STATE OF CONNECTICUT *v.* FRANKLIN FOSTER (AC 44043)

Cradle, Suarez and Seeley, Js.

Syllabus

The acquittee, who had been found not guilty of the crimes of burglary in the first degree, risk of injury to a minor, assault in the third degree and possession of weapon on school grounds, appealed to this court from the judgment of the trial court granting the state's petition seeking his continued commitment to the jurisdiction of the Psychiatric Security Review Board pursuant to statute (§ 17a-593). *Held*:

1. The trial court did not err in finding that the state met its burden under § 17a-593, governing continued commitment to the board, of establishing by clear and convincing evidence that the acquittee currently was mentally ill and posed a risk of imminent harm to himself or others: contrary to the acquittee's claim, the court's statements, in which it expressed concern for the welfare of schoolchildren and women, were not improper, as the court's references to the well-being of schoolchildren was logically linked to the offenses for which the acquittee was prosecuted, and the court did not suggest or explicitly state that the acquittee had engaged in subsequent acts of violence toward a schoolchild, and the court's reference to the well-being of women logically was related to the records of the acquittee's confinement that were submitted in evidence, those records reflecting that the acquittee's treatment history during his commitment included several instances in which he intimidated, inappropriately touched, or made socially inappropriate statements to female staff members; moreover, the court could have found that, although under his current level of board supervision the acquittee did not pose an imminent risk of physical injury to himself or others, it was likely that he would pose an imminent risk of physical injury to himself or others if he were to be released from the board's supervision entirely because the evidence before the court logically supported a finding that he would risk relapse once outside of his present controlled environment and present an imminent danger to himself or to others; furthermore, the acquittee was unable to demonstrate that the court

erred in determining, based on the board's report filed with the court, that he did not have a sufficient history of being in a conditional release status to support a conclusion that he could live in the community without board oversight.

2. The trial court did not improperly reject the acquittee's claim that the recommitment procedure to which he was subjected under § 17a-593, as applied to him, violated his right to equal protection guaranteed by the federal constitution: the acquittee failed to establish the necessary predicate for purposes of equal protection analysis, namely, that he was similarly situated to civilly committed inmates, for the acquittee, to have prevailed at his criminal trial on his insanity defense, had to prove that there was a nexus between his mental illness and his violent criminal conduct, and, in the civil commitment process, such a proven correlation between mental illness and criminal conduct did not need to exist, and the acquittee did not satisfactorily address the difference in circumstances; moreover, this court was not persuaded that, in light of the continued danger that the acquittee posed to others due to his mental illness, his progress in treatment or the fact that he had reached the end of his maximum term of confinement should have led it to conclude that he was similarly situated to inmates whose mental illness had not manifested in criminal conduct, and these facts did not alter the significance of the circumstances that led to the acquittee's commitment, let alone undermine the fact that his mental illness continued to pose a danger to society.

(*One judge concurring separately*)

Argued September 12, 2022—officially released February 7, 2023

Procedural History

Petition for an order extending the acquittee's commitment to the Psychiatric Security Review Board, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number one, where the court, *Hon. Richard F. Comerford, Jr.*, judge trial referee, denied the acquittee's motions to dismiss and to strike; thereafter, the matter was tried to the court, *Hon. Richard F. Comerford, Jr.*, judge trial referee; judgment granting the petition, from which the acquittee appealed to this court. *Affirmed.*

Richard E. Condon, Jr., senior assistant public defender, for the appellant (acquittee).

James M. Ralls, special assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Maureen Ornousky*, supervisory assistant state's attorney, for the appellee (state).

Opinion

SUAREZ, J. The acquittee, Franklin Foster, appeals from the judgment of the trial court granting the state's petition seeking his continued commitment to the jurisdiction of the Psychiatric Security Review Board (board) pursuant to General Statutes § 17a-593. The acquittee claims that the court improperly (1) found that the state had proven by clear and convincing evidence that he suffered from a mental illness resulting in his being a danger to himself or others and (2) rejected his claim that § 17a-593, as applied to him, violates his right to equal protection guaranteed by the federal constitution. We affirm the judgment of the trial court.

The following undisputed facts and procedural history underlie the present appeal. In 2002, following a trial before the court, *Hon. William F. Hickey, Jr.*, judge trial referee, the acquittee was found not guilty by reason of mental disease or defect under General Statutes § 53a-13 with respect to the following offenses: burglary in the first degree in violation of General Statutes (Rev. to 2001) § 53a-101 (a) (2); risk of injury to a minor in violation of General Statutes § 53-21 (a) (1); two counts of assault in the third degree in violation of General Statutes § 53a-61 (a) (1); and two counts of possession of a weapon on school grounds in violation of General Statutes § 53a-217b (a) (1). The facts underlying the offenses are not in dispute. On January 16, 2001, the acquittee, then twenty-four years old, entered a Greenwich middle school while in possession of two knives. In a school hallway, the acquittee slapped, punched, and kicked a male sixth grade student, and

he lifted a female sixth grade student over his head. The acquittee was on school grounds without permission and his violent conduct was unprovoked.[1] When the acquittee was asked by the police why he was at the school, he responded, "I'm here to fight the first person I see. Both of us were in the wrong place at the wrong time." On April 2, 2003, the court committed the acquittee to the jurisdiction of the board for a period of time not to exceed ten years, and the acquittee was subsequently admitted to a psychiatric hospital. By agreement of the parties, the acquittee's commitment was continued by the court for one year in 2013, two years in 2014, two years in 2016, and one year in 2018. On July 24, 2018, the acquittee was granted conditional release, at which time he was discharged from the hospital and began living in the community. His release in the community was conditioned upon his compliance with several requirements pertaining to his ongoing mental health treatment.

On July 9, 2019, the state filed a petition for continued commitment pursuant to § 17a-593. Therein, it alleged that "[t]he state is of the opinion that reasonable cause exists to believe that the acquittee continues to be a danger to himself or others if discharged" and that "without continued supervision by the board, [the acquittee] would quickly decompensate and become a risk." Thereafter, the acquittee filed a motion to dismiss the petition as well as an accompanying memorandum of law in which he relied on equal protection grounds. In broad terms, the acquittee argued that the recommitment procedure that applies to him as *a committed acquittee* pursuant to § 17a-593 differs from the recommitment procedure that applies to *civilly committed*

[1] Later, the board determined that, during the incident at issue, the acquittee was responding to "command auditory hallucinations that told him to assault a minor."

inmates pursuant to General Statutes § 17a-515.[2] Although the acquittee does not define the term "civilly committed inmates" with specificity, courts in prior cases have defined such persons as "mentally ill, convicted defendants who were transferred, pursuant to General Statutes §§ 17a-498 and 17a-515, to a psychiatric facility while they were serving their sentences, and whom the state seeks to commit to a similar institution after their sentences end." (Footnote omitted.) *State* v. *Dyous*, 307 Conn. 299, 301, 53 A.3d 153 (2012); see also *State* v. *Long*, 268 Conn. 508, 514, 847 A.2d 862 (defining "civilly committed inmates" as "convicted prisoners who subsequently are civilly committed to a mental hospital at some point after they have been incarcerated"), cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004). The acquittee also argued that such disparate treatment of similarly situated persons cannot withstand intermediate scrutiny under the equal protection clause of the federal constitution. On August 27, 2019, the board filed with the court a report in which it recommended that the acquittee's commitment be extended for a period of time not to exceed five years. On November 12, 2019, the acquittee filed a motion to

[2] Pursuant to § 17a-515, General Statutes § 17a-498, which codifies the involuntary civil commitment procedure, is made applicable to any person in the custody of the Commissioner of Correction. Our Supreme Court has explained that "[t]he procedure for extending an insanity acquittee's term of commitment to the [board] imposes greater burdens on individual liberty than does the civil commitment procedure applicable to civilly committed inmates, that is, mentally ill, convicted defendants who were transferred, pursuant to §§ 17a-498 and 17a-515, to a psychiatric facility while they were serving their sentences, and whom the state seeks to commit to a similar institution after their sentences end. Among other disparities between the two commitment schemes, the procedure for recommitting insanity acquittees directs the finder of fact to '[consider] that its primary concern is the protection of society'; General Statutes [Rev. to 2011] § 17a-593 (g); whereas the procedure for recommitting civilly committed inmates directs the finder of fact to '[consider] whether . . . a less restrictive placement is available . . . .' General Statutes § 17a-498 (c)." (Footnotes omitted.) *State* v. *Dyous*, 307 Conn. 299, 301, 53 A.3d 153 (2012).

strike the portion of the board's report filed with the court that recommended that the acquittee's commitment be extended for five years, and he referred to arguments that he made in his memorandum of law he filed in support of his motion to dismiss.

In December, 2019, the court, *Hon. Richard F. Comerford, Jr.*, judge trial referee, held a hearing related to the acquittee's motions and the state's petition. In oral rulings, the court denied the motion to dismiss the petition and the motion to strike the board's recommendation. On December 18, 2019, the court issued a memorandum of decision granting the state's petition to extend the acquittee's commitment, for a period of two years, until December 23, 2021.

On March 16, 2020, the acquittee filed the present appeal. On May 5, 2020, the acquittee filed a motion for rectification in which he argued that, in its memorandum of decision, the court mistakenly stated that he had been acquitted of two counts of possession of *a firearm* on school grounds, rather than two counts of possession of *a weapon* on school grounds. On September 30, 2020, the court held a rectification hearing, during which it stated that the acquittee's request for rectification was appropriate.

On March 26, 2021, the court, *White, J.*, issued a corrected memorandum of decision in which it reiterated the findings and conclusions that had been set forth in Judge Comerford's original memorandum of decision, thereby granting the petition for a period of two years. In the corrected memorandum of decision, however, the court addressed the grounds for the acquittee's motion for rectification by stating that the acquittee had been acquitted of two counts of possession of a weapon on school grounds. The court also incorporated by reference statements made by Judge

Comerford during the rectification hearing.[3] Additional facts and procedural history will be discussed as necessary.

I

First, the acquittee claims that the court improperly found that the state had proven by clear and convincing evidence that he suffered from a mental illness resulting in his being a danger to himself or others. Specifically, he claims that the state was required, but failed, to establish by clear and convincing evidence that he posed a risk of imminent physical injury to himself or others, meaning a risk that physical injury is "ready to take place" or is "hanging threateningly over one's head." (Internal quotation marks omitted.) We are not persuaded.

In its corrected memorandum of decision, the court stated: "The court finds that the state has established by clear and convincing evidence that . . . [the acquittee] suffers from a psychiatric illness diagnosed as: schizoaffective disorder bi-polar type . . . borderline intellectual functioning . . . inappropriate and impulsive behaviors especially toward females . . . [and] frustration difficulties.

"While the record indicates progress, his current release into the community is stable because of substantial supervision and support. These mandated safeguards and supervision, including a required pharmaceutical regime, are necessary to avoid increasing his risk to himself and the community. While [the acquittee] has expressed [to his conditional release supervisor, Madeline Rodriguez] an intent . . . to voluntarily comply with mandated safeguards, a sufficient period of time in conditional release status has not passed for the

[3] The state represents, and the acquittee does not dispute, that, on October 18, 2021, the court, with the agreement of the parties, extended the acquittee's commitment until March 21, 2023.

court to give great weight to any such self-represented intent. Based on the reliable and probative evidence, the significant nature of the underlying criminal behavior, and the history of [the acquittee], the court finds that he cannot reside in the community without [the board's] continued oversight and support. . . .

"[The acquittee] remains an individual with psychiatric disabilities and he would constitute a danger to himself or others if discharged from [the board's] jurisdiction."

In its decision, the court also stated that it "incorporates by reference its oral remarks regarding the rationale involved in the court's ultimate decisions on the motion to dismiss, motion to strike, and the state's petition, made at the hearing on [the acquittee's] motion for rectification on September 30, 2021 . . . ." At the rectification hearing, the court explained: "[M]y interest is in the protection of schoolchildren, number one. And number two, the secondary rationale . . . . I'm concerned about the security of women and their person. Irrespective of what the cause is, I am concerned . . . that . . . women in [our] society be protected from any kind of irrational behavior or inappropriate behavior. And certainly, I'm concerned with the safety and welfare of our schoolchildren here today."

Having discussed the court's findings, we set forth the applicable legal principles and our standard of review. The court's authority to continue an acquittee's commitment to the board is governed by § 17a-593.[4]

[4] General Statutes § 17a-593 provides in relevant part: "(c) If reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities or a person with intellectual disability to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others, the state's attorney, at least one hundred thirty-five days prior to such expiration, may petition the court for an order of continued commitment of the acquittee.

"(d) The court shall forward any application for discharge received from the acquittee and any petition for continued commitment of the acquittee to the board. The board shall, within ninety days of its receipt of the applica-

"When a criminal defendant is found not guilty by reason of mental disease or defect; see General Statutes § 53a-13; the court holds a hearing to assess that individual's mental status and to determine whether confinement or release is appropriate. . . . If the acquittee fails to meet his burden of proof that he should be

tion or petition, file a report with the court, and send a copy thereof to the state's attorney and counsel for the acquittee, setting forth its findings and conclusions as to whether the acquittee is a person who should be discharged. The board may hold a hearing or take other action appropriate to assist it in preparing its report.

"(e) Within ten days of receipt of a recommendation for discharge filed by the board under subsection (a) of this section or receipt of the board's report filed under subsection (d) of this section, either the state's attorney or counsel for the acquittee may file notice of intent to perform a separate examination of the acquittee. An examination conducted on behalf of the acquittee may be performed by a psychiatrist or psychologist of the acquittee's own choice and shall be performed at the expense of the acquittee unless he is indigent. If the acquittee is indigent, the court shall provide him with the services of a psychiatrist or psychologist to perform the examination at the expense of the state. Any such separate examination report shall be filed with the court within thirty days of the notice of intent to perform the examination. To facilitate examinations of the acquittee, the court may order him placed in the temporary custody of any hospital for psychiatric disabilities or other suitable facility or placed with the Commissioner of Developmental Services.

"(f) After receipt of the board's report and any separate examination reports, the court shall promptly commence a hearing on the recommendation or application for discharge or petition for continued commitment. At the hearing, the acquittee shall have the burden of proving by a preponderance of the evidence that the acquittee is a person who should be discharged.

"(g) The court shall make a finding as to the mental condition of the acquittee and, considering that its primary concern is the protection of society and its secondary concern is the safety and well-being of the acquittee, make one of the following orders: (1) If the court finds that the acquittee is not a person who should be discharged, the court shall order the recommendation or application for discharge be dismissed; or (2) if the court finds that the acquittee is a person who should be discharged, the court shall order the acquittee discharged from custody. The court shall send a copy of such finding and order to the board."

The legislature amended subsection (g) of § 17a-593 since the events underlying the present appeal to add the phrase "and its secondary concern is the safety and well-being of the acquittee." See Public Acts 2022, No. 22-45, § 5. All references herein to § 17a-593 are to the current revision of the statute unless otherwise indicated.

discharged, the court must commit the acquittee to the jurisdiction of the board for a term not exceeding the maximum sentence that could have been imposed had there been a criminal conviction. . . . The board determines where to confine the acquittee and holds hearings and periodically reviews the progress of the acquittee to determine whether conditional release or discharge is warranted. . . . The acquittee also may apply periodically to be discharged from the board's jurisdiction. . . . This confinement, although resulting initially from an adjudication in the criminal justice system, does not constitute a punishment; rather, it serves the purposes of treating the acquittee's mental illness and protecting the acquittee and society. . . . The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous. . . . As he was not convicted, he may not be punished. His confinement rests on his continuing illness and dangerousness. . . .

"At the conclusion of the commitment period, the state has the option to seek an extension. When an acquittee reaches the end of the definite term of commitment set by the court, the state may submit a petition for continued commitment if reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities . . . to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others . . . . After the state files its petition, the board is required, by statute, to submit a report to the court setting forth the board's findings and conclusions as to whether discharge is warranted. . . . When making its decision, the Superior Court is not bound by the board's recommendation, but considers the board's report in addition to other evidence presented by both parties and makes its own finding as to the mental condition of the acquittee . . . . At this proceeding, the state

must prove the need for continued commitment by demonstrating, under the clear and convincing evidence standard, that the acquittee is currently mentally ill and dangerous to himself or herself [or others] . . . . At this proceeding, however, the court's primary concern is the protection of society. . . .

"The determination as to whether an acquittee is currently mentally ill to the extent that he would pose a danger to himself or the community if discharged is a question of fact and, therefore, our review of this finding is governed by the clearly erroneous standard. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . . Conclusions are not erroneous unless they violate law, logic or reason or are inconsistent with the subordinate facts. The court's conclusions are to be tested by the findings and not the evidence. . . . Conclusions logically supported by the finding must stand." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Dyous*, 198 Conn. App. 253, 261–65, 233 A.3d 1138, cert. denied, 335 Conn. 948, 238 A.3d 17 (2020). "In applying the clearly erroneous standard to the findings of a trial court, we keep constantly in mind that our function is not to decide factual issues de novo. Our authority . . . is circumscribed by the deference we must give to [the] decisions of the [trial court], who is usually in a superior position to appraise and weigh the evidence." (Internal quotation marks omitted.) Id., 272.

Moreover, we recognize that "our decisional law characterizes as difficult the task of the trial court in evaluating an acquittee's mental state and evaluating his dangerousness. It is, of course, not easy to predict

future behavior. . . . Predictions of future dangerousness are difficult for both psychiatrists and the courts to make because of the inherent vagueness of the concept itself, and such determinations must be dealt with by trial courts to a considerable extent on a case-by-case basis." (Internal quotation marks omitted.) *State* v. *Warren*, 100 Conn. App. 407, 423 n.2, 919 A.2d 465 (2007).

The acquittee does not challenge the court's finding that he suffers from a mental illness. Instead, he challenges the court's finding that he continues to pose a danger to himself or others in the community. The acquittee focuses on the statements made by the court during the rectification hearing, set forth above, in which it expressed its concern for the welfare of schoolchildren and women. The acquittee argues that, to the extent that the court granted the state's petition because it presumed that he posed a threat to schoolchildren, it improperly presumed dangerousness from the underlying offense, not on the basis of any evidence that he acted inappropriately toward one or more schoolchildren since the 2001 event that led to his arrest. According to the acquittee, "[t]he record shows that he has been clinically stable while consistently taking his prescribed medicine for approximately a decade. It is purely speculative to presume that, if for some reason, [he] discontinued his psychiatric medication regime and became psychotic, that he would experience the same florid psychosis and command hallucinations that compelled him to commit the index offense.[5] Similarly, the sequence of events required for the reoccurrence of such an incident is not only speculative, but also does not constitute the requisite risk of imminent danger to schoolchildren because it requires that, at some point, [he] discontinue his psychiatric medication, thereafter

[5] The psychiatric profession refers to the offenses that led to an acquittee's arrest as "index offenses." See, e.g., *State* v. *Torell*, Superior Court, judicial district of New Haven, Docket No. 03-0217045 (February 21, 2018).

suffer a decompensation, ultimately become psychotic and then experience command hallucinations to harm a child in school." (Emphasis omitted; footnote added.) The acquittee argues that, to the extent that the court granted the state's petition based on a finding that he posed a danger to women, there was no evidence that, he "harmed, threatened, or posed a risk of imminent danger to a woman." The acquittee acknowledges, nonetheless, that he has exhibited "inappropriate" behavior toward women during the course of his commitment to the board.

As a preliminary matter, we disagree with the acquittee that the court improperly presumed dangerousness based on the offenses that led to his arrest. We are persuaded that, to the extent that the court referred in its decision to these offenses, it did so as part of a proper consideration of the factual issues before it. "In reaching its difficult decision [as to an acquittee's dangerousness], the court may and should consider the entire record available to it, including the [acquittee's] history of mental illness, his present and past diagnoses, his past violent behavior, the nature of the offense for which he was prosecuted, the need for continued medication and therapy, and the prospects for supervision if released." *State* v. *Putnoki*, 200 Conn. 208, 221, 510 A.2d 1329 (1986).

The acquittee also argues that it was improper for the court to focus on the safety of schoolchildren and women, for there was no evidence that he physically harmed either a schoolchild or a woman since the time of his commitment to the board. We note that the state did not bear the burden of proving that the acquittee had engaged in any type of physical violence during his commitment. It was sufficient for the state to prove by clear and convincing evidence that the acquittee continues to pose a danger to himself or to others in the community. The court's reference to the well-being

of schoolchildren is logically linked to the offenses for which he was prosecuted, but the court did not suggest, let alone explicitly state, that the acquittee had engaged in subsequent acts of violence toward a schoolchild. We further note that the record does not reflect that, during his lengthy confinement at Whiting Forensic Hospital and Connecticut Valley Hospital and, later, while he was subject to the restrictions on his liberty that were incident to his temporary leave or conditional release statuses while under the jurisdiction of the board, the acquittee has had an opportunity to encounter a schoolchild.

Moreover, the court's reference to the well-being of women logically is related to the records of the acquittee's confinement that were submitted in evidence.[6] Although those records do not describe acts of violence committed by the acquittee against women, they nonetheless reflect that the acquittee's treatment history during his commitment includes several instances in which he intimidated, inappropriately touched, and made socially inappropriate statements, often of a sexual nature, to female staff members.[7] Such

[6] The court had before it reports prepared by the board dated January 16, 2013, July 2, 2014, January 29, 2016, July 24, 2018, and August 27, 2019. The court also had before it progress and risk assessment reports prepared for the board by a licensed clinical social worker dated January 24, 2019, and July 3, 2019, as well as conditional release progress reports prepared for the board by the acquittee's clinical release supervisor dated May 2, 2019, August 1, 2019, and November 1, 2019. Also in evidence were transcripts of proceedings before the board on December 7, 2012, May 16, 2014, January 8, 2016, June 2, 2017, September 15, 2017, and June 29, 2018.

[7] For example, there was evidence before the court that, on July 18, 2016, the acquittee approached a female staff member in a restricted storage room secured by a door that automatically closed. The staff member instructed the acquittee to back out of the room. Although the acquittee complied, he nonetheless remained close to the door, causing the staff member to feel threatened or barricaded in the room. Later, the acquittee remarked to the female staff member that he was "out to get" her.

There was evidence that, in 2012, the acquittee was "occasionally inappropriate with female staff [members]." Specifically, he had referred to some of the female staff as "baby" and had requested hugs from female staff members.

inappropriate conduct is noted to be a continued concern up through the latest report that the board filed with the court dated August 27, 2019. Even though there was no evidence that the acquittee has ever harmed a woman physically, the fact that there are several instances of this type of conduct in his treatment records supports the court's concern for the safety and well-being of women. This concern naturally follows from the court's obligation under § 17a-593 (c) to consider whether the acquittee's discharge would pose a threat to others.

The acquittee argues that a finding that he posed an imminent threat of physical harm to himself or others in the community, particularly women, was clearly erroneous. This court has observed that, "[t]he determination of dangerousness in the context of a mental status hearing reflects a societal rather than a medical judgment, in which the rights and needs of the defendant must be balanced against the security interests of society. . . . [The court's] . . . inquiry should focus on

The board's report filed with the court dated January 16, 2013, reflects that, in August, 2009, "[the acquittee] displayed socially inappropriate behavior, touching staff and making inappropriate comments to female staff." The report also noted that, in August, 2011, the acquittee "episodically lost his privileges due to inappropriate, often impulsive and self-defeating behaviors, including not respecting other people's boundaries, making inappropriate statements towards staff, and engaging in disrespectful and occasionally threatening behaviors toward others." The board found that the acquittee "continues to exhibit inappropriate social behavior, preventing his transition to the community. Though he is clinically stable with only intermittent episodes of threatening behavior in his highly structured setting, he has yet to demonstrate clinical stability and behavioral control outside that setting."

The board's report filed with the court dated July 2, 2014, reflected that, in December, 2013, the acquittee's temporary leave privileges were suspended after he had exhibited "inappropriate and impulsive behavior" while in the community and he insisted on returning to hospital care.

In the latest report filed with the court, dated August 27, 2019, the board noted that the acquittee "has a longstanding pattern of inappropriate and impulsive behaviors, which he usually exhibited when frustrated." In particular, it is noted that the acquittee has a history of "inappropriate" behavior with women.

whether the person is a danger to himself or others, whether he presents . . . the risk of imminent physical injury to others or self . . . . [T]he ultimate determination of mental illness and dangerousness is a legal decision . . . in which the court may and should consider the entire record available to it, including the defendant's history of mental illness, his present and past diagnoses, his past violent behavior, the nature of the offense for which he was prosecuted, the need for continued medication and therapy, and the prospects for supervision if released." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Damone*, 148 Conn. App. 137, 170–71, 83 A.3d 1227, cert. denied, 311 Conn. 936, 88 A.3d 550 (2014); see also *State* v. *March*, 265 Conn. 697, 711–12, 830 A.2d 212 (2003).

The acquittee urges us to conclude that a finding that he posed a risk of imminent physical injury to himself or others was not supported by the evidence because such a risk would depend on him, outside of his current supervised environment, failing to take necessary psychiatric medications, decompensating, becoming psychotic and, ultimately experiencing command hallucinations that would lead to him posing such a risk. The acquittee relies on evidence that he has been clinically stable while under the board's supervision, while consistently taking his prescribed medicine for nearly one decade. We disagree with the acquittee that the court could not have found that, although under his current level of board supervision he does not pose an imminent risk of physical injury to himself or others, it is likely that he would pose an imminent risk of physical injury to himself or others if he were to be released from the board's supervision entirely. This is because the evidence before the court logically supported a finding that, if he were to be released from the board's supervision entirely, he would risk relapse once outside of his

present controlled environment and present an imminent danger to himself or to others. See *State* v. *Damone*, supra, 148 Conn. App. 175; see also *State* v. *Warren*, supra, 100 Conn. App. 435 (fact that acquittee responded adequately to treatment while under board supervision did not undermine court's conclusion that continued commitment was justified); *State* v. *Coor*, 87 Conn. App. 717, 727, 733, 867 A.2d 124 (evidence supported finding of high likelihood that acquittee, who was in remission while under board's supervision, would become dangerous to himself or others if he stopped taking his medication), cert. denied, 273 Conn. 929, 873 A.2d 998 (2005); *State* v. *Jacob*, 69 Conn. App. 666, 685, 798 A.2d 974 (2002) (fact that acquittee had made progress was due, in part, to his confinement, supervision and ongoing treatment and did not undermine court's ultimate finding that he posed risk of danger to himself or others if released from board's supervision).

We note that there was evidence before the court that, following the acquittee's commitment to the board, he used physical violence toward other patients, he challenged another patient to engage in a physical altercation, and he engaged in otherwise threatening behavior toward others. In its 2019 report filed with the court, the board stated that the acquittee suffers from schizoaffective disorder, bipolar type; borderline intellectual functioning; cannabis use disorder; and tobacco use disorder. The board also stated: "[The acquittee] has a history of treatment noncompliance, including periodic noncompliance with prescribed medication in a hospital setting. He also has a longstanding pattern of inappropriate and impulsive behaviors, which he usually exhibited when frustrated. For many years, [the acquittee's] cognitive limitations, psychiatric illness and chronic impulsive behaviors repeatedly delayed his

transition to the community. However, he was eventually able to transition to overnights in the community in September, 2017, following a concerted effort by his treatment team to address his poor social skills and improve his frustration tolerance."

The board also stated that the acquittee had been granted conditional release since its last report to the court dated July 24, 2018, at which time he was discharged from the hospital and began living in the community, albeit with significant limitations that were linked to his ongoing treatment for mental illness. The board stated, however, that "[the acquittee's] experience living in the community remains limited and he is stable only because of substantial supervision and support, including daily monitored medication; a structured residential program with [forty] hours of mandated programming a week; limited travel in his own custody; in [six] hour increments; and weekly meetings with an individual therapist and [c]onditional [r]elease supervisor. Without these mandated safeguards, which his treaters continue to believe are required to address his risk, he is likely to become noncompliant with treatment and medication, increasing his risk to himself and the community. Given that he would no longer be subject to the safeguards if discharged from the board and that he was only released from hospital confinement during the past year and had not before that resided independently in the community since 2001, the board finds that he continues to require substantial supervision and that he cannot reside safely in the community without the board's continued oversight and support."

The court found that, during his commitment to the board, the acquittee had made progress and that the current level of his release into the community is "stable" only because of mandated safeguards imposed by the board. The court noted that the acquittee had

expressed his intent, if discharged from the board's jurisdiction, to voluntarily comply with mandated safeguards. The acquittee, however, is unable to demonstrate that the court erred in determining, based on the board's report filed with the court, that he has not had a sufficient history of being in a conditional release status to support a conclusion that he can live in the community without board oversight. As we discussed previously in this opinion, it was reasonable for the court to base its determination not on whether the acquittee presented a risk of imminent harm to himself or others while under the board's supervision, but, whether, if he were to be released from the board's supervision entirely, he posed a risk of imminent harm to himself or others. The board's findings squarely addressed this issue, and they support the court's decision.

Having reviewed the evidence presented to the court, we are persuaded that the court did not err in finding that the state met its burden, under § 17a-593, of establishing by clear and convincing evidence that the acquittee currently is mentally ill and poses a risk of imminent harm to himself or others. We conclude that the court's findings with respect to the danger that the acquittee continues to pose to the community and the need for significant and continued safeguards imposed by the board are not clearly erroneous.

II

Next, the acquittee claims that the court improperly rejected his claim that § 17a-593, as applied to him, violates his right to equal protection guaranteed by the federal constitution. We are not persuaded.

The following additional facts are related to this claim. As we stated previously in this opinion, in connection with his motion to dismiss the state's petition to extend his commitment, the acquittee argued that

his right to equal protection under the federal constitution was violated by the recommitment procedure to which he is subjected under § 17a-593, which implicates his right to individual liberty. He argued that the recommitment procedure that governs acquittees under § 17a-593 is applied more conservatively than the nominally identical commitment procedure that applies to civil committees under § 17a-515, that acquittees are similarly situated to civilly committed inmates for purposes of equal protection analysis, that an intermediate level of scrutiny should be utilized in an equal protection analysis of § 17a-593, and that § 17a-593 cannot withstand such scrutiny. The court, in an oral ruling, declined the acquittee's invitation to apply an intermediate standard of scrutiny and denied his motion to dismiss.

On appeal, the acquittee does not argue that § 17a-593 is facially discriminatory, but that it is discriminatory as applied to him. The acquittee argues that he is similarly situated to civilly committed inmates because his maximum term of commitment has expired, he has been discharged and afforded conditional release status, and he has largely demonstrated sustained progress in his mental health treatment. The state disagrees that the acquittee is similarly situated to civilly committed inmates. The state argues that there is a nexus between the acquittee's mental illness and the violent criminal conduct in which he engaged at a public school. In contrast, the state argues, civilly committed inmates have a prior felony or misdemeanor conviction, but there need not be a connection between the criminal conduct underlying that conviction and the mental illness underlying their civil commitment. Although the acquittee focuses his argument on inmates who have been civilly committed, the state also notes that the civil commitment scheme applies to both inmates and

civilians and, thus, civilly committed persons need not have committed any crime nor have been incarcerated.

We set forth our standard of review and relevant legal principles. A lower court's ruling on an equal protection claim presents this court with an issue of law to which we afford plenary review. See, e.g., *State* v. *Yury G.*, 207 Conn. App. 686, 695, 262 A.3d 981, cert. denied, 340 Conn. 909, 264 A.3d 95 (2021). "[T]he concept of equal protection [under the federal constitution] has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. . . . Conversely, the equal protection clause places no restrictions on the state's authority to treat dissimilar persons in a dissimilar manner. . . . Thus, [t]o implicate the equal protection [clause] . . . it is necessary that the state statute . . . in question, either on its face or in practice, treat persons standing in the same relation to it differently. . . . [Accordingly], the analytical predicate [of an equal protection claim] is a determination of who are the persons [purporting to be] similarly situated. . . . The similarly situated inquiry focuses on whether the [challenger is] similarly situated to another group for purposes of the challenged government action. . . . Thus, [t]his initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged. . . . Entities are situated similarly in all relevant aspects if a prudent person, looking objectively at the incidents, would [deem] them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the relevant aspects are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples. . . .

"When a court analyzes a law under the equal protection clause, it must employ a particular standard of review. The most deferential standard is rational basis review, which applies in areas of social and economic policy that neither proceed along suspect lines nor infringe fundamental constitutional rights . . . . Rational basis review demands only that the challenged classification be rationally related to a legitimate government interest. . . . A party challenging a law under rational basis review bears the burden of proving that the law's class-based distinctions are wholly irrational. . . .

"The least deferential standard of review is strict scrutiny, which applies both to laws that discriminate on the basis of a person's membership in a suspect class and to laws that burden a person's exercise of a fundamental right. . . . Under strict scrutiny, the state bears the burden of demonstrating that the challenged discriminatory means are necessary to the achievement of a compelling state interest. . . .

"Lying between the extremes of strict scrutiny and rational basis review is intermediate scrutiny, which typically applies to discriminatory classifications based on gender or illegitimacy. . . . Intermediate scrutiny also sometimes applies to laws that affect an important, though not constitutional, right. . . . Under intermediate scrutiny, the state bears the burden of establishing that the challenged discriminatory means are substantially related to an important governmental interest." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Dyous*, supra, 307 Conn. 315–18.

We begin by addressing whether the acquittee has established the necessary premise for his equal protection claim, that he is similarly situated to civilly committed inmates. Our decisional law has referred to the

initial inquiry that the entities at issue be similarly situated as "[an] analytical predicate" to an equal protection claim; (internal quotation marks omitted) id., 315; as well as "[a] threshold issue" to be considered in evaluating such a claim. *Keane* v. *Fischetti*, 300 Conn. 395, 403, 13 A.3d 1089 (2011). This is because, if the entities at issue are not similarly situated in the first instance, the claim at issue does not truly implicate the equal protection clause, and it becomes unnecessary for the court to decide the constitutional issue of whether the challenged state action violates the equal protection clause. See *Stuart* v. *Commissioner of Correction*, 266 Conn. 596, 602, 834 A.2d 52 (2003).

As the parties observe, in prior opinions, both this court and our Supreme Court have addressed constitutional challenges to § 17a-593. Several of these cases are instructive. In *State* v. *Metz*, 230 Conn. 400, 402, 645 A.2d 965 (1994), our Supreme Court addressed a challenge, brought on due process and equal protection grounds, with respect to which party bears the burden of proof under § 17-593 (c). Our Supreme Court concluded that the statute must be construed such that the state bears the burden of proving "the need for a period of continued commitment of an acquittee after the expiration of the maximum term specified by [General Statutes] § 17a-582 (e) (1) (A)." Id., 408. In its analysis, our Supreme Court observed that "[f]ederal law has . . . recognized that insanity acquittees are a special class that should be treated differently from other candidates for commitment . . . . Thus, when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the [c]onstitution permits the [g]overnment, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society. . . . For an insanity acquittee, the state may adopt procedures

that presume the acquittee's continued dangerousness and that envisage a diminished risk that a person will be committed who is not mentally ill." (Citations omitted; internal quotation marks omitted.) Id., 414.

Our Supreme Court in *Metz* also observed that disparities in laws that distinguish between civilly committed persons and acquittees are constitutionally justified "because of the unique status of persons acquitted by reason of insanity. . . . We have acknowledged that the obvious difference between insanity acquittees and other persons facing commitment is the fact that the former have been found, beyond a reasonable doubt, to have committed a criminal act. . . . While the acquittee therefore may be deprived erroneously of his liberty in the commitment process, the liberty he loses is likely to be liberty which society mistakenly had permitted him to retain in the criminal process. . . .

"In contrast to an acquittee's differentiated status at an initial commitment hearing, our state law has, for certain purposes, likened acquittees to prisoners who have been transferred to a mental hospital during the pendency of their jail sentence. We have noted that both classes of hospital inmates are being deprived of their liberty primarily for the protection of society; both have the same financial resources; and both have the same need for treatment. . . . Thus, this court has held that equal protection of the laws mandates that an acquittee, like a prisoner under our statutes, should not bear the costs of his commitment." (Citations omitted; internal quotation marks omitted.) Id., 417.

In *Metz*, the court also stated that, "[a]fter the expiration of a maximum term of confinement, it is difficult to find a constitutional justification for a categorical distinction between an insanity acquittee and an incarcerated prisoner who was transferred to a mental hospital while he was serving his criminal sentence. In each

instance, the purpose of commitment is to treat the individual's mental illness and protect him and society from his potential dangerousness . . . . In each instance, furthermore, the qualitative character of the liberty deprivation is the same, irrespective of the fact that the Superior Court rather that the Probate Court retains jurisdiction over the propriety of an acquittee's continued commitment." (Citations omitted; internal quotation marks omitted.) Id., 424–25.

In *State* v. *Long*, supra, 268 Conn. 510, the state appealed from a judgment of dismissal rendered by the trial court after it granted an acquittee's motion to dismiss a petition for an order of continued commitment of the acquittee pursuant to § 17a-593 (c). In *Long*, the trial court concluded that § 17a-593 (c) violated the acquittee's right to equal protection under the federal constitution in that "it treats acquittees . . . differently from convicted prisoners who subsequently are civilly committed to a mental hospital at some point after they have been incarcerated . . . ." Id., 514. Beyond challenging the acquittee's standing to raise an equal protection challenge, the state argued on appeal that the statute did not violate his equal protection rights because it discriminated against persons with psychiatric or intellectual disabilities on the basis of their proven criminal acts, not their mental disability, and, thus, it survives rational basis scrutiny. Id., 528. In analyzing the equal protection claim, our Supreme Court noted that it "assume[d] arguendo, without deciding, that acquittees are similarly situated to civilly committed inmates." Id., 535. The court thereafter concluded that § 17a-593 (c) survived rational basis review, reversed the judgment of the trial court, and remanded the case to the trial court for further proceedings. Id., 537, 541.

In *State* v. *Lindo*, 110 Conn. App. 418, 419, 955 A.2d 576, cert. denied, 289 Conn. 948, 960 A.2d 1038 (2008), an acquittee appealed from a trial court's judgment

granting the state's petition for an order of continued commitment. The acquittee claimed that § 17a-593 (c), as applied to him, violated his right to equal protection under the federal constitution because, "at the time of the recommitment hearing . . . he was an inmate and therefore should have been afforded the more stringent procedural protections applicable when the state seeks to commit mentally ill prisoners pursuant to [the civil commitment procedure made applicable to inmates] pursuant to . . . § 17a-515." Id., 422. In analyzing and ultimately rejecting the merits of the acquittee's equal protection claim, this court, following *Long*, assumed, without deciding, that acquittees are similarly situated to mentally ill inmates. Id., 426.

Finally, in *State* v. *Dyous*, supra, 307 Conn. 302, an acquittee appealed from a trial court's judgment granting the state's petition for an order of continued commitment pursuant to § 17a-593 (c). The acquittee claimed that § 17a-593, both on its face and as applied to him, violated his right to equal protection under the federal constitution; id., 315; because it subjects "insanity acquittees to a recommitment procedure that imposes greater burdens on individual liberty than does the procedure for obtaining an order of civil commitment set forth in § 17a-498, which applies to similarly situated civilly committed inmates, [and that the disparate treatment of these two classes of inmates] does not substantially relate to the achievement of an important governmental interest." Id., 303.

Our Supreme Court in *Dyous* first addressed the acquittee's burden of demonstrating that he and other insanity acquittees who face the prospect of continued commitment are similarly situated to civilly committed inmates. The court reasoned: "Both groups have been proven beyond a reasonable doubt to have engaged in criminal conduct, both are currently mentally ill, both require treatment, and both present a potential danger

to society, yet civilly committed inmates are subject to the statutory scheme governing civil commitment set forth in § 17a-498 et seq., whereas insanity acquittees who have reached the end of their terms of commitment are subject to the wholly separate statutory scheme including § 17a-593 (c) and related provisions. Although we acknowledge that there is some persuasive force to the state's contention that the two groups actually are not similarly situated—only insanity acquittees necessarily were mentally ill at the time of their prior criminal conduct, for example, and only insanity acquittees were proven to have engaged in such conduct because they were mentally ill—we assume, *arguendo*, that the two groups are similarly situated and that § 17a-593 accordingly may be analyzed under the equal protection clause." (Emphasis altered.) Id., 316. Although it chose not to resolve the issue of whether insanity acquittees and civilly committed inmates are similarly situated for equal protection purposes, the court nonetheless observed that "the issue is . . . [not] clear cut in light of the important features that the two groups have in common."[8] Id., 316 n.11.

[8] The court's observation was made in response to a concurring opinion in which a concurring justice stated: "Although this court often assumes that two groups are similarly situated for the purpose of conducting a more comprehensive equal protection analysis . . . I believe that insanity acquittees and those who are civilly committed are distinguishable on such a fundamental level that there is no reason to apply the presumption in the present case. As this court explained in *Long*, '[w]hat differentiates these two groups for the purposes of recommitment procedures is the acquittee's proven criminal offense, which has been adjudicated to be the product of mental illness. A verdict of not guilty by reason of mental disease or defect establishes two facts: (1) the person committed an act that constitutes a criminal offense; and (2) he committed the act because of mental illness. . . . Thus, unlike a civilly committed inmate, an acquittee has proven to the fact finder that his mental disease or defect caused him to commit a crime, thereby establishing a legal nexus between the acquittee's mental illness and the criminal act.' . . . *State* v. *Long*, supra, 268 Conn. 539–40." (Citations omitted.) *State* v. *Dyous*, supra, 307 Conn. 337–38 (*Zarella*, *J.*, concurring). In his concurrence, the justice further stated: "The discharge of an insanity acquittee, whose status indicates that he or she has been declared dangerous to society due to the commission of a criminal act,

The court also stated that, "to the extent that . . . *Metz* stands for the . . . proposition that, after the expiration of a maximum term of commitment, the equal protection clause requires the state to treat an insanity acquittee exactly as it would treat a civilly committed inmate, we reject that proposition as unfounded. However preferable it may be as a matter of policy for the state to treat insanity acquittees, following the expiration of their maximum term of commitment, in exactly the same manner as it treats civilly committed inmates . . . the equal protection clause simply does not require that the state treat these two groups identically. The special public safety concern that is raised by the prospective release of a person like [the acquittee in *Dyous*] does not evaporate the moment such a person reaches the end of his maximum term of commitment. An acquittee's maximum term of commitment bears no necessary relation to public safety: the maximum allowable term of commitment is equal to the maximum sentence that could have been imposed if the acquittee had been convicted of the offense . . . and [t]here simply is no necessary correlation between severity of the offense and the length of time necessary for recovery." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 331–32 n.18. The court in *Dyous* went on to conclude, however, that § 17a-593 was constitutional as applied to the acquittee and, consequently, that the statute was constitutional on its face. Id., 334.

Neither party suggests that we are bound by precedent to presume, as courts in prior cases have, that

raises the specter that the danger to society will recur if the mental disease recurs, which is not the case with a civilly committed inmate whose mental disease or defect was not accompanied by a criminal act. Accordingly, although insanity acquittees and civilly committed inmates share certain other characteristics, I would conclude that they cannot be considered similarly situated for the purpose of an equal protection challenge to § 17a-593." (Footnote omitted.) Id., 339 (*Zarella*, *J.*, concurring).

the acquittee is similarly situated to civilly committed inmates. Rather, we conclude that he is not. "The [e]qual [p]rotection [c]lause of the [f]ourteenth [a]mendment to the United States [c]onstitution is essentially a direction that all persons similarly situated should be treated alike." (Internal quotation marks omitted.) *Thomas* v. *West Haven*, 249 Conn. 385, 392, 734 A.2d 535 (1999), cert. denied, 528 U.S. 1187, 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000). As we have discussed previously in this opinion, in discussing what constitutes similarly situated entities, our Supreme Court has stated that entities need not be identical to be similarly situated, but they must be roughly equivalent. *State* v. *Dyous*, supra, 307 Conn. 316, citing *Kelo* v. *New London*, 268 Conn. 1, 104 n.98, 843 A.2d 500 (2004), aff'd, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

Before this court, the acquittee argues that, in *Dyous*, our Supreme Court "rejected" the argument that acquittees that share his characteristics are not similarly situated to civilly committed inmates. As our previous discussion of *Dyous* unambiguously reflects, however, the court did not reach such a conclusion; it chose to presume, without deciding, that the groups in *Dyous* were similarly situated. See *State* v. *Dyous*, supra, 307 Conn. 316. In an attempt to demonstrate that he is similarly situated to civilly committed inmates, the acquittee observes, accurately, that the state seeks his commitment beyond his maximum allowable term of commitment, he has "largely demonstrated sustained progress" in his treatment and, in fact, has been afforded conditional release status. He also relies on language from *Dyous* stating that acquittees as a class, like civilly committed inmates, have been proven beyond a reasonable doubt to have engaged in criminal conduct, are mentally ill, require treatment, and pose a potential danger to society. See *State* v. *Dyous*, supra, 316.

We are persuaded by the state's arguments that the acquittee is not similarly situated to civilly committed inmates. As the state correctly observes, for the acquittee to have prevailed at his criminal trial on his insanity defense, he had to prove that there was a nexus between his mental illness and his violent criminal conduct. This nexus existed either in terms of his being unable to appreciate the wrongfulness of his conduct or in terms of his being unable to control his conduct. Section 53a-13 (a) provides: "In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time the defendant committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law." In the civil commitment process, such a proven correlation between mental illness and criminal conduct simply need not exist.

The acquittee does not satisfactorily address the difference in the circumstances that, on the one hand, gave rise to his commitment as a person who committed a violent offense due to mental illness and, on the other hand, gave rise to the commitment of an inmate who is civilly committed pursuant to § 17a-515 for a psychiatric disability. More importantly, we are not persuaded that, in light of the continued danger that he poses to others due to his mental illness; see part I of this opinion; his progress in treatment or the fact that he has reached the end of his maximum term of confinement should lead us to now conclude that he is similarly situated to inmates whose mental illness has not manifested in criminal conduct. At the time of his criminal trial, it was proven that the acquittee's mental disease or defect caused him to engage in acts that constituted criminal offenses. In contrast, a civilly committed inmate has been proven to suffer from a psychiatric disability,

regardless of whether his or her mental illness has manifested cognitive and/or volitional effects that resulted in the commission of criminal conduct.

Simply put, the acquittee's focus on the fact that he has reached his maximum term of commitment and the sustained progress in his treatment leading to his conditional release status does not alter the significance of the circumstances that led to his commitment, let alone undermine the fact that his mental illness continues to pose a danger to society. We recognize, as our Supreme Court has observed, that the issue of whether acquittees, as a general class, and civilly committed inmates are similarly situated for equal protection purposes is not necessarily clear-cut. Yet, despite the fact that the acquittee and civilly committed inmates undoubtedly share other characteristics, the significant difference in the circumstances giving rise to the acquittee's commitment leads us to conclude that he is dissimilar to civilly committed inmates for equal protection purposes. Accordingly, we reject the acquittee's equal protection claim.

The judgment is affirmed.

In this opinion CRADLE, J., concurred.

SEELEY, J., concurring. I agree with my colleagues that the judgment of the trial court granting the petition to continue the commitment of the acquittee, Franklin Foster, to the jurisdiction of the Psychiatric Security Review Board (board) should be affirmed.[1] I join part I of the majority opinion and its conclusion that the

[1] After an acquittee has proven the defense of mental disease or defect, he or she may be committed to the jurisdiction of the board for a maximum term of commitment not to exceed the maximum sentence that could have been imposed had that individual been convicted. See General Statutes § 17a-582; see also *State* v. *Long*, 268 Conn. 508, 519, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004). The board is an administrative body consisting of six members, a psychiatrist, a psychologist, a probation expert, a layperson, an attorney who is a member of the state bar, and a layperson with experience in victim advocacy. General

court properly found that the state had proven, by clear and convincing evidence, that the acquittee suffered from a mental illness resulting in his being a danger to himself or others. With respect to the acquittee's claim that General Statutes § 17a-593 (c),[2] as applied to him, violated his right to equal protection guaranteed by the federal constitution,[3] I am not persuaded that the acquittee is not similarly situated to civilly committed inmates.[4] Instead, I follow the well traveled analytical

Statutes § 17a-581 (b). "The purpose of the board is to manage, monitor and review the status of each acquittee to ensure the protection of the general public." *State* v. *Long*, supra, 520; see also General Statutes § 17a-584. The state may file a petition to extend the maximum term of commitment if reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities and would constitute a danger to others or himself or herself. *State* v. *Long*, supra, 520; see also General Statutes § 17a-593 (c).

[2] General Statutes § 17a-593 (c) provides: "If reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities or a person with intellectual disability to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others, the state's attorney, at least one hundred thirty-five days prior to such expiration, may petition the court for an order of continued commitment of the acquittee." See also *State* v. *Dyous*, 307 Conn. 299, 307, 53 A.3d 153 (2012).

[3] The fourteenth amendment to the United States constitution provides in relevant part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

[4] In his reply brief, the acquittee asserts that he relied on the following definition of civilly committed inmates from *State* v. *Dyous*, 307 Conn. 299, 301, 53 A.3d 153 (2012): "[M]entally ill, convicted defendants who were transferred, pursuant to General Statutes §§ 17a-498 and 17a-515, to a psychiatric facility while they were serving their sentences, and whom the state seeks to commit to a similar institution after their sentences end." (Footnote omitted.) "[C]ivil commitment generally is an involuntary process, initiated by someone other than the committee" and "any person may file an application for the civil commitment of an individual with the Probate Court . . . ." *State* v. *Long*, 268 Conn. 508, 528–29, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004); see also General Statutes § 17a-497 (a). Furthermore, after civil commitment proceedings are commenced, the individual who is the subject of the proceedings, including an inmate in the prison system, has a right to a hearing on the merits before the Probate Court. General Statutes § 17a-498 (a).

General Statutes § 17a-498 (c) (3) provides in relevant part: "If the [Probate] [C]ourt finds by clear and convincing evidence that the respondent has psychiatric disabilities and is dangerous to himself or herself or others

path established by prior decisions of our Supreme Court and this court and assume, without deciding, that the acquittee is similarly situated to civilly committed inmates for purposes of the equal protection analysis. I further conclude that rational basis review, not intermediate scrutiny, applies and that the acquittee failed to challenge the constitutionality of § 17a-593 (c) pursuant to this standard of review. Accordingly, the acquittee has not established that the court improperly denied his equal protection claim. I therefore respectfully concur in the judgment.

I begin by setting forth the background of the acquittee's constitutional claim. "[T]he concept of equal protection [under both the state and federal constitutions] has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. . . . Conversely, the equal protection clause places no restrictions on the state's authority to treat dissimilar persons in a dissimilar manner. . . . Thus, [t]o implicate the equal protection [clause] . . . it is necessary that the state statute . . . in question, either on its face or in practice, treat persons standing in the same relation to it differently. . . . [*Accordingly*], *the analytical predicate* [*of an equal protection claim*] *is*

or gravely disabled, the court shall make an order for his or her commitment, considering whether or not a less restrictive placement is available, to a hospital for psychiatric disabilities to be named in such order, there to be confined for the period of the duration of such psychiatric disabilities or until he or she is discharged or converted to voluntary status pursuant to section 17a-506 in due course of law. . . ."

General Statutes § 17a-515 provides: "The provisions of section 17a-498 shall apply to any person regarding whom proceedings for commitment are being instituted under section 17a-513 or 17a-514, and to any other person in the custody of the Commissioner of Correction, except that if the [Probate] [C]ourt revokes the order of commitment, the person shall be returned to any institution administered by the Department of Correction as the Commissioner of Correction shall designate, unless his custody in the Commissioner of Correction has terminated, in which case he shall be discharged."

a determination of who are the persons [*purporting to be*] *similarly situated*. . . . The similarly situated inquiry focuses on whether the [plaintiff is] similarly situated to another group for purposes of the challenged government action. . . . Thus, [t]his initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (Citations omitted; emphasis added; internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 157–58, 957 A.2d 407 (2008); see also *In re Taijha H.-B.*, 333 Conn. 297, 312–13, 216 A.3d 601 (2019). If the court determines that the two groups are similarly situated, it then must apply the appropriate standard of review; rational basis,[5] intermediate scrutiny,[6] or strict scrutiny;[7] to determine whether the challenged statute

[5] Rational basis review is the most deferential standard. *State* v. *Dyous*, 307 Conn. 299, 317, 53 A.3d 153 (2012). "[Our Supreme Court] has held, in accordance with the federal constitutional framework of analysis, that in areas of social and economic policy that neither proceed along suspect lines nor infringe fundamental constitutional rights, the [e]qual [p]rotection [c]lause is satisfied [as] long as there is a plausible policy reason for the classification . . . the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker . . . and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational . . . ." (Citations omitted; internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, supra, 289 Conn. 158–59. "A party challenging a law under rational basis review bears the burden of proving that the law's class-based distinctions are wholly irrational." *State* v. *Dyous*, supra, 317.

[6] "[F]or purposes of federal equal protection analysis, the United States Supreme Court also has developed an intermediate level of scrutiny that lies [b]etween [the] extremes of rational basis review and strict scrutiny. . . . Intermediate scrutiny typically is used to review laws that employ quasi-suspect classifications . . . such as gender . . . or [il]legitimacy . . . . On occasion intermediate scrutiny has been applied to review of a law that affects an important, though not constitutional, right. . . . Under intermediate scrutiny, the government must show that the challenged legislative enactment is substantially related to an important governmental interest." (Citations omitted; internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, supra, 289 Conn. 160.

[7] "The least deferential standard of review is strict scrutiny, which applies both to laws that discriminate on the basis of a person's membership in a

is constitutional. *State* v. *Dyous*, 307 Conn. 299, 316–18, 53 A.3d 153 (2012).

As noted by the majority, the acquittee, in his motion to dismiss the state's petition for continued commitment, argued that the recommitment procedure applicable to acquittees violated his right to equal protection. The trial court denied the acquittee's motion to dismiss but did not address specifically whether the two classes were similarly situated. It also rejected the acquittee's assertion that intermediate scrutiny was the applicable standard for his claim. On appeal, the acquittee challenged, inter alia, "whether applying § 17a-593, authorizing continued commitment, to [the acquittee's] unique factual and legal posture, passes constitutional muster for federal equal protection purposes." Specifically, the acquittee contends that he was on conditional release for eighteen months, when a similarly situated class of civilly committed inmates would have been released by operation of law.[8] With regard to the initial determination of whether acquittees who have reached the maximum term of commitment are similarly situated to civilly committed inmates, the acquittee argues that these

suspect class and to laws that burden a person's exercise of a fundamental right." *State* v. *Dyous*, 307 Conn. 299, 317, 53 A.3d 153 (2012). "Under that heightened standard, the state must demonstrate that the challenged statute is necessary to the achievement of a compelling state interest." (Internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, supra, 289 Conn. 159.

[8] In *State* v. *Dyous*, supra, 307 Conn. 301, our Supreme Court explained that "[t]he procedure for extending an insanity acquittee's term of commitment to the [board] imposes greater burdens on individual liberty than does the civil commitment procedure appliable to civilly committed inmates . . . ." (Footnote omitted.) In its opinion, the court reviewed "the key disparities between the system applicable to insanity acquittees and the system applicable to civilly committed inmates. These disparities cause the system applicable to insanity acquittees to tilt more strongly toward confinement. In the most general terms, the system applicable to insanity acquittees, which is administered by the board and the Superior Court, operates such that its primary purpose is to protect the public, whereas the system applicable to civilly committed inmates, which is administered by mental health facilities and the Probate Court, operates such that a paramount concern is to protect a defendant's liberty.

two groups have common features that render them similar with respect to § 17a-593 and that a prudent person would deem them to be roughly equivalent. Finally, the acquittee claims that intermediate scrutiny, not rational basis review, is the appropriate standard, and that, under intermediate scrutiny, the mandates of § 17a-593, as applied to him, do not bear a substantial relationship to an important government interest.

The state counters, inter alia, that the two groups are not similarly situated. Specifically, it contends that, although "acquittees and [civilly committed inmates] share similarities, because there is a direct nexus between acquittees' crimes and their mental illness, and because [acquittees] affirmatively proved not only that they were mentally ill but also that they were unable to understand their own criminality or control their behavior, acquittees are not similarly situated to [civilly committed inmates]. As such, the acquittee cannot satisfy the threshold determination underlying his equal protection claim." In his reply brief, the acquittee responds that acquittees and civilly committed inmates are similarly situated because (1) both groups have been subjected to involuntary commitment, a deprivation of

"This difference in fundamental purpose yields specific disparities in standards, procedures and treatment conditions. Foremost among them is the fact that the legal standard for recommitting an insanity acquittee to the jurisdiction of the board is generally interpreted and applied more conservatively than is the legal standard for recommitting a civilly committed inmate, even though the two standards nominally are identical. This disparity is on display in the present case, the parties having stipulated at the defendant's recommitment hearing that, absent objection, the board's consulting psychiatrist and the defendant's retained psychiatrist both would have testified that the defendant did not meet the standard for involuntary civil commitment." Id., 322–23.

The court further reasoned that the legislature imposed different mandates on the two systems. Id., 323. With respect to acquittees, the primary concern for the board is consideration of public safety. Id. As to civilly committed inmates, physicians providing opinions to the Probate Court must consider whether a less restrictive placement should be recommended and is available. Id.

liberty, (2) the purpose of the commitment is to treat the individual's mental illness and to protect the individual and society from his or her potential dangerousness, and (3) both groups have committed a crime beyond a reasonable doubt.

The majority, although acknowledging that this issue is "not necessarily clear cut," accepts the state's argument that the acquittee is not similarly situated to civilly committed inmates. Herein lies my point of deviation from the approach taken by my colleagues. Neither party has persuaded me regarding the initial determination of whether the two groups are similarly situated. Therefore, my approach to resolving the present appeal is to bypass this threshold question for equal protection claims and to follow the analytical path established by several decisions from both our Supreme Court and this court and assume, without deciding, that acquittees are similarly situated to civilly committed inmates. Next, I conclude that, pursuant to the binding precedent of our Supreme Court in *State* v. *Long*, 268 Conn. 508, 540, 847 A.2d 862 (*Long I*), cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004), rational basis review applies to the acquittee's equal protection claim. As a result of the acquittee's failure to adequately brief § 17a-593 (c) under that standard of review, his equal protection claim fails.

Our Supreme Court often has commenced an equal protection analysis "by [a]ssuming arguendo that the two categories of defendants identified by the [acquittee] are similarly situated with respect to the [statutory scheme] . . . ." (Internal quotation marks omitted.) *State* v. *Wright*, 246 Conn. 132, 143, 716 A.2d 870 (1998). More specifically, in equal protection challenges to § 17a-593, the appellate courts of this state repeatedly and consistently have assumed, without deciding, that acquittees are similarly situated to other groups of persons suffering from mental illness. See,

e.g., *State* v. *Dyous*, supra, 307 Conn. 316; *State* v. *Long*, 301 Conn. 216, 233 n.17, 19 A.3d 1242, cert. denied, 565 U.S. 1084, 132 S. Ct. 827, 181 L. Ed. 2d 535 (2011); *State* v. *Long*, supra, 268 Conn. 535; *State* v. *Lindo*, 110 Conn. App. 418, 426, 955 A.2d 576, cert. denied, 289 Conn. 948, 960 A.2d 1038 (2008).

Next, I note our Supreme Court's observation that, "[a]s a matter of federal law, [i]t is clear that commitment for any purpose constitutes a significant deprivation of liberty . . . . The United States Supreme Court has recognized involuntary commitment to a mental institution, in particular, as involving more than a loss of freedom from confinement . . . due to its stigmatizing consequences, and the potential exposure to invasive, compulsory medical and psychiatric treatment." (Citations omitted; internal quotation marks omitted.) *State* v. *Metz*, 230 Conn. 400, 412–13, 645 A.2d 965 (1994); see also *State* v. *Long*, supra, 301 Conn. 238; S. Caspar & A. Joukov, "Worse than Punishment: How the Involuntary Commitment of Persons with Mental Illness Violates the United States Constitution," 47 Hastings Const. L.Q. 499, 532 (2020); A. Tsesis, "Due Process in Civil Commitments," 68 Wash. & Lee L. Rev. 253, 260 (2011).

Our appellate courts have considered equal protection claims to § 17a-593 on several occasions. In *State* v. *Long*, supra, 268 Conn. 510, the acquittee challenged the constitutionality of statutory procedures pertaining to the recommitment of acquittees past the initial term of their commitment if the discharge would constitute a danger to an acquittee or to others. In *Long I*, the acquittee had been found not guilty by reason of mental disease or defect pursuant to General Statutes (Rev. to 1985) § 53a-13 (a) of assault in the second degree in violation of General Statutes (Rev. to 1985) § 53a-60. Id., 511. The court committed the acquittee to the jurisdiction of the board for a period of five years, which was equal to the maximum sentence of incarceration

he could have received had he been convicted. Id., 512. The state successfully moved to extend the period of commitment on four occasions, resulting in the acquittee having been in the custody of the board for more than sixteen years at the time of his appeal. Id., 513.

At some point in 2001, the acquittee moved to strike the board's report to the court recommending his continued commitment and to dismiss the state's petition for recommitment. Id. Although the court initially denied the acquittee's motions, it sua sponte reconsidered its ruling and ultimately granted the acquittee's motions and vacated its order of commitment. Id., 513–14. The trial court concluded, inter alia, that § 17a-593 (c) violated the acquittee's federal constitutional right to equal protection "because [§ 17a-593 (c)] treats acquittees . . . differently from . . . civilly committed inmates . . . ." Id., 514.[9]

Our Supreme Court disagreed with the trial court and explained that, because a rational basis existed for treating acquittees differently from civilly committed inmates, the acquittee's equal protection claim failed. Id., 516–17. In its analysis, the court assumed, "without deciding, that acquittees are similarly situated to civilly committed inmates." Id., 535. Next, the court expressly held that § 17a-593 (c) neither affected a suspect group nor implicated a fundamental right, and, therefore, rational basis review applied. Id. Finally, the court identified two plausible policy reasons that supported the legislature's different treatment of acquittees and civilly

[9] The trial court also concluded that the acquittee's due process rights under article first, § 8, of the Connecticut constitution had been violated because § 17a-593 (c) failed to provide him with mandatory periodic judicial review of confinement. *State* v. *Long*, supra, 268 Conn. 514. Our Supreme Court rejected the trial court's conclusion and determined that the "existing statutory procedures, as applied to the [acquittee], did not expose him to an unreasonable risk of erroneous deprivation of his liberty." Id., 527. As a result, the acquittee's due process rights under our state constitution were not violated. Id.

committed inmates. Id., 536. "First, under the acquittee statutory scheme, the board has general and specific familiarity with all acquittees beginning with their initial commitment and, therefore, is better equipped than courts to monitor their commitment. By placing oversight of these individuals in a single administrative agency, such as the board, which is comprised of laypersons and experts in relevant areas, including psychiatry, psychology, probation, and victim advocacy, the legislature reasonably could have believed that the board, with its expertise and familiarity with the mental status of each acquittee, would be better equipped than a court to monitor the individuals' recommitment. This furthers the legislature's legitimate interest in efficiently managing the recommitment of acquittees." Id.

"Second, the state clearly has an interest in ensuring that its citizens are not erroneously committed based on harmless, idiosyncratic behavior. . . . The legislature, however, reasonably could have concluded that the risk of erroneous commitment is far less for an acquittee and, therefore, additional mandatory judicial review during the recommitment is unnecessary. Specifically, the legislature could have determined that the likelihood of an erroneous commitment is reduced in the case of an acquittee because an acquittee initiates the commitment process himself by pleading and proving the mental illness that led to his commission of a crime." (Citation omitted.) Id., 536–37. The court concluded that rational bases existed for the different treatment of acquittees and civilly committed inmates, and, therefore, the acquittee's right to equal protection was not violated. Id., 537.

In *State* v. *Lindo*, supra, 110 Conn. App. 420, the acquittee, during his commitment, pleaded guilty to stabbing a staff member and was sentenced to a period of two years of incarceration. He was transferred to a

correctional institution to serve his sentence, and, during his incarceration, his commitment was extended for a period not to exceed five years. Id., 420–21. On appeal, the acquittee argued that "§ 17a-593 (c), as applied to him, violated his right to equal protection because at the time of the recommitment hearing . . . he was an inmate and therefore should have been afforded the more stringent procedural protections applicable when the state seeks to commit mentally ill prisoners pursuant to General Statutes § 17a-515." Id., 422.

This court noted that, in essence, the acquittee presented two claims. Id., 423. First, he argued that he was a mentally ill prisoner, rather than an acquittee, at the time of the recommitment hearing, and, as such, civil commitment statutes should have been applied to him. Id. Second, the acquittee contended that, even if he were an acquittee, he was similarly situated to mentally ill prisoners and had been treated in a manner different from that group when § 17a-593 (c) was applied to him instead of the civil commitment statutes applicable to mentally ill prisoners. Id. We rejected the acquittee's first claim, concluding that, pursuant to General Statutes § 17a-582 (h), an acquittee remains under the jurisdiction of the board until discharged. Id., 424. As to his second claim, this court assumed, without deciding, that acquittees were similarly situated to civilly committed inmates. Id., 426. Applying the reasoning set forth in *State* v. *Long*, supra, 268 Conn. 537, we concluded that "there are rational bases that justify the disparate treatment afforded acquittees as compared with that afforded mentally ill prisoners," and, thus, his equal protection claim failed. *State* v. *Lindo*, supra, 110 Conn. App. 426–27.

In *State* v. *Dyous*, supra, 307 Conn. 301–302, our Supreme Court considered whether the disparities in the procedures for extending an acquittee's term of commitment as compared to the procedures for

extending a civilly committed inmate violated the federal equal protection clause.[10] The defendant argued

[10] "Among other disparities between the two commitment schemes, the procedure for recommitting insanity acquittees directs the finder of fact to '[consider] that its primary concern is the protection of society'; General Statutes [Rev. to 2011] § 17a-593 (g); whereas the procedure for recommitting civilly committed inmates directs the finder of fact to '[consider] whether . . . a less restrictive placement is available . . . .' General Statutes § 17a-498 (c)." *State* v. *Dyous*, supra, 307 Conn. 301.

General Statutes § 17a-593 (g), pertaining to acquittees, provides: "The court shall make a finding as to the mental condition of the acquittee and, considering that its primary concern is the protection of society and its secondary concern is the safety and well-being of the acquittee, make one of the following orders: (1) If the court finds that the acquittee is not a person who should be discharged, the court shall order the recommendation or application for discharge be dismissed; or (2) if the court finds that the acquittee is a person who should be discharged, the court shall order the acquittee discharged from custody. The court shall send a copy of such finding and order to the board."

I note that, in 2022, the legislature added the phrase "and its secondary concern is the safety and well-being of the acquittee" to subsection (g) of § 17a-593. See Public Acts 2022, No. 22-45, § 5.

General Statutes § 17a-498 (c), pertaining to civilly committed inmates, provides: "(1) The court shall require the certificates, signed under penalty of false statement, of at least two impartial physicians selected by the court, one of whom shall be a practicing psychiatrist, and each of whom shall be licensed to practice medicine in the state of Connecticut and shall have been a practitioner of medicine for at least one year and shall not be connected with the hospital for psychiatric disabilities to which the application is being made, or related by blood or marriage to the applicant, or to the respondent. Such certificates shall indicate that the physicians have personally examined the respondent not more than ten days prior to such hearing. The court shall appoint such physicians from a list of physicians and psychiatrists provided by the Commissioner of Mental Health and Addiction Services and such appointments shall be made in accordance with regulations promulgated by the Probate Court Administrator in accordance with section 45a-77. Each such physician shall make a report on a separate form provided for that purpose by the Probate Court Administrator and shall answer such questions as may be set forth on such form as fully and completely as reasonably possible. Such form shall include, but not be limited to, questions relating to the specific psychiatric disabilities alleged, whether or not the respondent is dangerous to himself or herself or others, whether or not such illness has resulted or will result in serious disruption of the respondent's mental and behavioral functioning, whether or not hospital treatment is both necessary and available, whether or not less restrictive placement is recommended and available and whether or not the respondent is incapable of understanding the need to accept the recommended treatment on a voluntary basis. Each such physician shall state upon the form the reasons for his or her opinions. Such respondent or his or her counsel shall

that intermediate scrutiny applied to his equal protection claim. Id., 303. Our Supreme Court concluded that it need not determine whether acquittees were similarly situated to civilly committed inmates or the appropriate standard of review because it agreed with the state that "§ 17a-593 would withstand intermediate scrutiny if such scrutiny were warranted." Id.

In its analysis, the court first recited the standards for determining if two groups were similarly situated for equal protection purposes: "[T]he concept of equal protection [under the federal constitution] has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. . . . Conversely, the equal protection clause places no restrictions on the state's authority to treat dissimilar persons

have the right to present evidence and cross-examine witnesses who testify at any hearing on the application. If such respondent notifies the court not less than three days before the hearing that he or she wishes to cross-examine the examining physicians, the court shall order such physicians to appear.

"(2) The court shall cause a recording of the testimony of such hearing to be made, to be transcribed only in the event of an appeal from the decree rendered under this section. A copy of such transcript shall be furnished without charge to any appellant whom the Probate Court finds unable to pay for such copy. The cost of such transcript shall be paid from funds appropriated to the Judicial Department.

"(3) If the court finds by clear and convincing evidence that the respondent has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, the court shall make an order for his or her commitment, considering whether or not a less restrictive placement is available, to a hospital for psychiatric disabilities to be named in such order, there to be confined for the period of the duration of such psychiatric disabilities or until he or she is discharged or converted to voluntary status pursuant to section 17a-506 in due course of law. Such court order shall further command some suitable person to convey such person to such hospital for psychiatric disabilities and deliver him or her, with a copy of such order and of such certificates, to the keeper thereof. In appointing a person to execute such order, the court shall give preference to a near relative or friend of the person with psychiatric disabilities, so far as the court deems it practicable and judicious. Notice of any action taken by the court shall be given to the respondent and his or her attorney, if any, in such manner as the court concludes would be appropriate under the circumstances."

in a dissimilar manner. . . . [Accordingly], the analytical predicate [of an equal protection claim] is a determination of who are the persons [purporting to be] similarly situated. . . . The similarly situated inquiry focuses on whether the [challenger is] similarly situated to another group for purposes of the challenged government action. . . . Thus, [t]his initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged. . . . Entities are situated similarly in all relevant aspects if a prudent person, looking objectively at the incidents, would [deem] them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the relevant aspects are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples." (Citation omitted; internal quotation marks omitted.) Id., 315–16.

The defendant asserted that both acquittees and civilly committed inmates had been proven guilty beyond a reasonable doubt to have engaged in criminal conduct, were currently mentally ill, required treatment, and presented a potential danger to society. Id., 316. The court acknowledged that the state's contention that the two groups were not similarly situated because only acquittees were mentally ill at the time of the criminal conduct and had engaged in such conduct because of their mental illness had "some persuasive force . . . ." Id. It also rejected the conclusion of the concurring opinion that acquittees and civilly committed inmates are not similarly situated, by stating that the initial inquiry of similarly situated *was not* "*nearly so clear cut in light of the important features that the two groups have in common*." (Emphasis added.) Id., 316

n.11. Ultimately, the court assumed, without deciding, that the groups were similarly situated. Id., 316.

With respect to the issue of the standard of review, our Supreme Court noted that the defendant argued that intermediate scrutiny applied because the recommitment of an acquittee constituted a "massive curtailment of . . . liberty"; (internal quotation marks omitted) id., 318; and that two decisions[11] of the United States Court of Appeals for the Second Circuit had applied that standard in reviewing a New York statute. Id., 318–20. Although inclined "to agree with the defendant that the balance of persuasive authority favors applying intermediate scrutiny to § 17a-593," the court ultimately concluded that it need not identify the proper standard of review because the statute withstood intermediate scrutiny.[12] Id., 321–22.

Prior to applying intermediate scrutiny, our Supreme Court first noted the different statutory goals of the protection of society with respect to General Statutes (Rev. to 2011) § 17a-593 (g) and consideration of the least restrictive placement with respect to General Statutes § 17a-498 (c). Id., 323. Next, the court explained that the board, an administrative body composed of individuals from various disciplines and whose purpose is "to manage, monitor and review the status of each acquittee to ensure the protection of the general public," has no civil counterpart. (Internal quotation marks omitted.) Id., 324. These disparities served to tip the balance in favor of confinement with respect to

[11] See *Ernst J.* v. *Stone*, 452 F.3d 186, 200 (2d Cir. 2006); *Francis S.* v. *Stone*, 221 F.3d 100, 111–12 (2d Cir. 2000).

[12] The court further noted that, because it did not determine the appropriate standard of review, it was unnecessary to consider whether its prior decision in *State* v. *Long*, supra, 268 Conn. 535, in which the court held that a federal equal protection challenge to § 17a-593 (c) must be analyzed under rational basis review, would preclude the court from determining that § 17a-593 (c) actually warrants intermediate scrutiny. *State* v. *Dyous*, supra, 307 Conn. 322 n.14.

acquittees and in favor of protecting the individual liberty of civilly committed inmates. Id., 325.

The court then noted the important government interests of protecting society and affording proper psychiatric treatment to acquittees. Id., 326. It also determined that the recommitment procedure substantially related to the goal of protecting society. Id., 327. As the court explained: "[S]omeone whose mental illness was sufficient to lead him to commit a dangerous crime, and whose mental illness demonstrably has persisted despite years of intensive treatment, is someone whose prospective release raises a special concern for public safety. That concern plainly is not present to the same degree in the case of a civilly committed inmate, a person who (1) might not have been mentally ill when he committed his crime, (2) might not suffer from a long-standing mental illness that has persisted despite years of intensive treatment, and (3) was not legally adjudicated to have committed a crime as a result of his mental illness." (Internal quotation marks omitted.) Id., 329. The court also concluded that a logical connection existed between this special concern and the recommitment procedure and that this procedure did not impose too great a burden on the individual liberty of acquittees. Id., 332–33.[13]

[13] Additionally, our Supreme Court has determined that acquittees are similarly situated to civilly committed inmates for purposes of paying hospital expenses. *State* v. *Reed*, 192 Conn. 520, 529–30, 473 A.2d 775 (1984). "The insanity acquittee does not bear the stigma associated with the conviction of a crime; he is under the jurisdiction of the [C]ommissioner of [M]ental [H]ealth rather than the [C]ommissioner of [C]orrection; and, most importantly, once his mental condition has improved to the extent, as determined by the court, that it would no longer be dangerous to release him, he cannot be denied his freedom. The ordinary prisoner, who is being punished for a crime, must serve the remainder of his term of imprisonment regardless of whether treatment for his mental condition has been successful. These differences, however, have no particular relevance to the propriety of requiring an insanity acquittee to pay for the same services which are provided to an ordinary prisoner without charge, because they are not related to comparative financial ability or need for treatment. During his period of confinement an acquittee has no greater earning capacity than his fellow

Decisions from the United States Supreme Court have suggested strongly that acquittees are similarly situated to civilly committed inmates.[14] For example, in *Baxstrom* v. *Herold*, 383 U.S. 107, 108, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966), the petitioner was sentenced to a period of incarceration, during which a prison physician certified him as insane. He then was transferred to a facility for the purpose of confining and caring for mentally ill prisoners. Id. The director of this facility filed a petition stating that the petitioner's sentence was about to terminate and requested that he be civilly committed pursuant to New York law. Id. On the date that the petitioner's period of incarceration ended, custody over him shifted from the Department of Correction to the Department of Mental Hygiene, although he remained confined in the same facility for mentally ill prisoners. Id., 109. The United States Supreme Court held that the petitioner "was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York. Petitioner was further denied equal protection of the laws by his civil commitment to an institution maintained by the Department of Correction beyond the

hospital inmate temporarily removed from prison for treatment. We are not aware of any evidence that his financial prospects upon his court sanctioned release from a mental hospital are any brighter than those of an ordinary prisoner whose term of imprisonment has expired and who has also been treated for mental illness. Neither can we perceive any difference in the relative need for mental treatment between acquittees and other prisoners who have been transferred to an institution for such treatment. In sum, both classes of hospital inmates are being deprived of their liberty primarily for the protection of society; both have the same financial resources; and both have the same need for treatment." Id.

[14] One commentator has indicated that "[w]hether an insanity acquittee's equal protection rights have been violated by state commitment proceedings has never been fully addressed by the [United States] Supreme Court." R. Dallet, note, "*Foucha* v. *Louisiana*: The Danger of Commitment Based on Dangerousness," 44 Case W. Res. L. Rev. 157, 163 (1993).

expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those . . . nearing the expiration of a penal sentence." Id., 110.

The Supreme Court rejected the respondent's argument that those individuals nearing the end of their criminal sentence who might be mentally ill and in need of being civilly committed were not similarly situated to those not nearing the end of a prison term. Id., 111–12. "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." Id., 111. The court also rejected the respondent's argument that persons such as the petitioner had proven criminal tendencies as shown by their convictions. Id., 114. "Where the [s]tate has provided for a judicial proceeding to determine the dangerous propensities of all others civilly committed to an institution of the Department of Correction, it may not deny this right to a person in [the petitioner's] position solely on the ground that he was nearing the expiration of a prison term. . . . All others receive a judicial hearing on this issue [of whether the petitioner was presently mentally ill and posed such a danger to others as to warrant confinement in Department of Correction facility]. Equal protection demands that [the petitioner] receive the same." (Footnote omitted.) Id., 114–15.

In *Jackson* v. *Indiana*, 406 U.S. 715, 717, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972), the petitioner, a "deaf mute with a mental level of a pre-school child," was charged with two separate robberies. He was determined to be incompetent to stand trial and the trial court committed him to the Indiana Department of Mental Health until his competency was restored. Id., 719. The petitioner's counsel moved for a new trial, arguing

that the court's order amounted to the imposition of a life sentence without ever being convicted of a crime. Id.

On appeal to the United States Supreme Court, the petitioner claimed that he had been denied equal protection because, in the absence of the criminal charges pending against him, the state would have been required to utilize "either the commitment procedures for feebleminded persons, or those for mentally ill persons." Id., 723. The petitioner argued that "under [the] statutes [that provided for such commitment procedures] (1) the decision whether to commit would have been made according to a different standard, (2) if commitment were warranted, applicable standards for release would have been more lenient, (3) if committed under [one of the statutes], he could have been assigned to a special institution affording appropriate care, and (4) he would then have been entitled to certain privileges not now available to him." Id.

The Supreme Court first reviewed its decision in *Baxstrom* v. *Herold*, supra, 383 U.S. 107, and noted that, if a criminal conviction and the imposition of a sentence were insufficient to justify less substantive and procedural protections against indefinite commitment than those generally available, the filing of criminal charges also could not suffice. *Jackson* v. *Indiana*, supra, 406 U.S. 724. It expressly noted that the "*Baxstrom principle also has been extended to commitment following an insanity acquittal* . . . ." (Citations omitted; emphasis added.) Id., 724–25.[15] Later, it explained that *Baxstrom*

[15] See, e.g., *United States* v. *Ecker*, 543 F.2d 178, 188 n.34 (D.C. Cir. 1976) ("we recognize that equal protection requires the standards governing the release of criminal acquittees, who have been confined for a period equal to the maximum sentence authorized for their crimes, to be substantially the same as the standards applicable to civil committees"), cert. denied, 429 U.S. 1063, 97 S. Ct. 788, 50 L. Ed. 2d 779 (1977); *Bolton* v. *Harris*, 395 F.2d 642, 649 (D.C. Cir. 1968) ("[i]t follows that there is no reasonable basis for distinction for commitment purposes between those who plead insanity and those who have the defense thrust upon them"); *Cameron* v. *Mullen*, 387 F.2d 193, 201 (D.C. Cir. 1967) ("*Baxstrom* thus might be said to require

"held that the [s]tate cannot withhold from a few the procedural protections or the substantive requirements for commitment that are available to all others." Id., 727; see, e.g., B. Wendzel, note, "Not Guilty, Yet Continuously Confined: Reforming the Insanity Defense," 57 Am. Crim. L. Rev. 391, 397–98 (2020) (discussing "*Baxstrom-Jackson* equal protection doctrine"). Ultimately, the court concluded that subjecting the acquittee "to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses . . . deprived [him] of equal protection of the laws under the [f]ourteenth [a]mendment." *Jackson* v. *Indiana*, supra, 730; cf. *Jones* v. *United States*, 463 U.S. 354, 368–70, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983) (noting that purpose of commitment following insanity acquittal is treatment and protection of society, not punishment of acquittee, in contrast to sentence of incarceration, which is based on considerations such as retribution, deterrence and rehabilitation, and no correlation exists between severity of offense and length of time necessary for recovery of acquittee; therefore, due process clause permits government to confine acquittee to mental institution until such time as he or she has regained

the conclusion that, while prior criminal conduct is relevant to the determination whether a person is mentally ill and dangerous, it cannot justify denial of procedural safeguards for that determination"); *People* v. *Lally*, 19 N.Y.2d 27, 35, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966) (to comply with spirit, if not express language of *Baxstrom*, acquittee must be afforded all protections afforded to civilly committed individuals). Simply stated, it has been recognized that "*after the expiration of the period for which an acquittee might have been incarcerated had he been convicted, it may be irrational, within the meaning of equal protection doctrine, to distinguish between an acquittee and a committee.* Acquittees who have been confined for that period, therefore, may be entitled to treatment no different from that afforded committees." (Emphasis added.) *Waite* v. *Jacobs*, 475 F.2d 392, 395 (D.C. Cir. 1973); see also B. Wendzel, note, "Not Guilty, Yet Continuously Confined: Reforming the Insanity Defense," 57 Am. Crim. L. Rev. 391, 404 (2020) (disparity in procedural protections for acquittees as compared to those for civil commitments is less justifiable once acquittee has "served their penal sentence").

sanity or is no longer danger to himself or herself or society).[16] As demonstrated by these cases, the issue of whether acquittees are similarly situated to civilly committed inmates presents a complicated inquiry that courts often bypass in order to address the merits of an equal protection claim.

The state argues that the existence of a nexus between the acquittee's mental illness and his criminal conduct, and the requirement that an acquittee affirmatively prove the defense of not guilty by reason of mental disease or defect, establishes that he is not similarly situated to civilly committed inmates. These arguments, although not without some persuasive force, do not convince me that we should reach a conclusive determination regarding this issue. Given the existing case law from both our state and federal courts, and my concern for the rights of individuals such as the acquittee, who has been committed to the custody of the board since April 2, 2003, approximately twenty years, which is twice as long as his ten year maximum period of incarceration,[17] I would follow the lead of our Supreme Court,

[16] In *State* v. *Dyous*, supra, 307 Conn. 316–17 n.11, the majority specifically distinguished the due process analysis set forth in *Jones* v. *United States*, supra, 463 U.S. 354, from its equal protection analysis. "The court in *Jones* merely determined that the distinctions between the two classes were sufficient to warrant differential treatment . . . the very same conclusion that we reach in the present case. Moreover, in *Jones*, the court expressly observed that its due process analysis was dispositive of the equal protection claims that the petitioner had raised at an earlier stage of the proceedings, without suggesting that those claims failed to establish the threshold requirement that the classes must be similarly situated. . . . Indeed, with respect to the one equal protection argument that the petitioner did raise in *Jones*, the court addressed and rejected it on the merits, apparently assuming that the two classes are similarly situated. . . . It may be argued, therefore, that *Jones* supports the view that the two classes are similarly situated for equal protection purposes. *We do not believe, however, that Jones sheds any real light on the issue*." (Citations omitted; emphasis altered.) *State* v. *Dyous*, supra, 316–17 n.11.

[17] As our Supreme Court has noted, although the purpose of an order of commitment differs significantly from the imposition of a criminal sentence, the effect of commitment is no less a deprivation of liberty. *Connelly* v. *Commissioner of Correction*, 258 Conn. 394, 405, 780 A.2d 903 (2001).

and a panel of this court, and continue to assume, without deciding, that the acquittee is similarly situated to civilly committed inmates to consider the merits of his equal protection claim.

With respect to the applicable standard of review, "[i]t is axiomatic that, as an intermediate appellate tribunal, this court is not free to depart from or modify the precedent of our Supreme Court." *Davis* v. *Davis-Henriques*, 163 Conn. App. 301, 312, 135 A.3d 1247 (2016); see also *State* v. *Gonzalez*, 214 Conn. App. 511, 522–23 n.10, 281 A.3d 501 (This court noted: "[W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.)), cert. denied, 345 Conn. 967, 285 A.3d 736 (2022). In *State* v. *Long*, supra, 268 Conn. 535, our Supreme Court expressly held that rational basis review applied to an equal protection challenge to § 17a-593 (c). See also *State* v. *Long*, supra, 301 Conn. 243 (issue of whether intermediate scrutiny applies to equal protection challenge to § 17a-593 (c) may be revisited at some point).

Furthermore, it is well established that "one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . As we have often stated, this court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. [That] may be accomplished only if the appeal is heard en banc. . . . Prudence, then, dictates that this panel decline to revisit such requests." (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 214 Conn. App. 524. In *State* v. *Lindo*, supra, 110 Conn. App. 425, this court specifically rejected the claim that intermediate scrutiny applied to an equal protection challenge to § 17a-593 (c).[18] Our precedent makes clear that § 17a-593 (c) must be analyzed under rational basis review.

[18] I note that, in *State* v. *Long*, supra, 301 Conn. 235, the acquittee conceded that rational basis review applied to his federal equal protection claim in

The acquittee argues in his appellate brief that the court erred in refusing to apply intermediate scrutiny to the acquittee's claim of disparate treatment in statutory recommitment procedures for acquittees as compared to civilly committed inmates. He then provides a lengthy analysis that focuses on whether the relevant statutory framework passes constitutional muster under the lens of intermediate scrutiny. I am not persuaded by the acquittee's efforts to distinguish the present case from *State* v. *Long*, supra, 268 Conn. 535–36. Instead, I am bound to apply rational basis review to the acquittee's claim of disparate treatment in statutory recommitment procedures for acquittees as compared to civilly committed inmates. An intermediate court must follow the precedent of our Supreme Court, which presently requires § 17a-593 (c), for purposes of a federal equal protection challenge, to be "analyzed under rational basis review." *State* v. *Long*, supra, 268 Conn. 535.[19]

The acquittee, however, has failed to adequately brief the claim that his right to equal protection had been violated under rational basis review. As noted, his appellate brief focuses on why § 17a-593 (c), as applied to him, does not survive intermediate scrutiny. There is, however, no cogent analysis or discussion of whether § 17a-593 (c) passes review under the rational basis

his prior appeal. There was no such concession in *State* v. *Lindo*, supra, 110 Conn. App. 425.

[19] In *State* v. *Dyous*, supra, 307 Conn. 322, our Supreme Court indicated that "the balance of persuasive authority favors applying intermediate scrutiny to § 17a-593 . . . ." Furthermore, the *Dyous* court signaled that it was critical of the application of rational basis review in *Long I*. The court stated: "Because we do not determine the appropriate standard of review, we need not consider whether our use of rational basis review in *Long I*, in which we stated conclusorily that '§ 17a-593 (c) neither affects a suspect group nor implicates a fundamental right for . . . purposes of the federal equal protection clause' and, therefore, 'must be analyzed under rational basis review'; *State* v. *Long*, supra, 268 Conn. 535; would preclude us from determining that § 17a-593 actually warrants intermediate scrutiny." *State* v. *Dyous*, supra, 322 n.14.

standard. "[W]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." (Internal quotation marks omitted.) *State* v. *Fetscher*, 162 Conn. App. 145, 155–56, 130 A.3d 892 (2015), cert. denied, 321 Conn. 904, 138 A.3d 280 (2016). As a result, his equal protection claim raised before this court must fail.

For the foregoing reasons, I respectfully concur.

D. S. *v.* D. S.*
(AC 44748)

Prescott, Suarez and Bishop, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dissolving his marriage to the defendant and making certain financial orders. At the time of dissolution, the defendant was a partner in a large, international law firm. The plaintiff had been unemployed for many years despite having multiple postgraduate degrees and having earned a significant income during his previous employment. As part of the trial court's property award, it concluded that the defendant's potential stream of income pursuant to the retirement provisions of her law firm's partnership agreement was not property subject to equitable distribution under the applicable statute (§ 46b-81). With respect to alimony, the trial court issued a two part order. First, the defendant was required to pay certain monthly, after-tax amounts to the plaintiff, which obligation would terminate on the earliest to occur of the following circumstances: the defendant's death, the plaintiff's death, the plaintiff's remarriage, or when the defendant was no longer employed as an active partner of her law firm. Second, the alimony order provided that, after the defendant ceased to be employed as an active partner of her law firm and to the extent that she received any retirement payments pursuant to the partnership agreement, her obligations under the first part of the order would terminate and, instead, she would be required to pay 25 percent of her net, after-tax income to the plaintiff. Such obligation would terminate on the first to occur of certain circumstances, namely, the defendant's death, the plaintiff's death, or the time at which the defendant's receipt of income under the partnership agreement ceased. On the plaintiff's appeal to this court, *held*:

1. The trial court did not err in concluding that the defendant's prospective interest in the receipt of retirement benefits pursuant to her law firm's partnership agreement did not constitute marital property subject to equitable distribution pursuant to § 46b-81: on appeal, the plaintiff did not challenge any of the trial court's underlying factual findings but contested only its ultimate legal conclusion that the potential source of retirement income was too speculative and, therefore, that it represented

* 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 person's identity may be ascertained.

a mere expectancy that could not be categorized as property for purposes of equitable distribution pursuant to § 46b-81, which this court concluded was not improper, as the trial court relied on what it deemed to be credible expert testimony indicating that the defendant's potential future unvested stream of income was not a property right or an asset because it had no value as of the date of dissolution, the payments involved variables, risks and requirements that were not fixed and were impossible to determine at such time, the future income was not carried as a liability by the law firm on its books, it was not guaranteed, transferrable, saleable, or funded, and it could be eliminated at any time.

2. The trial court's alimony order was not improper: the alimony order did not represent an improper delegation of judicial function but, rather, was more akin to an appropriate, self-executing order, as the court merely set forth the circumstances pursuant to which the order would be terminated or modified on the basis of the conduct of the parties, and the authorities relied on by the plaintiff in making his argument to the contrary were inapposite because, in those cases, the trial court delegated its judicial function by yielding to a nonjudicial officer the authority to make decisions that were binding on the parties; moreover, the plaintiff's alternative argument, that the trial court's alimony order represented an abuse of its discretion because, inter alia, it precluded any modifications that increased the amount or duration of the payments, was unavailing because the trial court's decision reflected that it devised a thoughtful and just order tailored to the parties' specific circumstances and abilities, including that the court found the plaintiff's claim that he was too busy to secure employment to be without merit, that the plaintiff had earned a substantial income during his previous employment, that the plaintiff was responsible for the breakdown of the marriage, and that his wasteful pattern of spending placed the family in financial distress.

Argued October 20, 2022—officially released February 7, 2023

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Diana*, *J.*, rendered judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Diana*, *J.*, granted the defendant's motion for clarification, and the plaintiff appealed to this court. *Affirmed.*

Charles D. Ray, with whom were *Justyn P. Stokely*, and, on the brief, *Jessica D. Solotruk*, for the appellant (plaintiff).

Kenneth J. Bartschi, with whom were *Karen L. Dowd*, and, on the brief, *Thomas P. Parrino* and *Randi R. Nelson*, for the appellee (defendant).

Opinion

BISHOP, J. The plaintiff, D. S., appeals from the judgment of the trial court dissolving his marriage to the defendant, D. S. On appeal, the plaintiff claims that the court improperly (1) concluded that the defendant's prospective interest in the receipt of retirement benefits pursuant to her law firm's partnership agreement did not constitute marital property subject to equitable distribution pursuant to General Statutes § 46b-81, and (2) issued an alimony order that, by its terms, terminates upon the undertaking of certain actions by the defendant on the basis that the order represents an improper delegation of judicial authority or an abuse of discretion by the court. We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are pertinent to our consideration of the issues on appeal.[1] The parties were married in

[1] The record reveals that, during the course of the multiday, remote hearing on this action, the trial court, at the urging of both parties, ordered certain documents to be sealed, and, from time to time, the court closed the hearings on the basis that revealing certain information would be detrimental to one or more of the parties. In no instance did the trial court provide public notice of its intent to seal files or the courtroom as required by Practice Book § 25-59A (e). Subsequent to oral argument before this court, this court ordered the parties to file supplemental briefs on the question of whether this court should be bound by the trial court's sealing orders. Both parties, in their supplemental briefs, have urged this court to adhere to the sealing orders. The defendant argues that the trial occurred during the COVID-19 pandemic and that the trial court was not required to adhere to the dictates of Practice Book § 25-59A on the basis of the governor's order suspending rules of the court and the order of the Rules Committee of the Superior Court to similar effect, which were in place during the pandemic. The plaintiff urges this court to adhere to the sealing orders on the basis of equity and the parties' reliance on the sealing orders in the manner in which the trial was conducted. This court, however, has an obligation to publicly issue its opinion for the public benefit and for the advancement of the law. Accordingly, in light of our authority pursuant to Practice Book § 77-2 (a) to alter a trial court's sealing orders, but in the spirit of the trial court orders

1990 in Woodbury, New York. They have two children, one born in 1999 and the other in 2005. At the time of the marital dissolution, the plaintiff was fifty-seven years old and in fair health. He has a bachelor's degree from Trinity College, a master's degree in business administration (MBA) from the Wharton School, University of Pennsylvania, and a master's degree in public administration from the John F. Kennedy School of Government at Harvard University. Notwithstanding these academic credentials and a history of substantial employment, earning, in some years, several hundred thousand dollars, the plaintiff has not worked for an employer since 2001 and had no earned income at the time of the dissolution. In 2002, the plaintiff formed his own private equity firm. That venture, however, was unsuccessful and officially dissolved in 2008. The court found that the reasons given by the plaintiff for his lack of employment since then were without merit.

At the time of the marital dissolution, the defendant also was fifty-seven years old. Educated in Canada, she holds MBA and Juris Doctor degrees from the University of Western Ontario. At the time of the marital dissolution, she was a partner in a large international law firm. Her annual gross income is approximately eight million dollars, and her annual net income is approximately 50 percent of her gross income. Were the defendant to retire from her current law firm, the terms of the firm's partnership agreement may entitle the defendant to a future stream of retirement income.

On November 6, 2017, the plaintiff filed this dissolution action against the defendant. On December 14, 2017, the defendant filed an answer and cross complaint against the plaintiff. After four years of intense litigation

and the parties' reliance on them, we do not, in this opinion, refer to either party or their children by name; nor does this opinion identify any of the parties' past or present employers.

and discovery, the court held a contested dissolution trial over the course of several days in January, February, and March, 2021.[2] At the trial, the parties cumulatively introduced hundreds of exhibits and elicited testimony from several fact and expert witnesses.

On April 19, 2021, the court rendered judgment dissolving the parties' marriage by way of a comprehensive memorandum of decision. The court found that the plaintiff was solely responsible for the breakdown of the parties' marriage due to "his abusive and intimidating treatment of the defendant, by his excessive wasteful pattern of spending placing this family in financial distress, along with his failure to contribute financially to the household in-kind and in fact, in addition to his baseless jealously and suspicious nature of the defendant's fidelity." The court made financial orders relating to parenting, child support, activity costs and schooling for the parties' children, alimony, health insurance and related costs, for the disposition of the parties' assets and liabilities, and for counsel fees.[3] At issue in this appeal are the court's property and alimony orders.

As part of its property award, the court concluded that the defendant's potential stream of income pursuant to the law firm's partnership agreement was not property subject to equitable distribution pursuant to § 46b-81. The court reasoned that "[t]he value of most of the assets and liabilities in this matter are clear and not in dispute. One financial matter that is unique in form and substance required undisputed expert testimony," and that related to the partnership agreement

[2] Because the trial took place during the COVID-19 pandemic, all hearings were conducted remotely.

[3] Among its property orders, the court ordered an equitable division of the defendant's Keogh plan valued at $1,762,000, her 401k plan valued at $1,540,700, and her partner defined benefit pension plan with an annual benefit of approximately $197,000, payable when the defendant reached the age of sixty-two years.

of the defendant's law firm, which included provisions for retirement income. In assessing the retirement provisions, the court found that the defendant's potential future receipt of retirement income was a mere expectancy, and the court concluded, therefore, that the potential stream of income did not meet the statutory definition of property as stated in § 46b-81.

As for alimony, the court awarded alimony to the plaintiff in a two part order. First, the court ordered the defendant to "pay alimony to the plaintiff in the monthly net after-tax amount of $35,000 for the first twelve months and $30,000 a month thereafter," which "alimony obligation shall automatically terminate upon the first of the following circumstances: (i) the defendant's death, (ii) the plaintiff's death, (iii) remarriage of the plaintiff, or (iv) when the defendant is no longer employed as an active partner of [the law firm]." Second, the court ordered that, "[a]fter the defendant ceases to be employed as an active partner of [the law firm], and to the extent that the defendant receives any payments pursuant to the [law firm's partnership agreement] . . . the defendant shall no longer pay alimony to the plaintiff as set forth [in the first part of the order], and instead, shall pay alimony to the plaintiff in the amount of 25 percent . . . of the defendant's net after-tax income actually received," and that "[t]his alimony obligation shall automatically terminate upon the first of the following circumstances: (i) when the defendant's receipt of income . . . under the [law firm's partnership agreement] ceases, (ii) the defendant's death, or (iii) the plaintiff's death, not the plaintiff's remarriage." Furthermore, the court ordered that "[t]he amount of alimony as ordered herein under both scenarios shall be nonmodifiable upward and nonmodifiable as to increases in duration. The defendant's income generated by the retirement assets distributed to her shall not be includable in the defendant's income

for purposes of adjudicating motions to modify alimony, nor shall any income generated by the defendant for employment subsequent to her departure from [the law firm]."

On April 28, 2021, the defendant filed a motion for clarification, requesting that the court permit her to deduct from her alimony payments any outstanding amounts of childcare expenses that the plaintiff fails to pay to the defendant, which the court granted on May 3, 2021. On May 10, 2021, the plaintiff filed a motion to reargue the court's dissolution judgment challenging, inter alia, the court's property and alimony awards, which the court denied on the same date. This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the court improperly concluded that the defendant's prospective interest in the receipt of retirement benefits pursuant to her law firm's partnership agreement did not constitute marital property subject to equitable distribution pursuant to § 46b-81. Notably, the plaintiff contests only the court's ultimate legal conclusion on appeal and does not challenge any of the court's underlying factual findings.[4] The plaintiff contends that the court should have concluded that the defendant's expectation to receive retirement benefits pursuant to her law firm's partnership agreement constituted marital property under § 46b-81 because her right to that future income is "sufficiently concrete, reasonable, and justifiable . . . ." We disagree.

[4] There are parts of the plaintiff's principal appellate brief in which he appears to ask this court to reweigh the evidence introduced at trial, thereby implicitly challenging the court's factual findings. Nevertheless, the plaintiff subsequently clarified his claim by expressly stating in his reply brief and at oral argument before this court that he is not challenging any of the factual findings supporting the court's legal conclusion.

At the outset, we note that the plaintiff claims that the provisions in the law firm's partnership agreement for retirement pay upon the retirement of partners create a property interest subject to equitable distribution pursuant to § 46b-81. In making this assertion, the plaintiff points to the language of *Bender* v. *Bender*, 258 Conn. 733, 785 A.2d 197 (2001), in which Justice Borden, speaking for the majority of a divided court, opined that the term "property" is not defined by § 46b-81 and, thus, should be broadly construed to include "every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments . . . ." (Internal quotation marks omitted.) Id., 742–43. The plaintiff further claims that *Bender* created a two part framework for assessing whether a particular interest may be classified as property for purposes of distribution, namely, whether (1) "the holder has an enforceable right akin to a valid contract claim," or (2) "the holder's expectation to receive [that] property is not too speculative, i.e., the expectation is 'sufficiently concrete, reasonable and justifiable as to constitute a presently existing property interest for equitable distribution' [purposes]." See also *Bender* v. *Bender*, supra, 748–49. In the case at hand, although the plaintiff acknowledges that the defendant's right to receive retirement pay does not meet the first prong of the test, he claims that her right to the future receipt of retirement pay satisfies the second prong of the test because it is not merely speculative.

In further support of his argument, the plaintiff cites to two cases decided by this court subsequent to *Bender*.[5] In *Czarzasty* v. *Czarzasty*, 101 Conn. App. 583, 584–86, 922 A.2d 272, cert. denied, 284 Conn. 902,

[5] The plaintiff also substantially relies on decisions from other jurisdictions as well as decisions of the Superior Court. We are not bound by these decisions and, regardless, do not find them persuasive. See *Mazza* v. *Mazza*, 216 Conn. App. 285, 306 n.13, 285 A.3d 90 (2022).

931 A.2d 262 (2007), this court was required to determine whether the defendant's unvested interest in his employer's performance based deferred compensation plan, which provided for an award in the amount of $100,000 at the conclusion of ten years of employment as long as a specific production goal was met, constituted property subject to equitable distribution under § 46b-81. Answering that question in the affirmative, this court noted that the trial court had found that the defendant had worked for his employer for eight years and that his level of production was on target to meet the required goal in order to receive the award of $100,000. Id., 594–95. This court noted, as well, that the trial court had found that the contingent nature of the defendant's interest was "readily obtainable by [the defendant] based upon his employment history, performance record and the projections of [his employer]," and, therefore, the trial court properly considered the amount of the prospective award in fashioning its property orders. (Internal quotation marks omitted.) Id., 595.

The plaintiff relies, as well, on another post-*Bender* opinion of this court. In *Ranfone* v. *Ranfone*, 103 Conn. App. 243, 244, 928 A.2d 575, cert. denied, 284 Conn. 940, 937 A.2d 698 (2007), this court was called on to determine whether the trial court had properly awarded the plaintiff 50 percent of the defendant's pension benefits as of the date the defendant would become eligible to collect them, which would include contributions made to the defendant's pension after the marital dissolution. There, the defendant argued that "assets earned after the date of the dissolution are not marital property" and that assets must be valued "as of the date of dissolution." Id., 247. Rejecting the defendant's argument, this court pointed out that, in *Bender*, the court had opined: "The fact that a portion of the pension benefits, once vested, will represent the defendant's service to the fire department after the dissolution does

not preclude us from classifying the entire unvested pension as marital property." (Internal quotation marks omitted.) Id., 252.

Although not disagreeing that the court in *Bender* established a two part test, the defendant argues that her potential receipt of an uncertain amount of retirement pay is a mere expectancy not sufficiently concrete to remove it from the realm of speculation and, therefore, does not constitute an interest subject to distribution because the ultimate retirement payments she may receive are subject to many variables and uncertainties.

We next set forth the applicable legal principles and standard of review applicable to the plaintiff's first claim. The question of whether a particular retirement benefit constitutes distributable property pursuant to § 46b-81 turns on the meaning of the word "property" as it is contained in § 46b-81. See *Reville* v. *Reville*, 312 Conn. 428, 446, 93 A.3d 1076 (2014). Accordingly, because our task involves statutory interpretation, our review is plenary. See id. In conducting this review, we look not only to the common meaning of the term "property" but also to the prior judicial gloss on the term as it is used in the statute in question. *Bender* v. *Bender*, supra, 258 Conn. 742–43. In conducting our review of the court's determination in this instance, we examine the undisputed facts as found by the court to determine whether those facts support the court's conclusion that the defendant's prospects for the future receipt of retirement income are too speculative to be deemed property for equitable distribution under the statute. In sum, our review does not involve fact-finding by this court; rather, we conduct a legal analysis of whether the trial court's ultimate conclusion, based on the facts found at trial, is legally correct.

In *Bender*, our Supreme Court somewhat altered the lens through which this issue must be decided. Before

Bender, our Supreme Court had held that, in order to be subject to distribution, a party's expectation of the future receipt of funds had to have the attributes of a property right, such that there was an enforceable contract right therein at the time of the dissolution. See id., 753. The majority's analysis in *Bender* began with the statute itself, § 46b-81,[6] which provides in relevant part that a court in a marital dissolution decree "may assign to either spouse all or any part of the estate of the other spouse. . . ." General Statutes § 46b-81 (a); see also *Bender* v. *Bender*, supra, 258 Conn. 741–42. The statute further provides that, "[i]n fixing the nature and value of the property, if any, to be assigned," the court should consider a number of factors that need not be iterated for the purpose of our analysis. General Statutes § 46b-81 (c). Recognizing that the statute did not include a definition of property, our Supreme Court opined that, in the context of marital dissolution and mindful of the equitable nature of the proceedings, the General Assembly intended for the term "property" to have a broad meaning. *Bender* v. *Bender*, supra, 742–43.

In *Bender*, Justice Borden reviewed our Supreme Court's then previous treatment of certain potential benefits to determine whether those benefits qualified as property in the marital dissolution context. Id., 745–48; see also *Lopiano* v. *Lopiano*, 247 Conn. 356, 367, 752 A.2d 1000 (1998) (involving personal injury award); *Bornemann* v. *Bornemann*, 245 Conn. 508, 518, 752 A.2d 978 (1998) (addressing granted but not yet exercisable stock options); *Krafick* v. *Krafick*, 234 Conn. 783, 798, 663 A.2d 365 (1995) (concerning vested pension benefits). From this review of salient decisional law, Justice Borden concluded that our Supreme Court previously had determined that rights to the future

[6] Subsequent to *Bender*, our legislature amended § 46b-81. See Public Acts 2013, No. 13-213, § 2. That amendment has no bearing on the merits of this appeal; thus, for convenience, we refer to the current revision of the statute.

receipt of income over which a person had some presently existing, enforceable right constituted marital property under § 46b-81. *Bender* v. *Bender*, supra, 258 Conn. 748. But *Bender* broke new ground in our Supreme Court's determination that a person's expectancy in the future receipt of funds could also be considered property, even if not yet presently an enforceable right, so long as the right to the future receipt was not merely speculative. Id., 749. In short, the court concluded that a present right to the future receipt of funds must be "sufficiently concrete, reasonable and justifiable as to constitute a presently existing property interest for equitable distribution purposes." Id. Applying these principles, the majority in *Bender* concluded that, because the defendant, a firefighter, had been employed in that capacity for nineteen years and his right to the receipt of pension benefits would vest after twenty-five years of service; id., 736–37; his expectancy was not too speculative because it was subject to limited variables such as his survival, continued faithful service, and the continued existence of the pension plan. Id., 749–50.

With that legal backdrop in mind, we next turn to the facts at hand. As noted previously, the defendant is a partner in a large international law firm. During trial, the defendant offered the expert testimony of Mark Harrison, a certified public accountant and attorney who previously had testified in marital dissolution actions as a forensic accountant and valuation expert. Pursuant to his engagement, Harrison examined the law firm's partnership agreement that came into evidence. The agreement provides, in relevant part, that a partner who has reached the age of fifty and completed at least ten years of service, may retire and receive a stream of payments, subject to certain limitations and caveats. As an initial matter, Harrison noted, the provisions for retirement payments set forth in the

partnership agreement are not funded and are not carried on the firm's books as a liability. Rather, retirement payments are disbursed from the firm's future earnings. Harrison found it significant that the provision for retirement payments is subject to termination or reduction at any time by a vote of the firm's partners. Harrison pointed out, as well, a provision in the partnership agreement reciting that the payments to a retiree could be adjusted by the firm's compensation committee and the concurrence of a certain number of partners on their determination that the payments are no longer fair to the remaining partners or the firm, or are otherwise inappropriate or inequitable to the former partner. Retirement payments also could be adjusted, deferred, or simply not paid, if the payments to retired partners exceed a certain percentage of the firm's income. In that event, the partnership agreement provides, payments to retirees may be deferred and not paid for up to five years and, if the payments cannot be made during the period of deferral, the obligation of the firm to make payments could be extinguished forever. Distinguishing the partnership retirement provisions from a qualified pension plan, Harrison characterized the defendant's potential to receive retirement payments from the firm as "the epitome of a mere expectancy."

Harrison commented that, although he had reviewed many law firms' partnership agreements with retirement provisions, he had never before seen a provision that reserved to a small group within the firm the absolute right to terminate or adjust a former partner's retirement pay at their sole discretion and on the basis that the firm's retirement payments to former partners unreasonably diminished the firm's profits available to current partners. Harrison also commented, as to the certainty of future retirement payments by the firm, that those payments depended on the continuing viability of the firm which, although international in nature,

could not be viewed as a certainty because, as Harrison claimed, twenty-two firms of nearly the same size as the defendant's employer had either been disbanded or had declared bankruptcy since the financial crisis of 2007.

With respect to the valuation of the potential stream of payments the defendant may receive on her retirement, Harrison testified that it is not subject to a present valuation because of the variables and uncertainties in the retirement provisions of the partnership plan. In sum, Harrison testified that the retirement provisions could not be given a present value because doing so would require him to make speculative assumptions.

It is noteworthy that Harrison's assessment of the uncertainty of the defendant's potential retirement payments was not theoretic. On the basis of firm documents, he concluded that, over the past two decades, the firm had changed the formula by which a retiree's pay is determined as the firm's demographics have changed to reflect the greater number of retirees vis-à-vis active partners. He noted, in particular, how these changes reduced the potential payments to the defendant on her retirement and the potential for further reductions as the number of retirees continues to rise compared to the number of active partners.

Harrison concluded his testimony by stating that the defendant's potential stream of retirement payments cannot be considered to be an asset because the firm does not report the potential payments as a liability. In that regard, Harrison was speaking in accounting terms. When asked more specifically for his opinion as to whether the potential stream of payments could be considered as property under Connecticut's marital dissolution statute, Harrison replied in the negative, stating that there is not enough certainty in the potential stream

for it to rise to the level of property as defined by our Supreme Court.

The trial court embraced the views expressed by Harrison.[7] In its memorandum of decision, the court stated: "The court relied on the credible expert testimony of . . . Harrison regarding the defendant's potential stream of income upon her retirement from her law firm. This stream of payments involves variables, risks and requirements that are not fixed and [are] impossible to determine at this time. This future income is not carried as a liability by the law firm on their books, not guaranteed, not transferable, not saleable, not funded and can be entirely eliminated at any time. Thus, its value today is found to be a mere expectancy. The court finds the defendant's potential future unvested stream of income is not a property right, or an asset, it has no worth and no value as of the date of this decision. It may produce a stream of income if all the stars line up in the future as it has for the past retired partners of the law firm."

On the basis of the facts adduced at trial regarding the defendant's potential receipt of retirement income, we do not disagree with the court's conclusion that this potential source of income is too speculative and,

[7] During the trial, the plaintiff offered the testimony of Henry Guberman, a certified public accountant who specializes in forensic litigation services with an emphasis on matrimonial matters. He testified that he had analyzed the benefits that might be available to the defendant upon retirement but was unable to provide a present valuation of them without resorting to speculation as to the amount of the defendant's retirement pay. On cross-examination from the defendant's counsel, Guberman acknowledged that he could not characterize the defendant's potential retirement payments as an asset but, rather, indicated that he characterized them simply as a potential stream of payments. Ultimately, Guberman testified that he was not intending to offer an expert opinion as to valuation of the retirement provisions of the partnership agreement with any degree of professional certainty. On that basis, the court declined to qualify Guberman as an expert for purposes of offering any opinions because he stated that he had no opinions to offer.

therefore, represents a mere expectancy that cannot be categorized as property for purposes of equitable distribution pursuant to § 46b-81.

II

The plaintiff next challenges the court's alimony order, asserting that it represents an improper delegation of a judicial function or an abuse of discretion. The plaintiff first argues that the court's alimony order amounted to an improper delegation of a judicial function to a nonjudicial actor because the court provided the defendant with the ability to terminate her alimony obligation by leaving her employment with her present law firm. The plaintiff alternatively argues that, even if the court's alimony order was lawful, that order represented an abuse of discretion by the court because "it precludes modification of alimony upward and as to increases in duration, while, at the same time, permits the defendant to seek modification of the award and to take unilateral action to terminate her alimony obligation without seeking court approval by way of modification." We are not persuaded that the court's order was improper.

We begin by recounting the court's alimony order, which has two parts. First, the court ordered the defendant to pay alimony to the plaintiff in the monthly net amount of $35,000 for the first twelve months after dissolution and, thereafter, in the amount of $30,000 per month to terminate on the death of the defendant, the plaintiff's death or remarriage, or at such time as the defendant is no longer employed as an active partner with her present law firm. The court also provided a "safe harbor" of up to an additional $200,000 that the plaintiff could earn beyond his earning capacity of $150,000 per annum, as found by the court, before the amount of alimony could be subject to downward modification. Second, the court further provided that, post-termination of the defendant's employment with her

present law firm and to the extent that she receives any potential retirement payments pursuant to the law firm's partnership agreement, the alimony order would be modified and, instead, the defendant was ordered to pay alimony to the plaintiff in an amount equal to 25 percent of her net retirement income actually received. The court's memorandum of decision provided, as well, that the second part of the alimony obligation would terminate once the defendant was no longer receiving payments from the law firm, upon her death or the plaintiff's death but not upon his remarriage. Finally, the court ordered, as to both tranches of alimony, that the amounts ordered would not be subject to modification as to any increase either in amount or duration.

A

The plaintiff first argues that the court's alimony orders, insofar as they gave to the defendant the ability to terminate her alimony obligation by moving to another position and left the power to terminate alimony in her hands, constituted an improper delegation of a judicial function to a nonjudicial actor.

We first set forth the applicable legal principles and standard of review applicable to the plaintiff's argument that the court improperly delegated its authority. "[W]hether the court improperly delegated its judicial authority presents a legal question over which we exercise plenary review. . . . It is well settled . . . that [n]o court in this state can delegate its judicial authority to any person serving the court in a nonjudicial function. The court may seek the advice and heed the recommendation contained in the reports of persons engaged by the court to assist it, but in no event may such a nonjudicial entity bind the judicial authority to enter any order or judgment so advised or recommended. . . . A court

improperly delegates its judicial authority to [a nonjudicial entity] when that person is given authority to issue orders that affect the parties or the children. Such orders are part of a judicial function that can be done only by one clothed with judicial authority." (Citation omitted; internal quotation marks omitted.) *Thunelius* v. *Posacki*, 193 Conn. App. 666, 674, 220 A.3d 194 (2019).

In support of his argument of improper delegation, the plaintiff cites to the language of General Statutes § 46b-82,[8] concerning alimony, and also to decisional law. He claims to find support in this court's opinions in *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 371–72, 190 A.3d 68 (2018), *Keenan* v. *Casillo*, 149 Conn. App. 642, 660–61, 89 A.3d 912, cert. denied, 312 Conn. 910, 93 A.3d 594 (2014), *Nashid* v. *Andrawis*, 83 Conn. App. 115, 120–22, 847 A.2d 1098, cert. denied, 270 Conn. 912, 853 A.2d 528 (2004), *Weinstein* v. *Weinstein*, 18 Conn. App. 622, 628–29, 561 A.2d 443 (1989), and in our Supreme Court's decision in *Valante* v. *Valante*, 180 Conn. 528, 532–33, 429 A.2d 964 (1980). Each of those decisions, however, is inapposite.

In *Kyle S.*, the salient issue related to a parent's contact with a minor child after a restraining order had been issued. *Kyle S.* v. *Jayne K.*, supra, 182 Conn. App. 370. In making its orders concerning parenting time and

[8] General Statutes § 46b-82 provides in relevant part: "(a) At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section 46b-81. . . . In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment."

custodial rights, the trial court stated: "As far as [the child] being involved, I'm going to rely on Dr. Corson [who was the child's psychologist]. Dr. Corson will dictate the scope of your contact with [the child] in a therapeutic setting." (Emphasis omitted; internal quotation marks omitted.) Id., 370–71. The court stated further: "I am restricting that contact so that the mental health professional can be in charge." (Emphasis omitted; internal quotation marks omitted.) Id., 371. In reversing the trial court's order, this court opined: "A court improperly delegates its judicial authority to [a nonjudicial entity] when that person is given authority to issue orders that affect the parties or the children." (Internal quotation marks omitted.) Id.

In *Keenan*, the trial court had accepted the recommendation of the guardian ad litem to select a coparenting therapist and required the parties to select an individual therapist from a list prepared by the guardian ad litem. *Keenan* v. *Casillo*, supra, 149 Conn. App. 660. There, because the court did not yield to the guardian ad litem the authority to make any binding orders regarding parenting, this court determined that there had been no improper delegation of judicial authority to a nonjudicial officer. Id., 660–61.

In contrast, in *Nashid*, this court determined that an order by the trial court that the parties submit any custody disputes to binding arbitration was an improper delegation because the effect of such an order would be to yield the court's decisional authority to an arbitrator, a nonjudicial officer. *Nashid* v. *Andrawis*, supra, 83 Conn. App. 120, 122.

In *Weinstein*, as well, this court concluded that the trial court had exceeded its authority by improperly delegating its judicial function to counsel for the minor children when the court's order included a provision requiring the parties to share certain child related

expenses but also provided that, if they could not agree on whether to incur such expenses, they were to submit their disagreement to counsel for the minor children for a decision. *Weinstein* v. *Weinstein*, supra, 18 Conn. App. 628–29.

Finally, in *Valante*, our Supreme Court concluded that a court's order that the family relations division of the Judicial Branch make orders regarding the division of personal property was improper. *Valante* v. *Valante*, supra, 180 Conn. 532–33.

In response to the plaintiff's claims, the defendant argues that the court's alimony orders do not constitute an impermissible delegation of a judicial responsibility and that, to the extent the orders contain self-executing provisions, they are lawful. In making this assertion, the defendant cites decisional law supporting the notion that self-executing orders are lawful. For example, the defendant points to *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 195–96, 200–201, 112 A.3d 144 (2015), in which our Supreme Court found no fault in an order adopting the parties' agreement that alimony would cease upon cohabitation. See also *Krichko* v. *Krichko*, 108 Conn. App. 644, 650, 948 A.2d 1092, cert. granted, 289 Conn. 913, 957 A.2d 877 (2008) (appeal withdrawn May 19, 2009).

Having reviewed the authorities advanced by the plaintiff, we find them inapposite because in each of these cases in which there was a reversal on appeal, the trial court had actually delegated its judicial function by yielding to a nonjudicial officer the authority to make decisions binding on the parties. In the case at hand, however, the court made no such order. Rather, the court simply set forth the circumstances in which its alimony order would be terminated or modified on the basis of the conduct of the parties. In our view, the

orders we now review are more akin to the self-executing orders that have been determined to be appropriate on appellate review. We therefore conclude that the court did not improperly delegate to a nonjudicial officer its adjudicative responsibility.

B

Finally, the plaintiff argues that, even if the court's alimony order was not unlawful, it represented an abuse of discretion by the court because that order "precludes modification of alimony upward and as to increases in duration, while, at the same time, permits the defendant to seek modification of the award and to take unilateral action to terminate her alimony obligation without seeking court approval by way of modification."

We first set forth the applicable legal principles and standard of review applicable to the plaintiff's argument that the court abused its discretion. In *Czarzasty* v. *Czarzasty*, supra, 101 Conn. App. 587, we repeated our oft stated maxim that "[a]n appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) "The generally accepted purpose of . . . alimony is to enable a spouse who is disadvantaged through divorce to enjoy a standard of living commensurate with the standard of living during marriage. . . . In addition to the marital standard of living, the trial court must also consider the factors in . . . § 46b-82 when awarding alimony." (Internal quotation marks omitted.) *Reinke* v. *Sing*, 186 Conn. App. 665, 689, 201 A.3d 404 (2018). Section 46b-82 (a) requires the court, when determining whether alimony should

be awarded, to "consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment." See also *Reinke* v. *Sing*, supra, 689–90. "In addition to being awarded to provide an incentive for the spouse receiving support to use diligence in procuring training or skills necessary to attain self-sufficiency, time limited alimony is also appropriately awarded to provide interim support until a future event occurs that makes such support less necessary or unnecessary." (Internal quotation marks omitted.) *O'Neill* v. *O'Neill*, 209 Conn. App. 165, 177, 268 A.3d 79 (2021).

In this regard, the court made several pertinent factual findings that find support in the record. The court recited the facts of the plaintiff's past employment, noting that, in 2000, he had earned more than $1 million dollars and, in 2001, he had earned more than $800,000. As to the plaintiff's claims regarding his lack of employment during the several years leading up to the marital dissolution, the court found "the plaintiff's position that he was too busy to secure employment to be without merit." The court further stated: "The defendant has solely earned the income for the family while the plaintiff was not working and refused to secure employment. . . . The plaintiff spent their money recklessly as the defendant tried to institute restraints. Controlling the plaintiff's buying sprees and spending habits was a constant struggle for the defendant that she was unable to master. . . . These parties were not equal financial

partners. She made the money (he made no real financial contribution after 2002), and he spent it faster than she could earn it." As an example of the plaintiff's spendthrift ways, the court noted that, at one point, the plaintiff had "leased a Lamborghini, [a] Maserati, [an] Alfa Romeo, and a Porshe at the same time at an expense of over $8000 per month, all without the defendant's consent or knowledge." On the basis of expert opinion testimony, the court found that the plaintiff, at the time of trial, had a present earning capacity of $150,000 per year after approximately six months of "gig assignments and selective placement by a professional placement service. . . . The plaintiff's financial rewards thereafter will match the personal effort advanced and that could be considerable over time." (Citations omitted.) The court found that the plaintiff was solely responsible for the breakdown of the parties' marriage due to "his abusive and intimidating treatment of the defendant, by his excessive wasteful pattern of spending placing this family in financial distress, along with his failure to contribute financially to the household in-kind and in fact, in addition to his baseless jealously and suspicious nature of the defendant's fidelity." Finally, the court expressly stated that its alimony award was "intended to provide the plaintiff with financial incentive to initiate a good faith job search and acquire employment commensurate with his earning capacity so that he may contribute toward his own expenses."

Given this factual foundation, and mindful of the statutory factors and the purposes for alimony, it cannot be said that the court's alimony orders represent an abuse of its discretion. Instead, the memorandum of decision reflects that the court devised thoughtful and just alimony orders tailored to the parties' specific circumstances and abilities.

The judgment is affirmed.

In this opinion the other judges concurred.