior by either party to involve the children in the parties' dispute. She believed that the children were bonded with the plaintiff and the defendant; however, during two supervised visits between the defendant and the children that she had attended, the defendant made certain comments that gave her "pause . . . ."[19]

[19] As the guardian ad litem testified, during one of the supervised visits, the defendant discussed the Ten Commandments with the children, including the commandment that proscribes the coveting of a neighbor's spouse. The guardian ad litem stated that, "knowing what the allegations were in this case . . . that [discussion] was probably inappropriate." In addition, during the same visit, the parties' daughter told the defendant that a peer of hers had placed stolen money in her backpack, which she returned after discovering it. The defendant responded by conveying that the daughter "now . . . know[s] what it feels like to be accused of something you didn't do." The guardian ad litem believed that the defendant's response appeared to "shut [the daughter] down" and that the defendant had missed an opportunity "to

The guardian ad litem believed that the children were unaware of the April 24, 2018 incident. She further believed that it was possible to keep the April 24, 2018 incident hidden from the children, explaining: "It's not inevitable [for the children to learn about the April 24, 2018 incident], [the parties] can stop what they're doing about putting it up publicly so [the children] and their friends will [never] have access [to] or learn about it. That's up to the [parties], it is not inevitable, there are parents that shield their children from things like that all of the time, and that's what they do for the sake of their kids." According to the guardian ad litem, the plaintiff was capable of and had succeeded in shielding the children from learning of the April 24, 2018 incident, whereas the defendant, despite having the ability to do so, had no desire to protect the children from that information. The guardian ad litem further believed that the defendant's "desire to be vindicated and . . . [to] have [the plaintiff] punished for his perceived injustices overshadow[ed] what historically ha[d] been great or phenomenal parenting skills," and the guardian ad litem was concerned by the defendant's repeated statements that the plaintiff had to be "held accountable" and "punished."

In addition, the guardian ad litem expressed concern regarding the defendant's "outrageous" statements that the plaintiff wanted the children to be killed for financial gain and that the plaintiff had attempted to poison the defendant. In light of those statements, the guardian ad litem had reservations about the defendant's "mental status . . . as it relate[d] to the ability to isolate [the] children from the parental conflict." With regard to the defendant's radio interview in the summer of 2020, the guardian ad litem expressed concern over the defendant's "publicly maligning the [plaintiff] to the point

show his support of [the daughter] and [of] her wise decision in returning the money and things like that."

where it generate[d] threats from the outside public," which, according to the guardian ad litem, did not appear to alarm the defendant as evinced by his participation in the second part of the interview, notwithstanding his awareness of the threatening comments.

In the dissolution judgment, the court awarded the plaintiff sole legal and physical custody of the children. The court also entered a parenting plan providing that (1) the defendant shall have supervised parenting time two days per week for two hours per day, (2) within sixty days of the court's decision, the defendant shall engage in reunification therapy with the children provided by a therapist selected by the plaintiff with input from the children's therapist(s), (3) following the third reunification session with each child, or earlier if recommended by the reunification therapist, the defendant shall have unsupervised parenting time every Monday and Wednesday for two hours per day and every other Friday for approximately four hours, and (4) after eight weeks of the "postreunification therapy schedule," the parties shall work with the reunification therapist to expand the defendant's parenting time, with the terms of the unsupervised visitation order remaining in effect until the parties executed a written agreement providing otherwise or the court modified its orders. The court also afforded the defendant the ability, with limitations, to contact the children by phone, text, email, and video.

In support of its custody orders, the court found that "[t]he plaintiff has consistently cared for the children appropriately and provided them with a stable environment. The plaintiff is more capable than the defendant of nurturing the children's relationship with their noncustodial parent. . . . [T]he plaintiff is more likely to keep the defendant informed of important occurrences in the children's lives. . . . [I]t is in the children's best interests for the plaintiff to have sole legal custody and for the children to continue residing with her." The

court further found that "[b]ased on the testimony during the trial . . . the parties are unable to coparent at this time. During the trial, the defendant made unsubstantiated accusations against the plaintiff, including that she attempted to poison him and that she wanted the defendant to die at the hands of the police. The defendant provided no evidence convincing to the court that the plaintiff wished him harm. . . . [A]t this point, the defendant does not have the ability to take care of his children and to act in his children's best interest[s] by putting their welfare first and foremost."

The defendant maintains that the record lacks evidence supporting the court's visitation orders. In particular, the defendant asserts that the court's finding that he "does not have the ability to take care of his children and to act in his children's best interest[s] by putting their welfare first and foremost" is clearly erroneous. We disagree. The visitation orders largely tracked the guardian ad litem's recommendations, the basis of which was explained in her testimony. As the guardian ad litem testified, she had significant concerns about the defendant's ability to care for the children because of his unrelenting desire to be vindicated and to see the plaintiff punished for purportedly falsifying the details of the April 24, 2018 incident,[20] his unwillingness to shield the children from the April 24, 2018 incident, and his belief, which the court found to be unsubstantiated, that the plaintiff had sought to cause him serious harm. The guardian ad litem's testimony, in addition to the defendant's own testimony buttressing the guardian ad litem's concerns, adequately support the challenged finding, upon which the court properly relied in entering its visitation orders.[21] Accordingly, the defendant's claim fails.

[20] As we concluded in part II of this opinion, the court's factual findings regarding the April 24, 2018 incident, which align with the plaintiff's version of events, are not clearly erroneous.

[21] The defendant also claims that the court "made no finding that it [was] in the children's best interests to continue to have such extremely limited

B

The defendant also claims that the court improperly delegated its judicial authority to nonjudicial entities by authorizing counselors providing therapeutic treatment to the children to determine whether to afford him access to the children's private therapy records. The defendant contends that, pursuant to § 46b-56 (g), only the trial court is authorized to limit a noncustodial parent's access to his or her child's health records. We agree.

The following additional facts are relevant to our resolution of this claim. The court ordered in relevant part that "[b]ecause [the plaintiff] has sole legal custody, she shall make decisions on issues concerning the children, including, but not limited to, counseling for the children, schooling, when and where the children shall attend church services, if any, and extracurricular activities. The [defendant] may have access to the children's records with the [children's] pediatrician, dentists, and schools. He may obtain information directly from the provider or the school. *If the children receive therapeutic counseling, the* [*children's*] *counselor(s) shall decide based on their professional requirements whether either parent shall have access to the children's private therapy records.*" (Emphasis added.)

"Although we typically review a trial court's custody and visitation orders for an abuse of discretion, the

contact with their loving father." In the dissolution judgment, however, the court expressly stated that "[t]he court has reviewed the evidence to ascertain the best interests of the minor children," and it expressly found that the defendant was unable to act in the children's best interests. Thus, we reject this claim.

In addition, the defendant claims that there is no evidence that he disparaged the plaintiff or acted inappropriately in front of the children. Assuming arguendo that the record is devoid of such evidence, the record nevertheless contains sufficient evidence buttressing the court's findings underlying its visitation orders.

question of whether the court improperly delegated its judicial authority presents a legal question over which we exercise plenary review. . . . It is well settled . . . that [n]o court in this state can delegate its judicial authority to any person serving the court in a nonjudicial function. The court may seek the advice and heed the recommendation contained in the reports of persons engaged by the court to assist it, but in no event may such a nonjudicial entity bind the judicial authority to enter any order or judgment so advised or recommended. . . . A court improperly delegates its judicial authority to [a nonjudicial entity] when that person is given authority to issue orders that affect the parties or the children. Such orders are part of a judicial function that can be done only by one clothed with judicial authority." (Citation omitted; internal quotation marks omitted.) *Lehane* v. *Murray*, 215 Conn. App. 305, 311, 283 A.3d 62 (2022).

Moreover, insofar as we are required to construe § 46b-56 (g), "[i]ssues of statutory interpretation constitute questions of law over which the court's review is plenary. The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [the court's] 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. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or

unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Keller* v. *Beckenstein*, 305 Conn. 523, 532, 46 A.3d 102 (2012).

Section 46b-56 (g) provides: "A parent not granted custody of a minor child shall not be denied the right of access to the academic, medical, hospital or other health records of such minor child, *unless otherwise ordered by the court for good cause shown*." (Emphasis added.)

On the basis of the plain and unambiguous language of § 46b-56 (g), the defendant, as the noncustodial parent, was statutorily entitled to have access to the children's private therapy records, subject only to the court's denying him the right of access to the records for good cause shown. By conferring on the children's therapeutic counselors the authority to determine whether the defendant was allowed to have access to the children's private therapy records, the court improperly delegated its judicial authority set forth in § 46b-56 (g). Accordingly, we conclude that the court's order was improper.[22]

[22] In her appellate brief, the plaintiff argues that (1) the court's custody orders "granted [her] the sole parental discretion to consent to the release of [the children's] private therapy records," and (2) in accordance with General Statutes § 52-146c, without her consent, any counselor providing therapeutic counseling to the children would not be authorized to disclose the records. Insofar as the plaintiff contends that the court's custody orders empowered her to decide whether to provide the defendant with access to the records, that position is belied by the express language of the court's order transferring that authority to the children's counselors. Moreover, § 52-146c, which concerns the psychologist-patient privilege, is not germane to the issue of whether the court improperly delegated its judicial authority as set forth in § 46b-56 (g).

In addition, as the defendant acknowledges in his principal appellate brief, the order at issue applies to "either parent . . . ." The plaintiff has not filed a cross appeal. Nevertheless, we conclude that the order fails in its entirety and cannot be salvaged insofar as it applies to the plaintiff.

IV

Last, we address the defendant's claim that the trial court improperly ordered him to pay the plaintiff $300 per week in child support without making the initial finding of the presumptive support amount pursuant to the guidelines. We agree.[23]

"To ensure the appropriateness of child support awards, General Statutes § 46b-215a provides for a commission to oversee the establishment of child support guidelines." *Kiniry* v. *Kiniry*, 299 Conn. 308, 319, 9 A.3d 708 (2010). Pursuant to General Statutes § 46b-215b (a),[24] the guidelines "shall be considered in all determinations of child support award amounts . . . . In all such determinations, there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered. A specific finding on the record at a hearing, or in a written judgment, order or memorandum of decision of the court, that the application of the guidelines would be inequitable or inappropriate in a particular case, as determined under the deviation criteria established by the Commission for Child Support Guidelines under section 46b-215a, shall be required in order to rebut the presumption in such case."

"The guidelines incorporate these statutory rules and contain a schedule for calculating the basic child support obligation, which is based on the number of children in the family and the combined net weekly income

[23] The defendant also claims that, in entering the child support award, the court (1) improperly relied on outdated financial information and (2) made a clearly erroneous finding as to his earning capacity. Our conclusion that the court erred in failing to determine the presumptive support amount under the guidelines is dispositive with respect to the defendant's challenge to the child support award and, therefore, we need not resolve these additional issues.

[24] Section 46b-215b (a) was amended by No. 21-104, § 36, of the 2021 Public Acts, which made changes to the statute that are not relevant to this appeal. Accordingly, we refer to the current revision of the statute.

of the parents. . . . Consistent with . . . § 46b-215b (a), the guidelines provide that the support amounts calculated thereunder are the correct amounts to be ordered by the court unless rebutted by a specific finding on the record that the presumptive support amount would be inequitable or inappropriate. . . . The finding *must* include a statement of the presumptive support amount and explain how application of the deviation criteria justifies the variance.[25]. . . [Our Supreme Court] has stated that the reason why a trial court must make an on-the-record finding of the presumptive support amount before applying the deviation criteria is to facilitate appellate review in those cases in which the trial court finds that a deviation is justified. . . . In other words, the finding will enable an appellate court to compare the ultimate order with the guideline amount and make a more informed decision on a claim that the amount of the deviation, rather than the fact of a deviation, constituted an abuse of discretion." (Citations omitted; emphasis in original; footnote added; internal quotation marks omitted.) *Kiniry* v. *Kiniry*, supra, 299 Conn. 319–20; see also *Righi* v. *Righi*, 172 Conn. App. 427, 436–37, 160 A.3d 1094 (2017) ("three distinct findings [are required] in order for a court to properly deviate from the child support guidelines in fashioning a child support order: (1) a finding of the presumptive child support amount pursuant to the guidelines; (2) a specific finding that application of such guidelines would be inequitable and inappropriate; and (3) an explanation as to which deviation criteria the court is relying on to justify the deviation").

[25] Section 46b-215a-5c (a) of the Regulations of Connecticut State Agencies provides in relevant part: "The current support . . . contribution amounts calculated under [the guidelines] . . . are presumed to be the correct amounts to be ordered. The presumption regarding each such amount may be rebutted by a specific finding on the record that such amount would be inequitable or inappropriate in a particular case. . . . Any such finding shall state the amount that would have been required under such sections and include a factual finding to justify the variance. . . ."

In awarding the plaintiff $300 per week in child support, the court stated: "The plaintiff's gross weekly income is $1153 based on [a] financial affidavit [that the plaintiff filed] dated February 18, 2021 . . . . Her net income is $997. The actual gross and net weekly income for the defendant is zero based on [a] financial affidavit [that the defendant filed] dated March 1, 2021 . . . . The court finds that the defendant's prior annual salary was $112,892 based on [a prior] financial affidavit [that he filed] dated June 20, 2018 . . . . The court finds that, after the defendant's arrest in 2018, he was on paid leave until he eventually lost his job and his income. The defendant has been supporting himself and his children with savings and, in part, with gifts from his family and members of his church. He has been paying child support in the amount of $300 per week. The defendant began the process of arbitration to get his job back, but he testified that he has not taken other measures to find employment. The defendant testified that he won an arbitration award that reinstated his employment, which is on appeal. The defendant testified he is confident that he will be reinstated eventually. The court finds that the defendant was successful throughout his adult life in the academic field and he can work in that field despite his legal setback. The court finds that the defendant has an earning capacity of $112,892 based on his employment history.

"The court finds that, while the defendant has no actual income currently, he could have been looking for work to mitigate his lack of income. The court finds that not requiring the defendant to pay any child support while he is unemployed would be inequitable and inappropriate, and the court will deviate and order the defendant to pay child support. The court finds that, based on the defendant's earning capacity, he should continue to pay child support of $300 per week consistent with [a child support guidelines worksheet created

by the Connecticut Judicial Service Center, dated June 20, 2018]. The court notes that the defendant has been able to maintain this level of child support throughout the divorce proceedings." (Citations omitted; footnotes omitted.)

As reflected in the dissolution judgment, the court determined that the application of the guidelines in the present case would be inequitable or inappropriate and that a deviation from the guidelines was warranted in light of the existence of one of the deviation criteria, namely, the defendant's earning capacity. See Regs., Conn. State Agencies § 46b-215a-5c (b) (1) (B). Despite having all of the necessary information, however, the court did not take the mandatory initial step of determining, on the record, the presumptive support amount pursuant to the guidelines,[26] which constituted an abuse of discretion.[27] See *Kiniry* v. *Kiniry*, supra,

[26] The dissolution judgment suggests that, but for the court's determinations that applying the guidelines was inequitable or inappropriate and that a deviation from the guidelines was justified, the court would not have ordered the defendant to pay child support; however, nothing in the judgment reflects that the court utilized the guidelines to make a finding on the record that the presumptive support amount was $0.

[27] In her appellate brief, the plaintiff agrees with the defendant that the court did not establish the presumptive support amount under the guidelines, but she argues that the defendant "contributed to the court's [failure to make the] finding by his failure to provide child support information, even to the point of failing to provide his own [child support guidelines] [w]orksheet . . . ." As we explain in this opinion, the court had the necessary information to make the mandatory initial determination of the presumptive support amount under the guidelines. Moreover, the record reveals that the defendant relied on the child support guidelines worksheet referenced by the court. In any event, a party's failure to submit a child support guidelines worksheet does not bar the party from claiming that a trial court erred in failing to comply with the guidelines. In *Bee* v. *Bee*, 79 Conn. App. 783, 831 A.2d 833 (overruled in part by *Tuckman* v. *Tuckman*, 308 Conn. 194, 61 A.3d 449 (2013)), cert. denied, 266 Conn. 932, 837 A.2d 805 (2003), this court declined to review the defendant's claim that the trial court failed to follow the guidelines because the defendant had not filed a child support guidelines worksheet in accordance with Practice Book § 25-30 (e), holding that "a party who has failed to submit a child support guidelines worksheet as required by . . . § 25-30 (e) cannot complain of the court's alleged failure

299 Conn. 321 (court abused its discretion in failing to establish presumptive support amount before deviating from guidelines notwithstanding that court "possessed all of the information necessary to calculate the presumptive child support obligation under the guidelines' schedule, namely, the parties' combined net weekly income and the number and ages of the minor children"); *Favrow* v. *Vargas*, 231 Conn. 1, 25, 647 A.2d 731 (1994) (concluding that "trial court, in deciding that the application of the guidelines would be inequitable or inappropriate in a particular case because of the existence of one of the deviation criteria, must first determine on the record the amount of support indicated by the guidelines schedule"); see also *Battistotti* v. *Suzanne A.*, 182 Conn. App. 40, 52 n.8, 188 A.3d 798 (observing that "a court errs in calculating child support on the basis of a parent's earning capacity without first stating the presumptive support amount at which it arrived by applying the guidelines and using the parent's actual income and second finding application of the guidelines to be inequitable or inappropriate" (emphasis omitted)), cert. denied, 330 Conn. 904, 191 A.3d 1000 (2018). Accordingly, the court's child support award cannot stand.

We now turn to resolving the issue of the appropriate relief in light of our conclusion that the court committed error in entering its child support award. "Individual financial orders in a dissolution action are part of the carefully crafted mosaic that comprises the entire asset reallocation plan. . . . Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements. Consistent with that approach, our courts have utilized the

to comply with the guidelines." Id., 788. Our Supreme Court expressly overruled *Bee* in 2013. See *Tuckman* v. *Tuckman*, 308 Conn. 194, 202 n.6, 61 A.3d 449 (2013).

mosaic doctrine as a remedial device that allows reviewing courts to remand cases for reconsideration of all financial orders even though the review process might reveal a flaw only in the alimony, property distribution or child support awards. . . . Every improper order, however, does not necessarily merit a reconsideration of all of the trial court's financial orders. A financial order is severable when it is not in any way interdependent with other orders and is not improperly based on a factor that is linked to other factors. . . . In other words, an order is severable if its impropriety does not place the correctness of the other orders in question. . . . Determining whether an order is severable from the other financial orders in a dissolution case is a highly fact bound inquiry." (Citation omitted; internal quotation marks omitted.) *Renstrup* v. *Renstrup*, 217 Conn. App. 252, 284, 287 A.3d 1095, cert. denied, 346 Conn. 915, A.3d (2023).

The court's error as to the child support award does not cause us to question the propriety of the court's other financial orders, which principally concern the division of the parties' property. We perceive no interdependence or connection between the child support award and the property distribution orders. Accordingly, we conclude that the child support award is severable from the court's other financial orders. See *Kiniry* v. *Kiniry*, supra, 299 Conn. 345–46 (improper child support orders, reversed on grounds that included trial court's failure to make presumptive support finding pursuant to guidelines, were severable from unrelated financial orders); see also *Renstrup* v. *Renstrup*, supra, 217 Conn. App. 285 (listing cases supporting proposition that "this court and our Supreme Court have held that, under some circumstances, a child support award may be severable from the other financial orders"). Although the defendant does not challenge on appeal the court's remaining child support orders, such as the payment

of unreimbursed medical and dental expenses,[28] we further conclude that the court will be required on remand to reconsider "all of the child support orders to ensure that the total award will be proper in all respects." *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 390, 999 A.2d 721 (2010); see also *Kiniry* v. *Kiniry*, supra, 345–46 (same).

The judgment is reversed only with respect to the child support orders and the order authorizing the minor children's therapeutic counselors to decide whether either party shall have access to the children's private therapy records and the case is remanded for further proceedings on those issues consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

JULIO BURGOS TORRES *v.* STATE OF CONNECTICUT ET AL.
(AC 45371)

Bright, C. J., and Moll and Suarez, Js.

Syllabus

The petitioner appealed to this court from the judgment of the habeas court dismissing his amended petition for a new trial. *Held* that, in light of this court's decision in *Randolph* v. *Mambrino* (216 Conn. App. 126), the habeas court improperly dismissed the petition, as the three year limitation period in the statute (§ 52-582) governing a petition for a new trial may be tolled by a showing of fraudulent concealment pursuant to statute (§ 52-595).

Argued April 11—officially released April 18, 2023

Procedural History

Amended petition for a new trial, and for other relief, brought to the Superior Court in the judicial district of

[28] The court ordered that the defendant would pay 46 percent of the unreimbursed medical and dental expenses, with the plaintiff responsible to pay the remaining 54 percent of the expenses.

Waterbury and transferred to the judicial district of Tolland, where the court, *Bhatt*, *J.*, granted the respondents' motion to dismiss and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Shanna P. Hugle, deputy assistant public defender, for the appellant (petitioner).

Melissa E. Patterson, senior assistant state's attorney, with whom, on the brief, were *Angela Macchiarulo*, supervisory assistant state's attorney, and *Michael Proto*, senior assistant state's attorney, for the appellees (respondents).

Opinion

PER CURIAM. In light of this court's decision in *Randolph* v. *Mambrino*, 216 Conn. App. 126, 284 A.3d 645 (2022), the judgment of the habeas court dismissing the amended petition for a new trial filed by the petitioner, Julio Burgos Torres, is reversed and the case is remanded for further proceedings according to law. See id., 132 (holding that three year limitation period of General Statutes § 52-582 may be tolled by showing of fraudulent concealment pursuant to General Statutes § 52-595).