IN RE JUDAH B. ET AL.*
(AC 46140)

Cradle, Suarez and Clark, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her four minor children. The respondent father, who had mental health and substance abuse issues, was arrested due to an instance of domestic violence against the mother. Thereafter, the children were adjudicated neglected and committed to the custody of the petitioner, the Commissioner of Children and Families. The mother was referred to a variety of services by the Department of Children and Families for, inter alia, parenting education, domestic violence counseling, and intensive family preservation services. The department also paid for daycare for one of the minor children and provided the mother with visitation and the opportunity to attend her children's medical appointments. Following a trial, the court found, by clear and convincing evidence, that the department made reasonable efforts to reunify the children with the mother, that the mother was unable or unwilling to benefit from those reunification efforts, and that she had failed to rehabilitate. *Held*:

1. The respondent mother could not prevail on her claim that the trial court erred in concluding that the department made reasonable efforts to reunify her with her children, the evidence having supported the court's reasonable efforts determination: there was no evidence that the department ceased reunification efforts before the petitions to terminate the mother's parental rights were filed, and, because the mother's sole challenge to the court's reasonable efforts determination was premised on the department's conduct after the adjudicatory date, and, as the mother conceded, the court was limited to considering only those facts preceding the adjudicatory date, this court could not conclude that the trial court erred in finding that the department made reasonable efforts.

* 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.

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.

2. The respondent mother could not prevail on her claim that the trial court erred in concluding that she had failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the ages and needs of her children, she could assume a responsible position in their lives: the court properly considered the evidence, which was sufficient to support its finding that the mother failed to rehabilitate, because, although the court found that the mother had addressed many of her specific steps toward reunification, the court was not satisfied that she had established necessary, long-term, independent housing and was concerned about the mother's credibility on any housing issue, as she lived with the father until well after the adjudicatory date, which was problematic given his untreated mental illness, and, although the mother argued that the court improperly relied on stale evidence in determining that she failed to rehabilitate because she had recently separated from the father, the court properly considered the report and testimony of R, a court-appointed evaluator whose observations with respect to the mother focused on observations before the adjudicatory date; moreover, although the court was not required to consider postadjudicatory date evidence, it nevertheless did so, crediting the testimony of L, who supervised the mother's visitations after the adjudicatory date and stated that the mother was apathetic and did not fully engage with the children during visits, and the testimony of the children's therapists, who testified that the children suffered from various disorders and exhibited dysregulated behavior after visits; furthermore, contrary to the mother's claim that the court disregarded recent evidence that she had separated from the father and gained insight into how to keep her children safe from him, the court did, in fact, consider evidence from H and M, clinical psychologists whose testimony the mother relied on in connection with her claim, but gave less weight to their testimony because neither H nor M observed the mother with the children, whereas R observed the mother with the children on two occasions, and it was not the function of this court to reweigh the evidence.

Argued May 23—officially released August 23, 2023**

Procedural History

Petitions to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, and tried to the court, *Hon. John C. Driscoll*, judge trial referee; judgments terminating the respondents' parental rights,

** August 23, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

from which the respondent mother appealed to this court. *Affirmed.*

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

Joshua Perry, solicitor general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (petitioner).

Megan Maynard, for the minor child Judah B.

Opinion

CLARK, J. The respondent mother, Amanda B.,[1] appeals from the judgments of the trial court terminating her parental rights as to her minor children, Judah, Angelika, Malachi, and Moses. On appeal, the respondent claims that the court erred in concluding that (1) the respondent failed to rehabilitate, (2) the respondent was unable or unwilling to benefit from reunification efforts, and (3) the Department of Children and Families (department) made reasonable efforts to reunify the respondent with the children.[2] We affirm the judgments of the trial court.

[1] The court also terminated the parental rights of the children's father, Jake B., with respect to each child. Because Jake B. has not appealed from the judgments of the trial court, all references to the respondent are to the mother only.

[2] We note that, for purposes of judicial economy, we address the respondent's claims in a different order than which she has briefed them. We also note that, in her principal appellate brief, the respondent argues for the first time on appeal that the court "fail[ed] to follow the core constitutional mandate that any state abridgement of . . . individual rights employ the least restrictive means available to advance the relevant state interest." In her reply brief, she attempts to clarify that this argument "is not offered as an independent attack on the trial court's ruling" but, rather, "as a reframing of [the] court's fundamental duty in considering a petition for termination of parental rights." Moreover, the only less restrictive alternative to termination that she offers on appeal are orders denying the petition and directing the department to give her more time and services to rehabilitate. Even if we were to conclude that the respondent attempted to raise a claim of error sounding in a violation of her right to due process, we would decline to review it because it is incoherent and inadequately briefed. It is well established that "[a]nalysis, rather than mere abstract assertion, is required in order to

The following facts, as found by the trial court, and procedural history are relevant to our disposition of this appeal. "The [respondent] and [the children's] father met at an event hosted by a local nonprofit agency. The [respondent] was sixteen years old, and the father was twenty-eight years old at the time. Their relationship quickly became romantic. The [respondent's] parents initially objected to the relationship due in part to the disparity in age. According to the [respondent], the maternal grandfather did a background check on the father and had the father arrested and incarcerated for an outstanding charge. The charge was unrelated to the [respondent]. The [respondent] was aware that the father was then engaged to another woman and had other children. The [respondent] claims she did not know he had a child protection history. She was aware of his criminal history including five prior incarcerations. The father has been incarcerated four more times since the [respondent] and the father met.

"The [respondent] was overwhelmed by the father, and, as noted by both expert witnesses, the [respondent] was particularly vulnerable due to her age and his seeming maturity. The [respondent] and the father married in September, 2012. The children were born in 2012, 2014, and 2017.[3]

"The family became involved with the department in 2012. The maternal grandmother had filed a petition with a local probate court, which court requested a study by the department. The grandmother later withdrew her petition. Shortly thereafter, the family relocated to Texas, where they became involved with Texas child protection services, due to allegations of alcohol abuse by the father and mistreatment of [Judah]. The

avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021).

[3] Malachi and Moses are twins.

family relocated to Connecticut. With the assistance of a supportive housing program, the father obtained a housing voucher. The father was able to obtain a home adequate in size [for] the needs of the [respondent] and their children.

"In February, 2018, the father was arrested due to an incident in the home with the [respondent]. The [respondent] told the police that she attempted to awaken the father to assist with childcare, and that he struck her in the face and choked her. The father initially denied the allegations and deflected blame for the marks about the [respondent's] face onto the children. The father subsequently was convicted of assault and given a suspended sentence and probation. A condition of his probation was to cooperate with the department. A partial protective order for the [respondent's] benefit was in effect.

"The father had been diagnosed with paranoid schizophrenia, bipolar disorder, and schizoaffective disorder, as well as multiple substance use diagnoses. On August 9, 2018, the department filed neglect petitions on all four children. The [respondent] and the father were cooperative initially with a safety plan [that] included a provision that the father would not be alone with the children. The father was treating with a psychiatrist and addressing his mental health and substance abuse issues. The father was receiving medication by injection to obtain and maintain stability. Unfortunately, the father discontinued his treatment and his medication compliance. He terminated his substance use cooperation and began using unprescribed Suboxone. The family rapidly slid back into poor supervision, inappropriate housing conditions, and lack of proper hygiene for the children.

"The [respondent] and the father had been involved with an intensive parent preservation program (IFP)

[through Child and Family Agency]. IFP reported to the department in December, 2018, that the family was noncompliant and likely to be discharged. As noted, the father had discontinued his necessary mental health treatment and medication and had relapsed. The house was not clean. The children were being left with inappropriate caretakers, including the father, and were exhibiting signs of serious emotional concerns. [Judah] was exhibiting severe behavioral issues in school. The parents were argumentative and uncooperative.

"The department imposed an administrative ninety-six hour hold on the children on December 14, 2018, and obtained ex parte orders of temporary custody from [the] court on December 18, 2018. The parents agreed to sustain the orders of temporary custody on December 26, 2018. On March 6, 2019, the parents submitted written pleas of nolo contendere, and the children were adjudicated neglected. On October 16, 2019, by agreement, the children were committed to the [petitioner, the Commissioner of Children and Families]. The children have been in the [petitioner's] care and custody since December 14, 2018. Specific steps for reunification were set on December 18, 2018, and again on March 6, 2019, and issued to the parents." (Footnote added.) The respondent was provided with specific steps, including the following: (1) cooperate with the department's home visits; (2) keep her whereabouts known to the department; (3) cooperate with individual counseling, domestic violence counseling, and parenting education; (4) not use illegal drugs or abuse alcohol or medication; (5) cooperate with court-ordered evaluations; (6) sign releases authorizing the department to communicate with service providers; (7) maintain an adequate home and income; (8) cooperate with the department's safety plan regarding the father; (9) not get involved with the criminal justice system; (10) cooperate with the children's therapy; and (11) visit with

the children as often as the department permitted. On October 3, 2019, the petitioner filed petitions to terminate the respondent's parental rights as to all four of her minor children.

The court held a trial on seven nonconsecutive days between February 2 and May 11, 2022. Numerous witnesses testified, including the respondent, and several exhibits were entered into evidence. On November 3, 2022, the court, *Hon. John C. Driscoll*, judge trial referee, issued a memorandum of decision terminating the respondent's parental rights as to each of the children. The court found by clear and convincing evidence that the department made reasonable efforts to reunify the children with the respondent, that the respondent was unable or unwilling to benefit from those reunification efforts, and that she had failed to rehabilitate. This appeal followed. Additional facts will be set forth as necessary.

I

The respondent first argues that the court erred in concluding that the department made reasonable efforts to reunify her with the children. We disagree.[4]

[4] The petitioner argues that the respondent's reasonable efforts claim is moot because she failed to challenge the court's alternative finding that she was unable or unwilling to benefit from reunification efforts. See, e.g., *In re Autumn O.*, 218 Conn. App. 424, 433–34, 292 A.3d 66 (failure to challenge one basis for satisfying General Statutes § 17a-112 (j) (1) renders challenge to other basis moot), cert. denied, 346 Conn. 1025, 294 A.3d 1026 (2023). The petitioner contends that the respondent failed to challenge the latter finding because the respondent specifically argues that the court found that "she was unwilling or unable to *rehabilitate*" instead of arguing that the court found that "she was unwilling or unable to *benefit from the department's reunification efforts*." (Emphasis added; internal quotation marks omitted.)

Although the statute uses the phrasing "benefit from the department's reunification efforts," we do not find the respondent's word choice significant enough to render her challenge moot, especially because this court has used the same phrasing at times. See, e.g., *In re A'vion A.*, 217 Conn. App. 330, 357, 288 A.3d 231 (2023) ("the respondent makes no mention of any claim regarding the court's unwilling or unable to rehabilitate finding"). We therefore conclude that the respondent's challenge to the court's reason-

We begin by setting forth the standard of review and general legal principles governing our resolution of this claim. "The reasonableness of the department's efforts must be assessed in the context of each case. The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonable efforts means doing everything reasonable, not everything possible. . . . [R]easonableness is an objective standard . . . and whether reasonable efforts have been proven depends on the careful consideration of the circumstances of each individual case." (Internal quotation marks omitted.) *In re Omar I.*, 197 Conn. App. 499, 589, 231 A.3d 1196, cert. denied, 335 Conn. 924, 233 A.3d 1091 (2020), cert. denied sub nom. *Ammar I.* v. *Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020).

"Our review of the court's reasonable efforts determination is subject to the evidentiary sufficiency standard of review [which asks] whether the trial court could have reasonably concluded, upon the facts established

able efforts determination is not moot because she properly challenged the court's determination that she was unwilling or unable to benefit from reunification efforts. We need not decide, however, whether the respondent was unable or unwilling to benefit from the department's reunification efforts because, as we explain later in this opinion, we conclude that the evidence is sufficient to support the court's conclusion that the department made reasonable efforts to reunify the respondent with her children. See *In re Ryder M.*, 211 Conn. App. 793, 808 n.7, 274 A.3d 218 ("Pursuant to § 17a-112 (j) (1), the petitioner must prove either that the department has made reasonable efforts to reunify or, alternatively, that the parent is unwilling or unable to benefit from reunification efforts. . . . Section 17a-112 (j) clearly provides that the petitioner is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element." (Citation omitted; emphasis omitted; internal quotation marks omitted.)), cert. denied, 343 Conn. 931, 276 A.3d 433 (2022).

and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . In so doing, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court and will not disturb the court's subordinate factual findings unless they are clearly erroneous." (Citations omitted; internal quotation marks omitted.) *In re Kylie P.*, 218 Conn. App. 85, 96, 291 A.3d 158, cert. denied, 346 Conn. 926, 295 A.3d 419 (2023).

The record reveals that, prior to removal, the department paid for Judah's daycare and referred the family to Child and Family Agency for IFP. After the children were removed but prior to the adjudicatory date, the department referred the respondent to Madonna Place for parenting education and to Safe Futures for domestic violence counseling. The department also referred the respondent to Sound Community Services for individual counseling in December, 2018, which she discontinued in May, 2019, despite the organization's recommendation that she continue treatment. Last, the department provided the respondent visitation with all four children and the opportunity to attend the children's medical appointments. The court found by clear and convincing evidence that these efforts were reasonable, and we conclude that the evidence is sufficient to support that finding.

The respondent argues that the court improperly relied on outdated information, citing this court's decision in *In re Vincent B.*, 73 Conn. App. 637, 809 A.2d 1119 (2002), cert. denied, 262 Conn. 934, 815 A.2d 136 (2003). The respondent's argument is, essentially, that "[the department] could have known, had it inquired, that [Thomas Maciolek, the respondent's] treating psychologist believed that she had effectively disentangled herself from [the father], she had developed a healthy support network, and she was in a position to parent

her children independent of her [the father]. Reasonable efforts include attempts to obtain available, timely information to determine what specific efforts, if any, can be undertaken." (Footnote omitted.)

The respondent's reliance on *In re Vincent B.* is misplaced. In *In re Vincent B.*, this court reversed a judgment terminating parental rights because the department failed to make reasonable efforts to reunify the respondent father with his son and because the trial court erred in concluding that the respondent was unable or unwilling to benefit from reunification efforts. Id., 644–45. In concluding that the trial court erroneously found the respondent unable or unwilling to rehabilitate; id., 632–44; this court determined that the trial court had relied on a clinician's testimony but noted that her "conclusions were based on her evaluations of the respondent prior to his successful completion of [a voluntary long-term] treatment program and should be viewed in that context." Id., 646. This court's observations regarding the reliability of the clinician's testimony, however, pertained only to the trial court's determination that the respondent was unable or unwilling to rehabilitate. See id. Regarding reasonable efforts, we concluded that the department had not satisfied its statutory obligation to make reasonable efforts to reunify because, although the respondent "had failed to utilize services that were offered to him by the department prior to March, 2000," the department "had made no efforts at reunification at all [since July, 2000]"; id., 645; despite the fact that the petitioner did not file the termination petition until November 2, 2000. Id., 639.

Unlike in *In re Vincent B.*, there is no evidence in the present case that the department ceased reunification efforts before the petitions were filed. See id., 639, 645. More significantly, *In re Vincent B.* is inapposite because the respondent cites that case exclusively for this court's observation about outdated evidence, which

did not pertain to whether the department had made reasonable efforts in that case; see id.; and argues that the department should have consulted with Maciolek to ascertain what services it should offer the respondent because Maciolek "believed [the respondent] had effectively disentangled herself from [the father] . . . ." The respondent concedes, however, that she did not "disentangle herself" from the father until well after the adjudicatory date, and a trial court, "[w]hen making its reasonable efforts determination . . . is limited to considering only those facts preceding the filing of the termination petition or the most recent amendment to the petition . . . ." (Internal quotation marks omitted.) *In re Lillyanne D.*, 215 Conn. App. 61, 82, 281 A.3d 521, cert. denied, 345 Conn. 913, 283 A.3d 981 (2022). Because the respondent's sole challenge to the court's reasonable efforts determination is premised on the department's conduct after the adjudicatory date, we cannot conclude that the court erred in finding that the department made reasonable efforts to reunify the respondent with her children.

II

The respondent also argues that the court erred in concluding that she failed to rehabilitate. We disagree.

"The court's determination that a parent has failed to rehabilitate is subject to the evidentiary sufficiency standard of review. . . . We look to see whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Citation omitted; internal quotation marks omitted.) *In re Kylie P.*, supra, 218 Conn. App. 108.

"Pursuant to [General Statutes] § 17a-112,[5] [t]he trial court is required . . . to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . Rehabilitate means to restore [a parent] to a useful and constructive place in society through social rehabilitation. . . . The statute does not require [a parent] to prove precisely when [she] will be able to assume a responsible position in [her] child's life. Nor does it require [her] to prove that [she] will be able to assume full responsibility for [her] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [she] can assume a responsible position in [her] child's life. . . . In addition, [i]n determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department. . . .

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

"When a child is taken into the [petitioner's] custody, a trial court must issue specific steps to a parent as to what should be done to facilitate reunification and prevent termination of parental rights. . . . Specific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of [parental] rights. Their completion or noncompletion, however, does not guarantee any outcome. A parent may complete all of the specific steps and still be found to have failed to rehabilitate. . . . Conversely, a parent could fall somewhat short in completing the ordered steps, but still be found to have achieved sufficient progress so as to preclude a termination of . . . her rights based on a failure to rehabilitate. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [her] ability to manage [her] own life, but rather whether [she] has gained the ability to care for the particular needs of the child at issue." (Footnote added; internal quotation marks omitted.) *In re Ryder M.*, 211 Conn. App. 793, 812–14, 274 A.3d 218, cert. denied, 343 Conn. 931, 276 A.3d 433 (2022).

The following additional facts are relevant to the respondent's claim. The court found that the respondent satisfactorily addressed many of the specific steps but noted that "[h]er housing [had] not been satisfactory." The court found that "[s]he lived with the father in supportive housing until February, 2020. This was problematic given [his] ongoing untreated mental illness, which the [respondent] knew, or should have known, was an insuperable barrier to reunification due to the father's coercive control over [her] and the family dynamics. The [respondent] then moved in with the maternal grandmother, despite knowing that the grandmother's house could not accommodate the children. The [respondent] advised the department in October, 2020, that she had moved into a shelter, without further

explanation. She would not sign a release to allow the department to contact the shelter. The release was not received until March, 2021, just after the [respondent] left the shelter."

The court further found that "the [respondent], while in residence at the shelter, was still with the father and had been lying to the department, especially when she said she was separated from him and seeking a legal separation to create the illusion she was going to leave [the father]. At the same time, the father's supportive housing manager indicated that the [respondent] was to join his lease because she was there almost daily. Based upon these reports, the shelter asked the [respondent] to leave. The [respondent] revealed that she and the father had a plan to get the children back and then to leave Connecticut. It was believed that the [respondent] returned to the father's residence, but she would not confirm this. The [respondent's] car was seen at the father's home. When confronted with this knowledge, the [respondent] claimed she was there to do her laundry or to assist [the father] in his efforts to move. She would not acknowledge her ongoing relationship with the father. The [respondent] misrepresented to a housing authority the nature of her involvement with the department when [she] was applying for her own housing voucher. This unnecessarily interfered with and delayed the [respondent's] efforts to obtain legal housing. During the pendency of the trial, the [respondent] finally obtained a housing voucher. It is for a one bedroom apartment and is the [respondent's] first effort to live independently, an essential step for the [respondent] if she wished to reunify." The court concluded that "[t]aking more than three years to begin meeting this step is too long. The court is not satisfied that the [respondent] has established necessary, long-term, independent housing, and is concerned about the [respondent's] credibility on any housing issue."

The court made clear that "the [respondent's] relationship with the father is central to this case." It explained that "[t]he crux of this case is whether the [respondent] truly appreciates the nature of the father's mental illness and will be able to protect the children from its malign influence. The [respondent], and the experts, noted that the father has a strong, overbearing personality, and that the [respondent] was very young when she met the father. The father, twelve years her senior, dominated the [respondent]. This may explain, but does not excuse, several of the [respondent's] maternal lapses. The [respondent] minimized the father's violent behavior toward her. The [respondent] minimized or ignored the father's paranoid and delusional remarks made to the children. The [respondent] had an obligation to correct the father, or at least let the children know [his] statement was delusional and not to be accepted. The [respondent] remained mute to the detriment of her children, particularly [Judah]. [For example, the respondent] was present when the father told [Judah] that the department provided foster children to priests for molestation. The [respondent] said nothing then or later to correct this."

The court credited the testimony and report of Nancy Randall, a court-appointed evaluator and an expert in clinical and forensic psychology. "Randall found that the [respondent] and the father had a strong connection with each other and it was clear they wanted to stay together. The [respondent] was very supportive of the father and minimized his delusions. She claimed [his] behaviors were probably due to his diabetes. She blamed herself for the 2018 arrest when the father struck her and choked her. She had no problem with [his] delusional statements made in front of or to the children. [Randall] found that reunification could not occur under those circumstances as the [respondent] could not stand up to the father and his psychiatric

disorders, and that it would result in developmental harm to the children. . . . The [respondent's] minimization of the father's behaviors stands in stark relief to the picture [Judah] drew for [Randall]. [Randall] asked the child to draw a picture of his family doing something together. His drawing was of his family fighting. [Judah] said his parents fight a lot.

"[Randall] acknowledged that, at sixteen years old, the [respondent] was very susceptible to manipulation by an older, independent man such as the father. She found that the [respondent] and the father were seriously enmeshed. The [respondent] considered the [father's] behavior to be the norm and accepted it as normal. [Randall] recommended that the father have long-term, consistent treatment. If the father failed to do so, [Randall] said that the [respondent] would need long-term, consistent treatment and would need to learn how to separate from a controlling, possibly violent man. [Randall] said the [respondent] would have to find a support system away from the father, and this would just be for the [respondent] to become an independent adult apart from the father. This was without expectation of reunification. For that, the [respondent] would have to be able to acknowledge the father's mental health issues to her children or to permanently separate the children from him. To date, the [respondent] has not demonstrated the capacity or willingness to do so. The [respondent] did seek a legal separation from the father and, one year later, just before the conclusion of the trial, obtained a dissolution of marriage. The court was not persuaded by the [respondent's] testimony that she sees the need to permanently remove the father from the children's lives. The [respondent's] insight as a parent is inadequate. The court finds that the [respondent] is inclined to maintain contact with the father in pursuit of co-parenting, which clearly would be to the detriment of the children. [Judah] and [Angelika] still

do not appreciate that the [respondent] and the father will no longer be together. [Judah] wishes to return to them as a couple.

"At the time of trial, [Randall] . . . recognized and acknowledged the positive steps that the [respondent] had taken but questioned the efficacy of the [respondent's] treatment. She was particularly concerned about the [respondent's] parenting capabilities. The [respondent] demonstrated an inability during her evaluation to set boundaries with the children. [Randall] had to intervene personally to prevent [Judah] from leaving the building and placing himself in danger.

"The [respondent] had completed two parenting programs before [receiving] a referral for more parenting education. Sarah Laisi Lavoie, the most recent parenting educator and visitation supervisor, testified about [the respondent's] strengths and weaknesses with respect to her participation in [Laisi Lavoie's] program. [The respondent] is timely and consistent in her participation. [The respondent] does not fully engage with the children, despite appearing to be receptive to [Laisi Lavoie's] feedback and modeling behaviors. The [respondent] often has a flat effect and does not understand or respond to the children's individual interests and needs."

The court concluded that "[t]here is no question that there is a bond between the [respondent] and her children. There is no question that there is a bond between the [respondent] and the father. These bonds can cause negative consequences for the children. The [respondent] has made some recent efforts at improving her own life. The court finds that what she has done is too little and too late and too uncertain to support the proposal of reunification. Her parenting is still deficient. She still does not appreciate the damage inflicted upon all four children by her relationship with the father and

her inability or unwillingness to protect the children from his delusional and harmful behaviors. She did not properly engage in or gain insight from domestic violence counseling or individual therapy. Most significantly, in her own testimony she stated that the father's actions have more of an effect on her and how she lives her life than on the children." On the basis of the foregoing subordinate findings, the court concluded that the respondent failed to achieve a degree of personal rehabilitation that would encourage the belief that, within a reasonable time, considering the age and needs of the children, she could assume a responsible position in their lives.

On appeal, the respondent argues that the uncontroverted evidence showed that she had separated from the father and gained insight about how to keep her children safe from him. She argues that, although "[t]here is no error in the trial court's subordinate findings of fact with regard to the sad history of [her] long inability to disentangle herself from [the father's] damaging behavior . . . the trial court [erred] when it disregard[ed] completely the more recent evidence of [her] separation from [him]—not just in a practical, physical sense, but in terms of her psychological independence and her insight into her past." (Citation omitted.) In particular, she argues that the testimony of Stephen Humphrey—a clinical psychologist who met with the respondent several times between 2020 and 2022—and Maciolek—a clinical psychologist who treated the respondent weekly for anxiety and depression beginning in 2019—constitutes uncontroverted evidence that shows that she has overcome her earlier deficiencies. She essentially argues that the court improperly relied on stale evidence in determining that she had failed to rehabilitate. We are not persuaded.

When determining whether one or more grounds for termination of parental rights exists, "a court generally

is limited to considering only evidence that occurred before the date of the filing of the petition or the latest amendment to the petition, often referred to as 'the adjudicatory date.' " *In re Nevaeh G.-M.*, 217 Conn. App. 854, 877, 290 A.3d 867, cert. denied, 346 Conn. 925, 295 A.3d 418 (2023). We have held, however, that a court is permitted, but not required, to "rely on events occurring after the date of the filing of the petition to terminate parental rights when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Internal quotation marks omitted.) *In re Lillyanne D.*, supra, 215 Conn. App. 91; see also, e.g., *In re Nevaeh G.-M.*, supra, 881.

Here, the adjudicatory date was October 3, 2019, and Randall's report was dated June 7, 2019. Contrary to the respondent's assertions, it was proper for the court to consider Randall's report and testimony, which focused exclusively on her experiences and observations with respect to the respondent prior to the adjudicatory date. Moreover, although the court was not required to consider postadjudicatory date evidence, it nevertheless elected to do so. For example, the court credited the testimony of Laisi Lavoie, who supervised the respondent's visitation in 2021 and 2022 and provided evidence directly addressing the respondent's relationship with her children. She testified that the respondent was apathetic during visits and that she had not seen the respondent effectively "elaborate, expand . . . self-reflect, [and] apply [the parenting lessons] in different situations." On the basis of Laisi Lavoie's testimony, the court found that the respondent "[did] not fully engage with the children [during visits], despite appearing to be receptive to [Laisi Lavoie's] feedback and modeling behaviors. [The respondent] often ha[d] a flat affect, and [did] not understand or respond to the children's individual interests and needs."

Regarding the particularized needs of the children, the court credited the testimony of Michael Pines, Judah and Angelika's therapist, and Shatoya Colõn, Malachi and Moses' therapist. Pines testified that both Judah and Angelika suffer from complex trauma disorders and attachment disorders. Colõn testified that both Malachi and Moses suffer from adjustment disorder "with mixed disturbance of emotions and conduct." Pines opined that Judah had extremely dysregulated behavior for twenty-four to forty-eight hours following visitation with either parent, and Colõn testified that Moses and Malachi also exhibited dysregulated behaviors following visitation. Judah's dysregulated behavior included bedwetting and aggression, Malachi's dysregulated behavior included aggression, and Moses's dysregulated behavior included severe anxiety and fainting spells. Both providers testified that the children's behavior improved when the department decreased visitation with their parents. Pines echoed Randall's statements that "each child needs a consistent, stable home with clear expectations, appropriate rules, structure, and an absence of inappropriate conflicts. They need consistent, reliable caretaking."

Last, it is clear from the record that the court did, in fact, consider the testimony of Humphrey and Maciolek, the evidence on which the respondent relies in connection with this claim. The court gave less weight to their testimony, however, because neither Humphrey nor Maciolek observed the respondent with the children. On the other hand, Randall observed the respondent with the children on two occasions, once with the father and once without, before drafting her report. See *In re Ryder M.*, supra, 211 Conn. App. 814 ("the critical issue [in a failure to rehabilitate analysis] is not whether the parent has improved [her] ability to manage [her] own life, but rather whether [she] has gained the ability to care for *the particular needs of the child* at issue"

(emphasis added; internal quotation marks omitted)). In squaring Humphrey's and Maciolek's testimony with that of Randall and the other witnesses, we note that "it is not the function of this court to reweigh the evidence presented or to pass upon the credibility of witnesses, and we decline the respondent's implicit invitation to do so in this case . . . ." *In re Nevaeh G.-M.*, supra, 217 Conn. App. 881.

The respondent cites our Supreme Court's decision in *In re Oreoluwa O.*, 321 Conn. 523, 139 A.3d 674 (2016), in support of her position that the court improperly failed to rely on the most current information about her rehabilitation. Specifically, she claims that, "like the trial court in [*In re Oreoluwa O.*], the court here describes [the respondent's] rehabilitation entirely in terms and facts from early in the case, while ignoring more recent, contradictory evidence . . . ." (Citations omitted.) We are not persuaded.

In *In re Oreoluwa O.*, our Supreme Court confronted the question of whether the department had made reasonable efforts to reunify the respondent father with his son. Id., 526. In that case, the court reversed the judgment of this court, which affirmed the judgment of the trial court terminating the parental rights of the respondent, who lived in Nigeria and who was denied two applications for a visa to the United States to visit the minor child, who had several complex heart conditions. Id., 526–43. The court determined that the department's efforts to reunify were based on a presumption that the respondent needed to be present in this country in order to engage in reunification efforts because the child could not travel to Nigeria due to his medical issues. Id., 542. The court explained that, "[d]espite knowing that the child had successfully undergone repeated cardiac procedures and that his medical team

was meeting to discuss future medical plans, the department took no steps to inquire into this medical information or to present it to the trial court." Id., 542–43.

In light of the unique circumstances presented in that case, our Supreme Court concluded that the trial court should have considered events subsequent to the adjudicatory date. Id., 543–44. The court's conclusion was heavily influenced by the fact that, as of the adjudicatory date, "there was uncertainty as to when [the child] would be cleared to travel [to be with the respondent] and his medical status was in a state of flux." Id., 543–44. The court also noted that the trial court relied on summary statements in the department's studies that "[t]here [was] . . . uncertainty regarding the medical care [the child] would be able to receive in Nigeria and if his ongoing medical needs would be able to be met." (Internal quotation marks omitted.) Id., 544. It explained that "[t]he [petitioner] presented no evidence that the department had attempted to investigate what type of medical care [the child] would receive in Nigeria. The department's failure to investigate the type of medical care available to [the child] in Nigeria and its willingness to rely on 'uncertainty' about that care is also not evidence of an effort to reunify the respondent with [the child]." Id. The court concluded that, "[w]ithout updated medical information regarding [the child's] ability to travel and medical needs . . . the [petitioner] did not meet the burden of demonstrating that the department did 'everything reasonable' under the circumstances to reunite the respondent with [the child]." Id., 546.

The facts and the legal claim presented in *In re Oreoluwa O.* bear no resemblance to the present case. Indeed, the only certified question addressed by the court in *In re Oreoluwa O.* was whether the department provided reasonable efforts to reunify the respondent with the child, not whether he failed to rehabilitate.

See id., 526 n.1. In answering that question, the court determined that, under the unique facts of that case, the trial court improperly confined its analysis to events that occurred prior to the adjudicatory date. Id., 543–44. As explained previously, the court in this case considered postadjudicatory date evidence in addition to other evidence. Although it did not give certain postadjudicatory date evidence as much weight as the respondent may have liked, "[i]t is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony." (Internal quotation marks omitted.) *In re Aubrey K.*, 216 Conn. App. 632, 658, 285 A.3d 1153 (2022), cert. denied, 345 Conn. 972, 286 A.3d 907 (2023). Thus, *In re Oreoluwa O.* provides little, if any, support for the respondent's argument.

On the basis of our review of the record, we conclude that the court properly considered the evidence before it and that the evidence was sufficient for it to find that the respondent failed to achieve the requisite personal rehabilitation so as to encourage the belief that, within a reasonable time, she could assume a responsible position in her children's lives.

The judgments are affirmed.

In this opinion the other judges concurred.

SELMA MIRIAM ET AL. *v.* SUMMIT SAUGATUCK, LLC
(AC 45645)

Prescott, Suarez and Seeley, Js.

Syllabus

The plaintiffs, residents of a Westport neighborhood, sought to enjoin the defendant developer from building a multifamily housing development in their neighborhood and constructing anything other than single-family houses on each of its lots. The plaintiffs alleged that their property, and

that which the developer owned or had the option to acquire, comprised part of a plan for residential development shown on a map prepared in 1954 for the estate of L, the individual who had owned the property prior to its subdivision. The map purported to subdivide L's property into twenty-two lots, thirteen of which were located substantially or wholly in Westport and nine of which were in Norwalk. The map did not contain any restrictions with respect to the lots. In 1955, G and H, the administrators of L's estate, conveyed seven of the Westport lots to various individuals. Each deed contained a restriction that allowed only a single-family house to be constructed on the lot. The language of the restriction did not evidence an intent for it to be mutually enforceable by the future owners of the properties. As evidenced by a certificate of devise that was recorded in the Westport land records, in 1956, G and W, L's brothers and heirs, each became the owner of an undivided one-half interest in the remaining Westport lots and the Norwalk lots. No restrictions on the lots were recorded at the time of these transfers. Later that year, G and the executor of W's estate conveyed four of the Westport lots pursuant to deeds that did contain the single-family house restriction. In 1959, H and two other individuals conveyed the Norwalk lots to a corporation without any restrictions. The final two Westport lots were also conveyed in 1959, one by the conservator of G's estate and the executor of W's estate and the other by the executors of G's estate and the trustees under W's will. Neither of these lots was subject to the single-family house restriction. The plaintiffs alleged that the eight Westport lots that the defendant planned to develop were conveyed subject to the single-family house restriction because they were part of a common plan of development that existed by virtue of the single-family house restriction in the deeds to the Westport lots. The defendant filed a motion for summary judgment, to which it attached an affidavit and a report prepared by a title company, arguing, inter alia, that the title search records demonstrated that no enforceable common plan of development existed. The plaintiffs filed a memorandum in opposition to the defendant's motion, which the trial court, with the agreement of the parties, treated as a motion for summary judgment. Thereafter, the parties entered into a stipulation, agreeing that the trial court was to consider the issue of whether the plaintiffs had a right to enforce the single-family house restriction against the defendant's lots before considering the other arguments raised by the defendant in support of its motion for summary judgment and that, if the trial court determined that the facts did not demonstrate the existence of a common plan and a right of the plaintiffs to enforce the single-family house restriction as to the defendant's lots, the plaintiffs had no other basis on which to challenge or prevent the defendant from proceeding with its development, which had already received various land use approvals. The trial court determined that no common plan existed with respect to the twenty-two lots because there was no common grantor of the property.

As a result, it granted the defendant's motion for summary judgment and denied the plaintiffs' motion for summary judgment. On the plaintiffs' appeal to this court, *held* that the trial court properly granted the defendant's motion for summary judgment and denied the plaintiffs' motion for summary judgment because this court determined, following an analysis of the factors set forth in *Abel* v. *Johnson* (340 Conn. 240), that no common plan of development existed with respect to the Westport lots, and the parties had stipulated that such a conclusion was dispositive of the plaintiffs' action: it was clear from the factual history of the conveyances of the Westport lots as shown on the map that there was no common grantor that sold or expressed an intent to convey all thirteen Westport lots subject to a common plan to restrict development to single-family houses only, the map that subdivided the land contained no indication that any of the lots shown thereon were or would be subject to any restrictions, and the administrators of L's estate did not record a declaration of restrictive covenants relating to the lots at the time of the subdivision; moreover, although the plaintiffs appeared to treat the various individuals or representatives who conveyed the lots at different times as one common grantor, they did not provide this court with any authority to support their claim that multiple individuals could be considered a common grantor, the only common owner to all thirteen of the Westport lots was L, who never conveyed any lots, placed any restrictions on them, or indicated a common plan for their development, and, contrary to the plaintiffs' assertion, the administrators of L's estate did not convey the lots in a representative, fiduciary capacity on behalf of the true owners of title because, in accordance with *Scott* v. *Heinonen* (118 Conn. App. 577) and *Stepney Pond Estates, Ltd.* v. *Monroe* (260 Conn. 406), the conveyances were made by the estate, as the Probate Court's grant of authority to the administrators to sell the real property provided them with the right to immediate possession and control of the property, which related back to the time of L's death, and, accordingly, L's heirs were deemed never to have taken title to the property; furthermore, although the Westport lots had single-family homes constructed on them in accordance with the alleged plan and substantial uniformity existed in the restrictions imposed in the deeds because the deeds to eleven of the thirteen Westport lots contained identical language concerning the single-family house restriction, these factors were insufficient to demonstrate an intent to create a common plan; accordingly, because this court concluded that the trial court's determination that no common plan existed was proper, even when considered in relation to only the thirteen Westport lots, it did not need to address whether it was proper for the trial court to have taken into consideration all twenty-two lots in determining that no common plan existed.

Argued May 8—officially released August 29, 2023

Procedural History

Action seeking an injunction prohibiting the defendant from constructing a multifamily development on certain of its real property, and for other relief, brought to the Superior Court in the judicial district of Fairfield and transferred to the judicial district of Hartford, Land Use Litigation Docket, where the plaintiff Christopher Gazzelli withdrew from the action; thereafter, the court, *Hon. Marshall K. Berger, Jr.*, judge trial referee, granted the defendant's motion for summary judgment, denied the motion for summary judgment filed by the named plaintiff et al., and rendered judgment thereon, from which the named plaintiff et al. appealed to this court. *Affirmed.*

Joel Z. Green, with whom was *Linda Pesce Laske*, for the appellants (named plaintiff et al.).

Timothy S. Hollister, with whom were *David A. DeBassio* and, on the brief, *Joette Katz*, for the appellee (defendant).

Opinion

SUAREZ, J. In this action to enforce a restrictive covenant, the plaintiffs Selma Miriam and Leslie Ogilvy[1] appeal from the judgment rendered by the trial court following its granting of a motion for summary judgment filed by the defendant, Summit Saugatuck, LLC, and denial of their motion[2] for summary judgment. On appeal, the plaintiffs claim that the court improperly determined, as a matter of law, that a common plan of development does not exist for certain lots of real

[1] Christopher Gazzelli initially was a plaintiff in this matter but withdrew from the action. Accordingly, our references in this opinion to the plaintiffs are to Miriam and Ogilvy only.

[2] The plaintiffs filed a memorandum in opposition to the defendant's motion for summary judgment, which the court treated as a motion for summary judgment per an agreement of the parties. See also footnote 13 of this opinion.

property located within the historic Saugatuck neighborhood area of Westport, where both plaintiffs reside. We disagree and affirm the judgment of the court.

The following undisputed facts and procedural history are relevant to this appeal. The plaintiffs each own real property in Westport: Miriam's property is located at 29 Hiawatha Lane Extension, and Ogilvy's property is located at 27 Hiawatha Lane Extension. The plaintiffs alleged in their verified complaint (complaint) that their properties "comprise[d] part of a plan for a residential development shown upon a map entitled, 'Map of Property Prepared for the Estate of E. Louise Bradley, Gershom [B.] Bradley, [Administrator], Jeanette [Bradley] Hughes, [Administrator], Westport & Norwalk, Conn., Dec. 6, 1954 . . . .' " On December 17, 1954, that map was recorded in the Westport land records as map number 3802 (map 3802).[3] Map 3802 purports to subdivide real property originally owned by E. Louise Bradley into twenty-two lots. The lots are located in both Westport and Norwalk, with lots 1 through 10 and 20 through 22 being situated wholly or substantially in Westport (Westport lots) and lots 11 through 19 being situated in Norwalk (Norwalk lots). Map 3802, as recorded, contains no restrictions with respect to the lots shown thereon. Currently, Miriam owns lot 2, and lot 1 is owned by Ogilvy.

In 1955, Gershom Bradley and Jeanette Bradley Hughes, as administrators of the estate of E. Louise Bradley,[4] conveyed lots 6, 8, 9, 10, 20, 21 and 22 to various individuals.[5] Each deed of conveyance was

[3] Map 3802 was not recorded in the Norwalk land records.

[4] E. Louise Bradley died without a will on April 13, 1953.

[5] Specifically, the conveyances occurred as follows: lot 6 was conveyed by deed dated July 7, 1955, to Howard W. Hare; lot 8 was conveyed by deed dated July 7, 1955, to John Cretella; lot 9 was conveyed by deed dated July 7, 1955, to Peter Milazzo and Theresa Milazzo; lot 10 was conveyed by deed dated July 12, 1955, to John Febbraio and Alice Febbraio; lot 20 was conveyed by deed dated October 20, 1955, to Mary T. Bottone and Fiore Bottone; lot 21 was conveyed by deed dated August 12, 1955, to Louis Nistico; and lot

recorded in the Westport land records and included a restriction allowing only a single-family house to be erected on each lot (single-family house restriction). Thereafter, on April 9, 1956, as reflected in a certificate of devise that was recorded in the Westport land records, Gershom Bradley and William B. Bradley, brothers and heirs of E. Louise Bradley, each became owners of an undivided one-half interest in the remaining lots owned by E. Louise Bradley, which included lots 1 through 5, lot 7, and the Norwalk lots. At the time when the certificate of devise was recorded, there was nothing in the land records showing any restrictions on these remaining lots.

Subsequently, on various dates in 1956, Edmond P. Bradley, as executor of the estate of William Bradley, and Gershom Bradley conveyed lots 1, 2, 5 and 7.[6] Each deed of conveyance for those lots was recorded in the Westport land records and contained the single-family house restriction.

In a single conveyance and by warranty deed dated September 30, 1959, the Norwalk lots were conveyed by Julia S. Bradley, Jeanette H. B. Hughes, and Conrad Ulmer[7] to United Aircraft Corporation. These lots were not conveyed subject to the single-family house restriction.

Of the twenty-two lots originally shown on map 3802, the final two lots to be conveyed were lots 3 and 4. By

22 was conveyed by deed dated August 11, 1955, to William Francis Cribari and Olga Elizabeth Cribari.

[6] The lots were conveyed as follows: lot 1 was conveyed by deed dated August 7, 1956, to Joseph Nazzaro and Sadie Nazzaro; lot 2 was conveyed by deed dated November 9, 1956, to Vincent Pascarelli and Catherine Pascarelli; lot 5 was conveyed by deed dated May 7, 1956, to Mariano Cairo and Carmela Cairo; and lot 7 was conveyed by deed dated May 21, 1956, to Mary Cribari.

[7] It is unclear from the record how or when these individuals acquired title to the Norwalk lots from Gershom Bradley and William Bradley.

a deed dated September 30, 1959, and recorded in the Westport land records, lot 3 was conveyed by the conservator of the estate of Gershom Bradley and the executor of the estate of William Bradley. This conveyance was not made subject to the single-family house restriction, nor was the conveyance of lot 4,[8] which was conveyed in 1962 by the executors of the estate of Gershom Bradley and the trustees under the will of William Bradley.

The defendant, a developer, owns or has options to acquire lots 6, 7, 8, 9, 10, 20, 21 and 22 as shown on map 3802 and seeks to build a multifamily housing development on the property that will have 157 residential dwelling units that qualify as affordable housing under General Statutes § 8-30g. Following extensive administrative and judicial proceedings[9] involving the defendant, the town of Westport, and the Planning and

[8] In their complaint, the plaintiffs allege that lot 3 subsequently was subdivided and made subject to the single-family house restriction per an agreement dated October 13, 1960, which was recorded in the Westport land records. With respect to lot 4, the plaintiffs allege that it "was later divided into three parcels, each developed with a one-family house, although one such house . . . currently has an accessory apartment within it."

[9] Specifically, the trial court noted that, by 2021, there were five pending cases before it, which included an administrative appeal involving a sewer extension; see *Summit Saugatuck, LLC* v. *Water Pollution Control Authority*, Superior Court, judicial district of Hartford, Land Use Litigation Docket, Docket No. CV-20-6143715-S; an administrative appeal of the 2019 denial by the Planning and Zoning Commission of the Town of Westport of applications for an affordable housing development; see *Summit Saugatuck, LLC* v. *Planning & Zoning Commission*, Superior Court, judicial district of Hartford, Land Use Litigation Docket, Docket No. CV-19-6120090-S; two appeals concerning emergency access by the defendant over a right-of-way on wetlands located in Norwalk; see *Summit Saugatuck, LLC* v. *Conservation Commission/Inland Wetland Agency*, Superior Court, judicial district of Hartford, Land Use Litigation Docket, Docket Nos. CV-20-6143605-S and CV-20-6143606-S; and a declaratory judgment action against the town and the state Department of Housing concerning § 8-30g. See *Summit Saugatuck, LLC* v. *Dept. of Housing*, Superior Court, judicial district of Hartford, Land Use Litigation Docket, Docket No. CV-20-6127403-S.

Zoning Commission of the Town of Westport, an agreement for a reduced development plan was reached. As a result, the pending sewer and zoning cases were resolved by a stipulated judgment that ultimately was approved by the court on July 19, 2021.[10]

The plaintiffs did not intervene in the prior litigation and, instead, commenced the present action seeking to enjoin the defendant from moving forward with the affordable housing development and constructing anything other than a single-family house on each of its lots. In their complaint, the plaintiffs, owners of lots 1 and 2, alleged that the Westport lots, which include all of the lots on which the defendant intends to build its development, were conveyed subject to the single-family house restriction. The basis for this assertion is their claim that a common plan of development exists by virtue of the single-family house restriction in the deeds to the Westport lots. In response, the defendant filed an answer and five special defenses.[11]

Thereafter, the defendant filed a motion for summary judgment with an attached affidavit and a November 8, 2021 report (report) of Andrew R. Sherriff, Jr. Sherriff is the owner of Sound Title, LLC, a title company that, at the request of the defendant, investigated and drafted the report concerning the twenty-two lots depicted on map 3802. In its memorandum of law in support of its motion for summary judgment, the defendant argued, inter alia, that the title search records demonstrate that

[10] As part of the stipulated judgment, the two Norwalk wetlands cases also were withdrawn, as well as the declaratory judgment action. See footnote 9 of this opinion.

[11] The five special defenses are as follows: (1) the plaintiffs' action was barred by laches; (2) the claim alleged in the complaint was previously litigated and barred by res judicata; (3) the plaintiffs' action was barred by the statute of limitations in General Statutes § 52-575a; (4) the plaintiffs' action was an impermissible collateral attack on the stipulated judgment rendered in the zoning action; and (5) the plaintiffs were barred from litigating their claims due to the stipulated judgment.

no enforceable common plan of development exists that restricts the lots to single-family houses only.[12] The plaintiffs subsequently filed a memorandum in opposition to the defendant's motion for summary judgment, which the court, upon agreement of the parties, treated as a motion for summary judgment.

On January 18, 2022, the parties entered into a stipulation regarding the motions for summary judgment. Pursuant to that stipulation, the parties agreed that the court first would consider the threshold issue of whether the plaintiffs have the right to enforce the single-family house restriction against the defendant's lots 6 through 10 and 20 through 22 before considering other arguments raised by the defendant in support of its motion for summary judgment. The stipulation further provides: "This threshold issue can be adjudicated based on the facts presented in the November, 2021 report prepared by Sound Title, LLC, and attached to [the defendant's] summary judgment motion, along with other related facts presented in the relevant pleadings; that is, *the parties agree that there are no issues of material fact with respect to the threshold issue*; the relevant pleadings along with the pleadings already filed

[12] In its memorandum of law in support of its motion for summary judgment, the defendant raised two other grounds to support its claim that it was entitled to judgment as a matter of law with respect to the plaintiffs' complaint. Specifically, the defendant also argued that the plaintiffs' action is an impermissible collateral attack on the stipulated judgment and that the plaintiffs had to prove, but could not demonstrate, irreparable harm to support the imposition of an injunction. The court, however, did not address those claims in light of the parties' stipulation that the court first had to determine the threshold issue of whether the plaintiffs have a right to enforce the single-family house restriction against the defendant, which was dependent on the existence of a common plan of development. Under the stipulation, if, as was done, the court determined that a common plan of development did not exist, the plaintiffs agreed that they had no other basis to challenge or prevent the defendant from proceeding with its development plans. In light of our agreement with the court's decision, we also need not address the additional grounds raised by the defendant in support of its motion for summary judgment.

by the parties contain all facts necessary [to] resolve this issue; and an evidentiary hearing on the issue is not required. . . . If this court determines that the facts do not demonstrate the existence of a uniform common plan and a right of any of the plaintiffs to enforce [the single-family house] restriction as against [the defendant's] lots, then the plaintiffs have no other basis to challenge or prevent [the defendant] from acting on the land use approvals granted through the stipulated judgment . . . ." (Emphasis added.)

On February 9, 2022, the court heard arguments on the motions for summary judgment limited to the issue of the existence of a common plan of development. In a memorandum of decision dated May 31, 2022, the court granted the defendant's motion for summary judgment on the basis of its conclusion that no common plan exists with respect to the twenty-two lots shown on map 3802. In making that determination, the court referred to the parties' stipulation that the material facts were not contested and that the court could decide the threshold issue as a matter of law on the basis of the facts set forth in the report prepared by Sherriff. In that report, Sherriff concluded: "The estate of E. Louise Bradley aka Emma Bradley was the only entity that held title to all of the lots as shown on [map 3802]. Of the original [twenty-two] lots, such [e]state conveyed [seven] lots subject to the [r]estriction, while the [r]estriction was not imposed by the estate [on] the remaining [fifteen] lots. The [e]state and [four subsequent] owners of the lots owned by the [e]state, imposed the [r]estriction on a total of [twelve] of the [twenty-two] lots, while [ten] of the lots shown on [map 3802] were not made subject to the [r]estriction."

In concluding that no common plan exists, the court stated: "There is no question of fact that E. Louise Bradley was not a common grantor and that she did not create a common plan. Map 3802 was prepared

for her estate and, significantly, the map contained no restrictions. In fact, there were several sets of grantors of the lots of the original parcel and some lots were subject to the [single-family house] restriction and some were not.

* * *

"[T]here is no common grantor or evidence of a grantor's intent to convey all of the lots subject to the plan. Indeed, the original twenty-two lots were not all conveyed by the original grantor, E. Louise Bradley's estate, nor were they all conveyed subject to any recorded declaration of restrictions applicable to all lots. This is underscored by the undisputed fact that the nine lots in Norwalk were conveyed without the [single-family house] restriction. . . . Additionally, there is no map of the entire tract with notice of the [single-family house] restriction upon it. While Gershom Bradley was involved in certain transfers—whether he acted as an administrator for E. Louise Bradley, in his individual capacity, or through his estate—the administrators of E. Louise Bradley's estate only imposed the [single-family house] restriction on seven lots (lots 6, 8, 9, 10, 20, 21 and 22) out of the original twenty-two lots. The next four lots (lots 1, 2, 5 and 7) with the [single-family house] restriction were conveyed by different grantors . . . . Thus, of the original twenty-two lots, only eleven had the initial single-family [house] restriction and this does not effectuate a general plan by the grantor." (Citation omitted; footnotes omitted.) The court thus granted the defendant's motion for summary judgment and denied the plaintiffs' motion for summary judgment. This appeal challenging both rulings followed.[13] Additional facts and procedural history will be set forth as necessary.

[13] We note that, "[a]lthough the denial of a motion for summary judgment is not ordinarily a final judgment and, thus, not immediately appealable, if parties file . . . motions for summary judgment and the court grants one and denies the other, this court has jurisdiction to consider both rulings on

On appeal, the plaintiffs challenge the court's determination that no common plan of development exists as to the twenty-two lots depicted on map 3802. Specifically, they claim that the court "improperly considered only whether *all* of the land in both Norwalk and Westport was conveyed subject to the [single-family house] restriction" and failed to address their claim that there is a common plan for the Westport lots only. (Emphasis added.) We do not agree.

Before we address the plaintiffs' claim on appeal, we first set forth our well established standard of review pertaining to a trial court's decision granting a motion for summary judgment. "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. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact . . . . [T]he party moving for summary judgment is held to a strict standard. [The moving party] must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . A material fact is a fact that will make a difference in the result of the case. . . . Because the court's decision on a motion for summary judgment is a legal determination, our review on appeal is plenary. . . . [W]e must [therefore] decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Stewart* v. *Old Republic National Title Ins. Co.*,

appeal." (Internal quotation marks omitted.) *Freidheim* v. *McLaughlin*, 217 Conn. App. 767, 777 n.3, 290 A.3d 801 (2023).

218 Conn. App. 226, 237–38, 291 A.3d 1051 (2023); see also *Brass Mill Center, LLC* v. *Subway Real Estate Corp.*, 214 Conn. App. 379, 385, 280 A.3d 1216 (2022) ("[s]ummary judgment rulings present questions of law" (internal quotation marks omitted)).

We next set forth relevant legal principles governing construction of deeds and restrictive covenants. "Early Connecticut case law acknowledges the power of property holders with substantially uniform restrictive covenants obtained by deeds in a chain of title from a common grantor to enforce the restrictions against other owners with similar restrictive covenants." (Internal quotation marks omitted.) *Abel* v. *Johnson*, 340 Conn. 240, 256–57, 263 A.3d 371 (2021). "When uniform covenants are contained in deeds executed by the owner of property who is dividing his property into building lots under a general development scheme, any grantee under such a general or uniform development scheme may enforce the restrictions against any other grantee. . . . The owner's intent to develop the property under a common scheme is evidenced by the language in the deeds. . . . [T]he determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is plenary." (Citations omitted; internal quotation marks omitted.) *Cappo* v. *Suda*, 126 Conn. App. 1, 8, 10 A.3d 560 (2011); see also *Abel* v. *Johnson*, supra, 255 ("[i]ntent is determined by the language of the particular conveyance in light of all the circumstances and is a question of law" (internal quotation marks omitted)).

"The doctrine of the enforceability of uniform restrictive covenants is of equitable origin. The equity springs from the presumption that each purchaser has paid a premium for the property in reliance on the uniform development plan being carried out. While that purchaser is bound by and observes the covenant, it would

be inequitable to allow any other landowner who is also subject to the same restriction to violate it. . . . [T]he uniform plan development must be derived from the language of the covenants inserted in the deeds of various owners' plots and it is necessary to determine the intent of the owner in creating the restrictions upon any lot to make the benefit of them available . . . to the owners of the other lots in the tract. The meaning and effect of the [restrictions] are to be determined, not by the actual intent of the parties, but by the intent expressed in the deed, considering all its relevant provisions and reading it in the light of the surrounding circumstances . . . ." (Citation omitted; internal quotation marks omitted.) *Mannweiler* v. *LaFlamme*, 46 Conn. App. 525, 535–36, 700 A.2d 57, cert. denied, 243 Conn. 934, 702 A.2d 641 (1997).

In *Abel* v. *Johnson*, supra, 340 Conn. 240, our Supreme Court recently explained that "[r]estrictive covenants generally fall into one of three categories: (1) mutual covenants in deeds exchanged by adjoining landowners; (2) uniform covenants contained in deeds executed by the owner of property who is dividing his property into building lots under a general development scheme; and (3) covenants exacted by a grantor from his grantee presumptively or actually for the benefit and protection of his adjoining land [that] he retains. . . . With respect to the second category, under which the plaintiffs claim standing, [r]estrictive covenants should be enforced when they are reflective of a common plan of development. . . . The factors that help to establish the existence of an intent by a grantor to develop a common plan are: (1) a common grantor sells or expresses an intent to put an entire tract on the market subject to the plan; (2) a map of the entire tract exists at the time of the sale of one of the parcels; (3) actual development according to the plan has occurred; and (4) substantial uniformity exists in the restrictions imposed in the

deeds executed by the grantor. . . . The factors that help to negate the presence of a development scheme are: (1) the grantor retains unrestricted adjoining land; (2) there is no plot of the entire tract with notice on it of the restrictions; and (3) the common grantor did not impose similar restrictions on other lots." (Citations omitted; internal quotation marks omitted.) Id., 255–56.

In this appeal, the plaintiffs claim that the court improperly determined that no common plan exists and that the court, in making that determination, improperly considered all twenty-two lots as shown on map 3802, which included land in both Norwalk and Westport, and failed to determine whether a common plan exists concerning the Westport lots only. The plaintiffs argue that a common plan was implemented only with respect to the Westport lots, as "manifest[ed] by the conveyance of the first eleven of the thirteen Westport lots by deeds subject to the [single-family house] restriction, within a two year period. Two years later, lot 3 was conveyed out by successor fiduciaries and by deeds that did not contain the [single-family house] restriction. However, all then owners of the [Westport] lots, as well as of the Norwalk tract, then entered into a property agreement in which they acknowledged the [single-family house] restriction and consented to division of lot 3 into two parcels on the condition that the [single-family house] restriction be imposed on the resulting parcels." The plaintiffs further assert that "[t]he absence of the [single-family house] restriction in the first deed conveying out the final lot, lot 4, should be deemed, on balance, to have little to no negating effect, for several reasons," including that "[t]he actual use and development on lot 4 occurred well after the common plan was already manifest with respect to the other lots . . . ." Moreover, according to the plaintiffs, the court "ignored the fact that the Norwalk tract was not approved for subdivision and was not actually divided into building lots

at all," which rendered immaterial whether the Norwalk lots were subject to the single-family house restriction. (Emphasis omitted.) We are not persuaded.

The following additional undisputed facts provide context for this claim. As we stated previously in this opinion, the parties' stipulation provides that the threshold issue of the existence of a common plan "can be adjudicated based on the facts presented in the November, 2021 report prepared by" Sherriff that was attached to the defendant's motion for summary judgment. Sherriff drafted the report following his investigation and review of the land records in Westport and Norwalk for the twenty-two lots designated on map 3802; he did not limit his report to the Westport lots only. Furthermore, the plaintiffs' complaint is not entirely clear on this issue. Although the plaintiffs allege in their complaint that "[t]he *Westport lots* were all conveyed subject to" the single-family house restriction, the complaint also alleges that the plaintiffs' properties are "*part of a plan* for a residential development shown upon" map 3802, which depicts all twenty-two lots. (Emphasis added.) The parties' conflicting positions concerning the lots that fall within the scope of the claimed common plan are further demonstrated by the arguments raised in their memoranda in support of their motions for summary judgment. The defendant's argument that no common plan exists clearly encompassed an examination of the twenty-two lots originally owned by E. Louise Bradley as depicted on map 3802. The plaintiffs, on the other hand, focused their argument in support of a common plan on the Westport lots only and disagreed with the defendant's "suggestion that the nondevelopment of the Norwalk lots proves there is no common development plan comprised of the Westport lots . . . ." According to the plaintiffs, "[i]n sum and on balance, the relevant factors overwhelmingly weigh in favor of finding the existence of

a common plan subject to restrictive covenants permitting one family houses only on the [Westport] lots . . . .'' Relying on the parties' stipulation, the court considered the deeds and surrounding circumstances related to the conveyances of all twenty-two lots in determining that no common plan exists.

The transcript of the parties' February 9, 2022 arguments regarding the motions for summary judgment also sheds light on this issue. During those arguments, the plaintiffs' counsel discussed the four factors set forth in *Abel* for establishing a common plan. See *Abel* v. *Johnson*, supra, 340 Conn. 256. Thereafter, counsel turned to the three negating factors set forth in *Abel*, arguing that the first one—that the grantor retained unrestricted adjoining land—was not applicable. The following colloquy transpired between the court and the plaintiffs' counsel:

''The Court: What about the Norwalk property? What about the Norwalk property?

''[The Plaintiffs' Counsel]: Well, I think that, at the time [the] plan was devised, it was—the Norwalk property . . . well actually, I hadn't thought of that, Your Honor. Can I get back to you on that one? The . . . unrestricted adjoining land, I think that factor really applies where you have—where it shows that the adjoining land, the owner of the adjoining land wants to impose a restriction to benefit that adjoining land that's being retained. And I don't think there's any evidence of that in this case. Yeah, I think what the intent was is that all of it be developed for residential lots, but then, when the subdivision was denied in Norwalk, the plan was revised to just apply to the Westport property. The retention of the . . . Norwalk land not subject to restriction, I don't think that placing the restriction for one family homes shows—would benefit the

Norwalk property. I don't think that the—that first factor would apply here.

"The Court: I . . . hear what you're saying, but again, I don't think you can make the statement that the plan was revised to apply just to . . . Westport. I don't think you have any proof of that. It may well be. I'm not suggesting that that didn't happen, but I don't think we have in this record anything from the Bradley administrators where they have come out and said, yeah, this is what we're going to do. I think you're surmising that. I . . . think that's what you've just indicated, but I . . . don't think there's any evidence on that. I may have to conclude that, but I don't know.

"[The Plaintiffs' Counsel]: I think that . . . we have to consider what—what property was involved and what was the intent. So, with—

"The Court: *Twenty-two lots. I have twenty-two lots.*

"[The Plaintiffs' Counsel]: Was the original plan, but the Westport subdivision that was approved was only as to the thirteen Westport lots.

"The Court: That's Westport, right. But—

"[The Plaintiffs' Counsel]: And—

"The Court: You know, it begs the question: *Is this a Westport or is this the whole thing*? So, I understand what you're saying, but go ahead." (Emphasis added.)

The plaintiffs' counsel thereafter continued her discussion of the remaining *Abel* factors as applied to the thirteen Westport lots. Significantly, she never directly responded to the court's question concerning whether the matter involved just the Westport lots, although she did subsequently argue that there was a common plan for the Westport lots. Thereafter, the defendant's counsel continued to argue that the Norwalk lots were never approved for a subdivision, making them retained land

that was eventually sold for nonresidential purposes, which counsel argued was a dispositive factor in demonstrating the lack of a common plan. The plaintiffs' counsel responded by arguing that no one factor in *Abel* is dispositive. Again, the plaintiffs' counsel never definitively stated that the Norwalk lots should not factor into the determination of the existence of a common plan.

With that background in mind, we turn to the plaintiffs' claim. Before we engage in a plenary review of the court's determination that no common plan exists in this case, we must address the issue of the proper scope of that inquiry, namely, whether that inquiry encompasses an examination of the deeds and circumstances surrounding the conveyances of all twenty-two lots or whether our analysis should be confined to the Westport lots only. The record clearly demonstrates that the parties' positions at oral argument differed on this issue, and the court even questioned whether "this [is] a Westport or is this the whole thing?"[14] Nevertheless, because we conclude, for the reasons that follow, that the court's legal determination that no common plan exists is proper even when considered in relation to the thirteen Westport lots only, we need not determine whether it was proper for the court to have taken all twenty-two lots into consideration in making its determination of no common plan.

Under the circumstances of this case, in which "the uniform plan of development must be divined from the language of the covenants inserted in the deeds of various owners of lots," we must "determine the intent of the owner in creating the restrictions upon any lot to make the benefit of them available . . . to the owners of the other lots in the tract. . . . The intent of the

[14] We note that, after the court issued its memorandum of decision finding that no common plan exists in this case, the plaintiffs filed a timely motion to reargue, which the court denied.

grantor must be determined by reading the deeds in light of the surrounding circumstances attending the transactions." (Citation omitted; internal quotation marks omitted.) *Contegni* v. *Payne*, 18 Conn. App. 47, 52, 557 A.2d 122, cert. denied, 211 Conn. 806, 559 A.2d 1140 (1989), and cert. denied, 211 Conn. 806, 559 A.2d 1140 (1989). In making that determination, we also are guided by the factors set forth in *Abel* v. *Johnson*, supra, 340 Conn. 256, which "help to establish the existence of an intent by a grantor to develop a common plan . . . ." (Internal quotation marks omitted.) Id.

With respect to the first factor, namely, a common grantor sells or expresses an intent to put an entire tract on the market subject to the plan, we conclude that this factor does not weigh in favor of a determination that a common plan exists. In the present case, map 3802, which subdivided land originally owned by E. Louise Bradley into twenty-two lots, with thirteen of those lots being located wholly or substantially in the town of Westport, was prepared and recorded in the land records in December, 1954, by Gershom Bradley and Jeanette Bradley Hughes, as administrators of the estate of E. Louise Bradley. Map 3802 contains no indication that any of the lots shown thereon were or would be subject to any restrictions, and the administrators did not simultaneously record a declaration of restrictive covenants relating to the subdivided lots shown on map 3802. See *DaSilva* v. *Barone*, 83 Conn. App. 365, 371, 373, 849 A.2d 902, cert. denied, 271 Conn. 908, 859 A.2d 560 (2004).

In July, 1955, the administrators of the estate of E. Louise Bradley, who were authorized and empowered by the Probate Court to sell the real property that was in the inventory of the estate, conveyed lots 6, 8, 9, 10, 21 and 22 to various individuals by deeds, all of which contained the single-family house restriction. The specific language of that restriction was identical in all of

the deeds and provided: "Restriction that only a one-family house shall be erected on said premises, the house or plans for which shall be approved by the [g]rantors . . . ." Thereafter, on October 20, 1955, the administrators conveyed lot 20 by a deed containing the same restriction. Thus, seven of the thirteen Westport lots were conveyed by the administrators subject to the single-family house restriction.

Thereafter, the ownership of lots 1 through 5, lot 7, and the Norwalk lots passed by devise to Gershom Bradley and William Bradley, brothers and heirs to E. Louise Bradley. As per a certificate of devise dated April 19, 1956,[15] and issued by the Probate Court, Gershom

[15] The plaintiffs argue that the court misunderstood the legal significance of a certificate of devise in determining that no common plan exists. In making this claim, the plaintiffs take issue with the statements of the court in its memorandum of decision that lots 1 through 5, lot 7, and the Norwalk lots had been "transferred by a certificate of devise to Gershom Bradley and . . . William B. Bradley without the [single-family house] restriction," and that lots 1 and 5 "were conveyed by a certificate of devise in 1956 without any restriction." The plaintiffs argue that "certificates [of devise] are not instruments that can effectuate a conveyance of title or impose a restriction. Instead, they are merely a notice, recorded in the land records, that title has been determined to be in the heirs at law of an intestate decedent . . . ." According to the plaintiffs, "[t]he court's finding that there was a lack of substantially uniform restrictions imposed by a common grantor appears . . . to have been based on [this] misapplication of the law concerning the legal significance of a certificate of devise . . . ." Although we agree with the plaintiffs that the court misstated the legal significance of a certificate of devise, that does not impact our determination, as a matter of law, that there was no common grantor who created a common plan of development for the Westport lots.

"It is fundamental jurisprudence that title to real estate vests immediately at death in a deceased's heirs, or in devisees upon the admission of a will to probate. . . . The recording of a probate certificate of devise or descent is necessary only to perfect marketable title. That certificate furnishes evidence that the heir's or devisee's title is no longer in danger of being cut off by a probate sale to pay debts of the estate and also because it furnishes a record of who received the title. Such a probate certificate is not a muniment of title, however, but merely a guide or pointer for clarification of the record." (Internal quotation marks omitted.) *Zanoni* v. *Lynch*, 79 Conn. App. 309, 320–21, 830 A.2d 304, cert. denied, 266 Conn. 929, 837 A.2d 804 (2003).

Bradley and William Bradley each had an undivided one-half interest in those lots.

Of the six remaining Westport lots owned by Gershom Bradley and William Bradley, four—lots 1, 2, 5 and 7—were conveyed on various dates between May 7 and November 9, 1956, by deeds that contained the single-family house restriction. Those conveyances were done by Edmond Bradley, as executor of the estate of William Bradley, and Gershom Bradley. By the time lots 3 and 4 were conveyed, Gershom Bradley had died. Those lots were conveyed by various representatives and/or trustees under his estate and that of his brother, William Bradley, without the single-family house restriction.

It is clear from this factual history of the conveyances of the Westport lots as shown on map 3802 that there is no common grantor who sold or evinced an intent to convey all thirteen of the Westport lots subject to a common plan to restrict development to single-family houses only. Seven of the eight lots that the defendant either owns or has an option to acquire were first conveyed by the administrators of the estate of E. Louise

In the present case, it was incorrect for the court to state that certain of the lots were transferred or conveyed without any restrictions pursuant to the certificate of devise. Instead, the certificate referenced by the court simply furnished evidence that Gershom Bradley and William Bradley, as the sole heirs of E. Louise Bradley, each held an undivided one-half interest in the remaining parcels of real property within the estate. Although it is noteworthy that, at the time when the certificate of devise was recorded, there was nothing in the land records showing any restrictions on those remaining lots, the certificate, not being an instrument of conveyance, did not itself effect a conveyance without the single-family house restriction. Also, to the extent that the court's misstatement implicated the Norwalk lots, it had no bearing on our analysis of whether the Westport lots, alone, were part of a common plan of development. Moreover, in our plenary review concerning whether a common plan exists for the Westport lots, we afforded the proper legal significance to the certificate of devise and did not construe it as conclusive evidence that the lots were conveyed without the single-family house restriction. Therefore, the court's misstatement has no bearing on our conclusion.

Bradley, with the remaining lot first having been conveyed by Edmond Bradley, as executor of the estate of William Bradley, and Gershom Bradley. Lots 1 and 2, now owned by the plaintiffs, were initially conveyed by Edmond Bradley, as executor of the estate of William Bradley, and Gershom Bradley. The plaintiffs appear to treat the administrators of the estate of E. Louise Bradley, as well as heirs of E. Louise Bradley and executors of the estates of those heirs, all as one common grantor. In their appellate brief, they argue: "The common plan as to the Westport lots was made manifest by the conveyance of the first eleven of the thirteen Westport lots by deeds subject to the [single-family house] restriction, within a two year period." According to the plaintiffs, "[t]he common grantors were the heirs of E. Louise Bradley, in whom title had descended upon her death, or those acting in a representative, fiduciary capacity on their behalf, and/or by their successors, who all acted [in] concert to convey the first eleven of the thirteen Westport lots subject to the substantially uniform restriction in fairly rapid succession within a two year time frame." The plaintiffs, however, have not furnished this court with any authority to support their claim that multiple individuals can be considered a "common grantor," and we are not persuaded by their novel claim.

A "common grantor is that owner of property who has divided it into building lots that are subject to a general development scheme as simultaneously expressed on the land records of the location of the property." *DaSilva* v. *Barone*, supra, 83 Conn. App. 371. The thirteen Westport lots that the plaintiffs claim are part of a common plan of development were conveyed at different times by various individuals or representatives, including Gershom Bradley and Jeanette Bradley Hughes, as administrators of the estate of E. Louise Bradley (lots 6, 8, 9, 10, 20, 21 and 22); Gershom Bradley,

individually, and Edmond Bradley, as executor of the estate of William Bradley (lots 1, 2, 5 and 7); and the conservator of the estate of Gershom Bradley, the executors of the estate of Gershom Bradley and/or the trustees under the will of William Bradley (lots 3 and 4). Indeed, the only common *owner* to all thirteen of the Westport lots was E. Louise Bradley, who never conveyed any lots let alone placed restrictions on them or indicated a common plan for their development.[16] Instead, the administrators of her estate obtained subdivision approval of map 3802 and recorded the map

[16] The plaintiffs also argue on appeal that the court misapplied the law concerning title to land within a decedent's estate in making its determination that no common plan exists. The plaintiffs assert in their principal appellate brief that "the court erroneously [relied on] the statement in [Sherriff's] affidavit and title report that '[t]he *estate* of E. Louise Bradley aka Emma Bradley was the only entity that *held title* to all of the lots as shown on [m]ap . . . 3802.' " (Emphasis added.) According to the plaintiffs, "[t]he court's finding is not accurate and reflects a misapplication of the law because a decedent's estate does not 'hold title' to the property within the decedent's estate. A decedent's estate cannot own property because '[a]n estate is not a legal entity. . . .' Instead, '[t]itle to real property passes upon death to the heirs of the owner subject to the right of administration.' " (Citation omitted.)

The plaintiffs are correct that "[a]n estate is not a legal entity. It is neither a natural nor artificial person, but is merely a name to indicate the sum total of the assets and liabilities of the decedent or incompetent. . . . Not having a legal existence, it can neither sue nor be sued." (Internal quotation marks omitted.) *American Tax Funding, LLC* v. *Design Land Developers of Newtown, Inc.*, 200 Conn. App. 837, 845, 240 A.3d 678 (2020); see also *Isaac* v. *Mount Sinai Hospital*, 3 Conn. App. 598, 600, 490 A.2d 1024, cert. denied, 196 Conn. 807, 494 A.2d 904 (1985). Additionally, an estate "cannot hold title to property . . . ." *Trumbull* v. *Palmer*, 104 Conn. App. 498, 503, 934 A.2d 323 (2007), cert. denied, 286 Conn. 905, 944 A.2d 981 (2008). We also agree with the plaintiffs that the statement in the report that "[t]he estate of E. Louise Bradley . . . was the only entity that held title to all of the lots as shown on [m]ap . . . 3802" is not accurate. Although the real property was part of the estate's inventory, it is clear from case law that the estate did not hold title to the real property, that, upon the death of E. Louise Bradley, the property within her estate passed to her heirs, and that the administrators of her estate also did not hold title to the real property. Nevertheless, because we exercise plenary review over this appeal, any error in the court's reliance on the language used by Sherriff does not affect our conclusion that no common grantor exists.

in the land records. In doing so, however, they never indicated on map 3802 or in a recorded declaration that any of the lots were or would be restricted to single-family houses only, and, after the administrators subdivided the land, other owners acquired some of the lots. Moreover, those administrators conveyed only seven of the thirteen Westport lots subject to the single-family house restriction. As this court has stated previously, "enforceable restrictive covenants usually involve the presence of the same or similar restrictions in *all or substantially all* of the deeds conveyed by the common grantor. See *Whitton* v. *Clark*, 112 Conn. 28, 37, 151 A. 305 (1930) (twenty of fifty-four lots with similar restrictions did not show common plan); *DaSilva* v. *Barone*, supra, 376 (deed restriction applied to two-thirds of lots involved did not show common plan)." (Emphasis in original.) *Cappo* v. *Suda*, supra, 126 Conn. App. 11.

As the defendant argues in its appellate brief: "The sine qua non of a uniform common plan is a 'common grantor,' who may be a person or entity, but must have, at one time, owned all of the lots to be subdivided, and at the time of obtaining subdivision approval, through notice on the subdivision map and a recorded declaration of restrictions, expressed 'simultaneous intent' to impose a mutually enforceable obligation on all initial and subsequent owners. Here, there was no common grantor, no map notation, no recorded declaration, no evidence of intent to make the [single-family house] restriction mutually enforceable by future owners,[17] and

[17] We note, as did the trial court, that none of the deeds containing the single-family house restriction contains words of succession binding the heirs and assigns of the allegedly restricted land. "It is well settled that where a restrictive covenant contains words of succession, i.e., 'heirs and assigns,' a presumption is created that the parties intended the restrictive covenant to run with the land"; *Weeks* v. *Kramer*, 45 Conn. App. 319, 323, 696 A.2d 361 (1997), appeal dismissed, 244 Conn. 203, 707 A.2d 30 (1998) (certification improvidently granted); that is, "[t]he presence or absence of express words of succession—such as 'heirs' or 'assigns'—offers strong, though not conclusive, evidence of whether the parties intended to bind

no uniform imposition on all lots." (Footnote added.) We agree.

The plaintiffs also assert that, "[w]hen the administrators of the estate conveyed lots pursuant to orders of the Westport Probate Court, they did so in a representative, fiduciary capacity on behalf of the true holders of title, i.e., the heirs at law of E. Louise Bradley and/or those in whom title descended or was devised upon the death of her heirs." We are not persuaded.

In the present case, E. Louise Bradley died without a will. "At death the intestate real property of a decedent vests at once in his [or her] heirs; an administrator does not have title to it, although *it is subject to being brought within the scope of administration of the estate* so far as necessary to the proper exercise of that administration." (Emphasis added.) *Bowen* v. *Morgillo*, 127 Conn. 161, 168, 14 A.2d 724 (1940); see *Zanoni* v. *Lynch*, 79 Conn. App. 309, 321, 830 A.2d 304 ("[T]he fiduciary of a decedent's estate possesses a limited statutory right to interfere with the passage of title to a devisee. Upon the death of a testator, the title to the real property devised in his will vests in the devisees, subject to the control of the court and possession of the executor during administration." (Internal quotation marks omitted.)), cert. denied, 266 Conn. 929, 837 A.2d 804 (2003); id., 322 ("although title to specifically devised real property passes to a decedent's devisees at his death, such title is not absolute"); see also *Wooden* v. *Perez*, 210 Conn. App. 303, 309, 269 A.3d 953 (2022) ("[o]n the death of an owner, title to real estate at once passes to his heirs, subject to being defeated should it be necessary for the administration of the estate that it be sold by order of the court, and subject to the right of the administrator to have possession, care and control of it

future owners of the land." *Wykeham Rise, LLC* v. *Federer*, 305 Conn. 448, 464, 52 A.3d 702 (2012).

during the settlement of the estate, unless the [P]robate [C]ourt shall otherwise order" (internal quotation marks omitted)). It is within the authority of the Probate Court to order a sale of real property, even if it has been specifically devised, for the necessary administration of the estate, including the payment of debts of the estate. See *Zanoni* v. *Lynch*, supra, 321–22. "The estate[18] of a deceased person consists of property the title to or an interest in which is derived from [her], which it is the duty of the executor or administrator to inventory and for which he must account to the Probate Court." (Footnote added.) *American Surety Co. of New York* v. *McMullen*, 129 Conn. 575, 582–83, 30 A.2d 564 (1943).

This court's decision in *Scott* v. *Heinonen*, 118 Conn. App. 577, 985 A.2d 358 (2009), cert. denied, 295 Conn. 909, 989 A.2d 603 (2010), is helpful to our resolution of this issue. In *Scott*, the issue before this court was "whether the executor of an estate, who has been authorized to market certain real property of a decedent to satisfy the financial obligations of the decedent's estate, has the power to evict an occupant to whom the property has specifically been devised by the will of the decedent." Id., 578. After the decedent's death, the plaintiff executor of the decedent's estate submitted a petition to the Probate Court "to market and to sell the property to satisfy creditor claims against the estate and administration expenses." Id., 579. The Probate Court granted the petition, after which the executor

[18] Black's Law Dictionary defines the term "estate," when used in the context of probate proceedings, to encompass the "totality of assets and liabilities of [the] decedent, including all manner of property, real and personal, choate or inchoate, corporeal or incorporeal. . . . The total property of whatever kind that is owned by a decedent prior to the distribution of that property in accordance with the terms of a will, or, when there is no will, by the laws of inheritance in the state of domicile of the decedent. It means, ordinarily, the whole of the property owned by anyone, the realty as well as the personalty." (Citation omitted.) Black's Law Dictionary (6th Ed. 1990) p. 547.

served a notice to quit possession of the premises on the defendant, who had been residing at the decedent's property and to whom the decedent specifically had devised the real property in her will. Id. Thereafter, the executor brought a summary process action to evict the defendant. Id. The trial court rendered judgment in favor of the defendant, concluding that the executor did not have the power to evict the defendant even though the Probate Court had issued an order authorizing the executor to market the real property of the decedent to pay the debts of the estate. Id., 579–80. On appeal, this court disagreed. Id., 582.

In concluding that the executor had the power to evict the defendant and was entitled to summary process as a matter of law, this court explained: "[A] central question we must resolve in our determination of the appeal at hand is at what point, after an executor is authorized to market specifically devised property for sale so as to satisfy the debts of an estate, a devisee's title and interest in such property is extinguished. The defendant argues that he retains a superior interest in the decedent's real property until such time that the plaintiff enters a contract of sale on behalf of the estate or the Probate Court orders him to vacate the property. We disagree. In construing a statute, common sense must be used, and courts will assume that the legislature intended to accomplish a reasonable and rational result. . . . Our legislature has granted the Probate Court the power to authorize the sale of specifically devised property to satisfy the debts of an estate. Common sense dictates that inherent in such an order is a right to immediate possession and control of such property by the administrator of the estate to make the property marketable." (Citation omitted; internal quotation marks omitted.) Id., 584.

In *Scott*, this court relied on our Supreme Court's holding in *Stepney Pond Estates, Ltd.* v. *Monroe*, 260

Conn. 406, 797 A.2d 494 (2002), in which our Supreme Court stated: "[U]pon the death of the owner of real estate, neither the executor nor the administrator holds title. . . . Title immediately descends to the heirs or devisees of real estate, subject to the right of administration. . . . It has been held, however, that when an administrator takes possession of his or her decedent's real estate such possession relates back to the time of decedent's death. . . . Accordingly, in such a case the devisees are deemed never to have taken title and, consequently, an executor exercising his power to transfer property *does not transfer the title from the devisees, but from the estate*." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 433 n.28; see also *Scott* v. *Heinonen*, supra, 118 Conn. App. 588. Therefore, in *Scott*, this court concluded: "[T]he effect of the order of the Probate Court was to grant to the plaintiff, as executor, the right to possess and to control the property so as to make it marketable. Ergo, because the plaintiff as executor is entitled to possession and control of the property, *the specific devisees are deemed never to have taken title*." (Emphasis in original.) *Scott* v. *Heinonen*, supra, 588.

In the present case, as we stated previously in this opinion, the administrators of the estate of E. Louise Bradley conveyed lots 6, 8, 9, 10, 20, 21 and 22 in July and October, 1955. The deeds conveying all seven of those lots contain the following relevant language: "[U]pon written application of Gershom B. Bradley and Jeanette Bradley Hughes, Administrators of the Estate of Emma Louise Bradley, late of Westport, in [the] District [of Westport], deceased, praying that the [Probate] Court order the sale of certain real estate owned by the decedent, and empowering them as such Administrators to sell and convey the same, the said Administrators were ordered, authorized and empowered to sell any and all of the said real property described in the

inventory of said estate, at private sale, and give a deed of conveyance thereof . . . .'' Thus, it is apparent from the language in the deeds that the Probate Court authorized the administrators of the estate of E. Louise Bradley to sell certain of the real property that was part of the estate, similar to what had occurred in *Scott* v. *Heinonen*, supra, 118 Conn. App. 582. It necessarily follows that, in light of the principles set forth in *Scott* and *Stepney Pond Estates, Ltd.*, when those administrators were authorized to sell the real property included within the inventory of the estate, they had a right to immediate possession and control of such property, which related back to the time of E. Louise Bradley's death, and her heirs are deemed never to have taken title to the property. As a result, when the administrators sold lots 6, 8, 9, 10, 20, 21 and 22, the conveyances were from the estate, not the heirs. See *Stepney Pond Estates, Ltd.* v. *Monroe*, supra, 260 Conn. 433 n.28. Accordingly, the plaintiffs' claim fails.

We conclude that the lack of a common grantor or evidence of an intent by a common grantor to convey all thirteen of the Westport lots subject to a common plan to restrict development to only single-family houses weighs significantly against our concluding, as a matter of law, that a common plan exists; nevertheless, we briefly discuss the remaining three factors. With respect to the second factor, the existence of ''a map of the entire tract . . . at the time of the sale of one of the parcels''; (internal quotation marks omitted) *Abel* v. *Johnson*, supra, 340 Conn. 256; map 3802 had been recorded in the Westport land records prior to the conveyance of any of the Westport lots. As we indicated previously, however, that map contains no indication of any restrictions on the lots and, thus, does little to advance the plaintiffs' argument. Concerning the third factor, the Westport lots have single-family homes constructed on them. We agree with the trial

court that this factor "does not, by itself, demonstrate an intent to create a common plan as defined in our case law." The fourth factor asks whether "substantial uniformity exists in the restrictions imposed in the deeds executed by the grantor." (Internal quotation marks omitted.) *Abel* v. *Johnson*, supra, 256. This factor does weigh in favor of the plaintiffs, as the deeds to eleven of the thirteen Westport lots, albeit from various grantors, contain identical language concerning the single-family house restriction.

We turn next to an examination of the factors that evidence a lack of a common plan for development,[19] which include "(1) the grantor retains unrestricted adjoining land; (2) there is no plot of the entire tract with notice on it of the restrictions; and (3) the common grantor did not impose similar restrictions on other lots." (Internal quotation marks omitted.) Id. It is not disputed that the second factor exists, that is, that there is no map of the thirteen Westport lots with notice of the single-family house restriction on it. In the absence of a common grantor, an analysis of the first and third factors concerning the actions of the common grantor is not necessary.

After examining the factors concerning the presence or absence of an intent to create a common plan of development by a common grantor, we conclude that there was no intent to create a common plan restricting development of the Westport lots to single-family houses only. Our case law makes clear that the existence of a common plan must stem from the intent of

[19] The plaintiffs also claim that the court misapplied the law relevant to the factors that help negate the existence of a common plan of development. See *Abel* v. *Johnson*, supra, 340 Conn. 256. In making this claim, the plaintiffs focus on the court's application of those factors to the Norwalk lots. In light of the plaintiffs' claim on appeal that the Norwalk lots are not relevant to the issue of a common plan for the Westport lots, as well as our determination that a common plan does not exist with respect to the Westport lots, we need not address this claim, as any error is immaterial to our analysis.

a common grantor to impose uniform restrictions on an entire tract of land. The absence of a common grantor, therefore, is dispositive to any such claim of a common plan. Furthermore, the claim of a common plan is undermined by the fact that the administrators of the estate of E. Louise Bradley, in subdividing the land and recording map 3802 in the Westport land records, did not indicate on the map that the lots were subject to any restrictions, nor did they record a declaration of restrictive covenants. See *DaSilva* v. *Barone*, supra, 83 Conn. App. 371. The fact that those administrators conveyed seven of the thirteen Westport lots with the single-family house restriction does not demonstrate an intent to so restrict all thirteen lots, nor does the fact that *subsequent owners* conveyed four of their six lots subject to a similar restriction. "Restrictive covenants, being in derogation of the common-law right to use land for all lawful purposes which go with title and possession, are not to be extended by implication." (Internal quotation marks omitted.) Id., 376. We therefore agree with the trial court's conclusion that "the undisputed facts demonstrate no question of fact that a uniform common plan does not exist in this case."

In summary, we conclude that no common plan of development exists in this case with respect to the Westport lots. In light of the parties' stipulation that such a conclusion is dispositive of the plaintiffs' action against the defendant, the court properly granted the defendant's motion for summary judgment and denied the plaintiffs' motion for summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* ANASTASIA AMELIO ET AL.
(AC 45036)

Elgo, Suarez and Clark, Js.

Syllabus

The defendant C appealed to this court from the trial court's judgment of strict foreclosure for the plaintiff. Prior to the start of the foreclosure trial, C, who was self-represented at that time, filed a motion to dismiss that, inter alia, challenged the plaintiff's standing to bring the action. During argument on C's motion to dismiss in February, 2020, the plaintiff's counsel produced what he asserted was the original note, along with a redacted copy of the note. C objected to the authenticity of the note and articulated his concern that the note was fabricated. After examining the note and hearing C's argument, the court overruled C's objection, accepted the authenticity of the note, and admitted the copy of the note into evidence as a full exhibit. Thereafter, the court denied C's motion to dismiss and proceeded with trial. After a lengthy delay due to the foreclosure moratorium precipitated by the COVID-19 pandemic, the trial resumed in April, 2021, via videoconference, at which C was represented by counsel. During the direct examination of the mortgage servicer, the plaintiff's counsel referred to the copy of the original note without objection from C and held the original note up to the videoconferencing camera. Prior to conducting his cross-examination of the mortgage servicer, C's counsel made a request on the record to inspect the original note. The plaintiff's counsel objected, arguing that the time for discovery had passed. The court reserved ruling on C's request until the next trial session. Two days prior to the third trial session, in July, 2021, C attempted to serve a subpoena on the plaintiff's counsel, seeking to have the plaintiff produce a witness for the resumption of trial to provide testimony on the history of the transfer of ownership of the original note and any and all transfers of possession of the original note. In his subpoena, C also requested, inter alia, that the plaintiff produce the original note in court for inspection. In response, the plaintiff filed a motion to quash C's subpoena. The plaintiff argued that the original note had previously been provided to the court and that the plaintiff had established at trial that it was the holder of the note, and, therefore, the plaintiff was not required to produce a history of the note transfers. The court granted the plaintiff's motion to quash on the grounds of improper service and lack of relevance regarding the request for a historical recitation of the note transfers. After the court granted the plaintiff's motion to quash, it addressed C's April, 2021 midtrial request to inspect the original note, on which the court had previously reserved its ruling. C's counsel then further argued for the

ability to inspect the note, notifying the court that C was prepared to retain an expert to testify regarding the authenticity of the note, although C had yet to retain such an expert for the July, 2021 trial session. The court denied C's request to inspect the note after equating it to an informal discovery request and, again, emphasized that the court had already decided the standing issue on the first day of trial in February, 2020. Thereafter, C declined to present evidence and the trial concluded. In August, 2021, the plaintiff filed a motion for a judgment of strict foreclosure, and the day before the hearing on the motion in September, 2021, C filed a motion for order to allow inspection of the original promissory note. The court denied C's motion, again reiterating that the authenticity of the original note had already been decided by the court in February, 2020. The court thereafter granted the plaintiff's motion for judgment of strict foreclosure. *Held* that the trial court did not abuse its discretion in denying C's motion for order to allow inspection of the original promissory note: the court had afforded C the opportunity to inspect the original note during trial, it also examined the note and heard C's repeated arguments regarding the authenticity of the note, and, after it found the note to be authentic, the court reiterated throughout the course of the trial that the authenticity of the original note had been established on the first day of trial and that the court had decided the issue of standing at that time; moreover, when the court denied C's midtrial request to inspect the note, the court afforded C the opportunity to argue why the court should allow a midtrial discovery request, it considered the length of the trial, which had spanned one year and five months from the date it began, and the fact that C had the opportunity to confer with the plaintiff and request to inspect the note but, instead, chose to subpoena the plaintiff to inspect the note days before the resumption of trial; furthermore, the court also considered it to be significant that C did not retain an expert to inspect the note in preparation for trial despite an ample amount of time to do so and did not present any evidence to rebut the plaintiff's prima facie case.

Argued January 4—officially released August 29, 2023

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *J. Moore*, *J.*, denied the motion for order to allow inspection of the original note securing the mortgage filed by the defendant Carmine Amelio; thereafter, the court, *J. Moore*, *J.*, granted the plaintiff's motion for judgment of strict foreclosure

and rendered judgment thereon, from which the defendant Carmine Amelio appealed to this court. *Affirmed.*

Thomas P. Willcutts, for the appellant (defendant Carmine Amelio).

Jeffrey M. Knickerbocker, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant Carmine Amelio[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, Deutsche Bank National Trust Company, as Trustee for Residential Asset Securitization Trust 2007-A6 Mortgage Pass-Through Certificates Series 2007-F. On appeal, the defendant claims that the court improperly denied his motion for an order to allow inspection of the original promissory note in accordance with Practice Book § 23-18.[2] We affirm the judgment of the trial court.

[1] When the subject mortgage was executed in 2007, the defendant was married to the nonappearing codefendant Anastasia Amelio. The couple has since divorced, and Anastasia Amelio has no current interest in the subject property. The other codefendants, Russell Boon Rhea and OneWest Bank, N.A., are not participating in this appeal. For clarity, we refer to Carmine Amelio as the defendant in this opinion.

[2] In his principal appellate brief, the defendant frames his claim as follows: "Given that a proper adjudication of the defendant's challenge directed to the plaintiff's standing required inspection of the original mortgage note by a document expert, the trial court erred in failing and refusing to arrange and/or order that such an inspection be had by the defendant." We interpret the defendant's claim as challenging only the court's denial of his motion for an order to allow inspection of the original note. Significantly, the defendant has not appealed from the judgment of the trial court denying his February 18, 2020 motion to dismiss, in which the court expressly found that the plaintiff had standing to maintain this foreclosure action. Instead, the defendant merely references in his appellate brief a prospective intention to challenge standing had his motion been granted. As such, the defendant has neither distinctly raised nor adequately briefed such a claim on appeal. See *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022) ("We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only

The following facts, as found by the trial court, and procedural history are relevant to the resolution of this appeal. On or about February 8, 2007, Anastasia Amelio executed a note promising to repay $464,000 to Quicken Loans, Inc. To secure the note, Anastasia Amelio and the defendant executed a mortgage on February 8, 2007, for property located at 32 Main Street in New Milford (property). The mortgage deed was recorded on the New Milford land records on February 8, 2007. It is undisputed that Anastasia Amelio has been in default of the note due to nonpayment of principal and interest since January 1, 2014. Although proper notice of the arrearages was sent to the defendant and Anastasia Amelio in accordance with the terms of the mortgage, they did not cure the default.

On January 7, 2015, the plaintiff filed its summons and complaint against the defendant to foreclose on the property. In its complaint, the plaintiff alleged that, "[o]n or before July 11, 2014, the plaintiff became and at all times since then has been the party entitled to collect the debt evidenced by said note and is the party entitled to enforce said mortgage." On September 18, 2015, the self-represented defendant filed his answer, alleging seven special defenses and four counterclaims. The plaintiff subsequently filed an answer and three special defenses to the defendant's counterclaims.

When the defendant failed to file a response to those special defenses, the plaintiff filed a motion for a judgment of nonsuit against the defendant. By order dated December 2, 2019, the court granted the plaintiff's

cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Internal quotation marks omitted.)). Therefore, the only issue properly before us in this appeal is whether the court improperly denied the defendant's motion for an order to allow inspection of the original note.

motion. In so doing, the court expressly found that "[t]he actions of the defendant . . . demonstrate that the defendant's strategy in this case is to delay." The court thus ordered the plaintiff to file a case flow request to schedule "a trial date in this matter to take place within the next two months."

Approximately one week before the start of trial, the defendant filed a motion to dismiss on February 18, 2020, which, inter alia, presented a challenge to the plaintiff's standing but contained no reference as to whether the plaintiff was in possession of the original note. The court heard argument on the defendant's motion to dismiss when trial commenced on February 26, 2020. At that time, the plaintiff's counsel produced both what he asserted was the original note and a copy of the note. The defendant objected to the authenticity of the note and articulated his concern that the note was fabricated. The court overruled the defendant's objection. In so doing, the court accepted the authenticity of the note and admitted the copy of the note into evidence as a full exhibit labeled exhibit 2. The court further stated for the record that it found exhibit 2 to be a copy of the original note. When the defendant continued to argue that the note was not authentic, the court expressly found that "[t]he plaintiff has presented the original note to the court in this case." Upon additional and persistent argument by the defendant, the court reiterated that "the plaintiff had brought to court and presented before the court the original note in this case and a copy of it has been made a court exhibit, which the court finds to be an identical copy except for the redaction of personal identifying information." Thereafter, the court denied the defendant's motion to dismiss and proceeded with trial.

After a lengthy delay due to the foreclosure moratorium precipitated by the COVID-19 pandemic, the trial resumed on April 30, 2021, via videoconference, at

which the defendant was represented by legal counsel. During the direct examination of the mortgage servicer, the plaintiff's counsel referred to the copy of the original note without objection from the defendant, which copy previously had been admitted into evidence as exhibit 2. At that time, the plaintiff's counsel stated: "I would ask the court to look at the original, but we're doing this via teleconference." The record reflects that the plaintiff's counsel then held the original note up to the videoconferencing camera for the court to view.

Prior to conducting his cross-examination of the mortgage servicer, the defendant's counsel made a request on the record to inspect the original note that the plaintiff's counsel held up during the direct examination. The plaintiff's counsel objected, arguing that "[t]he time for discovery has come and gone. . . . Today's the day of trial." The defendant's counsel responded that, "[b]ut for us being on a videoconference . . . that exhibit would be in court today and we would all be in court, and I would have the ability to then examine it in court, and it's just the peculiarity of our accommodating world circumstances that I don't have that opportunity. So that's the nature of my request." The court reserved ruling on the defendant's request and suspended any further argument on the issue of the note at that time. The court then suspended trial until the next session and ordered the parties to confer to determine if they could stipulate to any facts.

The trial resumed on July 16, 2021. At that time, the defendant's counsel notified the court that the defendant had agreed to withdraw his special defenses and counterclaims, thereby narrowing the issues in the dispute on liability to the defendant's challenge to the plaintiff's standing.

Two days prior to the July 16 resumption of trial, the defendant attempted to serve a subpoena on the

plaintiff's counsel seeking to have the plaintiff produce a witness for the resumption of trial to provide testimony on the history of (1) the transfer of ownership of the original note and (2) any and all transfers of possession of the original note. In his subpoena, the defendant also requested, inter alia, that the plaintiff produce the original note in court for inspection. In response, the plaintiff filed a motion to quash the defendant's subpoena, alleging that the defendant "did not do any discovery with respect to this case and has not produced any evidence to call the plaintiff's standing into question . . . ." The plaintiff further argued that the note previously was provided to the court and that the plaintiff had established at trial that it was the holder of the note, and, therefore, the plaintiff was not required to produce a history of the note transfers. When trial resumed, the court granted the plaintiff's motion to quash on the grounds of improper service and lack of relevance regarding the request for a historical recitation of the note transfers.

After the court granted the plaintiff's motion to quash, it addressed the defendant's April 30, 2021 midtrial request to inspect the original note, on which the court had previously reserved its ruling. The defendant's counsel then further argued for the ability to inspect the note, notifying the court that the defendant was prepared to retain an expert to testify regarding the authenticity of the note, although the defendant had yet to retain said expert for the July 16 trial session.[3] The court then denied the defendant's request to inspect the note after equating it to an informal discovery request and, again, emphasizing that the court had already decided the standing issue on the first day of trial on February 26, 2020. Thereafter, the defendant

[3] The record reflects that, at the April 30, 2021 trial session, the plaintiff rested its case-in-chief and the defendant requested more time to gather witnesses in preparation for the July 16, 2021 trial session.

declined to present evidence and the trial concluded. On August 17, 2021, the plaintiff filed a motion for a judgment of strict foreclosure.

On September 21, 2021, the court issued a memorandum of decision, in which it concluded that "the plaintiff has established, by a preponderance of the evidence, a prima facie case for foreclosure by showing that it is the present owner of the note and mortgage, that [the defendant and Anastasia Amelio] defaulted on the note and that the conditions precedent to foreclosure, as set forth in the note and mortgage, have been satisfied. Although [the defendant] filed a special defense of lack of standing, said defendant did not put forward any persuasive testimony in support of that defense. . . . Further, the court previously denied, on the record on the first day of trial, [the defendant's] motion to dismiss for lack of standing. The court also affirmatively found that day that the plaintiff had standing to proceed. . . . The plaintiff has, therefore, established a prima facie case of foreclosure against [the defendant and Anastasia Amelio] . . . . [They] did not rebut any aspect of this prima facie case at trial." (Citations omitted.) Accordingly, the court scheduled a hearing on the plaintiff's motion for judgment of strict foreclosure for September 24, 2021.

On September 23, 2021, the defendant filed a motion for an order to allow inspection of the original note. The court denied the defendant's motion, stating "[f]or the reasons set forth on the record, the authenticity of the original note had already been decided by the court on the first day of trial on [February 26, 2020] at approximately 11:30 and shortly thereafter. The defendant had raised the same issues contemplated by this motion to review the original note in other filings, including [the February 18, 2020] motion to dismiss . . . which the court denied on [February 26, 2020]. The defendant was aware that [the February 18, 2020 motion to dismiss]

had to be taken up by the court before proceeding further, in that it raised issues of subject matter jurisdiction, and yet retained no expert to appear in court that day. The defendant got to examine the note and make arguments about why he believed it was not authentic. The court also examined the note and denied the defendant's motion.

"The Administrative Judge of the Civil Division, based upon legal advice to the [Judicial] Branch, has permitted uploaded copies of notes in a remote proceeding, such as exhibit 2 in this case, to satisfy the 'original note' requirement of [§] 23-18 of the Practice Book in hearings considering motions for foreclosure since December, 2020." The court thereafter granted the plaintiff's motion for judgment of strict foreclosure on September 24, 2021, and set the law days to begin on January 31, 2022. From that judgment, the defendant now appeals.

On appeal, the defendant claims that the court improperly denied his motion for an order to inspect the original note pursuant to Practice Book § 23-18.[4] We disagree.

As a preliminary matter, we note our agreement with the court's well reasoned finding that the defendant's April 30, 2021 request on the record for the court to order inspection of the original note was a discovery request made in the middle of the second day of the trial. Specifically, the court stated that, "I do see this as a discovery request. . . . You're looking for additional information to pursue a defense . . . ." In his September 23, 2021 motion for order to allow inspection of

[4] Practice Book § 23-18 provides in relevant part: "(a) In any action to foreclose a mortgage where no defense as to the amount of the mortgage debt is interposed, such debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness, stating what amount, including interest to the date of the hearing, is due, and that there is no setoff or counterclaim thereto. . . ."

the original note, the defendant once again made the same discovery request that he originally advanced during trial. The defendant now challenges the propriety of the court's denial of that motion.

"We have long recognized that the granting or denial of a discovery request rests in the sound discretion of the [trial] court, and is subject to reversal only if such an order constitutes an abuse of that discretion." (Internal quotation marks omitted.) *CIT Bank, N.A.* v. *Francis*, 214 Conn. App. 332, 340, 280 A.3d 485 (2022). "In our review of the trial court's exercise of its discretion, we make 'every reasonable presumption . . . in favor of the correctness of its ruling.' " *Southbridge Associates, LLC* v. *Garofalo*, 53 Conn. App. 11, 22, 728 A.2d 1114, cert. denied, 249 Conn. 919, 733 A.2d 229 (1999).

After a careful review of the record, we cannot conclude that the court abused its discretion in denying the defendant's motion for order to allow inspection of the original note. As we previously recited, the court ruled on the authenticity of the original note during trial on February 26, 2020, at which time it considered the defendant's motion to dismiss on the grounds of standing and subject matter jurisdiction. At that time, the court afforded the defendant the opportunity to inspect the original note. The court also examined the note and heard the defendant's repeated arguments regarding the authenticity of the note. The court thereafter found the note to be authentic and denied the defendant's motion to dismiss. Moreover, the record reflects that, throughout the course of the three trial dates, the court reiterated that the authenticity of the original note was established in February, 2020, and that the court had decided the issue of standing at that time.

Additionally, on July 16, 2021, when the court denied the defendant's April 30, 2021 request to inspect the

note, the court afforded the defendant the opportunity to argue why the court should allow a midtrial discovery request, in which the defendant reasserted the issue of standing. In denying the defendant's discovery request, the court again stated that the issue of standing had already been decided in February, 2020. The court also specifically considered the length of the trial, which had spanned one year and five months from the date it began, and the fact that the defendant had the opportunity to confer with the plaintiff and request to inspect the note but, instead, chose to subpoena the plaintiff to inspect the note days before trial. The court also considered it to be significant that the defendant did not retain an expert to inspect the note in preparation for trial despite the ample amount of time to do so and did not present any evidence to rebut the plaintiff's prima facie case. The court subsequently relied on this very reasoning when it denied the defendant's September 23, 2021 motion for order to allow inspection of the note.

In light of the foregoing, we conclude that the court did not abuse its discretion in denying the defendant's motion for order to allow inspection of the original note.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

FRASER LANE ASSOCIATES, LLC *v.* CHIP FUND 7, LLC

CHIP FUND 7, LLC *v.* FRASER LANE ASSOCIATES, LLC

(AC 45274)

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

Syllabus

The defendant appealed to this court from the judgments of the trial court confirming an arbitration award for the plaintiff and denying the defendant's application to vacate the arbitration award. The parties had

entered into a power purchase agreement pursuant to which the defendant agreed, inter alia, to install solar panels on the roofs of condominiums that the plaintiff was developing. After delays in installation, the plaintiff demanded arbitration under the terms of the agreement. During a preliminary hearing, the arbitrator noted that the arbitration clause in the agreement required each party to submit a "last best offer" and that he would choose between the parties' proposals when issuing an award unless the parties agreed otherwise in writing. The defendant submitted a counterclaim to the arbitrator. Following an arbitration hearing, the parties submitted posthearing briefs and proposals. The plaintiff argued that a $200 per day liquidated damages provision agreed on by the parties was valid and reasonable and submitted a proposal of $210,000 to resolve its claim and $5348 to resolve the defendant's counterclaim. The defendant argued that the liquidated damages provision was an unenforceable penalty and submitted a proposal of $0 to resolve the plaintiff's claim and $294,211.49, with postjudgment interest, to resolve its counterclaim. The arbitrator issued a decision finding that the liquidated damages provision was enforceable under Connecticut law and selecting the plaintiff's proposal on the claim and counterclaim as the one most consistent with his findings. The defendant filed an application to vacate the award, and, in a separate action, the plaintiff filed an application to confirm the award. Thereafter, the court consolidated the two applications and, following a hearing, granted the application to confirm the award and denied the application to vacate, noting that the award was consistent with the submission and that the arbitrator acted in accordance with the parties' agreement. *Held*:

1. The defendant could not prevail on its claim that the arbitration award violated public policy because the award was made pursuant to an unenforceable liquidated damages provision and the plaintiff suffered no actual damages as a result of the defendant's breach: the defendant failed to submit to the trial court a sufficient record to prevail on its claim, as it did not provide the court with a copy of the liquidated damages provision, which was set forth in an email between the parties, or a transcript from the arbitration proceedings, which undisputedly were not transcribed; moreover, the defendant neither asked the arbitrator to articulate the basis for his conclusion that the liquidated damages provision satisfied the requirement for enforceability nor asked the court to order the arbitrator to make such an articulation, and the defendant failed to cite to any relevant authority in support of its argument that, in the absence of such findings by the arbitrator, the court was required or permitted to conduct an evidentiary hearing for the purpose of making its own findings of fact relative to the defendant's public policy challenge to the award; furthermore, the defendant could not prevail on its claim that the court improperly denied it the opportunity to submit the complete arbitral record, as the court issued an order that gave both parties sufficient opportunity to submit material from the arbitration and notice

that the court would potentially decide the applications on the same date that it heard oral argument, the defendant's challenge to the liquidated damaged provision primarily relied on the testimony of witnesses during the arbitration, the proceedings of which were not transcribed, and the defendant did not provide the court with anything resembling an undisputed summary of the evidence before the arbitrator.

2. The defendant could not prevail on its claim that the arbitrator exceeded his authority under the arbitration provisions of the agreement: because there was no record of the defendant raising objections at the arbitration to the arbitrator's instruction to the parties to submit separate proposals for each claim, the defendant failed to produce sufficient evidence to invalidate the arbitrator's award on this ground; moreover, the defendant's claim that the plaintiff's arbitration demand failed to comply with the requirements set forth in the agreement was inadequately briefed and deemed abandoned, as the defendant's argument was devoid of any legal citation or analysis; furthermore, the defendant could not prevail on its claim that the arbitrator exceeded the scope of his powers by selecting a proposal that was outside the scope of the submission made to him, as the arbitrator, by selecting a party's proposal for the claim and counterclaim and awarding damaged accordingly, did precisely what the agreement required.

3. The defendant's claim that the arbitrator manifestly disregarded the law in selecting a proposal that was not supported by any legal or factual basis was inadequately briefed and deemed abandoned, as the defendant failed to cite to any legal authority in support of its claim or to provide any meaningful analysis.

Argued February 6—officially released August 29, 2023

Procedural History

Application, in the first case, to confirm an arbitration award and, in the second case, application to vacate an arbitration award, brought to the Superior Court in the judicial district of Fairfield, where the applications were consolidated and tried to the court, *Hon. Dale W. Radcliffe*, judge trial referee; judgments granting the application to confirm the award and denying the application to vacate the award, from which the defendant appealed to this court. *Affirmed.*

David C. Shufrin, for the appellant (defendant in the first case; plaintiff in the second case).

James J. Healy, with whom was *Brennen Maki*, for the appellee (plaintiff in the first case; defendant in the second case).

Opinion

CLARK, J. The defendant, Chip Fund 7, LLC, appeals from the judgments of the trial court confirming an arbitration award in favor of the plaintiff, Fraser Lane Associates, LLC, and denying the defendant's application to vacate an arbitration award.[1] On appeal, the defendant argues that the trial court erred because (1) the arbitration award violates public policy, (2) the arbitrator exceeded his authority under the arbitration agreement, and (3) the arbitrator manifestly disregarded the law. We disagree and, accordingly, affirm the judgments of the trial court.

The following undisputed facts and procedural history are relevant to our disposition of this appeal. In March, 2016, the parties entered into a power purchase agreement pursuant to which the defendant agreed to install, operate, and maintain solar panels on the roofs of twenty condominiums in a residential development that the plaintiff was in the process of developing, and the plaintiff agreed to pay the defendant for all the electricity that the panels produce for twenty years (agreement). Section 23 (c) of the agreement provides in relevant part that "[a]ny [d]ispute that is not settled to the mutual satisfaction of the [p]arties [through negotiation or mediation] shall . . . be settled by binding arbitration . . . ."

[1] As explained subsequently in this opinion, each party commenced a separate action in the judicial district of Fairfield. In docket number CV-21-6110418-S, Fraser Lane Associates, LLC, is the plaintiff, and Chip Fund 7, LLC, is the defendant. In docket number CV-21-6110217-S, Chip Fund 7, LLC, is the plaintiff, and Fraser Lane Associates, LLC, is the defendant. For convenience, we refer to Fraser Lane Associates, LLC, as the plaintiff and to Chip Fund 7, LLC, as the defendant.

On September 30, 2020, the plaintiff filed a demand for arbitration with the American Arbitration Association pursuant to § 23 (c) of the agreement and served a copy of that demand on the defendant. The demand stated: "Installation of solar panel system on residential condominium development. After serious delays, [the defendant] agreed to a $200 per diem penalty for every day work was not completed after [January 28, 2018]. Work is still not completed."

The parties subsequently selected Attorney Louis R. Pepe as the arbitrator. At a preliminary hearing on December 7, 2020, the arbitrator noted that the arbitration clause in the agreement required each party to submit to him its "last best offer" to resolve the claims and required him to choose between the parties' proposals when issuing an award. He made clear that he would follow that procedure unless the parties agreed otherwise in writing.[2]

On January 15, 2021, the defendant filed an objection to the plaintiff's arbitration demand, arguing that the demand failed to comply with the procedure set forth in § 23 (c) (2) of the agreement.[3] On the same day,

[2] Section 23 (c) (5) of the agreement states: "Upon ten (10) days of completion of the hearing conducted by the [arbitrator], each [p]arty shall submit to the [arbitrator] its proposal for resolution of the dispute. The [arbitrator] in its award shall be limited to selecting only one of the two proposals submitted by the [p]arties. The award shall be in writing (stating the amount and reasons therefore) and shall be final and binding upon the [p]arties, and shall be the sole and exclusive remedy between the [p]arties regarding any claims and counterclaims presented to the [arbitrator]. The [arbitrator] shall be permitted, in [his] discretion, to add pre-award and post-award interest at commercial rates. Judgment upon any award may be entered in any court having jurisdiction."

[3] Section 23 (c) (2) of the agreement provides that "[t]he [p]arty initiating the [a]rbitration . . . shall submit such [d]ispute to arbitration by providing a written demand for arbitration to the other [p]arty . . . which demand must include statements of the facts and circumstances surrounding the dispute, the legal obligation breached by the other [p]arty, the amount in controversy and the requested relief, accompanied by all relevant documents supporting the [d]emand."

the defendant also submitted a counterclaim to the arbitrator, alleging that the plaintiff had failed to pay for the solar panels' electricity and that the plaintiff owed an ongoing obligation to pay for the electricity until the purchasers of each condominium executed a guarantee to assume the plaintiff's obligation. The counterclaim asserted, inter alia, claims of breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment.

On July 12, 2021, a five day arbitration hearing commenced, during which the parties introduced evidence that included live witness testimony and exhibits. There is no transcript of the arbitration hearing. At the conclusion of the hearing, the arbitrator reminded the parties of the agreement's last best offer provision, made clear his intention to follow it, and suggested that they be strategic in submitting their respective proposals for resolution. The arbitrator also reminded the parties in his July 19, 2021 scheduling order that, in accordance with the parties' agreement, they should submit with their briefs a "last best offer" for resolution of the plaintiff's claim and the defendant's counterclaim.

On August 9, 2021, the parties submitted their respective posthearing briefs and proposals for resolution of the dispute. The plaintiff argued in its brief that the $200 per day liquidated damages provision, which the parties agreed to verbally and subsequently set forth in an email, was valid and reasonable because the potential damages stemming from the delay—buyers walking away, reputational damage, and condominiums being less marketable—were uncertain in amount and difficult to prove. The plaintiff submitted a proposal of $210,000 to resolve its claim and $5348 to resolve the defendant's counterclaim. The defendant argued in its brief that the liquidated damages provision was a penalty, and therefore unenforceable, because $200 per day was not commensurate with the anticipated damages

and that, even if the provision itself did not constitute an unenforceable penalty, enforcement of the provision would violate public policy because the plaintiff suffered no actual damages. The defendant submitted a proposal of $0 to resolve the plaintiff's claim and $294,211.49 to resolve its counterclaim, with postjudgment interest at a rate of 10 percent.

On September 2, 2021, the arbitrator issued an award. Regarding the plaintiff's claim, the arbitrator found that the parties "amended [the agreement] to add a liquidated damages provision making [the defendant] liable for damages of $200 per day if the installation of [the] solar panels in question was not finished by an agreed-upon date." He also found "that the liquidated damages provision satisfies the requirements for enforceability under Connecticut law; that it required the solar panels in question to be installed and operable—not just installed; and that [the defendant] failed to meet its obligations thereunder." The arbitrator selected the plaintiff's proposal as "the one most consistent with [his] findings . . . ." Regarding the defendant's counterclaim, the arbitrator found that the plaintiff breached the agreement in one or more ways, but he ultimately selected the plaintiff's proposal for that claim as well because he determined that "[the plaintiff's] proposal more closely approximates the resulting damages sustained by [the defendant]." Thus, the arbitrator awarded $210,000 to the plaintiff and $5348 to the defendant, both without interest. The parties were also ordered to split evenly the administrative fees associated with the arbitration and the arbitrator's compensation.

On October 4, 2021, the defendant filed an application to vacate the arbitration award with the Superior Court, asserting that the arbitrator manifestly disregarded the law and exceeded his powers and that the arbitration award violates public policy. The defendant attached to its application a copy of the agreement, the arbitration

award, and the arbitrator's July 19, 2021 scheduling order. The defendant also requested a show cause hearing as to why the application should not be granted. On October 12, 2021, in a separate action, the plaintiff filed an application to confirm the arbitration award. On October 27, 2021, the plaintiff moved for judgment in its favor. The defendant objected to that motion on November 8, 2021.

On November 9, 2021, the trial court, *Stevens*, *J.*, issued an order consolidating the two separate actions. That order further stated: "The parties shall file briefs in support of their positions by December 3, 2021; the parties shall file reply briefs by December 17, 2021. Any surreply brief may be filed by January 14, 2022. Caseflow shall schedule the cases for oral argument for a date after January 14, 2022."

On November 12, 2021, the plaintiff filed a memorandum of law in support of its application to confirm the arbitration award, arguing that the arbitration had been conducted in accordance with the agreement and that, despite the defendant's claim in its application to vacate that the plaintiff failed to prove that it suffered the precise amount of damages that were awarded, a last best offer arbitration award does not need to reflect with precision the actual damages suffered. The plaintiff also argued that the defendant failed to articulate a basis for overturning the arbitrator's determination that the liquidated damages provision was enforceable. The appendix to the plaintiff's memorandum of law contained the agreement, each party's proposal for resolution, and the arbitration award.

On December 7, 2021, the defendant filed a memorandum of law in support of its application to vacate the arbitration award. The defendant argued that enforcement of the arbitration award would violate public policy because the liquidated damages provision of the

agreement constituted an unenforceable penalty, the plaintiff suffered no actual damages and, even if the plaintiff had suffered some damages, the evidence did not support the amount that the arbitrator awarded the plaintiff. The defendant also argued that the manner in which the arbitrator solicited the parties' last best offers was improper because the arbitration provision of the agreement called for each party to submit one proposal, but the arbitrator required the parties to make one proposal for the plaintiff's claim and another for the defendant's counterclaim. The defendant argued in the alternative that, if the court found that the arbitrator did not err by accepting separate proposals for each claim, the arbitrator should have required separate proposals for the two counts of the defendant's counterclaim.

The appendix to the defendant's memorandum of law contained the parties' posthearing arbitration briefs, the plaintiff's demand for arbitration, a letter from the plaintiff's attorney to the defendant's attorney summarizing the arbitration claims, the defendant's objection to the plaintiff's arbitration demand, the arbitrator's July 19, 2021 scheduling order, the defendant's counterclaim, and a copy of the agreement.[4] The defendant's memorandum of law also included a footnote stating that "[the defendant] requests the opportunity to submit to the court the appropriate arbitral record, including each of the exhibits that were entered into evidence

[4] These documents, along with the arbitration award that the defendant attached to its initial motion to vacate, are the only record of the arbitration proceedings that the defendant provided to the trial court. Nevertheless, when the defendant filed its appellate brief with this court, it included a 739 page appendix comprised of 55 items, most of which were never submitted to the trial court. On August 30, 2022, the plaintiff filed a motion to strike 39 exhibits—more than 500 pages—of the defendant's appendix on the basis that the defendant never submitted those documents in the trial court. This court granted that motion on October 5, 2022, and ordered the defendant to file a substitute brief and appendix.

at the arbitration hearing. To the extent necessary to preserve its rights, [the defendant] hereby incorporates by reference herein each and every pleading, order, and exhibit submitted in the arbitration as if attached hereto."

On January 19, 2022, the court, *Hon. Dale W. Radcliffe*, judge trial referee, held a hearing on the parties' respective applications. At that hearing, the defendant argued that the court should vacate the arbitration award because the award of $210,000 to the plaintiff had no basis in fact. The plaintiff countered that the precise amount of actual damages suffered was irrelevant because this was a last best offer arbitration and the arbitrator's sole obligation was to choose one of the two offers before him, which he did. The court ultimately agreed with the plaintiff, granting the application to confirm and denying the defendant's application to vacate. In so ruling, the court noted that the arbitrator "select[ed] the proposal submitted by the [plaintiff] . . . on the first proposal in the amount of $210,000. And he did not award, as is discretionary in any award, prejudgment interest or postjudgment interest but awarded the $210,000. On the counterclaim, he found for [the defendant] and did so in the amount of $5348. He also found administrative fees and arbitrator's compensation . . . . The court finds that the award of the arbitrator, without making any determination as to the rectitude of the award from a factual standpoint . . . is consistent with the [restricted] submission . . . . The arbitrator was limited to selecting one of the two proposals submitted and . . . he acted in accordance with . . . [§] 23 (c) [paragraph] 5 of the agreement between the parties. So . . . both the award and the award by way of counterclaim, along with the costs, are confirmed."

After the court ruled, the defendant's counsel asked the court for "a factual hearing on the de novo review

of the . . . award for purposes of public policy." The court responded: "No, I'm not going to take up the de novo review of the award. That's the purpose of arbitration . . . to make an award, and the court is limited to determining whether [the award] is within the [scope of the] agreement. I've done that. . . . [I]t seems to me, after reading all of your briefs and the award itself, that the arbitrator has adhered to the arbitration [provision of the] agreement. He has adhered to the contract between the parties, which requires . . . a last best offer. And the court is not charged, in review of an arbitration proceeding, with a trial de novo on the issues that were fully and fairly litigated after many days by the arbitrator chosen mutually by the parties." This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the arbitration award violates public policy because the award was made pursuant to an unenforceable liquidated damages provision[5] and because the plaintiff suffered no actual damages as a result of the defendant's breach. Although the defendant failed to ask the arbitrator to clarify or articulate his finding "that the liquidated damages provision satisfies the requirements for enforceability under Connecticut law" and failed to submit to the trial court a complete record from the arbitration, including a transcript of the witness testimony on which it relies for its claims, it nevertheless contends that the court should have vacated the award on public policy grounds. In its view, the trial court erred by failing to undertake a de novo review of the arbitration award. The plaintiff counters that the defendant failed to demonstrate to

[5] The arbitrator concluded that the liquidated damages provision, which the parties agreed to after entering into the original agreement, was an amendment to the agreement. Neither party challenged that conclusion in the trial court or in this appeal.

the trial court that the award violates public policy and that, on appeal, the defendant relies entirely on evidence from the arbitration that was never submitted to the trial court. We agree with the plaintiff.

We first set forth our standard of review and the legal principles governing a claim that an arbitration award violates public policy. Our Supreme Court has "consistently stated that arbitration is the favored means of settling differences and arbitration awards are generally upheld unless an award clearly falls within the proscriptions of [General Statutes] § 52-418[6] . . . . A challenge of the arbitrator's authority is limited to a comparison of the award to the submission. . . . Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . .

"In spite of the general rule that challenges to an arbitrator's authority are limited to a comparison of the award to the submission, an additional challenge exists under § 52-418 (a) (4) when the award rendered is claimed to be in contravention of public policy. . . . This challenge is premised on the fact that the parties cannot expect an arbitration award approving conduct which is illegal or contrary to public policy to receive

[6] General Statutes § 52-418 provides in relevant part: "(a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. . . ."

judicial endorsement any more than parties can expect a court to enforce such a contract between them. . . . When a challenge to the arbitrator's authority is made on public policy grounds, however, the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award. . . . Accordingly, the public policy exception to arbitral authority should be narrowly construed and [a] court's refusal to enforce an arbitrator's interpretation of [the contract] is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. . . . *The party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated.* . . . Therefore, given the narrow scope of the public policy limitation on arbitral authority, [*a party*] *can prevail* [*on that basis*] *only if it demonstrates that the* [*arbitrator's*] *award clearly violates an established public policy mandate.* . . .

"In *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 429, 747 A.2d 1017 (2000), [our Supreme Court] held that, where a party challenges a consensual arbitral award on the ground that it violates public policy, and where that challenge has a legitimate, colorable basis, de novo review of the award is appropriate in order to determine whether the award does in fact violate public policy. [It] also stated in *Schoonmaker*, however, that, [b]y no means should our decision be viewed as a retreat of even one step from our position favoring arbitration as a preferred method of dispute resolution. . . . [O]ur faith in and reliance on the arbitration process remains undiminished, and we adhere to the long-standing principle that findings of fact are ordinarily left undisturbed upon judicial

review. . . . We conclude only that as a reviewing court, we must determine, pursuant to our plenary authority and giving appropriate deference to the arbitrator's factual conclusions, whether the [contract] provision in question violates those policies. . . . Thus, [the] court held that it would not substitute its judgment for the judgment of the arbitrator with respect to the meaning of the contract. . . .

"It is clear, therefore, that . . . *Schoonmaker* is in no way inconsistent with the principle that, [w]hen a challenge to the arbitrator's authority is made on public policy grounds . . . the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award. . . . Thus, when the issue before the arbitrator involves the interpretation of [an] agreement, the court presumes the correctness of the arbitrator's interpretation, even when the award implicates some public policy. . . . Accordingly, the sole question that the court must decide, in the exercise of its plenary power to identify and apply the public policy of this state . . . is whether, under the arbitrator's presumptively correct interpretation of the contract, the *contract provision* violates a well-defined and dominant public policy. . . .

"The courts employ a two-step analysis . . . [in] deciding cases such as this. First, the court determines whether an explicit, well-defined and dominant public policy can be identified. If so, the court then decides if the arbitrator's award violated the public policy." (Citations omitted; emphasis altered; footnote added; internal quotation marks omitted.) *State* v. *AFSCME, Council 4, Local 391*, 309 Conn. 519, 526–29, 69 A.3d 927 (2013).

In this case, the arbitrator found that the liquidated damages provision satisfies the requirements for enforceability under Connecticut law. In the trial court

and on appeal, the defendant argues that the arbitrator was wrong and that the award violates public policy because the liquidated damages provision constitutes an unenforceable penalty and the plaintiff suffered no actual damages. We disagree.

Although an arbitration award that enforces a penalty clause violates public policy; see generally *HH East Parcel, LLC* v. *Handy & Harman, Inc.*, 287 Conn. 189, 205, 947 A.2d 916 (2008); a liquidated damages clause is not an unenforceable penalty "if three conditions are satisfied: (1) The damage which was to be expected as a result of a breach of the contract was uncertain in amount or difficult to prove; (2) there was an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated was reasonable in the sense that it was not greatly disproportionate to the amount of the damage which, as the parties looked forward, seemed to be the presumable loss which would be sustained by the contractee in the event of a breach of the contract." (Internal quotation marks omitted.) Id. "In determining whether any particular provision is for liquidated damages or for a penalty, the courts are not controlled by the fact that the phrase 'liquidated damages' or the word 'penalty' is used." *Berger* v. *Shanahan*, 142 Conn. 726, 731–32, 118 A.2d 311 (1955).

The defendant argues that the liquidated damages provision at issue was an unenforceable penalty because the plaintiff's president testified during the arbitration that he wanted there to be a penalty for the defendant if it continuously delayed installing the solar panels; the amendment "was the product of threats and verbal assaults that occurred more than a year and a half after the contract was signed"; the amount that the plaintiff's president proposed, $200 per day, was divorced from any calculation of potential damages; and the plaintiff "intended for the . . . penalty to continue even after [it] no longer owned any of the relevant

condominium units . . . .'' The plaintiff, on the other hand, contends that the defendant's claims are not reviewable because the defendant failed to provide the trial court with any transcripts of the arbitration testimony or a copy of the liquidated damages provision itself. The plaintiff argues that the defendant's claims also fail on the merits because the liquidated damages provision was not a penalty, arguing the damages resulting from the ongoing delay—reputational harm, loss of marketability of real estate, lower assessment of property values, and postsale customer dissatisfaction—were uncertain in amount at the time the parties amended the agreement.

As the party seeking to vacate the award on public policy grounds, the defendant bears the burden of demonstrating its claim that the award was made pursuant to an unenforceable penalty and that the plaintiff suffered no actual damages. See *State* v. *AFSCME, Council 4, Local 391*, supra, 309 Conn. 527 (''The party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated. . . . Therefore, given the narrow scope of the public policy limitation on arbitral authority, [a party] can prevail [on that basis] only if it demonstrates that the [arbitrator's] award clearly violates an established public policy mandate.'' (Internal quotation marks omitted.)). On the basis of our review of the record, it is clear that the defendant failed to submit to the trial court a sufficient record to prevail on its claim. It failed, for instance, to provide the court with a copy of the liquidated damages provision, which was set forth in an email between the parties. And, although it relies almost entirely on the testimony of witnesses who testified at the arbitration to support its claims, it failed to provide the court with a transcript from the arbitration proceedings. Indeed, it is undisputed that the proceedings were not transcribed.

On appeal, the defendant, in advancing its claim that the arbitration award violates public policy and that the trial court erred by failing to undertake a de novo review of the award, argues that the court erred when it denied (1) its request for an evidentiary hearing for the purpose of introducing new evidence, including live witness testimony, directly to the trial court; and (2) the opportunity to submit to the court the complete arbitral record. It also argues that, even in the absence of such evidence, there was sufficient evidence in the record for the court to have concluded that the award violates public policy. We disagree and address each argument in turn.

First, the defendant argues that it was entitled to an evidentiary hearing in this case because the arbitrator made no subordinate findings of fact in connection with his conclusion that the liquidated damages provision "satisfies the requirements for enforceability under Connecticut law." This claim is unavailing. If the defendant intended to challenge the arbitrator's finding concerning the enforceability of the liquidated damages provision, it should have asked the arbitrator to articulate the basis for that conclusion. See, e.g., *Arvys Protein, Inc.* v. *A/F Protein, Inc.*, 219 Conn. App. 20, 26, 293 A.3d 899 (noting that arbitration award challenger "did not make any requests to the arbitrator to clarify or articulate the award"), cert. denied, 347 Conn. 905, 297 A.3d 198 (2023). Alternatively, it could have asked the trial court to order the arbitrator to make such an articulation. See, e.g., *Stutz* v. *Shepard*, 279 Conn. 115, 122, 901 A.2d 33 (2006) (trial court remanded award to arbitrator for articulation). The defendant did neither.

Moreover, the defendant fails to cite any relevant authority in support of its argument that, in the absence of such findings by the arbitrator, the trial court was required, or even permitted, to conduct an evidentiary hearing for the purpose of making its own findings of

fact relative to the defendant's public policy challenge to the award. Our courts have made clear that a de novo review of an award in the context of a public policy challenge does not involve a trial court conducting an evidentiary hearing. See *HH East Parcel, LLC* v. *Handy & Harman, Inc.*, supra, 287 Conn. 201 n.11 ("[t]o the extent that the defendant claims that factual determinations by the arbitrators must be reviewed anew by a trial court reviewing a public policy claim . . . we already have rejected that proposition as an invitation to turn public policy challenges into the arbitration equivalent of a mulligan by inviting de novo factual review of illegal contract issues" (internal quotation marks omitted)). Rather, the court must conduct a de novo review of the arbitration award based on the record of the arbitration. See id., 201 ("[t]he legal determination of whether a particular award violates public policy *necessarily depends on the facts found by the arbitrator* during those proceedings" (emphasis in original; internal quotation marks omitted)). It is incumbent on the party challenging an award to furnish the court with an adequate record to resolve such a claim. See *Stutz* v. *Shepard*, supra, 279 Conn. 125.

The defendant's second argument—that the trial court improperly denied it the opportunity to submit the complete arbitral record—also fails. The court's November 9, 2021 order gave the defendant ample opportunity to submit the arbitral record in advance of oral argument.[7] That order required the parties to submit memoranda of law prior to oral argument. The defendant complied with that order and included a 202 page appendix with its memorandum. The order thus gave both parties sufficient opportunity to submit materials from the arbitration and notice that the court would potentially decide their respective applications

[7] We note that the defendant also could have appended the arbitration record to its initial application to vacate.

on the same date that it heard oral argument. We therefore reject the defendant's claim that the court erroneously precluded it from supplementing the record with additional materials from the arbitral record.

In addition, on the basis of the defendant's claims in the trial court and on appeal, we conclude that, even if we assumed, arguendo, that the defendant was improperly precluded from submitting a complete record of the arbitration proceedings, any such error would be harmless. The defendant's challenge to the liquidated damages provision relies primarily on the testimony of witnesses during the arbitration. As already noted, however, it is undisputed that the arbitration proceedings were not transcribed. Thus, the defendant would still be incapable of proving the claims asserted.

Finally, the defendant cites *State* v. *AFSCME, Council 4, Local 391*, supra, 309 Conn. 519, for the proposition that, even in the absence of any transcripts, the record in this case was sufficient to support his claim. In *AFSCME, Council 4, Local 391*, the state, which was a party to the underlying arbitration proceedings, failed to provide the court with arbitration transcripts. Id., 536 n.12. Instead, it provided the court with a letter that it had sent to the Office of the Attorney General summarizing the testimony elicited at the arbitration; id., 535; and the parties did not dispute that the letter accurately described the testimony given at the arbitration. Id., 536 n.12. Our Supreme Court concluded that this letter set forth testimony that was presented to the arbitrator and that the letter, in conjunction with the arbitration award, created a sufficient record for the trial court to determine that the award violated public policy and, accordingly, to vacate it. Id.

This case is readily distinguishable from *AFSCME, Council 4, Local 391*. Unlike in *AFSCME, Council 4,*

Local 391, where the party challenging the arbitration award provided a letter that accurately summarized the evidence presented to the arbitrator; id., 535–37 n.12; the defendant in this case did not provide the trial court with anything resembling an undisputed summary of the evidence before the arbitrator. Instead, the defendant made bare assertions to the trial court about the nature of the evidence from the arbitration and now repeats those same assertions in its appellate brief. The plaintiff also does not concede that the assertions the defendant relies on represent a complete and accurate record of the evidence that the arbitrator heard. On the contrary, the plaintiff contends that the record here is inadequate to review that claim because the defendant failed to submit transcripts from the arbitration. The plaintiff also argues that, even if the court were to accept the defendant's representations of the evidence supporting its position, additional evidence was presented during the arbitration that supported the arbitrator's determination that the liquidated damages clause is enforceable. Under these circumstances, we conclude that the defendant's characterization of the evidence before the arbitrator is an insufficient substitute for the complete arbitral record. See *State* v. *Santangelo*, 205 Conn. 578, 585, 534 A.2d 1175 (1987) ("[r]epresentations of counsel . . . are not evidence upon which we can rely"); see also *Stutz* v. *Shepard*, supra, 279 Conn. 128 ("[W]e do not decide issues of law in a vacuum. In order to review an alleged error of law that has evidentiary implications, we must have before us the evidence that is the factual predicate for the legal issue that the appellant asks us to consider." (Internal quotation marks omitted.)).

In the absence of a record supporting the defendant's claim that the award violates public policy, we conclude that the court properly rejected that claim. As a result, the defendant's claim that the award violates public policy fails.

II

The defendant also claims that the arbitrator exceeded his authority under the arbitration provisions of the agreement because (1) the arbitrator instructed the parties to submit multiple proposals, (2) the plaintiff's arbitration demand did not conform to the requirements of the arbitration agreement, and (3) the arbitrator selected a proposal that was outside the scope of the submission. We address those claims in turn.

A

The defendant first argues that the arbitrator deviated from the procedures set forth in the agreement by allowing the parties to submit separate proposals for each claim. It argues that, "when the arbitrator instructed the parties to each submit two separate proposals, the [defendant] objected and demanded that the arbitrator follow the agreement's call for one proposal from each party. The arbitrator overruled the [defendant's] objection. In response, the [defendant] argued that it should, at the very least, have the right to submit separate proposals for each distinct count of its counterclaim. Again, the arbitrator overruled the [defendant's] objection—stating that the [defendant] would have to make the 'difficult' decision as to which claim it would be pursuing."

As with the defendant's public policy claim, this claim is predicated on bare and unsupported assertions in its appellate brief. "Representations of counsel, however, are not evidence upon which we can rely in our review of the [arbitrator's] conduct." *State* v. *Santangelo*, supra, 205 Conn. 585. As discussed in part I of this opinion, the defendant failed to provide a record, including transcripts, of the arbitration proceedings to the trial court. Because there is no record of the defendant raising these objections at the arbitration, the defendant has failed to produce evidence sufficient to invalidate

the arbitrator's award on this ground. See *Stutz* v. *Shepard*, supra, 279 Conn. 126–27 (in absence of transcripts from arbitration, plaintiff "failed to [produce] evidence sufficient to invalidate the arbitrator's award" (internal quotation marks omitted)).

B

The defendant next argues that the plaintiff's arbitration demand failed to comply with the requirements set forth in the agreement because it failed to set forth the facts and circumstances surrounding the dispute or the obligation that the defendant breached. We decline to consider this argument because it is inadequately briefed.

"[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where 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.) *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 748, 183 A.3d 611 (2018); see also *Parnoff* v. *Stratford*, 216 Conn. App. 491, 506, 285 A.3d 802 (2022). Here, in its appellate brief, the defendant dedicated just two paragraphs to this argument, both devoid of any legal citations or analysis. Accordingly, we decline to review this claim because it has been abandoned by virtue of the defendant's failure to adequately brief it.

C

The defendant next argues that the arbitrator exceeded the scope of his powers by selecting a pro-

posal that was outside the scope of the submission made to him.[8] We disagree.

The defendant argues that "[b]oth the [plaintiff's] demand for arbitration and its letter summarizing its claims limited the dispute to a claim for 'a $200 per diem penalty for every day work was not completed after [January 28, 2018].' In order to be within the scope of the submission, any damages award must have been the result of the application of the liquidated damages clause to a specified number of days determined by the evidence before the arbitrator."

The language of the agreement, however, does not support the defendant's claim. Although the defendant

[8] On appeal, the defendant makes passing suggestions in its brief that the submission at issue was restricted, without explaining why that is material. We conclude that determining whether the submission is restricted or unrestricted would be a purely academic exercise in this case.

"The significance . . . of a determination that an arbitration submission was unrestricted or restricted is not to determine what [the arbitrator is] obligated to do, but to determine the scope of judicial review of what [he has] done." (Internal quotation marks omitted.) *LaFrance* v. *Lodmell*, 322 Conn. 828, 851–52, 144 A.3d 373 (2016). When a "submission is deemed restricted . . . [courts] engage in de novo review"; *Office of Labor Relations* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, 288 Conn. 223, 229, 951 A.2d 1249 (2008); whereas, "[u]nder an unrestricted submission, the [arbitrator's] decision is considered final and binding; thus the courts will not review the evidence considered by the [arbitrator] nor will they review the award for errors of law or fact." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, 331 Conn. 524, 531, 205 A.3d 552 (2019). However, "[i]f a party specifically contends . . . that the arbitrator's award does not conform to an unrestricted submission in violation of § 52-418 (a) (4), we engage in what we have termed in effect, de novo judicial review." (Internal quotation marks omitted.) *Office of Labor Relations* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, supra, 229. Here, the defendant claims that the award exceeds the scope of the submission. "Therefore, regardless of whether we engage in a threshold inquiry of whether the submission is restricted or unrestricted, the standard of review of and considerations related to the ultimate issue are essentially the same." Id., 231. Accordingly, we need not determine whether the submission was restricted or unrestricted in this case because de novo review applies regardless. See id., 230 ("[i]n light of . . . the issue presented in this case . . . the typical threshold question of whether the submission is restricted or unrestricted is academic").

correctly notes that the plaintiff's demand focused on the liquidated damages provision—namely, whether the defendant's inactions triggered the liquidated damages provision and, if so, the amount of damages to which the plaintiff was entitled—it ignores the terms of the agreement requiring the arbitrator to select "only one of the two proposals submitted by the [p]arties." After reviewing the arbitration award, we are satisfied that the arbitrator did not exceed the scope of his powers because he selected one of the two proposals before him on each of the claims. Specifically, the arbitrator selected the plaintiff's proposal for the claim and counterclaim and awarded damages accordingly. We therefore cannot conclude that the arbitrator exceeded the scope of his powers; the arbitrator did precisely what the agreement required.

III

The defendant's final claim on appeal is that the arbitrator manifestly disregarded the law in selecting a proposal that was not supported by any legal or factual basis. The plaintiff argues that the defendant failed to adequately brief this claim, noting that the defendant devoted less than one and one-half pages to the claim, cited no legal authority other than a case detailing the elements of manifest disregard, and provided only a cursory explanation of why those elements are met here. We agree with the plaintiff that the defendant's claim is inadequately briefed and, accordingly, deem this claim abandoned. See *MacDermid, Inc.* v. *Leonetti*, supra, 328 Conn. 748 ("[w]here 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)).

The judgments are affirmed.

In this opinion the other judges concurred.