IN RE ANDREW C.*
(AC 47268)
(AC 47368)

Alvord, Cradle and Westbrook, Js.

Syllabus

The intervening foster parents and the minor child separately appealed from the judgment of the trial court granting the motion of the respondent father to open and vacate the court's judgment granting the foster parents' motion to transfer guardianship of the minor child to themselves. They claimed, inter alia, that the trial court erred in retroactively applying *In re Ryan C.* (220 Conn. App. 507), in which this court explained that the right of a foster parent to intervene in neglect proceedings is limited by statute (§ 46b-129 (p)) to the right to be heard, to its determination that the foster parents did not have the right to intervene. *Held*:

The trial court properly granted the respondent father's motion to open and vacate the guardianship judgment, as the foster parents' lack of standing to intervene in this action and, thus, the court's lack of subject matter jurisdiction to adjudicate their motion to transfer guardianship of the minor child, was so entirely obvious that the court's judgment granting the motion to transfer guardianship was void ab initio.

Argued September 4—officially released November 4, 2024**

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child neglected, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, where the court, *Hon. Barbara M. Quinn*, judge trial referee, rendered judgment adjudicating the minor child neglected and committing the minor child to the custody of the petitioner; thereafter, the court, *C. Taylor, J.*, granted the motion

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

** November 4, 2024, the date this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

filed by the foster parents of the minor child to intervene; subsequently, the court, *C. Taylor*, *J.*, granted the intervenors' motion to transfer guardianship of the minor child to themselves and denied the respondent father's motion to revoke the commitment; thereafter, the court, *Daniels*, *J.*, granted the respondent father's motion to open and vacate the judgment granting the intervenors' motion to transfer guardianship, and the minor child and the foster parents filed separate appeals with this court. *Affirmed*.

Dana M. Hrelic, with whom was *Stacie L. Provencher*, for the appellants in Docket No. AC 47268 and appellees in Docket No. AC 47368 (intervenors).

Matthew C. Eagan, assigned counsel, for the appellant in Docket No. AC 47368 (minor child).

Evan O'Roark, assistant solicitor general, with whom, on the brief, was *William Tong*, attorney general, for the appellee in Docket Nos. AC 47268 and AC 47368 (petitioner).

Benjamin M. Wattenmaker, for the appellee in Docket Nos. AC 47268 and AC 47368 (respondent father).

Opinion

CRADLE, J. These appeals arise from a child protection matter concerning the care and custody of the minor child, Andrew C. Andrew and his intervening foster parents separately appeal, in Docket Nos. AC 47368 and AC 47268[1] respectively, from the judgment

[1] The foster parents also filed a writ of error, Docket No. AC 47292, that challenged the same judgment as their appeal and on the same grounds. A "primary distinction between appeals and writs of error" is that "[a] writ of error is the means by which a nonparty may seek review of a final judgment," whereas "[a]n appeal is the means by which a party may seek review of a final judgment." *Redding Life Care, LLC* v. *Redding*, 331 Conn. 711, 726, 207 A.3d 493 (2019). The foster parents were parties to the underlying action—both the neglect matter and the motion to open. In the neglect matter, the court permitted them to intervene, after which they participated in the trial by prosecuting their motion to transfer guardianship and opposing

of the trial court, granting the motion, filed by the respondent father of Andrew, Chester C. (respondent), to open and vacate the court's judgment, rendered almost two years earlier, granting the foster parents' motion to transfer guardianship of Andrew to themselves.[2] We agree with the trial court that the foster parents did not have standing to intervene in this action and, thus, that the court did not have subject matter jurisdiction to adjudicate their motion to transfer guardianship of Andrew. We therefore affirm the judgment of the trial court.[3]

The following procedural history is relevant to our resolution of these appeals. The respondent and Andrew's mother have three children, Madison, Ryan, and Andrew. Madison and Ryan were living with the respondent mother in 2017 when the petitioner, the Commissioner

the respondent father's motion to revoke the commitment of Andrew. Based on the foregoing, party status was established for purposes of General Statutes § 52-263. See *In re Leo L.*, 191 Conn. App. 134, 135, 214 A.3d 430 (2019) (entertaining intervenor grandfather's appeal from judgment denying his motion to transfer guardianship). "No writ of error may be brought in any civil or criminal proceeding for the correction of any error where (1) the error might have been reviewed by process of appeal . . . ." Practice Book § 72-1 (b). Accordingly, "[i]f there is a right to appeal, a writ of error should not be brought . . . ." *Vasquez* v. *Superior Court*, 102 Conn. App. 394, 404, 925 A.2d 1112, cert. denied, 284 Conn. 915, 931 A.2d 935 (2007). Because we have jurisdiction to hear the foster parents' appeal, we have dismissed the writ of error.

[2] Although an order granting a motion to open generally is not an appealable final judgment, the present order is immediately appealable in that it implicates the custody of Andrew and "the important rights surrounding the parent-child relationship." (Internal quotation marks omitted.) *In re Shamika F.*, 256 Conn. 383, 404, 773 A.2d 347 (2001).

[3] The guardian ad litem, the Law Offices of Attorney Jason Goddard, is also a party to all three appellate matters. The attorney for the guardian ad litem has not filed a brief, a statement adopting the brief of a party, or a detailed statement that the factual and legal issues on appeal do not implicate the child's interest, as required by Practice Book § 67-13. Because the attorney for Andrew filed an appeal on his behalf, we are informed as to the manner in which the factual and legal issues on appeal implicate the child's interest.

of Children and Families, obtained orders of temporary custody and filed petitions alleging that Madison and Ryan had been neglected. As a result, Madison and Ryan were placed with a foster parent. On November 20, 2017, shortly after Andrew was born, the petitioner obtained an order of temporary custody and filed a neglect petition with respect to Andrew, who was placed with different foster parents. On November 30, 2017, all three children were adjudicated neglected and committed to the care of the petitioner.

On February 1, 2019, the petitioner filed a petition to terminate the parental rights of both parents as to Andrew. On August 16, 2019, the petitioner withdrew the termination petition as to the respondent.[4]

On August 14, 2019, the petitioner filed a motion to review a permanency plan providing for reunification of Andrew with the respondent. On December 4, 2019, the respondent filed a motion to revoke the commitment of Andrew and for the return of custody and guardianship of Andrew to him.

On December 30, 2019, Andrew's foster parents filed a motion to intervene in the proceedings pursuant to Practice Book § 35a-4.[5] In their motion, the foster parents alleged, inter alia, that they "have a direct and

[4] The respondent mother's parental rights were terminated with respect to all three children on November 13, 2019, which was affirmed on appeal. *In re Madison C.*, 201 Conn. App. 184, 241 A.3d 756, cert. denied, 335 Conn. 985, 242 A.3d 480 (2020). She has not participated in this appeal.

[5] Practice Book § 35a-4 provides in relevant part: "(c) Other persons unrelated to the child or youth by blood or marriage, or persons related to the child or youth by blood or marriage who are not seeking to serve as a placement, temporary custodian or guardian of the child may move to intervene in the dispositional phase of the case, and the judicial authority may grant said motion if it determines that such intervention is in the best interest of the child or youth or in the interests of justice.

"(d) In making a determination upon a motion to intervene, the judicial authority may consider: the timeliness of the motion as judged by the circumstances of the case; whether the movant has a direct and immediate interest in the case; whether the movant's interest is not adequately represented by existing parties; whether the intervention may cause delay in the proceedings

immediate interest in this matter. Specifically, [the respondent has never cared for Andrew and that] they have cared for [him] since [his] birth and consider him to be a part of their family. The [foster parents] have an interest in keeping their family intact . . . .'' They further alleged that their ''interest is not adequately represented by the existing parties to this matter'' and that they ''have an interest in maintaining their family's integrity.''[6] On January 23, 2020, the trial court, *C. Taylor*, *J.*, granted the foster parents' motion to intervene ''[f]or dispositional purposes only,'' noting that their ''[l]evel of participation [was] to be decided by the court'' and that the ''foster parents will not be allowed to present evidence [regarding the motion to review the permanency plan], but [they] may state [their] position.''[7] Also on January 23, 2020, the court approved a permanency plan to revoke Andrew's commitment and reunify him with the respondent.

On July 11, 2020, the petitioner filed another motion to review a permanency plan providing for the reunification of Andrew with the respondent.[8] On July 20, 2020,

or other prejudice to the existing parties; the necessity for or value of the intervention in terms of resolving the controversy before the judicial authority; and the best interests of the child. . . .''

[6] In their motion, the foster parents also alleged that allowing them to intervene would not delay the proceedings, would not prejudice any of the existing parties to this matter and would benefit the court and assist in resolving the controversy. They asserted that ''there is no party currently involved in this matter who knows or is more familiar with [Andrew] and his needs, [which] makes [them] uniquely able to inform the court of [Andrew's] health, welfare and best interest . . . .''

[7] There were no written objections filed to the motion to intervene. The memorandum of the January 23, 2020 permanency plan hearing, at which the court considered the motion, however, reflects that the respondent, the petitioner and Andrew's attorney objected to the foster parents' intervention. The memorandum of the hearing does not reflect that the issue of subject matter jurisdiction was raised at that time.

[8] It appears from the record that the initial plan was to reunify Andrew with the respondent on April 24, 2020. That plan seems to have been delayed by the COVID-19 pandemic.

the foster parents objected to that plan on the ground that reunification was not in Andrew's best interest. The foster parents also moved to revoke Andrew's commitment and to transfer guardianship to themselves. On July 27, 2020, the foster parents filed an emergency motion to stay the reunification of Andrew with the respondent. The court granted that motion.

On October 22, 2020, the respondent filed a motion to revoke Andrew's commitment, to which the foster parents objected. Thereafter, the foster parents' motion to transfer guardianship, the motion to review the permanency plan and the respondent's motion to revoke commitment were consolidated for trial.

After several days of trial, which commenced on January 28 and concluded on August 6, 2021, at which the foster mother testified and the foster parents presented numerous exhibits and the testimony of several witnesses, the court, *C. Taylor*, *J.*, filed a written decision on December 2, 2021, in which it denied the respondent's motion to revoke commitment and granted the foster parents' motion to transfer guardianship to them, finding that it was in Andrew's best interest. The respondent did not appeal from that judgment.

Meanwhile, matters pertaining to the respondent's other two children also proceeded. On July 8, 2020, Madison was returned to the respondent's care. On July 28, 2020, which was two days before the petitioner had planned to reunify the respondent and Ryan, his foster mother moved to intervene in the dispositional phase of the neglect petition in order to seek a transfer of guardianship to her. She was granted permission to intervene, and her motion to transfer guardianship to her was granted. The respondent appealed, and, in July, 2023, this court determined that Ryan's foster mother had been improperly allowed to intervene, as it was not authorized by Practice Book § 35a-4 and General

Statutes § 46b-129 (p). See *In re Ryan C.*, 220 Conn. App. 507, 523, 299 A.3d 308, cert. denied, 348 Conn. 901, 300 A.3d 1166 (2023). Specifically, this court concluded that the general language of Practice Book § 35a-4 "cannot be interpreted in a manner that enlarges a foster parent's rights under § 46b-129 (p)." Id., 526. This court determined that the erroneous intervention resulted in the trial court "improperly adjudicat[ing] the motion to transfer guardianship" because it "applied an improper standard and evaluated improper factors . . . ." Id., 532. Consequently, the judgment was reversed, and the case was remanded with direction to deny the foster mother's motion to intervene and dismiss her motion to transfer guardianship and for a new trial on the motions to revoke commitment.[9] Id., 533.

On October 2, 2023, in light of the decision in *In re Ryan C.*, the respondent filed a motion to open and vacate the trial court's December 2, 2021 judgment granting the foster parents' motion to transfer guardianship of Andrew to them. He argued that "foster parents do not have standing to intervene in the dispositional phase of neglect proceedings as a matter of law," and, as a result, the trial court "did not have jurisdiction to consider the foster parents' motion to transfer guardianship" such that the "order granting that motion is void ab initio." The respondent argued that the holding in *In re Ryan C.* applied retroactively here because the issue of the foster parents' standing was jurisdictional, which can be raised at any time. The foster parents objected, claiming that the respondent's motion to open was untimely and that the motion was an improper collateral attack on the judgment transferring guardianship to them. They further argued that *In re Ryan C.* did not apply retroactively to this case because the issue of the guardianship of Andrew was no longer pending. In his reply to the foster parents' objection,

[9] We note that Ryan has been reunified with the respondent.

the respondent argued, in addition to the arguments that he previously asserted in support of his motion to open, that the court maintained continuing jurisdiction to open the judgment pursuant to General Statutes § 52-212a.[10]

The court, *Daniels*, *J.*, held a hearing on the motion to open and, on January 3, 2024, issued a memorandum of decision in which it granted the respondent's motion to open, vacated the prior order granting the foster parents' motion to intervene, ordered that the foster parents' motion to intervene be denied, and dismissed their motion to transfer guardianship. The court further ordered that a new trial be held on the respondent's motion to revoke the commitment of Andrew. The court held that the respondent's motion to open was timely because the respondent was challenging the foster parents' standing to intervene, which implicated the court's subject matter jurisdiction and could be raised at any time. The court also agreed with the respondent that it maintained continuing jurisdiction over the matter. The court rejected the foster parents' arguments that the motion to open constituted an impermissible collateral attack on the guardianship judgment and that *In re Ryan C.* did not apply retroactively. On January 8, 2024, the court denied the foster parents' motion to reargue. This appeal followed.

On appeal, the foster parents and Andrew claim, inter alia, that the court improperly granted the motion to open on the ground that the foster parents lacked standing to intervene and that the court lacked subject matter

[10] Meanwhile, the foster parents had filed a motion to vacate the court's orders pertaining to the respondent's visitation of Andrew on the ground that the parties were "capable of communicating and scheduling visitation on their own without court supervision." The respondent objected to the foster parents' motion and disagreed with the representations made therein. The respondent also filed a motion to modify the visitation orders seeking increased visitation without the involvement of the foster parents.

jurisdiction to adjudicate their motion to transfer guardianship of Andrew to themselves almost two years earlier. We are not persuaded.[11]

Although we typically review the granting of a motion to open a judgment for an abuse of discretion; see *Wethington* v. *Wethington*, 223 Conn. App. 715, 724, 309 A.3d 356 (2024); our review of a court's decision pertaining to jurisdiction presents a question of law over which our review is plenary. See *Sousa* v. *Sousa*, 322 Conn. 757, 770, 143 A.3d 578 (2016).

"[I]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . .

"The issue of standing implicates [the] court's subject matter jurisdiction. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue

[11] The foster parents and Andrew also challenge the court's determinations that it had continuing jurisdiction to open and vacate the guardianship judgment and that the motion to open was not an impermissible collateral attack on that judgment. The petitioner similarly challenges the court's determination that it maintained continuing jurisdiction to open the guardianship judgment. Because we agree with the court's determination that the respondent's motion to open was timely in that it raised a challenge to the subject matter jurisdiction of the court that entered the judgment that was the issue of the motion to open, we need not address the additional bases on which the court relied in adjudicating the respondent's motion.

. . . .” (Citations omitted; internal quotation marks omitted.) *Bank of New York Mellon* v. *Tope*, 345 Conn. 662, 677–78, 286 A.3d 891 (2022). Generally, “[a]s a matter of law, in the absence of jurisdiction over the parties, a judgment is void ab initio and is subject to both direct and collateral attack.” (Internal quotation marks omitted.) *Schoenhorn* v. *Moss*, 347 Conn. 501, 514, 298 A.3d 236 (2023); see also *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 576, 953 A.2d 868 (2008) (“No principle is more universal than that the judgment of a court without jurisdiction is a nullity. . . . Such a judgment, whenever and wherever declared upon as a source of a right, may always be challenged.” (Internal quotation marks omitted.)).

“[E]ven litigation about subject matter jurisdiction [however] should take into account the importance of the principle of the finality of judgments, particularly when the parties have had a full opportunity originally to contest the jurisdiction of the adjudicatory tribunal.” (Internal quotation marks omitted.) *Investment Associates* v. *Summit Associates, Inc.*, 309 Conn. 840, 855, 74 A.3d 1192 (2013). “[T]he principle of finality rests on the premise that the proceeding had the sanction of law, expressed in the rules of subject matter jurisdiction. As long as the possibility exists of making error in a determination of the question of subject matter jurisdiction, the principles of finality and validity cannot be perfectly accommodated. . . . If the question is decided erroneously, and a judgment is allowed to stand in the face of the fact that the court lacked subject matter jurisdiction, then the principle of validity is compromised. On the other hand, if the judgment remains indefinitely subject to attack for a defect of jurisdiction, then the principle of finality is compromised. The essential problem is therefore one of selecting which of the two principles is to be given greater emphasis.” 1

Restatement (Second), Judgments § 12, comment a, pp. 116–17 (1982).

Faced with competing principles of the finality of a judgment and the validity of a judgment, our Supreme Court has held that, "[u]nless a litigant can show an absence of subject matter jurisdiction that makes the prior judgment of a tribunal entirely invalid, he or she must resort to direct proceedings to correct perceived wrongs, rather than to a collateral proceeding. . . . [T]o sustain a collateral attack on a judgment, the lack of jurisdiction must be entirely obvious and . . . the alleged deficiency must amount to a fundamental mistake that is so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Schoenhorn* v. *Moss*, supra, 347 Conn. 515.

"[W]here the lack of jurisdiction is not entirely obvious, the critical considerations are whether the complaining party had the opportunity to litigate the question of jurisdiction in the original action, and, if he did have such an opportunity, whether there are strong policy reasons for giving him a second opportunity to do so. . . .

"Litigation about whether subject matter jurisdiction exists should take into account whether the litigation is a collateral or direct attack on the judgment, whether the parties consented to the jurisdiction originally, the age of the original judgment, whether the parties had an opportunity originally to contest jurisdiction, the prevention of a miscarriage of justice, whether the subject matter is so far beyond the jurisdiction of the court as to constitute an abuse of authority, and the desirability of the finality of judgments." (Citation omitted; internal quotation marks omitted.) *Stones Trail, LLC* v. *Weston*, 174 Conn. App. 715, 736–37, 166 A.3d 832, cert.

denied, 327 Conn. 926, 171 A.3d 60 (2017), and cert. dismissed, 327 Conn. 926, 171 A.3d 59 (2017).

Here, for the reasons that follow, we conclude that the foster parents' lack of standing to intervene in this action, and thus the court's lack of subject matter jurisdiction to adjudicate their motion to transfer guardianship of Andrew to themselves, was entirely obvious so as to render its judgment entirely invalid.

In *In re Ryan C.*, supra, 220 Conn. App. 507, this court explained that "Section 46b-129 (p) and Practice Book § 35a-5 specifically limit the rights of foster parents to participate in neglect proceedings. Section 46b-129 (p) provides: 'A foster parent, prospective adoptive parent or relative caregiver shall receive notice and *have the right to be heard* for the purposes of this section in Superior Court in any proceeding concerning a foster child living with such foster parent, prospective adoptive parent or relative caregiver. A foster parent, prospective adoptive parent or relative caregiver who has cared for a child or youth shall *have the right to be heard and comment on the best interests of such child or youth* in any proceeding under this section which is brought not more than one year after the last day the foster parent, prospective adoptive parent or relative caregiver provided such care.' . . .

"Prior to the legislature's adoption of No. 01-142, § 8, of the 2001 Public Acts (P.A. 01-142), § 46b-129 stated that '[a] foster parent shall have standing for the purposes of this section in Superior Court in matters concerning the placement or revocation of commitment of a foster child living with such parent.' General Statutes (Rev. to 2001) § 46b-129 (o). Significantly, in 2001, 'standing' was replaced with 'the right to be heard . . . .' P.A. 01-142, § 8.

"The language of § 46b-129 (p) is reflected in Practice Book § 35a-5. Practice Book § 35a-5 provides in relevant

part: '(a) Any foster parent, prospective adoptive parent or relative caregiver shall be notified of and have a *right to be heard* in any proceeding held concerning a child or youth living with such foster parent, prospective adoptive parent or relative caregiver . . . .' " (Emphasis in original; footnote omitted.) *In re Ryan C.*, supra, 220 Conn. App. 522–23. "There is no language in § 46b-129 (p) or Practice Book § 35a-5 that authorizes a foster parent to intervene in the dispositional phase of neglect proceedings." Id., 523.

The foster parents and Andrew argue that the trial court improperly retroactively applied *In re Ryan C.*, which was issued in 2023, to the guardianship court's decision in 2021. The foster parents contend that "the lack of jurisdiction was not apparent or obvious until the *In re Ryan C.* decision came out in 2023, more than two years" after the court granted their motion to transfer guardianship. Notably, in so arguing, the foster parents acknowledge that the court's lack of jurisdiction to hear their motion to transfer guardianship became entirely obvious after *In re Ryan C.* was issued in 2023. Their argument is misplaced, however, in that, as the trial court found, *In re Ryan C.* "[did] not establish a new precedent, and it did not decide an issue of first impression," as expressly stated in that case. *In re Ryan C.* was arguably novel only in that it reconciled the inconsistent language of Practice Book § 35a-4, which applies generally to unrelated persons who are not seeking to serve as a placement or guardian for the minor child, with § 46b-129 (p) and Practice Book § 35a-5, which apply specifically to foster parents.

In *In re Ryan C.*, this court noted that its holding was consistent with earlier case law and recounted: "In *In re Baby Girl B.*, [224 Conn. 263, 278, 618 A.2d 1 (1992)], our Supreme Court discussed the importance of restricting preadoptive parents' intervention in child

custody proceedings. In that case, the preadoptive parents argued that the trial court improperly denied their motion to intervene as a matter of right or, alternatively, abused its discretion in denying them permissive intervention in the termination proceedings. Id., 274. Our Supreme Court affirmed the trial court's denial of the preadoptive parents' motion to intervene and held that the preadoptive parents were not entitled to intervene as a matter of right and that the court did not abuse its discretion in denying them permissive intention. Id.

"In holding that the trial court did not abuse its discretion by denying the preadoptive parents' request for permissive intervention, the court in *In re Baby Girl B.* stated: With respect to the intervention of foster parents in termination proceedings, this court has determined that [t]he intervention of foster parents as parties at the termination stage will permit them to shape the case in such a way as to introduce an impermissible ingredient into the termination proceedings. Petitions for termination of parental rights are particularly vulnerable to the risk that judges or social workers will be tempted, consciously or unconsciously, to compare unfavorably the material advantages of the child's natural parents with those of prospective adoptive parents and therefore to reach a result based on such comparisons rather than on the statutory criteria. . . . Similarly, the intervention of the preadoptive parents in the termination proceeding might have led to the introduction of impermissible and prejudicial factors. Moreover, because the termination proceeding was concerned only with the statutory criteria alleged as grounds for terminating the mother's parental rights, the preadoptive parents' intervention would have been of little or no value to the court's decision on whether the grounds for termination had been proved. . . . Id., 278.

"The policy considerations articulated in *In re Baby Girl B.* that weighed against allowing a preadoptive

parent permissive intervention in the adjudicatory phase of a termination of parental rights proceeding are similarly relevant to a foster parent's permissive intervention in the dispositional phase of neglect proceedings. In both the adjudicatory phase of termination proceedings and the dispositional phase of neglect proceedings, the biological parents' rights to their children have not yet been terminated. Therefore, the biological parents' rights must be protected by limiting a foster parent's participation in neglect proceedings to ensure that improper and prejudicial factors are not considered by a court. This is especially important in instances in which the court must determine whether the causes that led to a child's commitment to the petitioner no longer exist and whether the child should be returned to the care and custody of the biological parent.

"We have also recognized a distinction between a foster parent's right to be heard and right to intervene. In *In re Vincent D.*, 65 Conn. App. 658, 664, 783 A.2d 534 (2001), this court upheld the trial court's decision to permit foster parents to participate, in a limited manner, in the dispositional phase of a termination of parental rights proceeding. The trial court, rather than granting the foster parents' motion to intervene, recognized that standing to comment is not the same thing as intervention and permitted the foster parents to observe and . . . comment . . . on disposition. . . . Id., 667. This court upheld the trial court's decision and concluded that the trial court had properly protected the rights of the respondent parents by limiting the foster parents' participation in the proceedings. See id.

"In *In re Joshua S.*, [127 Conn. App. 723, 730, 14 A.3d 1076 (2011)], this court held that a child's foster parents did not have a colorable claim to intervene as a matter of right in the dispositional phase of a neglect proceeding, and, therefore, the foster parents were not parties to the proceeding and were not entitled to appeal the

court's denial of their motion to intervene. In coming to this conclusion, this court stated: [F]oster parents have a right under . . . § 46b-129 [p] to receive notice and be heard in any proceeding concerning their foster child. Although this statute explicitly gives foster parents a right to be heard during a proceeding regarding the foster child, neither this statute, nor any other statute, confers on foster parents a right to intervene in a proceeding related to their foster child. . . . Id." (Footnote omitted; internal quotation marks omitted.) *In re Ryan C.*, supra, 220 Conn. App. 527–29. In *In re Joshua S.*, this court reasoned that "[i]t is well established that [f]oster families do not have the same rights as biological families or adoptive families. . . . It is unquestioned that [b]iological and adoptive families have a liberty interest in the integrity of their family unit which is part of the fourteenth amendment's right to familial privacy. . . . Foster parents, on the other hand, do not enjoy a liberty interest in the integrity of their family unit. . . . Rather, [t]he rights of foster parents are defined and restricted by statute . . . [and] the expectations and entitlements of foster families can be limited by the state. . . . The statutory scheme provides to foster parents a limited and narrow set of rights regarding foster children. Such a limited and narrow set of rights is consistent with the premise that [f]oster parents are entrusted with foster children on a temporary basis only." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *In re Joshua S.*, supra, 127 Conn. App. 729–30; see also *Eason* v. *Welfare Commissioner*, 171 Conn. 630, 635, 370 A.2d 1082 (1976) (foster parent did not have standing to file motion to revoke commitment), cert. denied sub nom. *Eason* v. *Maloney*, 432 U.S. 907, 97 S. Ct. 2953, 53 L. Ed. 2d 1079 (1977).

On the basis of the foregoing case law, and the language of § 46b-129 (p) and Practice Book § 35a-5, it is

entirely obvious that the foster parents did not have standing to intervene in this matter and, consequently, the court lacked subject matter jurisdiction to allow them to do so and to hear their motion to transfer guardianship of Andrew to themselves. Although we are mindful that "[o]ur cases demonstrate that it is extraordinarily rare for a tribunal's jurisdiction to be so plainly lacking that it is entirely obvious"; (internal quotation marks omitted) *Reinke* v. *Sing*, 328 Conn. 376, 387, 179 A.3d 769 (2018); this case is distinguishable from those cases in which the lack of jurisdiction was not entirely obvious. This is not a case in which the authority relied on by the party seeking to raise a jurisdictional issue did not implicate the court's jurisdiction. See *Schoenhorn* v. *Moss*, supra, 347 Conn. 516 (jurisdiction was not lacking due to error in applying rules of practice). It is axiomatic that standing implicates a court's subject matter jurisdiction.

Similarly, this is not a case in which the lack of jurisdiction could not be ascertained from a review of the record. See *Investment Associates* v. *Summit Associates, Inc.*, supra, 309 Conn. 860–61 (lack of jurisdiction was not entirely obvious where record demonstrated evidentiary issue as to whether plaintiff was partnership or joint venture and thus lacked standing); *In re Shamika F.*, 256 Conn. 383, 394–97, 773 A.2d 347 (2001) (lack of jurisdiction was not entirely obvious where respondent parents resided in New York but children were in Connecticut); *Gibson* v. *Jefferson Woods Community, Inc.*, 206 Conn. App. 303, 311, 260 A.3d 1244 (lack of jurisdiction was not entirely obvious when record was silent as to whether plaintiff had met statutory jurisdictional prerequisites to maintaining foreclosure action on common charge lien), cert. denied, 339 Conn. 911, 261 A.3d 747 (2021). Rather, this case is more akin to the decisions in *Stones Trail, LLC* v. *Weston*, supra, 174 Conn. App. 737–38 (principle of finality of judgments did not

bar trial court from reconsidering ripeness of plaintiff's claims and its jurisdiction over them after acceptance of jury's verdict where new facts developed at trial that were unknown to court when previously considering ripeness issue), and *Daley* v. *Hartford*, 215 Conn. 14, 26–27, 574 A.2d 194 (principles of finality did not foreclose claim that court lacked subject matter jurisdiction where plaintiffs failed to exhaust administrative remedies pursuant to collective bargaining agreement), cert. denied, 498 U.S. 982, 111 S. Ct. 513, 112 L. Ed. 2d 525 (1990), in which the lack of jurisdiction was ascertainable from a review of the record. The jurisdictional issue in this case is readily ascertainable from the record in that it arises from the status of the foster parents as intervenors, which is improper as a matter of law.

This also is not a case in which a conflict or uncertainty in the law rendered the court's lack of jurisdiction unclear. See *Sousa* v. *Sousa*, supra, 322 Conn. 777–79 (lack of jurisdiction was not entirely obvious where "Connecticut's case law is in conflict regarding whether the modification of a property distribution postdissolution implicates the court's subject matter jurisdiction or merely its statutory authority" (internal quotation marks omitted)); *Rider* v. *Rider*, 200 Conn. App. 466, 480, 239 A.3d 357 (2020) (purported lack of subject matter jurisdiction was not entirely obvious where no applicable case law or other authority provided guidance on novel issue). To the contrary, as discussed herein, § 46b-129 (p), formerly subsection (o), expressly provides, as it has since 2001, that foster parents do not have party standing in child protection hearings but, rather, have only the right to be heard. The 2001 amendment, where "standing" was changed to "right to be heard," evinced a deliberate choice by the legislature to limit the role of foster parents in child protection proceedings, and our courts have consistently applied that principle.

On the basis of the foregoing, specifically the clear language of § 46b-129 (p) and the cases in which we have applied the language of that statute, we conclude that the court's order granting the foster parents' motions to intervene and to transfer guardianship constituted "a fundamental mistake that [was] so plainly beyond the court's jurisdiction that its entertaining [those motions] was a manifest abuse of authority." (Internal quotation marks omitted.) *Schoenhorn* v. *Moss*, supra, 347 Conn. 515. The foster parents' lack of standing to intervene in this matter and to file a motion to transfer guardianship, and, consequently, the court's lack of subject matter jurisdiction, was so entirely obvious that the court's judgment granting the foster parents' motion to transfer guardianship was void ab initio.[12]

Even if we were to conclude that the lack of jurisdiction was not entirely obvious in this case, there is a strong policy interest in revisiting the transfer of guardianship. "[I]n some situations, the principle of protection of the finality of judgments must give way to the principle of fairness and equity." *Kim* v. *Magnotta*, 249 Conn. 94, 109, 733 A.2d 809 (1999). "[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court." (Internal quotation marks omitted.) *Denardo* v.

[12] We note that the petitioner has stated that she takes no position on the issue of whether the trial court lacked subject matter jurisdiction over the foster parents' motion to transfer guardianship of Andrew to themselves. The petitioner explains that "the department knows of no other cases like this one. Courts rarely transfer guardianship to a foster parent. Reunification with the biological parent is the goal in every case. If reunification is not possible, termination of parental rights and adoption is the preferred disposition because it is more permanent than a transfer of guardianship. . . . Transfers of guardianship on a foster parent's own motion—rather than a motion filed by the department or child—are even rarer. So the retroactivity and subject matter jurisdiction questions . . . are unlikely to impact many other cases . . . ."

Bergamo, 272 Conn. 500, 511, 863 A.2d 686 (2005); see also id. (interests in finality of judgments and child's need for stability cannot trump parent's constitutionally protected right to raise child). The court's error in permitting the foster parents to intervene and the subsequent hearing and granting of their motion to transfer guardianship, which, notably, went beyond the contours of its order in granting intervention, was clear.[13] Although it may seem untimely for the trial court to have revisited the issue of subject matter jurisdiction almost two years after the foster parents' motion for guardianship had been granted, it is, as noted, important to prevent a miscarriage of justice to ensure that the court did, in fact, have jurisdiction over the claims at issue, particularly under these unique circumstances, where it was entirely obvious that the foster parents did not have standing to intervene in this matter.[14] This court explained in *In re Ryan C.*: "In . . . the dispositional phase of neglect proceedings, the biological parents' rights to their children have not yet been terminated. Therefore, the biological parents' rights must be

[13] As indicated herein, in granting the foster parents' motion to intervene, the court noted that their "level of participation [was] to be decided by the court" and that the "foster parents will not be allowed to present evidence [regarding the motion to review the permanency plan], but they may state [their] position." The foster parents thereafter filed an objection to the petitioner's plan to reunify Andrew with the respondent and moved to revoke Andrew's commitment and to transfer guardianship to themselves. They also filed an objection to the respondent's motion to revoke commitment. At the consolidated trial of these matters, the foster parents presented evidence in support of their position. Their involvement in this matter went well beyond an opportunity to state their position.

[14] Although the foster parents alleged in their motion to intervene that they had a "direct and immediate interest" in this matter in "keeping their family intact" and "maintaining their family's integrity," we reiterate that it is axiomatic that foster parents have no such legally cognizable interest. We recognize that the foster parents have developed a bond with Andrew and acknowledge the emotional impact separation can have on both the child and the foster parents. We by no means disparage the salutary role of foster parents in general and, presumably, the role of the foster parents in this case. However, we are required to follow and are bound by the law.

protected by limiting a foster parent's participation in neglect proceedings to ensure that improper and prejudicial factors are not considered by a court. This is especially important in instances in which the court must determine whether the causes that led to a child's commitment to the petitioner no longer exist and whether a child should be returned to the care and custody of the biological parent." *In re Ryan C.*, supra, 220 Conn. App. 528–29. As similarly decided in *In re Ryan C.*, the foster parents' intervention in this matter and, more specifically, their motion to transfer guardianship of Andrew to themselves, likely caused the court to apply an improper standard and evaluate improper factors in its consideration of the motion to transfer guardianship and the respondent's motion to revoke commitment. See id., 532. We therefore conclude that the court properly granted the respondent's motion to open and vacate the guardianship judgment. A new hearing should be held on the respondent's motion to revoke commitment, during which the foster parents should be afforded their statutory right to be heard.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE CHARLI M.*
(AC 47510)

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

Syllabus

The respondent father appealed from the trial court's judgment rendered for the petitioner, the Commissioner of Children and Families, terminating the father's parental rights as to his minor child, C. On appeal, the father claimed, inter alia, that the court erred in concluding that the Department of Children and Families made reasonable efforts to reunify him with C. *Held*:

The trial court's finding that the department made reasonable efforts to reunify the respondent father with C was supported by sufficient evidence in the record.

The trial court properly determined, by clear and convincing evidence, that the respondent father failed to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of C, he could assume a responsible position in her life.

It was not improper for the trial court to rely on certain police reports in support of its finding that the respondent father was involved in incidents of domestic violence because the father did not object to the admission of the police reports at trial and the court considered and weighed the contents of the admitted police reports as only one factor supporting its ultimate conclusion that the father failed to rehabilitate.

The trial court properly found that the respondent father's inconsistent visitation history with C, considered in light of the record in its entirety, supported the conclusion that the father failed to rehabilitate.

The trial court properly credited the testimony of R, a court-appointed evaluator and expert in clinical and forensic psychology, and relied on that testimony in support of its conclusion that the father failed to rehabilitate

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

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

because, although R's in person evaluation of the father was conducted more than two years prior to trial, R testified that she reviewed more recent materials, all of which were admitted as full exhibits, and that her present opinions and recommendations were based on her review of such records, and the father had ample opportunity to cross-examine R.

Argued September 13—officially released November 6, 2024**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, where the respondent mother consented to the termination of her parental rights; thereafter, the case was tried to the court, *Hon. John C. Driscoll*, judge trial referee; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, for the appellant (respondent father).

Samuel J. Shapiro, assistant attorney general, with whom were *Patrick T. Ring*, assistant attorney general, and, on the brief, *William Tong*, attorney general, and *Nisa Khan*, assistant attorney general, for the appellee (petitioner).

Opinion

CLARK, J. The respondent father, Tyler M., appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights as to his minor child, Charli M. (Charli).[1] The respondent claims that

** November 6, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The petitioner also sought to terminate the parental rights of Charli's mother. The mother later consented to such termination and is not a participant in this appeal. Accordingly, all references in this opinion to the respondent are to Tyler M. only.

the trial court erred in concluding that (1) the Department of Children and Families (department) made reasonable efforts to reunify the respondent with Charli and that he was unable or unwilling to benefit from the department's reunification efforts, and (2) the respondent failed to achieve a sufficient degree of personal rehabilitation. We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. "[Charli] was born [in March, 2021]. . . . [Charli] is [the] fourth biological child [of the respondent and Charli's mother]. The mother and [the respondent] began a relationship in 2012. The department became involved with the family in 2013 after receiving a report of domestic violence between the parents when the mother was approximately eight months pregnant. The department's concerns at that time particularly centered on substance abuse by the parents, domestic violence between the parents, and the need for mental health treatment. In 2014, the department received reports of ongoing domestic violence between the mother and [the respondent], including the issuance of protective orders. In 2015, further reports of domestic violence between the parents were received, including violation of an active protective order. The parents' second child was born in 2015. In 2016, the department received more reports of domestic violence as well as reports that [the respondent] was abusing pills and heroin. In March, 2016, [the respondent] was arrested for possession of heroin with intent to sell. At the time, it was noted that the parents were homeless, and the department believed they lacked insight into their parenting deficits." The two oldest children were removed from the care of the respondent and the mother in March, 2016, and committed to the custody of the petitioner in July, 2016. "[G]uardianship of the two oldest

children was transferred to their paternal grandmother on April 11, 2017.

"[O]n September 12, 2018, the mother gave birth to the [parents'] third child. On September 14, 2018, the third child was removed from their care. [The respondent's] parental rights to this child were terminated on July 27, 2021 . . . . The presenting issues in that child's case were largely the same as the two older siblings: domestic violence, substance abuse, unstable housing, and a need for consistent mental health treatment.

"The department was notified of Charli's birth by the hospital on the day of [her] birth. The mother at the time was a resident of an inpatient drug treatment program in Putnam. [The respondent] was incarcerated at the time. The mother had entered the [drug treatment] program on February 2, 2021, having been referred there by the office of adult probation. At the time of admission, the mother tested positive for cocaine and benzodiazepines. She also attempted to bring in multiple syringes, unidentified pills, and two containers of urine. On April 7, 2021, the department imposed an administrative ninety-six hour hold on [Charli]. On April 8, 2021, the [petitioner] obtained an ex parte order of temporary custody from the court, *Hoffman, J.*, vesting temporary custody of Charli in the [petitioner]. The child then was placed with fictive kin, her only placement to date. On April 16, 2021, the order of temporary custody was sustained. On November 16, 2021, the mother and [the respondent] submitted pleas of nolo contendere, [and] [Charli] was adjudicated neglected and committed to the [petitioner's custody]. Specific steps for reunification of the child were set [at] the time of the order of temporary custody and served on [the respondent].

"[The respondent's] presenting issues for Charli were essentially the same as they had been for his three

older children. They included his criminal behavior, especially his domestic violence with the mother, his unstable housing and income, his untreated mental health needs, his substance abuse needs, and lack of consistent contact with [Charli]. [The respondent's] specific steps were designed to address these concerns. . . .

"[The respondent] first met [Charli] when she was five months old at the office of Dr. [Nancy] Randall. The department had made a timely referral for a psychological evaluation of [the respondent], including a parent-child interactional. . . .

"Randall evaluated [the respondent] in August, 2021. She opined that [the respondent] had a significant history of substance abuse, as well as significant anger issues. She also noted his guarded disclosures. She was concerned about [the respondent's] criminal history, particularly his domestic violence, his long history of substance abuse, and his instability in housing and employment. She indicated that [the respondent] should address his individual issues in order to provide parenting reunification. She recommended that he participate in at least weekly, consistent visitation. She recommended that he participate in individual counseling to work on interpersonal relationships, domestic violence, and moving toward more independence and stability. She recommended continued substance abuse treatment including drug testing and regular drug counseling with a consistent counselor, supplemented by twelve step meetings at least three times [per] week. Most importantly, she recommended that [the respondent] should not be considered appropriate for reunification if further incidents of domestic violence occurred and that stable housing and income were necessities for reunification. . . .

"[The respondent] was involved in domestic violence incidents with the mother thrice following [Randall's]

evaluation. On the night of August 29, 2022, the mother called the Ansonia Police Department to report a verbal dispute with [the respondent]. The police responded, but no arrest was made. On January 2, 2023, the Ansonia Police Department responded to a 911 call from the mother at 4:50 a.m. A neighbor in a second floor apartment reported [that] the argument on the first floor was so loud that she was awakened. The police had difficulty gaining entrance to [the respondent's] apartment and obtained contradictory and implausible stories from the mother and [the respondent]." The respondent was arrested and charged with disorderly conduct in violation of General Statutes § 53a-182. "The mother was screened for domestic violence lethality and assessed as a high danger based upon her score. She did not wish to cooperate. Two weeks later, on January 15, 2023 . . . the Ansonia Police Department responded to the home, again at the mother's request, and again contradictory statements were given by the mother and [the respondent]. Both were arrested as a result of the incident." The respondent was charged with assault in the third degree in violation of General Statutes § 53a-61 and disorderly conduct in violation of § 53a-182.

On March 23, 2023, the petitioner filed a petition to terminate the respondent's parental rights, which alleged that the respondent failed to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B) and (E).[2] The court, *Hon.*

[2] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding . . .

John C. Driscoll, judge trial referee, held a trial on August 31 and October 5, 2023. On January 29, 2024, the court issued a memorandum of decision granting the petition. The court found by clear and convincing evidence that the department made reasonable efforts to reunify Charli with the respondent, that the respondent was unable or unwilling to benefit from those reunification efforts, and that he had failed to achieve a sufficient degree of personal rehabilitation to encourage the belief that within a reasonable time he could assume a responsible position in Charli's life. This appeal followed.[3] Additional facts will be set forth as necessary.

I

The respondent first claims that the trial court erred in concluding that the department made reasonable efforts to reunify him with Charli.[4] We disagree.

and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . [or] (E) the parent of a child under the age of seven years who is neglected, abused or uncared for, has failed, is unable or is unwilling to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child and such parent's parental rights of another child were previously terminated pursuant to a petition filed by the Commissioner of Children and Families . . . ."

[3] Pursuant to Practice Book §§ 67-13 and 79a-6 (c), the attorney for the minor child filed a statement with this court adopting the brief of the petitioner and supporting the affirmance of the judgment terminating the respondent's parental rights.

[4] The respondent also argues that the provision of § 17a-112 (j) (1) excusing the petitioner from making reasonable efforts to reunify "if the court has determined at a hearing pursuant to section 17a-111b . . . that such efforts are not required" is unconstitutional because it "allows for an impermissible end run around the clear and convincing evidentiary standard required, as a matter of due process, in all termination hearings." As the respondent acknowledges, however, the petitioner did not rely on that provision in the petition, and the trial court found, on the basis of clear and convincing

The following legal principles and standard of review govern our resolution of the respondent's claim. "The reasonableness of the department's efforts must be assessed in the context of each case. The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonable efforts means doing everything reasonable, not everything possible. . . . [R]easonableness is an objective standard . . . and whether reasonable efforts have been proven depends on the careful consideration of the circumstances of each individual case. . . .

"Our review of the court's reasonable efforts determination is subject to the evidentiary sufficiency standard of review [which asks] whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . In so doing, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court and will not disturb the court's subordinate factual findings unless they are clearly erroneous." (Citation omitted; internal quotation marks omitted.) *In re Judah B.*, 221 Conn. App. 387, 394–95, 300 A.3d 1253 (2023).

In reviewing the trial court's reasonable efforts determination, this court "[does] not examine the record to

evidence, that the department made reasonable efforts to reunify the respondent and Charli. Accordingly, we need not address the respondent's constitutional claim. See *In re Kyreese L.*, 220 Conn. App. 705, 714 n.6, 299 A.3d 296 (declining to address identical claim "[b]ecause the court properly found, on the basis of clear and convincing evidence, that the department made reasonable efforts to reunify the respondent and the child"), cert. denied, 348 Conn. 901, 300 A.3d 1166 (2023).

determine whether the trier of fact could have reached a conclusion other than the one reached. . . . In our review of the record for evidentiary sufficiency, we are mindful that, as a reviewing court, [w]e cannot retry the facts or pass upon the credibility of the witnesses. . . . Rather, [i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence." (Internal quotation marks omitted.) *In re Caiden B.*, 220 Conn. App. 326, 349, 297 A.3d 1025, cert. denied, 348 Conn. 904, 301 A.3d 527 (2023).

The evidence before the trial court reveals that the department referred the respondent to the Quality Parenting Center at The Village (QPC) for supervised visitation with Charli, in which the respondent participated from April through July, 2022. After the respondent missed two visits in April, 2022, due to reported issues with transportation, the department offered to arrange transportation for him. Despite the department's efforts, the respondent was discharged from QPC after he missed consecutive visits without notice in July, 2022. The department then referred the respondent to Kids Advocates, which provided supervised visitation beginning in August, 2022. Although the department again offered to arrange transportation for the respondent, he missed nine of forty-five scheduled visits, several of which were due to alleged transportation issues.

The department also assisted the respondent with locating a therapist by providing him with online resources from which he could search for a provider in his area based on his specific needs. Once the respondent reported that he had found a therapist, the department communicated with the therapist to review the respondent's specific steps and the issues that needed to be addressed to facilitate reunification, including intimate partner violence (IPV). The department also

discussed with the respondent the importance of addressing IPV and anger management with his therapist. Although the respondent told the department that he started seeing the therapist in February, 2022, the therapist reported to the department in November, 2022, that she had only been working with the respondent for three months. The trial court found that, "[a]fter those three months, [the respondent] became grossly inconsistent" with his therapy.

The department also referred the respondent to supportive housing, a housing assistance program, in an effort to help him find a home suitable for raising a child. The trial court found that, "[f]ollowing his discharge from incarceration, [the respondent] was in a halfway house until October, 2021, at which time he moved into a shelter. In March, 2022, [the respondent] provided documentation indicating he had been living in a motel [since] November, 2021." Amanda Parsons, the social worker employed by the department who oversaw the respondent's case, testified that she visited the respondent at the motel and told him that, to facilitate reunification, it was important that he find housing appropriate for raising a child. Initially, the respondent was ineligible for supportive housing because the program allows only one parent to participate at a time, and the department already had referred the mother. In May or June, 2022, the department transitioned the supportive housing referral from the mother to the respondent and started working with employees of the program to locate appropriate housing for the respondent. In September, 2022, however, the respondent obtained an apartment on his own, which made him ineligible for supportive housing.

In addition, there was evidence that the department made other reunification efforts. The respondent was

referred to Boys & Girls Village for a reunification readiness assessment, which was conducted from December, 2022, through January, 2023. The respondent, however, cancelled two of the eight scheduled appointments and did not disclose that he was arrested twice for domestic violence incidents around the same time as the assessment. Parsons also testified that she referred the respondent to Fatherhood Engagement Services, but he declined to participate. On the basis of all of the efforts described herein, the trial court found by clear and convincing evidence that the department made reasonable efforts to reunify the respondent with Charli.

In challenging the trial court's reasonable efforts determination, the respondent focuses primarily on the fact that the department did not refer him to a specialized IPV program. The respondent argues that "[t]he failure to provide appropriate IPV counseling significantly impacted the case" because IPV "was the most significant issue preventing reunification." As noted previously, however, the department communicated with the respondent and his therapist about the importance of addressing IPV as part of his counseling, and the therapist confirmed that she was addressing such issues with the respondent. There is no evidence that the respondent ever claimed that his therapist's efforts were insufficient or that he requested that the department refer him to a specialized IPV program. To the contrary, the record suggests that, to the extent the respondent did not sufficiently address his IPV issues in therapy, it was due to his failure consistently to engage with his therapist, rather than any deficiency with respect to the department's reunification efforts. See *In re Nevaeh W.*, 154 Conn. App. 156, 164–66, 107 A.3d 539 (2014) (determination of whether department made reasonable efforts to reunify may be assessed in light of respondent's failure to engage in services), rev'd

in part on other grounds, 317 Conn. 723, 120 A.3d 1177 (2015).

Moreover, it is well established that "[r]easonable efforts means doing everything reasonable, not everything possible," and that "courts are instructed to look to the totality of the facts and circumstances presented in each individual case in deciding whether reasonable efforts have been made." (Internal quotation marks omitted.) *In re Caiden B.*, supra, 220 Conn. App. 349–50. Furthermore, "[o]ur focus in conducting a review for evidentiary sufficiency is not on the question of whether there exists support for a different finding—the proper inquiry is whether there is enough evidence in the record to support the finding that the trial court made." (Internal quotation marks omitted.) *In re Lillyanne D.*, 215 Conn. App. 61, 88, 281 A.3d 521, cert. denied, 345 Conn. 913, 283 A.3d 981 (2022). Thus, the question for this court is not whether some evidence would support a determination that the department should have referred the respondent to an IPV program but, rather, whether the totality of the evidence supports the trial court's finding that the department's reunification efforts, considered cumulatively, were reasonable. See, e.g., *In re L. T.*, 220 Conn. App. 680, 694–95, 299 A.3d 1229 (2023) (respondent's claim that department's decision not to make referral for specific service rendered its reunification efforts unreasonable "ignores the principle that the department need not do everything possible, just everything reasonable, to promote reunification"); *In re Alexander T.*, 81 Conn. App. 668, 673, 841 A.2d 274 ("[i]n light of the entire record, the failure to provide [a] referral [for a psychiatric examination], while a lapse, does not make the overall efforts of the department fall below the level of what is reasonable"), cert. denied, 268 Conn. 924, 848 A.2d 472 (2004). On the basis of our review of the record, we conclude that there is sufficient evidence to support the trial court's

finding that the department made reasonable efforts to reunify the respondent with Charli.[5]

II

The respondent also claims that the trial court erred in concluding that he failed to rehabilitate. We disagree.

The following legal principles and standard of review govern the respondent's claim. "In the adjudicatory phase of a termination of parental rights proceeding, the court must determine whether one of the . . . statutory grounds that may serve as a basis for termination of parental rights exists. . . . Failure of a parent to achieve sufficient personal rehabilitation is one of [the] statutory grounds on which a court may terminate parental rights pursuant to § 17a-112. . . . That ground exists when a parent of a child whom the court has found to be neglected fails to achieve such a degree of rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, the parent could assume a responsible position in the life of that child." (Internal quotation marks omitted.) *In re Aurora H.*, 222 Conn. App. 307, 317–18, 304 A.3d 875, cert. denied, 348 Conn. 931, 306 A.3d 1 (2023).

"Personal rehabilitation as used in [§ 17a-112 (j) (3) (B)] refers to the restoration of a parent to his or her

[5] The respondent also claims that the trial court erred in concluding that he was unable or unwilling to benefit from the department's reunification efforts. Pursuant to § 17a-112 (j) (1), however, "[t]he [petitioner] must prove [by clear and convincing evidence] *either* that [the department] has made reasonable efforts to reunify or, *alternatively*, that the parent is unwilling or unable to benefit from the reunification efforts. Section 17a-112 (j) clearly provides that the [petitioner] is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element." (Emphasis in original; internal quotation marks omitted.) *In re Caiden B.*, supra, 220 Conn. App. 361 n.22. Because we conclude that there is sufficient evidence to support the trial court's reasonable efforts determination, we need not address the respondent's claim that the court erred in concluding that he was unable or unwilling to benefit from the department's reunification efforts.

former constructive and useful role as a parent. . . . The statute does not require [a parent] to prove precisely when [he] will be able to assume a responsible position in [his] child's life. Nor does it require [him] to prove that [he] will be able to assume full responsibility for [his] child, unaided by available support systems. . . . Rather, [§ 17a-112] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [the parent] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he] can assume a responsible position in [his] child's life." (Internal quotation marks omitted.) *In re Kyreese L.*, 220 Conn. App. 705, 719, 299 A.3d 296, cert. denied, 348 Conn. 901, 300 A.3d 1166 (2023).

"A conclusion of failure to rehabilitate is drawn from *both* the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Emphasis in original; internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015).[6]

[6] "Prior to *In re Shane M.*, supra, 318 Conn. 569, courts had applied the clear error standard of review both to a trial court's determination that a parent failed to rehabilitate and to that court's subordinate factual findings." *In re Kyreese L.*, supra, 220 Conn. App. 720 n.8. In his brief, the respondent argues that "the standard of review as established by our Supreme Court in *In re Shane M.* should be replaced by the former clear error standard."

The following additional facts and procedural history are relevant to our resolution of this claim. On August 31, 2023, prior to the commencement of evidence, the trial court asked the parties whether there were "any agreements as to anything, including exhibits . . . ." The petitioner's counsel notified the court that the parties stipulated that the state had entered a nolle prosequi on the criminal charges against the respondent stemming from the January 2 and 15, 2023 arrests. The petitioner's counsel further notified the court that the parties agreed to the admission of all proposed exhibits except for portions of an affidavit and a social study, both prepared by Parsons. The respondent's counsel argued that references to certain criminal charges from 2013 and 2016 should be redacted from the affidavit and social study. The trial court overruled both objections. Police reports relating to the three incidents involving the respondent and the mother were admitted as full exhibits by agreement of the parties.

At trial, Parsons testified regarding the department's reunification efforts and its concerns about the respondent's ability to provide a safe and stable home for Charli. Parsons testified that, although the respondent was able to maintain his sobriety, he did not meaningfully address the other concerns reflected in his specific steps, namely, his involvement in domestic violence, lack of stable housing and employment, and need for consistent mental health treatment. In addition, Parsons testified that the respondent was not forthright with the department about his lack of progress in complying with his specific steps. With respect to the domestic violence incidents involving the mother, Parsons testified that the respondent did not notify the department

As the respondent acknowledges, however, this court "is bound by the precedent from our Supreme Court and is unable to modify it." *In re Denzel W.*, 225 Conn. App. 354, 380 n.14, 315 A.3d 346, cert. denied, 349 Conn. 918, 317 A.3d 1 (2024).

about the arrests or the underlying incidents. In fact, the respondent repeatedly insisted to the department that, other than to speak about Charli, he no longer maintained a relationship with the mother. Contrary to his representations to the department, the respondent told the police at the time of his January 2, 2023 arrest that the mother was his girlfriend, and he listed her as a source of support for Charli during the reunification assessment with Boys & Girls Village.

Parsons also testified that, around the time the department referred the respondent to supportive housing, he told Parsons that he would not have any problem affording an apartment and that his primary obstacle was locating an apartment close to his work. Yet the respondent stopped paying rent for his apartment in November, 2022, just two months after he signed the lease, and his landlord commenced eviction proceedings in March, 2023. In addition, the respondent lost his job in February, 2023, but he did not notify the department until May, 2023. Even then, he told the department that "he was able to pay his rent and utilities based on his unemployment [benefits]," even though at that point he had not paid rent for approximately six months.

As discussed previously, the respondent also told the department that he found a therapist in February, 2022, but the therapist told Parsons in November, 2022, that she had been seeing the respondent for only three months. At the time of trial, the respondent had not seen his therapist in approximately five months. Parsons also testified that the respondent missed four supervised visits with Charli before being discharged from QPC and nine of forty-five visits while engaged with Kids Advocates. The respondent often cited difficulties with transportation as a reason for missing such visits, even though the department repeatedly offered to arrange transportation for him. The respondent also missed two

visits without notice while engaged with QPC and one while engaged with Kids Advocates.

The court also considered the report and testimony of Randall, a court-appointed evaluator and expert in clinical and forensic psychology. Based on her in person evaluation of the respondent in August, 2021, Randall recommended that the respondent participate in weekly visitation with Charli and that he engage in individual therapy to address his issues with interpersonal relationships and domestic violence. She further recommended that stable housing and income should be considered necessary to support reunification and that reunification would not be appropriate if the respondent was involved in any further incidents of domestic violence.

At trial, Randall testified that, following her in person evaluation of the respondent, she reviewed the social study prepared by Parsons, an addendum to the social study, the respondent's criminal history, and the police reports relating to the August, 2022 and January, 2023 incidents between the respondent and the mother. On the basis of that review, Randall had several concerns regarding the respondent's ability to properly care for Charli. First, she found it "very concerning" that "there have still continued to be incidents of domestic violence between [the respondent and the mother]." Relatedly, Randall was concerned that in light of the couple's long history of domestic violence and the mother's active substance abuse, the respondent's ongoing, close interpersonal relationship with the mother may put Charli at risk. Specifically, Randall testified that spending time with a person who is actively using illegal drugs is "probably the most common trigger to relapse" and that by maintaining an ongoing relationship with the mother, the respondent "put himself at risk for relapsing . . . ." She further testified that substance abuse can be a trigger for episodes of domestic violence and that

the respondent's relationship with the mother while she was actively using illegal drugs "increases the risk for domestic violence" and calls into question the respondent's ability to provide "a stable, safe home" for Charli.

Randall also testified that the respondent's repeated failure to maintain housing and employment indicates that the respondent "is not taking control of . . . those basic steps that need to happen to be a parent and care for his child in the home." She explained that because Charli has only ever lived with her current foster parents, removing her from that home would result in trauma and "she would need additional care more than most [children her age] because of that experience." She testified that the respondent "has not demonstrated that he is able to really be consistent in the treatments" and that she "question[ed] his willingness to participate in services that [Charli] would need . . . ."

Finally, Randall testified that she was especially concerned that the respondent's failure consistently to follow through with supervised visitation calls into question his ability to establish and maintain a consistent relationship with Charli. She testified that, especially at Charli's age, the respondent's failure consistently to be there for her could create trust issues and have a damaging impact on how Charli views relationships in general. Ultimately, Randall opined "that it would not be appropriate or safe for Charli to be returned to [the respondent] at this time."

On the basis of the evidence presented, the trial court found that, although the respondent "has made a laudable effort" by achieving and maintaining sobriety since his release from incarceration, "[the respondent's] sobriety is his only consistent compliance with his reunification steps." The court found that the respondent "did not obtain stable housing, employment, visitation, or an appropriate interpersonal relationship with

the mother." The court further found that the respondent's involvement in three incidents of domestic violence "directly contravened [Randall's] recommendation" and demonstrated that the respondent "had not mastered his anger or learned coping skills to deal with the tensions surrounding a difficult interpersonal relationship." The court shared Randall's concern that the respondent "continued his relationship with the mother despite his awareness that [she] has not addressed her significant substance abuse history and was actively using illegal drugs [at the time of the arrests]," noting that "[t]his exposure puts [the respondent's] sobriety at risk and increases the likelihood of domestic violence." Finally, the court found that the respondent's "inability or unwillingness to maintain consistent, regular visitation demonstrates a lack of insight into his parenting obligations and his daughter's needs." The trial court concluded that the respondent failed to achieve a degree of personal rehabilitation that would encourage the belief that, within a reasonable time, considering the age and needs of the child, he could assume a responsible position in Charli's life.

On appeal, the respondent presents three arguments in support of his claim that the trial court erred in concluding that he failed to rehabilitate. First, the respondent argues that the court improperly relied on the police reports in support of its finding that he was involved in incidents of domestic violence. Second, the respondent argues that the record does not support the court's factual findings regarding the respondent's visitation history. Third, the respondent argues that the court gave undue weight to the expert opinion of Randall. We address each argument in turn.

The respondent first argues that the trial court could not rely on the police reports to support its finding that he was involved in incidents of domestic violence

because such reports "can only show that a police officer determined there was probable cause to make an arrest," which "does not rise to the level of clear and convincing evidence." This argument is unavailing for two reasons.

First, the respondent did not object to the admission of the police reports at trial.[7] It is well settled that "[w]henever evidence is admitted without objection, the trier of fact can rely on its contents for whatever they are worth on their face." (Internal quotation marks omitted.) *In re Kasmaesha C.*, 148 Conn. App. 666, 678, 84 A.3d 1279, cert. denied, 311 Conn. 937, 88 A.3d 549 (2014). "Hearsay evidence admitted because no objection was voiced can be considered to prove the matters in issue for whatever its worth on its face. . . . If the evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of the rational persuasive power it may have." (Citations omitted; internal quotation marks omitted.) *Dufresne* v. *Dufresne*, 191 Conn. App. 532, 546–47, 215 A.3d 1259 (2019). Because the respondent did not object to the admission of the police reports, it was within the province of the trial court to determine the probative value of such reports in determining whether the respondent failed to rehabilitate. See *In re Gabriella A.*, 319 Conn. 775, 790, 127 A.3d 948 (2015) ("[i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence" (internal quotation marks omitted)).

[7] In his principal appellate brief, the respondent states that he "objected to certain aspects of the police [reports]" but not to the reports in their entirety. The respondent does not, however, provide any citation to the record to support his assertion. As discussed previously, the record reflects that the respondent objected only to the admission of portions of Parsons' affidavit and the social study. After the court overruled those objections, the respondent's counsel stated, "that is the last of . . . my objections." All other exhibits, including the police reports, were admitted by agreement.

Second, the respondent's argument misapprehends the manner in which the court relied on the police reports. Although the mere fact that the respondent was arrested would, as the respondent contends, "only show that a police officer determined there was probable cause to make an arrest," the court's decision did not rely on the fact that the respondent was arrested. Rather, the court considered and weighed the *contents* of the admitted police reports—which included the responding officers' observations, as well as statements of the respondent, the mother, and the respondent's neighbor—as a factor supporting its ultimate determination that the respondent failed to rehabilitate. Specifically, the police reports described the respondent's volatile interactions with the mother—while she was actively abusing illegal substances—during a crucial period in which the respondent was attempting to reunify with Charli. As discussed previously, the court agreed with Randall that, given that "substance abuse has played a significant role in [prior incidents of] domestic violence between the mother and [the respondent]," the respondent's ongoing relationship with the mother despite her active substance abuse "puts [the respondent's] sobriety at risk and increases the likelihood of domestic violence." The court relied on the content of the police reports in finding that the incidents between the respondent and the mother "directly contravened [Randall's] recommendation" and demonstrated that "[the respondent] had not mastered his anger or learned coping skills to deal with the tensions surrounding a difficult interpersonal relationship."

The trial court was not required to make these subsidiary factual findings on the basis of clear and convincing evidence. In *In re Zamora S.*, 123 Conn. App. 103, 998 A.2d 1279 (2010), this court recognized that "§ 17a-112 (j) requires the petitioner to establish three specific elements by clear and convincing evidence in order to

prevail on a termination of parental rights petition," namely, that (1) the department made reasonable efforts to reunify the parent and child or that the parent was unable or unwilling to benefit from such efforts, (2) termination of parental rights is in the best interest of the child, and (3) one of the statutory grounds for termination set forth in § 17a-112 (j) (3) exists. Id., 112. This court further recognized, however, that "any subordinate facts that, together, led the court to the conclusion that those elements have been met need not be proven by that heightened standard of proof." Id., 114. Here, the court's subsidiary findings regarding the respondent's ongoing relationship with the mother and involvement in domestic violence incidents supported its ultimate determination that the respondent failed to rehabilitate, and the court properly considered the police reports in support of such findings. See id., 113 (where failure to rehabilitate was alleged as ground for termination of parental rights, respondent's ongoing involvement in relationship marked by domestic violence "was relevant as a subordinate fact to the court's eventual finding of whether the respondent had, in fact, failed to rehabilitate herself").

We further note that the incidents of domestic violence that were documented in the police reports were not the sole basis for the court's conclusion that the respondent failed to rehabilitate. Rather, as noted previously, the court also found that the respondent "did not obtain stable housing, employment, visitation, or an appropriate interpersonal relationship with the mother." The court further found it significant that, "[e]ven with a termination petition pending, [the respondent] could not demonstrate consistent follow-through on services." Finally, the court credited Randall's testimony "that whatever efforts [the respondent] was making were too little and too late" and "[gave] added weight to her opinion that it would not be appropriate

or safe to return [Charli] to [the respondent] . . . .'' On the basis of all of its subsidiary findings, the court determined by clear and convincing evidence that the respondent failed to achieve sufficient rehabilitation to ''encourage the belief that within a reasonable period of time [the respondent] could assume a responsible position [in] the life of [Charli].'' Accordingly, we conclude that the trial court did not improperly rely on the police reports as one factor that supported its ultimate determination that the respondent failed to rehabilitate.

With respect to the respondent's argument that the record does not support the trial court's subsidiary factual findings regarding his visitation history, the respondent points to a finding, contained in the portion of the memorandum of decision addressing whether termination of parental rights was in the best interest of Charli, that the respondent ''missed 20 percent of his scheduled visits without a valid excuse.''[8] The respondent argues that the evidence does not support the finding that he had no ''valid excuse'' because, of the nine visits he missed while engaged with Kids Advocates, he missed three visits due to illness and five visits due to ''transportation issues.'' We are not persuaded.

We first note that the respondent appears to assume that, because the record demonstrates that he had provided a reason for missing the visits in question, there

[8] On appeal, the respondent does not challenge the trial court's conclusion that termination of his parental rights was in Charli's best interest. Although the court relied on the fact that the respondent missed 20 percent of his visits while engaged with Kids Advocates in concluding that the respondent failed to rehabilitate, in so concluding, the court did not expressly rely on the separate finding in its best interest analysis that the respondent had no ''valid excuse'' for missing such visits. Moreover, for the reasons explained herein, even assuming that the court's finding that the respondent had no valid excuse for the missed visits did, in fact, form part of the basis for its conclusion that the respondent failed to rehabilitate, we conclude that the court's findings regarding the respondent's visitation history are reasonably supported by the record.

was no basis for the trial court to find that he missed such visits "without a valid excuse." In reviewing the record for evidentiary sufficiency, however, "[o]ur function as an appellate court is to review and not retry the proceeding . . . . The probative force of conflicting evidence is for the trier to determine." (Internal quotation marks omitted.) *In re Nevaeh W.*, supra, 154 Conn. App. 170. Moreover, "[w]e will not disturb the court's subordinate factual findings unless they are clearly erroneous. . . . A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *In re Niya B.*, 223 Conn. App. 471, 490, 308 A.3d 604, cert. denied, 348 Conn. 958, 310 A.3d 960 (2024). In the present case, the petitioner presented testimony that specifically called into question the validity of the respondent's excuses for the visits he missed due to alleged transportation issues. Specifically, Parsons testified that the department repeatedly offered to arrange transportation for the respondent, but he declined to take advantage of such offers. The trial court was free to credit such testimony in assessing the respondent's visitation history.

Moreover, the respondent focuses solely on the trial court's statistical finding that he missed 20 percent of his visits while engaged with Kids Advocates, while ignoring the full context of the court's factual findings regarding his visitation history. The court, however, took a broader view of the evidence by discussing the respondent's overall commitment to supervised visitation based on his record with QPC *and* Kids Advocates. Specifically, the court found that when the department referred the respondent to QPC, "[i]t took at least four attempts before an intake could be scheduled," and

that, although "[the respondent] participated in this visitation, [he] was discharged in August, 2022, after two consecutive no call/no show visits." The court then found that after the department referred the respondent to Kids Advocates, he received "[a] very positive report" but "missed 20 percent of his available visits." Furthermore, although not referenced in the memorandum of decision, the record also reflects that, in addition to the two "no call/no show" visits that resulted in the respondent's discharge from QPC, he missed at least two other visits while engaged with QPC due to alleged transportation issues.

Additionally, Randall testified that, "regardless of the reason, for [the respondent] to miss multiple visits ongoing with his daughter, that's a letdown for her . . . [e]very time that she expects there to be a visit, and then he doesn't show up. So that to me is something that is very significant for her." The court relied on Randall's opinion in finding that the missed visits "would have a deleterious effect upon a young child, creating trust issues for that child." On the basis of the entire record, the court ultimately found that "[the respondent's] inability or unwillingness to maintain consistent, regular visitation demonstrates a lack of insight into his parenting obligations and his daughter's needs." Considering the record in its entirety and construing the evidence in the light most favorable to sustaining the trial court's judgment, we conclude that the court properly found that the respondent's inconsistent visitation history supported the conclusion that he failed to rehabilitate.

Finally, the respondent argues that the trial court erred by giving "added weight" to Randall's testimony because her opinion was based on outdated information. Relying on this court's decisions in *O'Neill* v. *O'Neill*, 13 Conn. App. 300, 536 A.2d 978, cert. denied, 207 Conn. 806, 540 A.2d 374 (1988), and *Merkel* v. *Hill*,

189 Conn. App. 779, 207 A.3d 1115 (2019), the respondent argues that Randall's testimony was "stale" because her in person evaluation occurred more than two years before trial.

The respondent's reliance on *O'Neill* and *Merkel* is misplaced. In *O'Neill*, the trial court in a dissolution of marriage action awarded sole custody of the parties' child to the father on the basis of a family relations case study report written thirteen months before trial. See *O'Neill* v. *O'Neill*, supra, 13 Conn. App. 302. In reversing the judgment of the trial court, this court noted that the case study report referred to past events in the mother's life "which [were] not probative of [her] present parenting abilities" and that the family relations officer who authored the report expressly testified "that due to the passage of time he could not competently testify as to whether the parties' stability and security had changed since his report." Id., 303. This court concluded that the trial court erred in relying on the outdated report because it "[did] not focus on the present abilities or infirmities of the [mother] as they may affect her ability to be a primary caretaker of the child." Id.

Similarly, in *Merkel*, this court reversed a judgment modifying a child custody and parental access plan because the trial court adopted recommendations from a family relations custody report completed ten months before trial, despite the family relations counselor's testimony that she had no updated information about the family and could not confirm that her recommendations were still valid. See *Merkel* v. *Hill*, supra, 189 Conn. App. 788–89. The counselor "testified that she could not opine as to the particulars of the report at issue because she was not expecting to testify that day" and "had not reviewed the file, report, or notes" prior to her testimony. Id., 784. The counselor further testified that she believed her report would have been "outdated after six months" and that she had "no basis to say that

it's still valid . . . [and] would be doing a disservice to the minor child to say that." (Internal quotation marks omitted.) Id., 785. This court concluded that the trial court erred because, "[n]otwithstanding the staleness of the report and the testimony of [the counselor] that it did not represent her present recommendations, the court surprisingly found that [the counselor's] testimony 'validated the report and her recommendations,' and . . . adopted her stale recommendations as its own." Id., 789.

Unlike in *O'Neill* and *Merkel*, Randall testified that, prior to trial, she reviewed Parsons' social study, an addendum to the social study, the respondent's criminal history, and the police reports and that her present opinions and recommendations were based on her review of such records. All of the materials that Randall reviewed were admitted as full exhibits, so the respondent had ample opportunity to cross-examine Randall concerning her testimony. The record reflects that the respondent availed himself of that opportunity. For example, the respondent's counsel elicited from Randall that her knowledge of the respondent's visitation history and reunification assessment was based solely on the social study and that she had not reviewed the underlying documentation. In addition, the respondent's counsel emphasized during closing argument that "Randall had only met Charli and . . . [the respondent] once" and argued that her evaluation "was so long ago at this point [that] the recommendations are not up to date."

Contrary to the respondent's argument, it was not improper for the trial court to credit Randall's testimony and to rely on that testimony in support of the conclusion that the respondent failed to rehabilitate. "It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony.

. . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses. . . . It is the quintessential function of the fact finder to reject or accept certain evidence, and to believe or disbelieve any expert testimony. . . . The trier may accept or reject, in whole or in part, the testimony of an expert offered by one party or the other." (Internal quotation marks omitted.) *In re Aubrey K.*, 216 Conn. App. 632, 658–59, 285 A.3d 1153 (2022), cert. denied, 345 Conn. 972, 286 A.3d 907 (2023).

On the basis of our review of the record, we conclude that the evidence was sufficient to support the conclusion that the respondent failed to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of Charli, he could assume a responsible position in her life.

The judgment is affirmed.

In this opinion the other judges concurred.

WOODBRIDGE CROSSING CONDOMINIUM ASSOCIATION, INC. *v.* GWENDOLYN FERGUSON ET AL.
(AC 47075)

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

Syllabus

The plaintiff appealed from the trial court's judgment for the defendant condominium unit owner in its foreclosure action for the defendant's alleged nonpayment of common fees. The plaintiff claimed that the court improperly concluded that it had not met its burden of proof. *Held*:

The trial court's finding that the plaintiff did not satisfy its burden of proving that the defendant had failed to pay common charges for her unit was

not clearly erroneous because it was supported by the evidence presented at trial.

Argued September 18—officially released November 12, 2024

Procedural History

Action to foreclose a statutory lien for unpaid common charges on a condominium unit owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *K. Murphy, J.*; judgment for the named defendant; thereafter, the court, *K. Murphy, J.*, rendered judgment dismissing the action as to the defendant Wells Fargo Bank, and the plaintiff appealed to this court. *Affirmed.*

Kristie Leff, for the appellant (plaintiff).

Opinion

PER CURIAM. In this foreclosure action concerning the alleged nonpayment of common fees, the plaintiff, Woodbridge Crossing Condominium Association, Inc., appeals from the judgment of the trial court rendered in favor of the defendant Gwendolyn Ferguson.[1] On appeal, the plaintiff claims that the court erred in determining that it had not met its burden of proof. We disagree and, accordingly, affirm the judgment of the trial court.

The following procedural history and facts, as found by the trial court, are relevant to this appeal. The plaintiff commenced a foreclosure action alleging that the defendant, the owner of a unit in the plaintiff's condominium complex, had failed to pay her monthly common fees for at least six years. Following a trial, the

[1] Wells Fargo Bank was also named as a defendant. After the court rendered judgment for Ferguson following a trial, which Wells Fargo Bank did not attend, the court rendered a judgment of dismissal as to Wells Fargo Bank, and it is not participating in this appeal. For ease of reference, we will refer to Ferguson as the defendant.

court delivered an oral decision in which it made the following findings of fact and conclusions of law. The strongest evidence in support of the plaintiff's claim of nonpayment was (1) plaintiff's exhibit 6, a copy of a portion of the plaintiff's bank records, which did not reflect the deposit of any checks or money orders from the defendant during the period from June, 2013, through May, 2018, and (2) the testimony of Michelle Hufcut, the owner of Evergreen Property Management, LLC (Evergreen), through which she served as the property manager for the plaintiff during the relevant time frame[2], who stated that while she worked for the plaintiff, she deposited all checks and money orders received from unit owners for the payment of common charges into the plaintiff's bank account. The court noted that Hufcut had testified as to her usual procedures with respect to depositing such payments but did not remember much, if anything, regarding the defendant's payments of common charges for her unit. The court compared plaintiff's exhibit 6 with defendant's exhibit J1, a handwritten spreadsheet prepared for the plaintiff by Evergreen in 2019 to document the defendant's payments of common charges for her unit while Evergreen was serving as its property management company. The defendant testified that exhibit J1 was sent to her by one of the plaintiff's subsequent property management companies, Shoreline Property Management, in 2019, in response to her inquiry about the alleged nonpayment of common charges for her unit in that later time frame. The court noted that the several payments listed in exhibit J1 were not reflected in exhibit 6. It ultimately concluded that it could not rely on either exhibit 6 or

[2] Evidence was adduced at trial that Hufcut worked as the property manager for the plaintiff through her company, Evergreen, from at least August, 2013, and that, in May, 2018, Hufcut's and Evergreen's positions as the property manager and property management company for the plaintiff were terminated.

exhibit J1 because the two exhibits were "inconsistent with each other."

The court detailed the following evidence in favor of the defendant's position that she had paid her common fees. To begin with, the defendant testified that she had owned her unit since 1991 and that she was current on her payments of common fees. The court found the defendant's testimony to be credible, noting in particular that she had supported her claim of payment with credible documentary evidence. The documentary evidence upon which the court relied included (1) exhibit B, a May 24, 2017 letter from Evergreen noting that the amount of common fees due from the defendant each month for her unit was $220 and stating that the defendant was a member in good standing of the condominium complex, (2) exhibit F, a communication from another former property management company of the plaintiff, Alan Barberino Real Estate, LLC, likewise stating that the amount of common fees due from the defendant each month for her unit in the complex was $220 and that her balance as of October 8, 2019, was $285, including $220 in common fees plus an additional $65 in other unspecified charges, and (3) exhibit E, a November 6, 2019 statement, which was prepared by the same former property management company, Alan Barberino Real Estate, LLC, on the letterhead of the plaintiff, stating that the defendant's current balance on that date was $285, including $220 in common fees plus an additional $65 in late fees.[3]

The court concluded that the "most logical" explanation for the inconsistencies in the parties' evidence was that the defendant had indeed made payments of common fees, but that "for whatever reason, and the court doesn't know why . . . it was not reflected in those

[3] Exhibit E further indicated that the defendant was owed a credit on her account as of November 28, 2018. The reason for the credit is not disclosed.

bank records. And again, I've given some possible reasons for that, but I really don't know. And ultimately, it's the plaintiff's burden of proving that the defendant did not make her payments." The court rendered judgment for the defendant on the plaintiff's complaint and ordered that the lis pendens be removed. This appeal followed.

The plaintiff claims that the court's finding that it did not meet its burden of proof that the defendant did not pay common fees during the period in question is clearly erroneous.[4] The plaintiff argues that it presented "abundant, credible and incontrovertible evidence of lack of payment," including the bank statements, which it contends is "the most accurate and precise method by which to determine the payments made by unit owners." We are not persuaded.

"A court's factual findings underlying its determination that a party failed to sustain its burden of proof will not be disturbed on appeal unless they are clearly erroneous." *O & G Industries, Inc.* v. *American Home Assurance Co.*, 204 Conn. App. 614, 624, 254 A.3d 955 (2021). "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. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *Schiavone* v. *Bank of America, N.A.*, 102 Conn. App. 301, 304, 925 A.2d 438 (2007).

[4] The plaintiff also argues that the court abused its discretion in determining that it had not met its burden of proof. Our standard of review, however, for factual findings is clearly erroneous, and we do not second-guess the credibility determinations of the trial court. See, e.g., *Schiavone* v. *Bank of America, N.A.*, 102 Conn. App. 301, 304, 925 A.2d 438 (2007).

After a careful review of the record, we conclude that the court's finding that the plaintiff did not satisfy its burden of proving that the defendant failed to pay common charges for her unit is supported by the evidence. The defendant testified that she had paid her common fees. Additionally, the defendant presented documentary evidence supporting her payment of the common fees in the relevant time frame, including a summary of her payments during that period and two later bills showing small current balances due with other minor charges but no arrearages. Although the plaintiff presented evidence of the defendant's nonpayment of common fees that included, most notably, bank records from the relevant time frame, the court did not credit that evidence. Rather, the court credited the defendant's testimony and the documentary evidence in exhibits B, E, and F that supported her testimony that she had paid the common fees for her unit. "[I]t is the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony." (Internal quotation marks omitted.) *Rockhill* v. *Danbury Hospital*, 176 Conn. App. 39, 44, 168 A.3d 630 (2017). We conclude that the court's finding that the plaintiff did not sustain its burden of proof was not clearly erroneous and therefore must be upheld.

The judgment is affirmed.

ROBERTO A. *v.* COMMISSIONER OF CORRECTION*
(AC 46884)

Clark, Westbrook and DiPentima, Js.

Syllabus

The respondent, the Commissioner of Correction, appealed, on the granting of certification, from the habeas court's grant of the petitioner's petition

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline

for a writ of habeas corpus. The respondent claimed, inter alia, that the court improperly concluded that the petitioner's right to the effective assistance of counsel was violated by the failure of his counsel, M, to investigate adequately and to present an alibi witness, G, at the petitioner's criminal trial. *Held*:

The issue raised in the habeas petition of whether M rendered ineffective assistance by failing to secure G's testimony at the criminal trial included within it the issue of whether M's investigation into G as a potential witness was reasonable.

The habeas court did not err in finding M's performance deficient, as it determined that, pursuant to the factors set forth in *Skakel* v. *Commissioner of Correction* (329 Conn. 1), M's failure to investigate and present the testimony of G was not reasonable and that G was a credible witness.

The habeas court correctly concluded that M's deficient performance prejudiced the petitioner, as the state's case was not particularly strong, the theory of the defense rested on the petitioner's alibi, and G would have offered noncumulative alibi testimony that the court determined was credible.

Argued September 11—officially released November 12, 2024

Procedural History

Amended petition for writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Bhatt*, *J.*; judgment granting the petition, from which the respondent, on the granting of certification, appealed to this court. *Affirmed*.

Timothy F. Costello, supervisory assistant state's attorney, with whom, on the brief, were *David R. Applegate*, state's attorney, and *Elizabeth Moseley*, senior assistant state's attorney, for the appellant (respondent).

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

to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Opinion

DiPENTIMA, J. In this appeal we again consider the parameters of the presumption of competence in determining whether trial counsel performed deficiently in representing a petitioner at his criminal trial. The respondent, the Commissioner of Correction, appeals from the judgment of the habeas court granting the petition for a writ of habeas corpus filed by the petitioner, Roberto A. The respondent claims that the court improperly (1) decided an issue not raised in the habeas petition and (2) concluded that the petitioner's right to the effective assistance of counsel was violated by the failure of his trial counsel to investigate adequately and to call a noncumulative and credible alibi witness. We affirm the judgment of the habeas court.

The following facts, as set forth by the habeas court, and procedural history are relevant. During the petitioner's 2013 criminal trial, the victim, A, testified that "[a]t the time of . . . the incident she was twelve years old and in sixth grade. She would return home from school around 3 p.m., let the dog out and make herself something to eat. She would stay there until her parents got home in the evening around 6 p.m.

"One day in the spring of 2009, she was at home per her usual routine when [the petitioner] came to the door. She opened the door and gave him a hug and kiss since he was family. She wondered to herself why he was there since he had never been there before. She thought 'it was just kind of weird that he would just show up randomly.' She testified that [the petitioner] did not live in the area, did not know where he lived and guessed New Jersey. She recalled that he was driving an 'SUV-type' car like an 'Explorer or something,' but was not really sure. She testified that it was a larger car. She then took him on a tour of the house, during which he sexually assaulted her. . . .

"The state and the defense attempted to pin down a precise time period for when the incident occurred and the 'safest bet' was that it was sometime in May, a few weeks after she returned from her week long family vacation, which started on April 12, 2009, but not close to the end of the school year in mid-June."

The petitioner presented an alibi defense that he was not in the state at the time of the alleged criminal offenses. B, the petitioner's daughter, testified at the criminal trial that from March to June, 2009, the petitioner lived in Georgia with her, her children, and her husband, G. B testified that, during that time, she was a full-time student and homemaker and that G was a soldier stationed in Georgia. She further testified that she would have known if the petitioner had borrowed one of the family's cars and that he did not borrow a car in May, 2009, for an overnight trip. On cross-examination, she stated that it was possible that the petitioner had been gone overnight to visit relatives. As the habeas court found, B "was also cross-examined about her motivation for testifying on behalf of her father," and, "[d]uring closing argument, the state repeatedly called into question [B's] testimony and hammered home her bias and prejudice . . . ."

C, the petitioner's employer in Georgia, testified that the petitioner's duties included driving a truck within a fifty mile radius and that the petitioner started working for him on March 27, 2009. C accounted for the petitioner's whereabouts on the days that the petitioner worked, which days did not include May 3 to May 7, May 9 to May 18, or May 20 to May 22, 2009. On May 30, 2009, the petitioner's employment was terminated.

Following a jury trial, the petitioner was convicted of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) and two counts of risk of injury to a child in violation of General

Statutes § 53-21 (a) (1) and (2). The court, *Pavia*, *J.*, sentenced the petitioner to a total effective sentence of thirty years of incarceration, suspended after seventeen years, followed by twenty-five years of probation.

After his conviction was affirmed on direct appeal, the petitioner filed a petition for a writ of habeas corpus. The operative petition alleges, inter alia, that his trial counsel, Miles Gerety, rendered ineffective assistance by failing to present G as an additional alibi witness because G could have testified that the petitioner was not physically present in Connecticut when the crimes were alleged to have occurred. At the habeas trial, G testified that, in 2009, he was a staff sergeant with the military and was stationed in Georgia where he lived in a house with B, their children and the petitioner. He testified that, although he worked long days, he saw the petitioner every day because the petitioner "was a very active part of the household." He further testified that he did not recall the petitioner leaving the Georgia home overnight during the spring and summer of 2009, that the petitioner did not borrow the family's car for an entire twenty-four hour period during that time frame, and that it was "[i]mpossible" for the petitioner to have traveled to Danbury during that time without his knowing it.

Following trial, the habeas court, *Bhatt*, *J.*, granted the petition and concluded that Gerety rendered ineffective assistance by failing to investigate and call G as an alibi witness at the petitioner's criminal trial. This appeal followed. Additional facts will be set forth as necessary.

I

The respondent claims that the court "erred in modifying the claim [pleaded] in the petitioner's habeas petition and deciding a claim not set forth therein. Specifically, it erred in faulting Gerety for inadequately

investigating [G's] utility as an alibi witness. The petition did not present a claim regarding Gerety's investigation." We are not persuaded.

"The petition is in the nature of a pleading . . . . [T]he interpretation of pleadings is always a question of law for the court . . . . Our review of the [habeas] court's interpretation of the pleadings therefore is plenary. . . . [T]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he [petition] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the [petition] is insufficient to allow recovery." (Citation omitted; internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 114 Conn. App. 778, 786, 971 A.2d 766, cert. denied, 293 Conn. 915, 979 A.2d 488 (2009).

In the operative petition, the petitioner alleged that Gerety rendered ineffective assistance by failing to present a meaningful alibi defense in that he (1) "[f]ailed to establish that the petitioner was not physically present in Connecticut when the alleged assault occurred, as he was living and working in Georgia," and (2) "[f]ailed to secure the testimony of [G], the petitioner's alibi witness." The respondent argues that the use of the term "secure" in the petition does not include a claim as to the adequacy of Gerety's investigation, yet the court determined that Gerety failed to investigate G as a potential alibi witness at the petitioner's criminal trial.

Reading the relevant claim in the petition broadly and realistically so as to give effect to the general theory

upon which the claim is based, securing G's testimony would necessarily entail an investigation into his potential testimony. Gerety's investigation of a potential defense witness is part of his overall determination of whether to call that witness to testify for the defense at trial. In *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 198 A.3d 52 (2019), the habeas court granted a petition on the basis that trial counsel failed to prepare and present an alibi defense; id., 523; and our Supreme Court reversed the decision of the Appellate Court, which held that the petitioner's claim of trial counsel's "inadequate investigation of the alibi witnesses was not properly preserved because he framed his claim as a failure to present alibi witnesses, not as a failure to investigate." (Internal quotation marks omitted.) Id., 540. Our Supreme Court stated that, "[a]lthough, in his amended petition for a writ of habeas corpus, the petitioner phrased his claim as a failure to 'present' the testimony of [certain alibi witnesses], it is sufficiently clear from the record that, throughout the habeas proceedings, the petitioner proceeded on a general theory that if defense counsel had adequately investigated his alibi defense, they would have learned that their concerns about its weaknesses were unfounded and, thus, would have presented the alibi witnesses' testimony at trial." Id., 540–41. The court further reasoned: "We see no meaningful distinction between the phrases 'failure to prepare and present' and 'failure to investigate and present' that renders the investigation portion of this claim unpreserved. 'Preparation' necessarily includes 'investigation.' " Id., 541. Similarly, in the present case, the issue of Gerety's investigation was litigated at the habeas trial without objection from the respondent. We see no meaningful distinction between the phrases "failed to secure" the testimony of G and "failed to investigate and secure" the testimony of G. See id.; see also *Gaines* v. *Commissioner of Correction*, 306 Conn.

664, 680, 51 A.3d 948 (2012) (strategic choices made after thorough investigation are virtually unchallengeable; strategic choices made after less than complete investigation are reasonable to extent that reasonable professional judgments support limitations on investigation).

Accordingly, we conclude that the issue raised in the petition of whether Gerety rendered ineffective assistance by failing to secure G's testimony at the criminal trial included within it the issue of whether Gerety's investigation into G as a potential witness was reasonable.

II

The respondent claims that the court improperly concluded that (1) Gerety rendered constitutionally deficient performance by failing to investigate and call G as an alibi witness and (2) such deficient performance prejudiced the petitioner. We disagree.

We begin with the applicable standard of review and law governing ineffective assistance of counsel claims. "In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . To satisfy the performance prong of the *Strickland* test, the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so

serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . [T]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) *Soto* v. *Commissioner of Correction*, 215 Conn. App. 113, 119–20, 281 A.3d 1189 (2022).

"[T]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citation omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 677.

A

The respondent first argues that the court erred in concluding that the petitioner proved deficient performance. We are not persuaded.

The court found that there was no reasonable strategic reason not to call G as a witness at the criminal trial. The court found that G was available at the time of the criminal trial, Gerety "had ample time to contact" G, and G's testimony could have been presented remotely to the jury if G was unable to travel to Connecticut. The court stated that it was "incumbent" upon Gerety, who knew of G's existence as an alibi witness, to contact G "to determine whether [G] was a witness who needed to be called on [the petitioner's] behalf." The court stated that "[G] was another alibi witness to confirm, corroborate and supplement [B's] testimony about [the petitioner's] alibi. His testimony would serve to corroborate the defense that [the petitioner] would

have been unable to make the approximately thirty-five to forty hour trip to Connecticut and back without anyone in the household knowing that he was gone. [G] testified that [the petitioner] helped the family with watching the children and making dinner for the family. He further testified that [the petitioner] did not have independent access to a car and would have to borrow their keys. Furthermore, he testified that this held true for the entire spring of 2009. His testimony is not merely duplicative of [B's] but complements and corroborates it."

The court additionally determined that G's testimony would have been "crucial" to the defense and that there is "no basis from which to conclude that [G's] testimony and credibility would have been impeached." The court further stated that B "was significantly impeached by the state by virtue of her being [the petitioner's] daughter. For example, the state's rebuttal arguments to the jury questioned [B's] motivation for supporting [the petitioner's] alibi, even referring to her as his 'right-hand woman.' While it was easy for the state to argue that a defendant's own daughter would either wilfully lie to protect her father or be wilfully ignorant of his misdeeds, it would be much harder for them to levy that charge against [G], specifically that he would be willing to lie to protect his former father-in-law. At the time of the criminal trial, he and [B] were divorced or divorcing, thus making it harder for the state to claim bias as [it] did with [B]. There is nothing about [G] himself that would make him a less than desirable witness. [G] was a member of the military and served the country here and overseas. There is no evidence of any criminal record or arrests or any acts of untruthfulness. [G], with his background and unimpeached credibility, would have made a strong defense witness. His testimony would have allowed the defense to work around

the obvious claims of bias and prejudice that were levied against [B]."

The respondent argues that the petitioner did not rebut the presumption that Gerety acted reasonably and that the court erred in failing to entertain the range of possible reasonable reasons that Gerety may have had for not further investigating G or presenting his testimony.

A court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"; (internal quotation marks omitted) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 679; but that presumption is not without limits. See id., 680–82. Although "strategic choices made after [a] thorough investigation of [the] law and facts relevant to plausible options are virtually unchallengeable"; (internal quotation marks omitted) id., 680; the facts found by the habeas court make clear that Gerety's failure to investigate G as a potential witness does not fall within this category.

We note that Gerety testified at the habeas trial that he had no memory of G or the specifics of his strategy in presenting the alibi defense.[1] Notwithstanding Gerety's lack of memory, the court, citing evidence produced at the habeas trial, found that G was available and that, given the theory of the defense, it was incumbent on Gerety to reach G to determine whether he needed to call G as a witness. Gerety, however, did not make any attempt to do so. Gerety's decision not to call G as a

[1] The respondent also argues that Gerety's inability to remember G's name at the habeas trial does not establish that he did not investigate G as a potential witness. The court however did not rely on Gerety's failure to remember G's name. The court explained that, despite that Gerety did not recall G at the time of the habeas trial, there was evidence that he knew who G was at the time of the criminal trial. Gerety elicited testimony from B at the criminal trial regarding G's whereabouts and G testified at the habeas trial that he was not contacted by anyone representing the petitioner.

witness, which was made after a less than complete investigation, is, therefore, only "reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (Internal quotation marks omitted.) Id.; see also *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 35, 188 A.3d 1 (2018) ("when counsel's failure to proceed with an investigation is due not to professional or strategic judgment but, instead, results from oversight, inattention or lack of thoroughness and preparation, no deference or presumption of reasonableness is warranted"), cert. denied sub nom. *Connecticut* v. *Skakel*, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019).

"[A] decision by counsel to forgo an investigation into the possible testimony of a potentially significant witness is constitutionally impermissible unless counsel has a sound justification for doing so; speculation, guesswork or uninformed assumptions about the availability or import of that testimony will not suffice. Instead, counsel must seek to interview the witness to determine the value of any testimony that he may be able to provide. . . . With specific regard to the duty to investigate a defendant's alibi defense, counsel is obligated to make all reasonable efforts to identify and interview potential alibi witnesses. . . . [Our Supreme Court has] identified several nonexclusive factors to be considered in determining whether counsel's failure to investigate and present the testimony of an additional alibi witness or witnesses was reasonable under the circumstances. They include (1) the importance of the alibi to the defense . . . (2) the significance of the witness' testimony to the alibi . . . (3) the ease with which the witness could have been discovered . . . and (4) the gravity of the criminal charges and the magnitude

of the sentence that the petitioner faced." (Citations omitted.) *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 34–37.

In concluding that Gerety's failure to investigate and present the testimony of G was not reasonable, the court examined the factors in *Skakel* and determined that (1) the theory of the defense was that the petitioner had an alibi, (2) G's testimony would have been "crucial" to the defense, (3) Gerety knew of the existence of G, was aware of his whereabouts, and would have been able to contact him through B and (4) the charges against the petitioner were "extremely serious and exposed him to decades in prison."

The respondent contends, however, that Gerety's performance in not securing G's testimony was reasonable because G was not credible, was not a disinterested witness, and would have been vulnerable to impeachment to the same extent as B had been due to his status as the petitioner's former son-in-law, the father of the petitioner's grandchildren, and someone who continued to care for the petitioner. The court considered the possible impeachment evidence against G and noted that G was not entirely disinterested, as he had been married to the petitioner's daughter, B. The court also noted that G was no longer part of the family structure, that at the time of the criminal trial G and B were either in the process of divorcing or were divorced, that G was not close with the petitioner, and, additionally, that G was a member of the military, lacked any criminal history, and lacked any acts of untruthfulness. The court determined that G was a credible witness, that he would have made a strong defense witness, and that there was nothing about G that would make him a less than desirable witness. The court's determination regarding deficient performance hinges in large part on its determination of G's credibility, which determination we cannot second-guess. See *Soto* v. *Commissioner of Correction*, supra, 215 Conn. App. 129 ("[a]ppellate courts

do not second-guess the trier of fact with respect to [determinations of] credibility . . . and [t]his court does not retry the case or evaluate the credibility of the witnesses" (citation omitted; internal quotation marks omitted)). For the foregoing reasons, we conclude that the court did not err in finding that Gerety's performance was deficient.

B

The respondent further argues that the court erred in concluding that the alleged failure of Gerety to investigate and present G's testimony prejudiced the petitioner. We disagree.

First, the respondent contends that the court applied an incorrect prejudice standard because it quoted from the dissent from the denial of certiorari in *Chinn* v. *Shoop*, U.S. , 143 S. Ct. 28, 214 L. Ed. 2d 229 (2022), regarding the reasonable probability standard in *Strickland* without also quoting from *Harrington* v. *Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). The court quoted the dissent in *Chinn* for the proposition that "the reasonable probability standard is not the same as the more likely than not or preponderance of the evidence standard; it is a qualitatively lesser standard." (Internal quotation marks omitted.) *Chinn* v. *Shoop*, supra, 143 S. Ct. 28 (Jackson, J., dissenting from denial of certiorari). The respondent contends that the court's failure to note that *Harrington* v. *Richter*, supra, 562 U.S. 112, described the difference between the prejudice standard in *Strickland* and a more probable than not standard as being "slight" demonstrates its application of an improper standard for prejudice. The respondent argues that "[t]he habeas court's emphasis on the qualitative difference between the standards, rather than the high degree of similarity highlighted in *Harrington*, evidences that it applied an improper, diluted prejudice standard."

The court did not apply an incorrect prejudice standard. The court correctly noted that the standard for assessing prejudice under *Strickland* and the preponderance of the evidence standard are not the same. *Harrington* stated that "*Strickland* asks whether it is reasonably likely the result would have been different. . . . This does not require a showing that counsel's actions more likely than not altered the outcome . . . ." (Citation omitted; internal quotation marks omitted.) *Harrington* v. *Richter*, supra, 562 U.S. 111–12. As part of its recitation of the prejudice standard under *Strickland*, the habeas court quoted relevant Connecticut law stating that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case . . . because [t]he result of a [criminal] proceeding can be rendered unreliable, and [thus] the proceeding itself unfair, even if errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." (Citation omitted; internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 38. In its reasoning, the habeas court applied the proper standard, and it concluded that there was a reasonable probability that G's testimony, if it were to have been presented to the jury, would have resulted in a different outcome. There is nothing in the court's decision to suggest that it used an incorrect standard. In the absence of any evidence that the court engaged in an improper legal analysis, we presume that the court knew the law and applied it correctly. See *State* v. *Reynolds*, 264 Conn. 1, 29 n.21, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004).

The respondent additionally contends that "it is not almost 'more probable than not' that [G's] testimony

would have altered the outcome of the [criminal] trial."[2] According to the respondent, in light of the fact that the petitioner was convicted at trial, the jury "evidently did not afford . . . much weight" to the testimony of B or C concerning the petitioner's whereabouts during the spring of 2009, and G's testimony would not have altered that outcome because (1) G's testimony was weak in that he was not perpetually present in the home to monitor the petitioner, (2) the strength of the state's case undermines the court's determination of prejudice and (3) G was impeachable.[3]

To the contrary, the state's case was not particularly strong. There was no DNA evidence or corroborating eyewitness testimony connecting the petitioner to the crimes. As the habeas court found, "the main testimony against [the petitioner] was that of A. Like most cases involving allegations of sexual assault, the jury's verdict depended on [its] assessment of her credibility. Unlike most cases, the defense did put on an alibi defense." The lack of the strength of the state's case is further illustrated by the length of the jury's deliberations. The jury deliberated for four days, asked for a playback of the testimony of A and her father, both of whom testified for the state, and sent a note stating, "[w]e are stuck,"

[2] We again note, however, that the standard for prejudice is not equivalent to a preponderance of the evidence standard, and we disagree that the habeas court's conclusion as to prejudice was improper.

[3] The respondent also suggests that the court erred by faulting Gerety for not requesting a continuance to secure G's testimony, stating that, "[a]s a question of prejudice, the petitioner presented no evidence that, had Gerety requested a continuance during trial, the court would have granted one and Gerety would have obtained [G's] testimony within the time provided." The court did not base its determination of prejudice on Gerety's failure to request a continuance. Rather, the court, when discussing deficient performance, found that G was an available witness. In so doing, the court noted supporting factors, including that G's testimony could have been secured remotely and presented to the jury if G was unable to travel to Connecticut and that Gerety could have requested a brief continuance to secure G's testimony.

and asking for advice. The court provided a Chip Smith instruction.[4] See *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 86 (lack of strength of state's case was illustrated by jury's four days of deliberations and request to have read back only testimony that supported state's theory).

The court reasoned that the defense presented an "incomplete alibi" through C, who provided alibi information for only a limited number of days when the petitioner was working, which did not cover the entire spring of 2009, within which time frame A testified that the sexual assault had occurred. The court further noted that B's testimony was challenged by the state for being incomplete, in that she ultimately testified that it was possible that the petitioner was gone for twenty-four hours during the relevant time frame, and for being biased because she is the petitioner's daughter.

The court determined that G's testimony was not cumulative and "would have provided further corroboration of the alibi from an individual who could not be impeached in the manner [B] was." G's testimony at the habeas trial differed from the testimony of B and C at the criminal trial in that G could account for the petitioner's whereabouts for the entire spring of 2009, unlike C, who could account for the petitioner's whereabouts only on certain days, and B, who admitted on cross-examination that the petitioner could have left her home for a twenty-four hour period. G testified that he saw the petitioner every day, that the petitioner did not leave the home overnight during the spring and summer of 2009, that the petitioner would have had to ask either G or B for the keys to the family car before

[4] "A Chip Smith instruction reminds the jurors that they must act unanimously, while also encouraging a deadlocked jury to reach unanimity." (Internal quotation marks omitted.) *State* v. *O'Neil*, 261 Conn. 49, 51 n.2, 801 A.2d 730 (2002).

borrowing it, and that it was impossible for the petitioner to travel to Danbury without G knowing it. The court determined that G's testimony was "credible and compelling . . . ." As detailed in part II A of this opinion, we will not second-guess the court's credibility determinations. See *Soto* v. *Commissioner of Correction*, supra, 215 Conn. App. 129.

In sum, the state's case was not especially strong, and the theory of the defense rested on the petitioner's alibi. G would have offered noncumulative alibi testimony, which the court determined was credible, placing the petitioner in Georgia within each twenty-four hour period during the spring of 2009, when A testified the crimes took place. See *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 70 ("research has not revealed a single case . . . in which the failure to present the testimony of a credible, noncumulative, independent alibi witness was determined not to have prejudiced a petitioner under *Strickland*'s second prong"). As such, we conclude that the court correctly concluded that the deficient performance of the petitioner's trial counsel in failing to investigate and present the testimony of G resulted in prejudice to the petitioner.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANGELO REYES
(AC 46750)

Suarez, Clark and Lavine, Js.

Syllabus

The defendant, who had been convicted of various crimes in connection with two incidents of arson, and sentenced to a total effective term of twenty-five years of incarceration, execution suspended after fifteen years, and five years of probation, appealed from the trial court's denial of his motion for sentence modification. The defendant claimed that the court

abused its discretion in finding that he had failed to establish good cause to modify his sentence. *Held*:

The trial court did not abuse its discretion in determining that the defendant failed to establish good cause to warrant a sentence modification, the court having conducted an appropriate review of the information before it when it determined that the devastation and harm resulting from the seriousness of the defendant's conduct and the fact that he had only served less than one third of his sentence outweighed his rehabilitative efforts.

Argued September 4—officially released November 12, 2024

Procedural History

Substitute information in one case charging the defendant with the crimes of arson in the second degree and conspiracy to commit criminal mischief in the first degree, and substitute information in a second case charging the defendant with the crimes of arson in the second degree, conspiracy to commit criminal mischief in the first degree, and conspiracy to commit burglary in the first degree, brought to the Superior Court in the judicial district of New Haven, where the cases were consolidated and tried to the jury before *Blue*, *J.*; verdicts and judgments of guilty; thereafter, the court, *Harmon*, *J.*, denied the defendant's motion for sentence modification, and the defendant appealed to this court. *Affirmed.*

Naomi T. Fetterman, assigned counsel, for the appellant (defendant).

Jonathan M. Sousa, assistant state's attorney, with whom, on the brief, were *John P. Doyle*, state's attorney, *Craig P. Nowak*, supervisory assistant state's attorney, and *Lisa D'Angelo*, executive assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Angelo Reyes, appeals from the judgment of the trial court denying his motion for a sentence modification filed pursuant to General Statutes § 53a-39. On appeal, the defendant claims that

the court abused its discretion in finding that he had failed to establish good cause to modify his total effective sentence. We disagree and, accordingly, affirm the judgment of the trial court.

The relevant facts concerning the defendant's underlying convictions, as stated by our Supreme Court in *State* v. *Reyes*, 325 Conn. 815, 160 A.3d 323 (2017), can be summarized as follows. In the first case, in October, 2008, the defendant, who owned a laundromat and several properties in the Fair Haven section of New Haven, paid two of his employees, Osvaldo Segui, Sr., and Osvaldo Segui, Jr. (Seguis), to set fire to a single-family residence on Downing Street in New Haven. Id., 818. The defendant was angry that one of the owners of the Downing Street property refused to sell the property back to him and, after the fire, he intended to purchase the lot of land on which the residence had stood. Id. The Seguis, who lived rent free in one of the defendant's properties, agreed to set the fire, and, in the early morning hours of October 9, 2008, they did so. Id. In a second case, in May, 2009, the defendant enlisted the Seguis to set another fire, this time to a vehicle belonging to Madeline Vargas, a local businesswoman and employee of a nonprofit substance abuse services agency operating in Fair Haven. Id., 818–19. The defendant had an ongoing dispute with Vargas concerning her attempts to run an outreach program for locals addicted to drugs in an empty parking lot near the defendant's laundromat. Id., 819.

On October 9, 2014, following a jury trial on the consolidated cases, the defendant was convicted of two counts of arson in the second degree in violation of General Statutes § 53a-112 (a) (2), two counts of conspiracy to commit criminal mischief in the first degree in violation of General Statutes §§ 53a-115 (a) (1) and 53a-48 (a), and one count of conspiracy to commit burglary in the first degree in violation of General Statutes

§§ 53a-101 (a) (1) and 53a-48 (a). On January 8, 2015, the court, *Blue*, *J.*, imposed a total effective sentence of twenty-five years of incarceration, execution suspended after fifteen years, followed by five years of probation. The defendant appealed the judgments of conviction to this court, the appeal was transferred to our Supreme Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1, and the judgments of conviction were affirmed. Id., 833.

On March 15, 2022, the defendant filed a motion for sentence modification, seeking to reduce his fifteen year sentence to four and one-half years of incarceration followed by five years of probation. In the memorandum in support of his motion, the defendant argued that good cause existed to modify his sentence due to newly discovered evidence of his innocence,[1] his lack of disciplinary issues during incarceration, his worsening medical health due to incarceration and COVID-19, his participation in rehabilitative programing, and his ties to the community. Following a hearing, the court, *Harmon*, *J.*, denied the motion in an April 8, 2022 memorandum of decision. The defendant filed a motion for reconsideration in which he argued that the court, in denying

[1] The defendant filed two petitions for a new trial based on purportedly newly discovered evidence of innocence. The appeal from the denial of the first such petition was dismissed. See *Reyes* v. *State*, 222 Conn. App. 510, 521, 306 A.3d 5 (2023) (dismissing appeal from denial of 2017 petition for new trial that raised issue of newly discovered evidence of innocence on ground that court did not abuse its discretion in denying petition for certification to appeal), cert. denied, 348 Conn. 944, 307 A.3d 910 (2024). The judgment on the second such petition was reversed in part on appeal and remanded for a new evidentiary hearing. See *Reyes* v. *State*, 222 Conn. App. 538, 560, 306 A.3d 515 (2023) (affirming in part dismissal of 2020 petition for new trial alleging newly discovered evidence of innocence and reversing in part on statute of limitations grounds and remanding for new evidentiary hearing). The defendant also filed a petition for a writ of habeas corpus that included claims of ineffective assistance of trial counsel in relation to evidence allegedly demonstrating innocence, which was denied by the habeas court. See *Reyes* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. TSR-CV-19-4009918-S (August 24, 2023).

his motion for a sentence modification, "might have overlooked" the newly discovered evidence of his innocence that he submitted in connection with his motion for sentence modification. The court denied the motion. This appeal followed.

The following standards, statutory language, and legal principles are relevant. Section 53a-39 (a) provides in relevant part that "the sentencing court or judge may, after hearing and for good cause shown, reduce the sentence, order the defendant discharged, or order the defendant discharged on probation or conditional discharge for a period not to exceed that to which the defendant could have been originally sentenced."

"[I]n arriving at its sentencing determination, the sentencing court may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information [it] may consider or the source from which it may come. . . . [T]his broad discretion applies with equal force to a sentencing court's decision regarding a sentence modification . . . . Accordingly, we review a court's judgment granting or denying a motion to modify a sentence for abuse of discretion. . . . An abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . As such, [i]n determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Generally speaking, under this deferential standard, [w]here the trial court has properly considered all of the offenses proved and imposed a sentence within the applicable statutory limitations, there is no abuse of discretion." (Internal quotation marks omitted.) *State* v. *Brelsford*, 227 Conn. App. 53, 61, 319 A.3d 763 (2024).

The defendant claims that the court abused its discretion in finding that he failed to establish good cause to modify his sentence.[2] Specifically, he contends that the court abused its discretion because, in addition to presenting evidence that he is actually innocent, "the fact that he has not incurred a single disciplinary ticket while serving this sentence, has engaged in rehabilitative programs, has maintained employment, and has a strong support network in the community . . . constitutes good cause for the modification of [his] sentence." We disagree.

The court stated in its memorandum of decision that it had "thoroughly reviewed the materials" submitted in support of the defendant's motion, including evidence of his good behavior while incarcerated, his mentoring of other inmates, his being a model prisoner with zero disciplinary reports, his health and the effect that COVID-19 had on his incarceration, and statements from community members in support of sentence modification. The court noted that, in determining whether the defendant demonstrated good cause, it "considered whether the defendant has demonstrated substantial rehabilitation since the date the crime was committed. Factors that have been examined include, but are not limited to: (1) the gravity of his crime; (2) correctional record and length of time incarcerated; (3) his age and circumstances at the time of the commission of the crime; (4) whether he has demonstrated remorse and increased maturity since the date of the offense; (5) whether he has contributed to the welfare of other

[2] The defendant also argues that, "to the extent that the court faulted [him] for presenting evidence in support of his innocence during the modification proceeding, such evidence is appropriately placed before the court for consideration." Even assuming, arguendo, that claims of innocence are an appropriate factor for courts to consider in sentence modification proceedings, the court allowed the defendant to present such evidence and to make arguments in support of his innocence claim in this case and, nevertheless, concluded that the defendant failed to establish good cause.

persons through service while incarcerated; and (6) the degree in which he has fully availed himself of opportunities for growth, rehabilitation, and contribution within the correctional system considering the nature and circumstances of the crime he committed."

The defendant acknowledges that the court's use of these factors was "well reasoned," but contests the court's weighing of the factors. In weighing the factors, the court stated that "[t]he gravity of the crime committed by the defendant, arson, in the court's view must be a consideration in evaluating the 'good cause' equation. Given the gravity of the crime, a commensurable level of rationale is at a minimum the starting point for a finding of 'good cause' to be warranted.

"The court should not and cannot ignore the devastation and harm resulting from this act of arson which could have resulted in the loss of a human life and required the assistance of thirty to forty firefighters who valiantly put their lives at risk. The court acknowledges the pain and devastation felt by the victim of the car fire. The crime of arson endangers lives and terrifies people. Property and more importantly people's lives were endangered by these actions.

"Therefore, after a review and consideration of the information and material presented, and with contemplation of the proper standard, the court finds the defendant has not established 'good cause' to modify the sentence imposed by the trial court. The circumstances presented by the defendant do not establish 'good cause', to wit: 'a legally sufficient reason,' to modify the sentence when balanced against the facts and harm created by the serious crime he committed. The defendant has served less than one third of his sentence at the time of this application which the court feels is not even close to sufficient based on the harm and

devastation that resulted from his actions that seemed centered in greed and monetary gain."

The court conducted an appropriate review of the information before it when it determined that the "devastation and harm" resulting from the seriousness of the defendant's conduct and the fact that he had only served less than one third of his sentence outweighed his rehabilitative efforts. The court's weighing of factors is consistent with the broad discretion afforded to it in ruling on a motion for sentence modification. See, e.g., *State* v. *Martin G.*, 222 Conn. App. 395, 406, 305 A.3d 324 (2023) (court did not abuse its discretion in determining that defendant failed to establish good cause to warrant sentence modification where gravity of defendant's conduct and its continuing effect on victim and her family outweighed defendant's rehabilitative efforts), cert. denied, 348 Conn. 944, 308 A.3d 34 (2024); see also *State* v. *Brelsford*, supra, 227 Conn. App. 63–64 (rejecting defendant's claim that court should have relied more heavily on rehabilitative efforts and holding that court did not abuse its discretion in determining that defendant failed to establish good cause to warrant sentence modification where defendant's rehabilitative efforts did not outweigh factors weighing against sentence modification). For the foregoing reasons, we conclude that the court did not abuse its discretion in determining that the defendant failed to establish good cause to warrant a sentence modification.

The judgment denying the motion for sentence modification is affirmed.

In this opinion the other judges concurred.

CITY OF NORWICH *v.* THE BRENTON FAMILY TRUST ET AL.
(AC 46858)

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

Syllabus

The defendant, who had been granted permission to be made a party defendant, appealed from the trial court's denial of her motion to open the judgment of foreclosure by sale rendered in favor of the plaintiff city in a municipal tax lien foreclosure action. The defendant claimed, inter alia, that the court abused its discretion in denying her motion without a hearing. *Held*:

This court dismissed the defendant's appeal as moot because it could not afford her any practical relief and, accordingly, lacked subject matter jurisdiction over her claims, as the defendant, during the pendency of the appeal, conveyed the property to a third party, leaving her with no legal or equitable interest in the property in her individual capacity.

The appeal was not saved by the collateral consequences doctrine, as the defendant's proposed collateral consequences were inadequately briefed and asserted nothing more than abstract, purely speculative injuries.

Submitted on briefs September 20—officially released November 12, 2024

Procedural History

Action to foreclose municipal tax liens on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of New London, where the named defendant was defaulted for failure to appear; thereafter, the court, *Calmar*, *J.*, rendered a judgment of foreclosure by sale, and Sheri Speer appealed to this court, *Prescott*, *Cradle* and *DiPentima*, *Js.*, which affirmed the judgment of the trial court and remanded the case for the purpose of setting new law days; subsequently, the court, *Calmar*, *J.*, approved the committee's motion for approval of the sale, and Sheri Speer appealed to this court, which dismissed the appeal; thereafter, the court, *Hon. Emmet L. Cosgrove*, judge trial referee, granted Sheri Speer's motion to be made a party defendant; subsequently, the court, *Hon. Emmet L. Cosgrove*,

judge trial referee, granted the plaintiff's motion to reset the sale date; thereafter, the defendant Sheri Speer appealed from, inter alia, the judgment of foreclosure by sale to this court, *Alvord*, *Cradle* and *Clark*, *Js.*, which affirmed the judgment of the trial court; subsequently, our Supreme Court denied the defendant Sheri Speer's petition for certification to appeal; thereafter, the court, *Goodrow*, *J.*, denied the defendant Sheri Speer's motion to open the judgment of foreclosure by sale, and the defendant Sheri Speer appealed to this court. *Appeal dismissed.*

Sheri Speer, self-represented, filed a brief as the appellant (defendant).

Opinion

PER CURIAM. In this municipal tax lien foreclosure action, the defendant Sheri Speer[1] appeals from the judgment of the trial court denying (1) her July 20, 2023 motion to open the judgment of foreclosure by sale rendered in favor of the plaintiff, the city of Norwich, and (2) her motion to reargue that denial. On appeal, the defendant claims that the court (1) abused its discretion in denying the motion to open without a hearing, (2) misinterpreted this court's decision in *Norwich* v. *Brenton Family Trust*, 218 Conn. App. 905, 291 A.3d 650, cert. denied, 347 Conn. 906, 297 A.3d 567 (2023), and (3) committed plain error in denying the motion to open. We do not reach the merits of the defendant's claims because, during the pendency of this appeal, the defendant conveyed the property by way of a quitclaim

[1] The Brenton Family Trust and Danjon Capital, Inc., were named as defendants in the complaint. Approximately three years after the complaint had been filed, the trial court granted Speer's motion to be made a party defendant. The Brenton Family Trust, which was defaulted for failure to appear, is not participating in this appeal. Danjon Capital, Inc., also is not participating in this appeal. Accordingly, we refer to Speer as the defendant.

deed to a third party, and, accordingly, we dismiss this appeal as moot.[2]

The following procedural history is relevant to our resolution of this appeal. In 2019, the plaintiff commenced this foreclosure action with respect to property located at 110 McKinley Avenue in Norwich (property) against The Brenton Family Trust and Danjon Capital, Inc. The complaint alleged, inter alia, that BMW, LLC, was the record owner of the property on October 1, 2015, October 1, 2016, and October 1, 2017, and that taxes in the amounts of $1650.88, $3280.22, and $3256.66, respectively, were duly assessed upon the property, became due and payable, and remained unpaid. The complaint further alleged that The Brenton Family Trust had become the owner of the property by virtue of a quitclaim deed dated and recorded January 12, 2018.

The Brenton Family Trust was defaulted for failure to appear and, on January 17, 2020, the defendant, then a nonparty, filed a motion to be made a party defendant, claiming that she had recently acquired title to the property. On February 3, 2020, the court denied the motion without prejudice to the defendant filing a copy of the recorded deed with the court, which she did not do. On February 18, 2020, the court rendered a judgment of foreclosure by sale. On February 28, 2020, the defendant filed an appeal from the denial of her motion to be made a party defendant and from the judgment of foreclosure by sale. This court summarily affirmed the trial court's judgment and remanded the case for the purpose of setting a new sale date. See *Norwich* v. *Brenton Family Trust*, 202 Conn. App. 905, 244 A.3d 186 (2021).

[2] The plaintiff did not file a brief in this court. On May 15, 2024, this court ordered that this appeal shall be considered on the basis of the defendant's brief and appendix, the record, as defined by Practice Book § 60-4, and oral argument by the defendant, if not waived. The defendant subsequently waived oral argument before this court.

On remand, the sale took place on September 18, 2021, and resulted in the sale of the property to two nonparties. On September 27, 2021, the committee of sale filed a motion for approval of the sale, which the court granted on October 13, 2021. On October 25, 2021, the defendant filed an appeal from the court's order granting the motion for approval. On November 18, 2021, this court dismissed that appeal for lack of subject matter jurisdiction as a result of the defendant's then status as a nonparty.

On May 10, 2022, the defendant filed another motion to be made a party defendant, appending thereto a copy of a January 2, 2020 recorded quitclaim deed showing a transfer of the property from The Brenton Family Trust to the defendant. On June 21, 2022, the court granted that motion, without objection. The defendant did not file a motion to open the judgment at that time. On June 28, 2022, the defendant filed an answer and a special defense, alleging that "BMW, LLC, was not in legal existence and was not the owner of the property subject to this action at the times alleged in the complaint and therefore the plaintiff cannot recover as a matter of law per Practice Book § 10-70."[3] The successful bidders ultimately did not consummate the sale, and, on June 30, 2022, the trial court rendered a judgment of foreclosure by sale and reset the sale date to September 10, 2022. Meanwhile, on July 5, 2022, the defendant

[3] Practice Book § 10-70 provides in relevant part: "(a) In any action to foreclose a municipal tax or assessment lien the plaintiff need only allege and prove: (1) the ownership of the liened premises on the date when the same went into the tax list, or when said assessment was made; (2) that thereafter a tax in the amount specified in the list, or such assessment in the amount made, was duly and properly assessed upon the property and became due and payable; (3) (to be used only in cases where the lien has been continued by certificate) that thereafter a certificate of lien for the amount thereof was duly and properly filed and recorded in the land records of the said town on the date stated; (4) that no part of the same has been paid; and (5) other encumbrances as required by the preceding section. . . ."

filed a motion for summary judgment arguing that she was entitled to judgment as a matter of law with respect to her special defense. This motion was not adjudicated. On July 11, 2022, the court rendered a corrected judgment of foreclosure by sale, which corrected a typographical error.

On July 11, 2022, the defendant filed a motion to reargue the June 30, 2022 foreclosure judgment. On July 25, 2022, the court denied that motion. On August 1, 2022, the defendant filed an appeal from the June 30, 2022 foreclosure judgment, the July 11, 2022 corrected foreclosure judgment, and the July 25, 2022 denial of her motion to reargue the foreclosure judgment. This court summarily affirmed the trial court's judgment. See *Norwich* v. *Brenton Family Trust*, supra, 218 Conn. App. 905. On June 27, 2023, our Supreme Court denied the defendant's petition for certification to appeal. See *Norwich* v. *Brenton Family Trust*, 347 Conn. 906, 297 A.3d 567 (2023).

On July 20, 2023, the defendant filed a motion to open the foreclosure judgment, arguing that the trial court should open the judgment and consider her motion for summary judgment. On August 7, 2023, the court denied the defendant's motion to open,[4] and, on August 21, 2023, the court denied the defendant's August 14, 2023

[4] On February 8, 2024, pursuant to an order of this court, the trial court filed a memorandum of decision setting forth the factual and legal basis for its August 7, 2023 order. The court reasoned in part: "[The defendant] did not file the motion to open the judgment of foreclosure by sale until August 7, 2023 ([docket entry] #212), well over a year after she obtained party status. Although the defendant argued that the Appellate Court agreed with her that the appropriate remedy was a motion to open judgment, rather than an appeal, [no] such decision was articulated by the Appellate Court. The motion to open the judgment was denied, in the court's discretion, finding that the request to open the judgment was not reasonable given the passage of time that had elapsed since [the defendant] was made a party defendant, and that it was unreasonable to open the judgment, under the circumstances."

motion to reargue the August 7, 2023 denial. On August 25, 2023, the defendant filed this appeal.

On August 30, 2023, pursuant to Practice Book § 61-11 (d) and (e), the plaintiff filed a motion to terminate the automatic appellate stay set forth in § 61-11 (a). On September 6, 2023, the defendant filed an opposition to the motion to terminate stay. On November 2, 2023, following a hearing held that same day, the court granted the motion to terminate stay. On November 8, 2023, the defendant filed a motion for review of the November 2, 2023 order. See Practice Book § 61-14. On February 7, 2024, this court granted review but denied the relief requested.

During the pendency of this appeal, by virtue of a July 12, 2024 motion to intervene filed in the trial court by 110 McKinley Avenue, LLC, this court became aware of a July 5, 2024 quitclaim deed, which was appended to the motion to intervene, reflecting the defendant's conveyance of the property to 110 McKinley Avenue, LLC.[5] Accordingly, on September 4, 2024, we ordered, sua sponte, the defendant "to file a supplemental memorandum of no more than 2000 words on or before September 16, 2024, addressing whether this appeal by the defendant has been rendered moot; see, e.g., *Rocco* v. *Shaikh*, 184 Conn. App. 786, 798–806, [196 A.3d 366] (2018); by virtue of a July 5, 2024 quitclaim deed conveying the subject property from the defendant to a third party, as documented in the July 12, 2024 motion to intervene filed in the trial court." On September 16, 2024, the defendant filed a supplemental memorandum in accordance with our order. For the reasons that follow, we conclude that this appeal is moot and is not saved by the collateral consequences doctrine. Accordingly, we lack subject matter jurisdiction to entertain the defendant's claims.

[5] The defendant is the managing member of 110 McKinley Avenue, LLC.

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . [A] subject matter jurisdictional defect may not be waived . . . [or jurisdiction] conferred by the parties, explicitly or implicitly. . . . [T]he question of subject matter jurisdiction is a question of law . . . and, once raised, either by a party or by the court itself, the question must be answered before the court may decide the case." (Internal quotation marks omitted.) *Brookstone Homes, LLC* v. *Merco Holdings, LLC*, 208 Conn. App. 789, 798–99, 266 A.3d 921 (2021).

The collateral consequences doctrine provides an exception to the mootness doctrine. "[F]or a litigant to invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not. This standard provides the necessary limitations on justiciability underlying the mootness doctrine itself. Where there is no direct practical relief available from the reversal of the judgment . . . the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the

case can afford the litigant some practical relief in the future. The reviewing court therefore determines, based upon the particular situation, whether the prejudicial collateral consequences are reasonably possible." *State* v. *McElveen*, 261 Conn. 198, 208, 802 A.2d 74 (2002).

In her supplemental memorandum, the defendant relies on the collateral consequences doctrine and maintains that this appeal has not been rendered moot as a result of her conveyance of the property to a third party. Specifically, the defendant argues that the trial court's denial of her motion to open entails the following adverse collateral consequences: "(1) to deny [her] due process as protected by the fifth amendment [to the United States constitution], for which she could later seek a remedy; (2) preclusion of her ability to prosecute her cross claim against appellee Danjon Capital [Inc.] and to receive those proceeds; (3) entry of a judgment against [her] without due process, which would stand as of public record and impair [her] credit; (4) an effect that would require future adjustments of the closing relative to the buyer that acquired the property subject to this action; and (5) ratifying the motion to open would ratify the associated committee fees incurred that otherwise would not have [been] had the motion been denied."

These proposed collateral consequences lend the defendant no support because, at a minimum, they are not only inadequately briefed, but they also assert nothing more than abstract, purely speculative injuries. See *Robb* v. *Connecticut Board of Veterinary Medicine*, 204 Conn. App. 595, 611, 254 A.3d 915 ("We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly.

. . . [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. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Internal quotation marks omitted.)), cert. denied, 338 Conn. 911, 259 A.3d 654 (2021).

In sum, the defendant acknowledges that she transferred the property to a third party during the pendency of this appeal. As a third party presently has legal title to the property, the defendant no longer has any legal or equitable interest in the property in her individual capacity. Accordingly, because there is no practical relief that we could afford the defendant, this court lacks jurisdiction to entertain the defendant's claims on appeal. See *Rocco* v. *Shaikh*, supra, 184 Conn. App. 805–806.

The appeal is dismissed.