IN RE JACQUELINE K.*
(AC 47584)

Cradle, Clark and Sheldon, Js.

Syllabus

The respondent father appealed from the judgment of the trial court terminating his parental rights with respect to his minor child. The father claimed, inter alia, that the court improperly determined that he had failed to achieve the requisite degree of personal rehabilitation required by the applicable statute (§ 17a-112 (j) (3) (B)). *Held*:

The trial court properly concluded that the Department of Children and Families made reasonable efforts pursuant to § 17a-112 (j) (1) to reunify the respondent father with the child, as that determination was not clearly erroneous and was supported by sufficient evidence.

The trial court's determination that the respondent father failed to achieve the requisite degree of personal rehabilitation required by § 17a-112 (j) (3) (B) was not clearly erroneous and was supported by sufficient evidence.

The trial court's finding that termination of the respondent father's parental rights was in the child's best interest was not clearly erroneous.

Argued October 8—officially released December 18, 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 Britain, Juvenile Matters, and tried to the court, *Taylor, J.*; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

* 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.

** December 18, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

James P. Sexton, assigned counsel, with whom were *Emily Graner Sexton*, assigned counsel, and, on the brief, *Gail Oakley Pratt*, assigned counsel, for the appellant (respondent father).

Nisa Khan, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (petitioner).

Opinion

CRADLE, J. The respondent father, Matthew S., appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights with respect to his daughter, Jacqueline K.[1] On appeal, the respondent claims that the court improperly concluded that (1) the Department of Children and Families (department) made reasonable efforts to reunify him with Jacqueline pursuant to General Statutes § 17a-112 (j) (1); (2) he failed to achieve the requisite degree of personal rehabilitation required by § 17a-112 (j) (3) (B); and (3) termination of his parental rights was in Jacqueline's best interest.[2] We affirm the judgment of the trial court.

The following facts, as set forth by the trial court, and procedural history are relevant to our resolution of the respondent's claims on appeal. When Jacqueline was born in August, 2021, she tested positive for cocaine and fentanyl and consequently spent several weeks in the neonatal intensive care unit. At the time of Jacqueline's birth, the respondent was incarcerated, in lieu of bond, on charges stemming from his assault of Jacqueline's mother on July 3, 2021, while she was pregnant

[1] The termination of the parental rights of Jacqueline's mother has not been challenged on appeal. Accordingly, all references to the respondent are to the respondent father only.

[2] The attorney for the minor child has filed a statement adopting the appellate brief of the petitioner.

with Jacqueline.[3] On August 30, 2021, the petitioner obtained an order of temporary custody of Jacqueline.

On September 3, 2021, both parents appeared before the court and agreed to the sustaining of the orders of temporary custody. On that date, the court issued specific steps for both parents and summarized those specific steps on the record. The court ordered that the respondent comply with several specific steps, including steps that required him to keep all appointments with the department; to take part in treatment recommended by the department; to submit to substance abuse evaluations and follow the recommendations about treatment, including aftercare and relapse prevention; to submit to random drug testing; not to use

[3] The court found, and the record reflects, that, "[o]n July 4, 2021, [the department] received a careline report from [Bristol Police] Officer [Taylor] Sutton. Officer Sutton responded to the home after [Jacqueline's mother] had contacted the police informing them that an incident took place on July 3, 2021. [Jacqueline's mother] reported [that the respondent] came over and forced his way inside the home. [Jacqueline's mother] alleged [that the respondent] had hit her head until she was unconscious. Officer Sutton had observed that [Jacqueline's mother] had extensive bruises around her eye, a lump on her head, and a swollen lip. Officer Sutton reported that, during the event, [her son] came out of his bedroom and witnessed some of the incident. [Jacqueline's mother] informed Officer Sutton that she told [her son] to go back to his room and he did. Officer Sutton reported that [Jacqueline's mother] was knocked unconscious and woke up an hour later and saw [the respondent] pacing back and forth so she went back to sleep to avoid a confrontation with [the respondent]. [Jacqueline's mother] then woke back up about 3 a.m. and did not know if [the respondent] was still around. [Jacqueline's mother] got [her son] and left the home to go and get help. Officer Sutton reported there was also a protective order in place at this time. Officer Sutton reported [that the respondent] was arrested and charged with the following: assault in the third degree on a pregnant person, breach of the peace in the second degree, violation of a protective order and use of a motor vehicle without permission. Officer . . . Sutton reported [that] there was a history of domestic violence between [Jacqueline's mother] and [the respondent]. Officer Sutton reported that [the respondent] was admitted to Bristol Hospital on July 4, 2021, because he had passed out behind the wheel of a car." The court noted that there had been three additional instances of intimate partner violence reported between the respondent and Jacqueline's mother prior to the July 3, 2021 incident.

illegal drugs; to attend and complete an appropriate domestic violence program; to secure and maintain adequate housing and a legal income; to comply with protective orders; not to get involved with the criminal justice system; and to visit with Jacqueline as often as the department permitted. In addition to those steps, the court identified the following goals for the respondent: to create and maintain a safe, stable and nurturing environment free from substance abuse and mental health issues; to learn and demonstrate age appropriate parenting, supervision, discipline and developmental expectations of a child with special needs; to understand the impact of unaddressed substance abuse issues on children and to learn and utilize coping skills to refrain from the use of substances; to understand the impact of unaddressed mental health and intimate parenting violence issues on children and to learn and utilize coping skills to maintain stability in the home; and to maintain a nurturing relationship with Jacqueline.

On January 5, 2022, Jacqueline was adjudicated neglected and committed to the petitioner's custody. On that same date, the court issued final steps for both parents. Those specific steps were essentially the same as the specific steps issued by the court on September 3, 2021.[4]

[4] The court ordered that the respondent comply with several of the same specific steps ordered on September 3, 2021, including to cooperate with the service providers recommended for parenting and individual counseling, substance abuse assessment and treatment and intimate partner violence services, such as inpatient treatment at Stonington Institute and additional treatment as recommended, individual counseling and medication management at Wheeler Clinic or the equivalent and a parenting education program at Klingberg Family Centers or the equivalent. In addition to those standard specific steps, the court ordered, inter alia, that the respondent make progress toward the following treatment goals: "[l]earn triggers for substance abuse and alternative coping mechanism[s]"; "[u]nderstand [the] impact of substance abuse on children"; "[u]nderstand [the] danger that intimate partner violence presents to children"; "[c]reate and maintain a safe and nurturing home environment free from substance abuse/mental health/intimate

On September 7, 2022, the petitioner filed a petition to terminate the respondent's parental rights on the grounds that Jacqueline previously had been adjudicated neglected and that the respondent had failed to achieve such a degree of personal rehabilitation as would encourage the belief that in a reasonable time, considering her age and needs, he could assume a responsible position in her life.[5] A trial on the termination petition was held on February 27 and November 2, 2023, before the court, *Taylor*, *J*. The petitioner presented the testimony of Bristol Police Officer Spencer Boisvert and department social worker Susana Lopez-Kossbiel.[6] The respondent testified and presented the testimony of department social worker Jarrod Gormick.

On February 22, 2024, the court issued a memorandum of decision in which it terminated the respondent's parental rights. The court found by clear and convincing evidence that the department had made reasonable efforts to reunify Jacqueline with the respondent and that the respondent was unable or unwilling to benefit from those reunification efforts. The court found that the department had referred the respondent to various programs and services but he was unable or unwilling to benefit from those referrals, as more fully set forth subsequently in this opinion.

The court also concluded that the respondent had failed to achieve an appropriate degree of personal rehabilitation as would encourage the belief that, within a

partner violence"; "[a]ttend all educational/medical/mental health provider meetings for [Jacqueline]"; "[d]evelop stronger parenting skills in the area of [Jacqueline's] mental health and educational needs and behavioral needs."

[5] The petitioner also alleged in the petition that there was no ongoing parent-child relationship between Jacqueline and the respondent. The petitioner withdrew that allegation at trial.

[6] Because the trial also included the petitions to terminate the parental rights of Jacqueline's mother with respect to Jacqueline and Jacqueline's half brother, the petitioner presented the testimony of another witness that did not pertain to the respondent.

reasonable time, considering Jacqueline's age and needs, he could assume a responsible position in her life. In support of this conclusion, the court set forth the following facts. The respondent presented with issues relating to mental health, substance abuse, parenting deficits, domestic violence, criminal recidivism and a failure to complete and benefit from counseling and services. On November 10, 2021, the respondent was admitted to Stonington Institute for inpatient substance abuse treatment. Upon his admission to the program, the respondent tested positive for methamphetamine, cocaine and benzodiazepine. He was successfully discharged from that program in December, 2021, and was referred to Wheeler Clinic for aftercare. He failed to follow up with Wheeler Clinic.[7] When he was discharged from Stonington Institute, the respondent did not make himself easily available to the department, which made it difficult to arrange in-person visitation with Jacqueline. On February 2, 2022, the respondent was readmitted to Stonington Institute for substance abuse treatment. He was unsuccessfully discharged on March 4, 2022, when he left the program against medical advice. He was again referred to Wheeler Clinic for aftercare treatment and again failed to follow up with that referral. The department referred the respondent to a Fatherhood Engagement Program, from which he was unsuccessfully discharged after attending only one session. The department held administrative case reviews on October 20, 2021, and April 13, 2022. The respondent did not attend either of those meetings. At the time of the termination trial, which began on February 27, 2023, the respondent was incarcerated, serving a three year sentence for burglary in the third degree, violation of a protective order and operating a motor vehicle while

[7] The respondent testified at trial that he was unable to do so because he was under house arrest at that time.

under the influence of intoxicating liquor or drugs.[8] In 2023, while he was incarcerated,[9] the respondent completed a program offered by the Victim Offender Institutional Correctional Educational Services, which is designed to "broaden inmates' understanding and sensitivity to the impact of their crime on others." The respondent also completed a domestic violence program during his period of incarceration.

The court found that the respondent had failed to comply fully with the specific steps requiring him to maintain consistent contact with the department; to take part in parenting, individual and family counseling and make progress toward the identified treatment goals; to follow recommendations as to substance abuse treatment, including inpatient treatment, aftercare and relapse prevention; not to use illegal drugs or abuse alcohol; to get and maintain adequate housing and a legal income; to comply with protective orders to avoid domestic violence incidents; not to break the law and to comply with any criminal court orders and follow the conditions of probation; to visit the child as often as permitted by the department; and to cooperate with the service providers recommended for parenting, individual and family counseling, substance abuse assessment and treatment, and intimate partner violence services.

The court concluded that the respondent "has been unable to correct the factors that led to [Jacqueline's]

[8] In its memorandum of decision, the court incorrectly found that these offenses had been committed during the time period within which the respondent was subject to the specific step that he not get involved with the criminal justice system. The court's decision reflects, however, that it knew the correct date that the respondent committed these offenses. Additionally, we note that the record does reflect that the respondent was incarcerated on April 1, 2022, on a failure to appear charge, which was within the time period the respondent was subject to the specific steps.

[9] The respondent was sentenced on the charges for which he is currently incarcerated on January 9, 2023.

initial commitment . . . .'' The court reasoned: ''The clear and convincing evidence reveals that from the date of commitment through the date of the filing of the [termination] petition, and continuing through the time of trial, [the respondent] has not been available to take part in his child's life in a safe, nurturing, and positive manner and based on his issues of mental health, substance abuse, criminal recidivism, parenting deficits, and a failure to complete and benefit from counseling and services, [the respondent] will never be consistently available to Jacqueline.

''The credible evidence in this case clearly and convincingly shows that [the respondent] has consistently failed to be available for [Jacqueline] by virtue of his failure to address his issues appropriately and in a timely manner.

''Unfortunately, the clear and convincing evidence also shows that [the respondent] has failed to improve his parenting ability to acceptable standards as far as [Jacqueline's] safety and emotional needs are concerned.

''[The respondent] refused to comply with [the department] and refused to comply with most of the referrals [the department] made on his behalf. [The petitioner] has demonstrated, by clear and convincing evidence, that [the respondent] cannot exercise the appropriate judgment necessary to keep Jacqueline safe and healthy and to maximize her abilities to achieve. . . .

''When one also considers the high level of care, patience, and discipline that Jacqueline's needs will require from her caregiver, it is patently clear that [the respondent] is not in a better position to parent his child than he was at the time of Jacqueline's commitment, and he still remains without the qualities necessary to successfully parent her. Effectively, [the respondent] is

no better able to resume the responsibilities of parenting at the time of filing the termination petition than he had been at the time of [Jacqueline's] commitment. . . .

"Even if [the respondent] was finally capable of realizing and addressing his problems, it would be exceedingly rash to expect him to be able to parent [Jacqueline] at any time in the near future, if ever.

"Unfortunately, the clear and convincing evidence shows that Jacqueline's needs for permanence and stability do not allow for the time necessary for [the respondent] to attempt rehabilitation. Given the [respondent's] history associated with his mental health issues, substance abuse issues, parenting deficits, domestic violence, criminal recidivism and a failure to complete and benefit from counseling, it is reasonable to infer that he will remain besieged by those issues for some extensive time and that he will not be physically available to serve as a custodial resource for Jacqueline during the time frame for rehabilitation contemplated in § 17a-112 (j) (3) (B) (ii). . . .

"Given the age, sensibilities, needs, and special needs of [Jacqueline], and given [the respondent's] failure and/or inability to correct his issues, it would be unreasonable to conclude that he would be able to achieve rehabilitation from his various issues so as to be able to serve as a safe, responsible, and nurturing parent for Jacqueline within a reasonable time.

"Jacqueline needs a parent who is able to effectively care for her now. She cannot wait for the remote possibility that [the respondent] might overcome his mental health issues, substance abuse issues, parenting deficits, domestic violence, criminal recidivism and a failure to complete and benefit from counseling and services and acquire sufficient parenting ability to care for [Jacqueline] one day in the future. Jacqueline is unable to

wait for [the respondent] to show that he has rehabilitated himself and is ready to assume his parental role." (Citations omitted; internal quotation marks omitted.)

In the dispositional phase of the proceedings, the court made findings as to each of the criteria set forth in § 17a-112 (k)[10] and concluded that the termination of the respondent's parental rights was in Jacqueline's best interest. Accordingly, the court rendered judgment terminating the respondent's parental rights and appointing the petitioner as Jacqueline's statutory parent. This appeal followed.

As a preliminary matter, we first set forth the following relevant legal principles. "Proceedings to terminate parental rights are governed by § 17a-112. . . . Under

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

[that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. The [petitioner] . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds. . . . Subdivision (3) of § 17a-112 (j) carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun. . . .

"If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence." (Citation omitted; internal quotation marks omitted.) *In re Autumn O.*, 218 Conn. App. 424, 430–31, 292 A.3d 66, cert. denied, 346 Conn. 1025, 294 A.3d 1026 (2023).

I

The respondent first contends that the court improperly concluded that the department made reasonable efforts to reunify him with Jacqueline pursuant to § 17a-112 (j) (1). The respondent argues that the court's reasonable efforts determination was based on clearly

erroneous factual findings and, consequently, was not supported by sufficient evidence. We disagree.[11]

"Section 17a-112 (j) (1) requires that before terminating parental rights, the court must find by clear and convincing evidence that the department has made reasonable efforts to locate the parent and to reunify the child with the parent, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts provided such finding is not required if the court has determined at a hearing . . . that such efforts are not appropriate . . . . Thus, the department may meet its burden concerning reunification in one of three ways: (1) by showing that it made such efforts, (2) by showing that the parent was unable or unwilling to benefit from reunification efforts or (3) by a previous judicial determination that such efforts were not appropriate. . . . [I]n determining whether the department has made reasonable efforts to reunify a parent and a child . . . the court is required in the adjudicatory phase to make its assessment on the basis of events preceding the date on which the termination petition was filed. . . . This court has consistently held that the court, [w]hen making its reasonable efforts determination . . . is limited to considering only those facts preceding the filing of the termination petition or the most recent amendment to the petition . . . .

[11] As noted herein, pursuant to § 17a-112 (j) (1), "[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.*, 220 Conn. App. 326, 361 n.22, 297 A.3d 1025, cert. denied, 348 Conn. 904, 301 A.3d 527 (2023). Because we conclude that the court properly found that the department's efforts to reunify the respondent with Jacqueline were reasonable, a finding that is sufficient to satisfy § 17a-112 (j), we need not address the merits of the respondent's additional claim that the court erred in finding that he was unable or unwilling to benefit from reunification efforts.

"Our review of the court's reasonable efforts determination is subject to the evidentiary sufficiency standard of review. . . . Under this standard, the inquiry 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. . . . The court's subordinate findings made in support of its reasonable efforts determination are reviewed for clear error. . . .

"[We do] not examine the record to 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. . . .

"Pursuant to § 17a-112, the department has the duty to make reasonable efforts to reunite the child or children with the parents. 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]easonableness is an objective standard . . . and whether reasonable efforts have been proven depends on the careful consideration of the circumstances of each individual case. . . . [R]easonable efforts means doing everything reasonable, not everything possible. . . . [O]ur 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." (Citations omitted; internal quotation marks omitted.) *In re Caiden B.*, 220 Conn. App. 326, 348–50, 297 A.3d 1025, cert. denied, 348 Conn. 904, 301 A.3d 527 (2023).

"The trial court's determination of this issue will not be overturned on appeal unless, in light of all of the evidence in the record, it is clearly erroneous. . . . A finding is clearly erroneous when either there is no evidence in the record to support it, or the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . [E]very reasonable presumption is made in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *In re Savannah Y.*, 172 Conn. App. 266, 273, 158 A.3d 864, cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017). In considering the respondent's claim in the present case, we note "the reality . . . that incarceration imposes limitations on what the department and its social workers can do and what services it can provide for an incarcerated parent facing termination of his or her parental rights. . . . The reasonableness of the department's efforts must be viewed in the context of these limitations." (Internal quotation marks omitted.) *In re Jadiel B.*, 228 Conn. App. 290, 298, 324 A.3d 211, cert. denied, 350 Conn. 921, 325 A.3d 217 (2024).

In concluding that the department made reasonable efforts to reunify, the court recounted that the department offered several services to the respondent, including administrative case reviews, casework services, supervised visitation, transportation assistance and referrals to substance abuse, domestic violence programs and parenting programs.

The respondent acknowledges that the department "made referrals on his behalf." He nevertheless challenges the court's finding that the department's reunification efforts were reasonable solely on the ground

that "the monthly visits that were supposed to occur did not occur with regularity, which was not reasonable." He argues that, "[w]hen [he] was incarcerated shortly after Jacqueline's birth, visits did not occur until he was released and admitted to Stonington [Institute]." He also argues that the department failed to afford visitation once he was incarcerated in April, 2022. He contends that "[i]n-person visits at the prison were to begin on June 2, 2022, but the case aide forgot to add it to her calendar, so the visit did not occur. The next visit was to be held on June 16, 2022, but that, too, had to be rescheduled. . . . In-person visits actually began in August, 2022."[12] (Citation omitted.)

We disagree with the respondent's allegation that the department failed to afford him regular visitation with Jacqueline. Although the respondent may not have been afforded visitation while he was incarcerated shortly after Jacqueline's birth, the department commenced virtual visits shortly thereafter, when the respondent was admitted to Stonington Institute, and continued those visits while the respondent was on house arrest. The respondent testified that he was "on weekly Skype video calls" with Jacqueline prior to his incarceration in April, 2022. On May 31, 2022, the respondent confirmed with the department that he would like monthly in-person visits with Jacqueline at the correctional facility. The department scheduled the first visit for June 2, 2022, but, as the respondent points out, that visit did not occur due to an error by the case aide, so it was

[12] The respondent also points to visits that he missed in June, July and September, 2023, as evidence that the department's reunification efforts were not reasonable. Because he raises an argument relating to evidence of events that were supposed to occur well beyond the September 7, 2022 date of the filing of the termination petition, they are not properly considered in the adjudicatory phase of the termination proceedings. See *In re Caiden B.*, supra, 220 Conn. App. 348 ("[w]hen making its reasonable efforts determination . . . [the court] is limited to considering only those facts preceding the filing of the termination petition" (internal quotation marks omitted)).

rescheduled for June 16, 2022. As to the respondent's complaint that the June 16, 2022 visit did not occur as scheduled, the record reflects that Jacqueline had a fever on that day and the department tried to reschedule it for June 23, 2022. The record does not reflect whether the visit occurred on June 23, 2022. Even if the respondent's assertion was correct that regular visits did not commence at the correctional facility until August, 2022, the record reflects that, as of June, 2023, the respondent had enjoyed regular monthly visitation with Jacqueline since that time.

Even if we were to conclude that the department should have been more diligent in ensuring that the respondent was afforded regular visitation, we cannot conclude, in light of the entire record, given the services offered to the respondent, as recounted in detail herein, and the visitation that he was afforded, that the missed visits rendered the department's reunification efforts less than reasonable. Our review of the evidence does not leave us with the definite and firm conviction that the court mistakenly found that the department had made reasonable efforts to reunify the respondent and Jacqueline. We therefore reject the respondent's claim that the court's reasonable efforts determination was clearly erroneous and supported by insufficient evidence.

II

The respondent next claims that the court improperly concluded that he failed to achieve a sufficient degree of personal rehabilitation. We disagree.

"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. . . . In regard to the failure to achieve personal rehabilitation, § 17a-112 (j) (3) (B) provides, in relevant part, for the termination of parental rights when the

child (i) has been found . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent . . . 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 . . . .

"Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to [his] former constructive and useful role as a parent. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his] ability to manage [his] own life, but rather whether [he] has gained the ability to care for the particular needs of the child at issue. . . . An inquiry regarding personal rehabilitation requires us to obtain a historical perspective of the respondent's child-caring and parenting abilities. . . . Although the standard is not full rehabilitation, the parent must show more than any rehabilitation. . . . Successful completion of the petitioner's expressly articulated expectations is not sufficient to defeat the petitioner's claim that the parent has not achieved sufficient rehabilitation. . . . [E]ven if a parent has made successful strides in [his] ability to manage [his] life and may have achieved a level of stability within [his] limitations, such improvements, although commendable, are not dispositive on the issue of whether, within a reasonable period of time, [he] could assume a responsible position in the life of [his] children." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Fayth C.*, 220 Conn. App. 315, 318–19, 297 A.3d 601, cert. denied, 347 Conn. 907, 298 A.3d 275 (2023).

"We review the trial court's subordinate factual findings for clear error, and review its finding that the

respondent failed to rehabilitate for evidentiary sufficiency. . . . In reviewing that ultimate finding for evidentiary sufficiency, we inquire 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]. . . . [I]t is not the function of this court to sit as the [fact finder] when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the [judgment of the trial court] . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the [judgment] of which it is reasonably capable. . . . In other words, [i]f the [trial court] could reasonably have reached its conclusion, the [judgment] must stand, even if this court disagrees with it. . . .

"When a child is taken into the [petitioner's] custody, a trial court must issue specific steps to a parent as to what should be done to facilitate reunification and prevent termination of parental rights. . . . Specific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of [parental] rights. . . . Specific steps are a benchmark by which the court will measure the respondent's conduct to determine whether termination is appropriate pursuant to § 17a-112 (j) (3) (B). . . . [T]he failure to comply with specific steps ordered by the court typically weighs heavily in a termination proceeding." (Citations omitted; internal quotation marks omitted.) *In re Deboras S.*, 220 Conn. App. 1, 30–32, 296 A.3d 842 (2023).

In claiming that the court's findings were clearly erroneous, the respondent does not contend, for the most part, that there was no evidence in the record to support

the court's findings, but, rather, he argues that there was evidence in the record that may have supported a determination that he substantially complied with most of his specific steps.[13] In support of this claim, the respondent argues that the court's findings "do not tell the whole story." In so arguing, the respondent essentially asks this court to reweigh the evidence presented at trial and consider it in a light favorable to him. "This we will not do, as it is not the function of a court of review to retry the facts." (Internal quotation marks omitted.) *In re Olivia W.*, 223 Conn. App. 173, 188 n.12, 308 A.3d 571 (2024).

Moreover, although a different view of the evidence might support the respondent's argument that he attempted to comply with the specific steps to the best of his ability within the constraints imposed by his incarceration, the court acknowledged the respondent's limited progress but nevertheless concluded that the respondent failed to rehabilitate. See *In re Fayth C.*, supra, 220 Conn. App. 319 (although parent's successful strides to manage his life are commendable, they are not dispositive on issue of whether, within reasonable period of time, he could assume responsible position in life of his children). To the extent the respondent seeks to excuse his noncompliance with the court-ordered specific steps, that noncompliance was, at best, an inevitable result of his incarceration or being on house arrest, both circumstances for which the respondent was solely responsible due to his criminal conduct. The record also reflects that, other than his completion of Stonington Institute's substance abuse treatment program in 2021, the respondent failed to complete any treatment programs during the period of time when he was not incarcerated.

[13] The respondent also argues that "it is important to note that [the court] appears to have applied an incorrect standard when assessing the petitioner's burden . . . [when it] stated that 'the critical issue for this court is whether the [respondent] had achieved the rehabilitation sufficient to render him

We also reject the respondent's challenge to the court's finding that he is in no better position now to assume a responsible position in Jacqueline's life than when she was committed. He argues that when Jacqueline was committed, he had several criminal charges pending and he was using drugs. Of course, at the time of the termination trial, the respondent no longer had several charges pending because by then he had been convicted of and sentenced for those charges, although he still had more than one year remaining to serve on his sentence. Also, it is reasonable to infer that, by virtue of his incarceration, he was no longer abusing drugs at the time of trial. Although this may be construed as progress in terms of the respondent making personal strides, that purported progress is not the result of the respondent's compliance with the department's referrals for services.[14] For instance, the respondent emphasizes that he has "stay[ed] clean" since his last positive drug test upon his admission to Stonington Institute in November, 2021.[15] "[S]taying clean" is not the equivalent to completing treatment programs. The respondent testified that he had been abusing drugs since he was in high school. The fact that the respondent

able to care for his child.' " It is clear from a reading of the entirety of court's decision that it knew and applied the correct legal standard.

[14] The respondent also emphasizes the programs he completed while incarcerated in 2023 as evidence of his rehabilitation. His reliance on these programs is misplaced in that he completed them well after the September 7, 2022 adjudicatory date.

[15] The respondent contends that his November, 2021 positive drug test should not have been used against him because the final specific steps were not issued until January 5, 2022. The respondent ignores the fact that specific steps were first issued on September 3, 2021, and included that he refrain from the use of illegal drugs. Additionally, although there was no evidence of any additional positive drug tests, the record likewise does not reflect that he was tested during the times that he was not incarcerated or at Stonington Institute. Additionally, when the respondent was readmitted to Stonington Institute in February, 2022, he was diagnosed with cannabis and crack cocaine dependence, whereas he was diagnosed with only cocaine dependence when he was admitted in November, 2021.

allegedly "stay[ed] clean" during the limited time during Jacqueline's life when he was not incarcerated does not, in itself, demonstrate that he will be able to do so when he is released from prison.

On the basis of our thorough review of the record, we are not left with the definite and firm conviction that a mistake has been made in this case. We therefore conclude that the court's findings were not clearly erroneous and the respondent's challenge to the evidentiary sufficiency of the court's determination that he failed to achieve the requisite degree of personal rehabilitation required by § 17a-112 (j) (3) (B) is unavailing.

III

Finally, the respondent claims that the court erroneously found that termination of his parental rights was in Jacqueline's best interest. We disagree.

In assessing Jacqueline's best interest, the court considered and made written findings as to each of the factors enumerated in § 17a-112 (k). The court reiterated its findings that the department offered timely, appropriate and comprehensive services to the respondent to facilitate his reunification with Jacqueline, but that he was unable and/or unwilling to benefit from those services. The court found, inter alia, that the respondent was aware of his issues and deficits and had received specific steps addressing those issues, but he failed to comply with several of those steps. The court further found that the respondent had been unable and/or unwilling to make realistic and sustained efforts to conform his conduct to acceptable parental standards or to serve as a safe, nurturing and responsible parent for Jacqueline. The respondent complied with certain services offered by the department, but his ability to care for Jaqueline remained poor in that he had failed to gain insight into the efforts needed in order to become a safe, nurturing and responsible parent. The

court found that Jacqueline had a bond with her foster mother and a visiting bond with the respondent. The court explained that "[t]o ask Jacqueline to wait for [the respondent] to be released from jail, establish himself in the community, successfully complete his rehabilitative programs and show himself to be a safe, responsible and nurturing parent is asking this child to wait too long for something which may never come to pass, based upon [the respondent's] history." The court concluded: "Having balanced the individual and intrinsic needs of . . . Jacqueline for stability and permanency against the benefits of maintaining a connection with the respondent . . . the clear and convincing evidence in this case establishes that [Jacqueline's] best interest cannot be served by continuing to maintain any legal relationship to the respondent . . . ." Accordingly, the court concluded that the termination of the respondent's parental rights was in Jaqueline's best interest.

"In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in [§ 17a-112 (k)]. . . . The seven factors serve simply as

guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence. . . .

"[A]n appellate tribunal will not disturb a trial court's finding that termination of parental rights is in a child's best interest unless that finding is clearly erroneous. . . . On appeal, our function is to determine whether the trial court's conclusion was factually supported and legally correct. . . . In doing so, however, [g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling. . . . [T]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . Although a judge [charged with determining whether termination of parental rights is in a child's best interest] is guided by legal principles, the ultimate decision [whether termination is justified] is intensely human. It is the judge in the courtroom who looks the witnesses in the eye, interprets their body language, listens to the inflections in their voices and otherwise assesses the subtleties that are not conveyed in the cold transcript." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Javonte B.*, 226 Conn. App. 651, 659–61, 318 A.3d 1095 (2024).

"In addition to considering the seven factors listed in § 17a-112 (k), [t]he best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . Furthermore, in the dispositional

stage, it is appropriate to consider the importance of permanency in children's lives." (Internal quotation marks omitted.) *In re Ava M.*, 223 Conn. App. 590, 604, 309 A.3d 383, cert. denied, 348 Conn. 962, 312 A.3d 38 (2024).

In support of his challenge to the court's best interest determination, the respondent argues that "many of the § 17a-112 (k) factors should have been found in his favor had the court made findings in accordance with the evidence. The factual findings in this case were sloppy and were biased in favor of the petitioner, with no consideration for the facts that weighed in favor of the respondent." In support of this argument, the respondent reiterates his claims that the court erred in determining that the department made reasonable efforts to reunify him with Jacqueline and that he failed to rehabilitate. We have addressed and rejected those claims and need not address them further here.

Notably, the respondent does not challenge the court's findings that Jacqueline needs stability, continuity, and permanency in her life and that the respondent is unable to provide those things. On the basis of our review of the record, we are not left with a definite and firm conviction that a mistake has been made in this case. We therefore reject the respondent's claim that the court's best interest determination was clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE MACI S.*
(AC 47485)

Alvord, Moll and Flynn, Js.

Syllabus

The respondent mother appealed from the judgment of the trial court rendered for the petitioner, the Commissioner of Children and Families, terminating her parental rights with respect to her minor child. She claimed, inter alia, that the court improperly determined that she was unable or unwilling to benefit from the reunification efforts of the Department of Children and Families. *Held*:

The trial court properly concluded that the respondent mother was unable or unwilling to benefit from the department's reunification efforts, as the evidence adduced at trial was sufficient to support the court's finding by clear and convincing evidence as required by statute (§ 17a-112 (j)).

Because this court concluded that the trial court properly found that the respondent mother was unable or unwilling to benefit from reunification services, this court declined to review the mother's claim regarding the trial court's alternative finding that the department made reasonable efforts to reunify.

The trial court properly found by clear and convincing evidence that the respondent mother failed to achieve a sufficient degree of personal rehabilitation within the meaning of § 17a-112 (j) (3) (B) (ii).

The trial court properly determined that the termination of the respondent mother's parental rights was in the best interest of the child, as the court's finding was factually supported and legally sound and this court will not substitute its judgment for that of the trial court.

Argued October 10—officially released December 19, 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

* 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.

** December 19, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Court in the judicial district of Tolland, Juvenile Matters at Rockville, where the respondent father was defaulted for failure to appear; thereafter, the matter was transferred to the judicial district of Middlesex, Child Protection Session at Middletown, and tried to the court, *Burgdorff, J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

David B. Rozwaski, assigned counsel, for the appellant (respondent mother).

Angela M. Fierro, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Nisa Khan*, assistant attorney general, for the appellee (petitioner).

Michelle A. Santos, assigned counsel, for the minor child.

Opinion

FLYNN, J. The respondent mother,[1] Dayna L., appeals from the judgment of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights with respect to her minor child, Maci S. On appeal, the respondent claims that the court improperly determined that (1) she was unable or unwilling to benefit from the reunification efforts of the Department of Children and Families (department), (2) she failed to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B),[2] and (3) the termination

[1] The parental rights of Joshua S., the biological father of Maci, also were terminated. He has not appealed and all references in this opinion to the respondent are to Dayna L. only.

[2] The respondent also claims that the court improperly concluded that she had abandoned Maci and had no ongoing parent-child relationship with her. We decline to review those claims because the trial court needs to find only one statutory ground to grant a petition to terminate parental rights and, thus, we may affirm the court's decision if we find that it properly concluded that any one of the statutory circumstances existed. See *In re Jermaine S.*, 86 Conn. App. 819, 822 n.3, 863 A.2d 720, cert. denied, 273

of her parental rights was in the best interest of Maci.[3] We disagree with the respondent's claims and, accordingly, affirm the judgment of the court.

The following facts and procedural history are relevant. A neglect petition was filed on April 3, 2019, alleging that Maci had been denied proper care and attention and had been permitted to live under conditions injurious to her well-being. A hearing was held on June 18, 2019, and the court, *Westbrook*, *J.*, adjudicated Maci neglected and ordered six months of protective supervision and specific steps. At a hearing held on November 22, 2019, the court adopted the agreement reached by the parties that Maci's father would have primary physical custody of Maci and decision-making authority with respect to Maci and further ordered that protective supervision be allowed to expire, as scheduled, on December 18, 2019. A second neglect petition was filed on October 23, 2020, alleging that Maci had been denied proper care and attention and that she had been permitted to live under conditions injurious to her well-being. At a hearing on December 8, 2020, the court defaulted the respondent and Maci's father for failure to appear. At a January 5, 2021 hearing, the court adjudicated Maci neglected, and ordered that she be committed to the care and custody of the petitioner, and ordered final specific steps to facilitate reunification. At a January 6, 2022 hearing, the court approved a permanency plan of termination of parental rights and adoption. A petition for the termination of the parental rights of the respondent was filed on January 11, 2022. The respondent was defaulted for failure to appear on February

Conn. 938, 875 A.2d 43 (2005). Because we conclude that the record discloses that there was clear and convincing evidence that the respondent failed to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B), we need not address her remaining claims concerning the statutory grounds for the termination of her parental rights. See id.

[3] Pursuant to Practice Book § 67-13, the attorney for the minor child filed a statement adopting the brief filed by the petitioner.

4, 2022. On December 1, 2022, the court, *Huddleston, J.*, approved a permanency plan of termination of parental rights and adoption.

Maci was born in July, 2018, and has resided with her paternal grandparents and extended family since birth. The respondent initially resided in the home of Maci's paternal grandparents, but left the paternal grandparents' home in August, 2019, after overdosing on heroin. The respondent has not visited with Maci since July or August, 2019.[4] Thereafter, the respondent's whereabouts were unknown for substantial periods of time due to her failure to inform the department of such information. The department made repeated and consistent efforts to locate the respondent, including using LexisNexis searches, obtaining her phone number from text messages, determining when and where her criminal court dates were scheduled, and contacting known family members. At the time of trial, Maci had no recollection of the respondent.

The respondent has a criminal history, including charges for attempt to commit larceny, larceny, failure to appear, breach of the peace, and violation of probation. The court found that "[the respondent] has a severe opioid use disorder including severe cocaine use and severe benzodiazepine use. She reported using heroin in 2021 and experimented with cocaine, MDMA (molly), and prescription drugs. She reported her substance of choice was cocaine and heroin which she would take intravenously. [The respondent] reported using fentanyl along with nonprescribed benzodiazepines and cocaine in 2022 after which she was prescribed methadone. She reports drinking alcohol and

[4] The court stated that the respondent has not visited with Maci since July 31, 2019, and, at another point, stated that she has not visited since August 12, 2019, when she left the home of the paternal grandparents. We conclude that whether the respondent last visited on July 31 or August 12, 2019, does not make a material difference in the outcome of this decision.

using marijuana. [The respondent] tested positive for fentanyl eight times in February, 2022, and norfentanyl from February 1, 2022, to March 24, 2022, August 28, 2022, September 1, 2022, October 8, 2022, and seven times from May 3, 2023, to July 14, 2023." (Internal quotation marks omitted.)

The respondent was referred for a clinical assessment for the purpose of determining how best to proceed with reintroducing her to Maci and to help her understand the impact of her absence in Maci's life, but the respondent "has not yet engaged in that therapy" as of the time of trial. The department made several attempts to engage the respondent with the paternal grandmother to facilitate communication regarding reintroducing Maci to the respondent, and the respondent made minimal contact with the paternal grandmother, blamed her for Maci being in her care and engaged in erratic and threatening phone calls with the paternal grandmother over a two year period. The respondent made no effort to be involved in Maci's daily life. On March 13, 2023, the department facilitated a virtual session between the respondent and Maci's paternal grandmother to discuss parenting sessions with Maci, but the respondent initially failed to log on and then experienced technical difficulties during the session, thereby preventing a productive session. At the next session on May 15, 2023, concerns were raised regarding the respondent's having continued blaming the paternal grandmother for being Maci's caregiver. The respondent met with Maci's therapist on April 7, 2023, and struggled with feedback concerning how her abandonment of Maci impacted Maci's emotional well-being and her lack of knowledge of who the respondent is.

The respondent engaged in services at Coventry House and Hallie House for substance abuse treatment. She presented at Coventry House in February, 2022, several months pregnant with another child, engaged in

treatment and tested negative for all substances except methadone, which had been prescribed to her. She returned to Coventry House after the birth of her son and was discharged to Hallie House in September, 2022. At Hallie House, she was given a day pass for December 25, 2022, but she failed to return, failed to respond to telephone calls, and, on December 26, 2022, fabricated a story that her infant son had been hospitalized. She returned to Hallie House on December 28, 2022, and blamed car trouble for her failure to return sooner. At Hallie House, she failed to comply with program rules, failed to participate in case management sessions, failed to comply with her treatment, and was unsuccessfully discharged in January, 2023. The court found that the respondent "continued to regularly test negative for substances at Hallie House where she was tested daily except for the period of time from December 25, 2022, to December 28, 2022, when she failed to return." She then moved her substance abuse treatment to Rushford where she was treated on a monthly basis. She was placed on Suboxone. She missed an appointment scheduled for January 31, 2023, and failed to attend substance abuse treatment sessions from December, 2022, until April, 2023. She reported that she reengaged with Intercommunity, a treatment program for addiction, but Intercommunity did not respond to the department's request for confirmation of compliance or transfer of services. On May 3, 2023, the respondent submitted a toxicology screen that was positive for Suboxone, which she had been prescribed, and fentanyl metabolites. The respondent denied substance use, but she continued to test positive for fentanyl until July 20, 2023. She continues to engage with Intercommunity for substance abuse treatment, is successfully engaged in Suboxone treatment, and continues to submit weekly negative toxicology screens.

The respondent engaged with Proud Program and worked with a recovery coach in a peer support program for parents recuperating from opiate use disorder, and her coach referred her to Narcotics Anonymous, which the respondent attends several times per week. She has been consistent with the program, has been attending fairly regularly with some missed sessions, but the program reported having some difficulty in maintaining contact with the respondent. She tested positive for fentanyl during her work with the program in May and June, 2023.

The respondent began services with a provider called Catherine's Heart Counseling Services in April, 2023, due to her desire to have a better relationship with Maci and to maintain sobriety, but she "failed to successfully engage in those services and was discharged on May 15, 2023." She reengaged with the services in August, 2023, but attended only four sessions, and her case was closed in November, 2023. The court found that the respondent "reported a history of mental health issues and began mental health treatment in 2002. She reported that these issues were in response to her mother's addictions." She began attending weekly individual therapy at Small Victories for mental health treatment on October 4, 2022, and began sessions with a new therapist in April, 2023.

Following a trial, at which the respondent was represented by counsel, the court, *Burgdorff*, *J.*, found, in the adjudicatory phase, that there was clear and convincing evidence that the department made reasonable efforts to locate and reunify the respondent with Maci, but that the respondent was unable or unwilling to benefit from such services. The court also found by clear and convincing evidence that Maci had been adjudicated neglected and that the respondent had failed to rehabilitate sufficiently under § 17a-112 (j) (3) (B) (ii), that the respondent had abandoned Maci pursuant to § 17a-112

(j) (3) (A), and that there was no ongoing parent-child relationship under § 17a-112 (j) (3) (D). In the dispositional phase of the proceedings, the court made findings by clear and convincing evidence as to each of the criteria set forth in § 17a-112 (k) and determined that terminating the respondent's parental rights was in Maci's best interest. Accordingly, the court rendered judgment terminating the parental rights of the respondent and appointing the petitioner as Maci's statutory parent. This appeal followed. Additional facts will be set forth as necessary.

At the outset, we note that "[a] hearing on a termination of parental rights petition consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the court must determine whether the [petitioner] has proven, by clear and convincing evidence, a proper ground for termination of parental rights. . . . Proceedings to terminate parental rights are governed by § 17a-112. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun." (Citation omitted; internal quotation marks omitted.) *In re A. H.*, 226 Conn. App. 1, 15, 317 A.3d 197, cert. denied, 349 Conn. 918, 317 A.3d 784 (2024).

I

The respondent first claims that the court improperly concluded that she was unable or unwilling to benefit from the department's reunification efforts. We disagree.

"Section 17a-112 (j) (1) requires that before terminating parental rights, the court must find by clear and convincing evidence that the department has made reasonable efforts to locate the parent and to reunify the child with the parent, unless the court finds in this

proceeding that the parent is unable or unwilling to benefit from reunification efforts provided such finding is not required if the court has determined at a hearing . . . that such efforts are not appropriate . . . . Thus, the department may meet its burden concerning reunification in one of three ways: (1) by showing that it made such efforts, (2) by showing that the parent was unable or unwilling to benefit from reunification efforts or (3) by a previous judicial determination that such efforts were not appropriate. . . . The trial court's determination of this issue will not be overturned on appeal unless, in light of all of the evidence in the record, it is clearly erroneous. . . . [W]e review the trial court's subordinate factual findings for clear error. . . . We review the trial court's ultimate determination . . . [that a parent is unable or unwilling to benefit from reunification services] for evidentiary sufficiency . . . ." (Citations omitted; internal quotation marks omitted.) *In re Corey C.*, 198 Conn. App. 41, 58–59, 232 A.3d 1237, cert. denied, 335 Conn. 930, 236 A.3d 217 (2020).

A

The respondent argues that the court erred in finding that she was unable or unwilling to benefit from reunification efforts because, "[c]ontrary to the trial court's findings, when the [respondent] became aware that the petitioner was reinvolved with her daughter's life again, the [respondent] was engaged in services for herself to be a better parent . . . ." The respondent highlights the progress she made and states that "[p]erhaps no better demonstration of the [respondent's] willingness to engage in reunification services is the [respondent's] own reason for addressing her issues when she stated that she committed herself to going into services on January 26, 2022, so that she could better herself, be a better parent for her children, and wanted to begin on January 26 as a tribute to her mother (whose birthday

was on the 26th), so that she could become a better mother and break the cycle of addiction."

Although the respondent highlights the strides she has made since January 26, 2022, the termination of parental rights petition was filed on January 11, 2022. The court is required in the adjudicatory phase to make its assessment based on events preceding the date on which the termination petition was filed. See *In re Lillyanne D.*, 215 Conn. App. 61, 81–82, 281 A.3d 521, cert. denied, 345 Conn. 913, 283 A.3d 981 (2022); see also Practice Book § 35a-7 (a). The court properly took into account events preceding the January 11, 2022 filing of the termination petition when making its determination regarding the respondent's inability and unwillingness to benefit from reunification efforts. The court found that the respondent was offered case management services by the department, supervised visitation, substance abuse and mental health evaluations through Wheeler Clinic, parenting support through The Village for Families and Children's Therapeutic Family Program, and passes for taxis and public transportation. The court noted that, although the respondent had engaged in some services, she "clearly failed to make sufficient progress in her ability to provide safe and consistent care for Maci. She has also clearly failed to take sufficient advantage of the multiple and well tailored services offered and made available to her by [the department] to improve her circumstances and has demonstrated her unwillingness and/or inability to benefit from reunification services as demonstrated by her inconsistent participation in treatment services. She has clearly not made sufficient progress with regard to her identified treatment needs concerning her substance abuse, mental health and parenting issues." The evidence adduced at trial was sufficient to support the court's finding by clear and convincing evidence that

the respondent was unable or unwilling to benefit from reunification efforts.

B

The respondent also argues that "the court erred in finding that the [respondent] was unable to benefit from services because, even though the [respondent] was not involved toward the end of protective supervision in 2019 and the petitioner did not hear from her until January of 2022, when the [termination of parental rights] default trial was scheduled . . . the petitioner did not make reasonable efforts to locate the [respondent] and engage her in services." (Citation omitted.) The court, in its analysis under § 17a-112 (j) (1), found that the respondent was unable or unwilling to benefit from the department's reunification efforts and, *alternatively*, found that the department made reasonable reunification efforts and used reasonable efforts to locate the respondent. "[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 Corey C.*, supra, 198 Conn. App. 66. We have concluded in part I A of this opinion that the court properly found that the respondent was unable or unwilling to benefit from reunification services and this finding alone is sufficient to satisfy § 17a-112 (j).[5]

[5] We, nonetheless, note that the evidence in the record sufficiently supports the court's findings that the department made reasonable efforts to locate the respondent and that the department made reasonable efforts to reunify the respondent with Maci.

II

The respondent next claims that the court improperly found that she failed to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B) (ii). We do not agree.

The following legal principles and standard of review are relevant. "Failure of a parent to achieve sufficient personal rehabilitation is one of six statutory grounds on which a court may terminate parental rights pursuant to § 17a-112." (Internal quotation marks omitted.) *In re G. Q.*, 158 Conn. App. 24, 25, 118 A.3d 164, cert. denied, 317 Conn. 918, 118 A.3d 61 (2015). Concerning the failure to achieve personal rehabilitation, § 17a-112 (j) (3) (B) (ii) provides in relevant part for the termination of parental rights when the minor child is adjudicated neglected and the parent of such child "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 . . . ." The standard for personal rehabilitation in § 17a-112 (j) (3) (B) is not full rehabilitation. *In re Alejandro L.*, 91 Conn. App. 248, 260, 881 A.2d 450 (2005). At the same time, successful completion of the petitioner's expressly articulated expectations and the court-ordered specific steps is not sufficient to defeat the petitioner's claim that the parent has not achieved sufficient rehabilitation. Id. Rather, even if a parent has made successful strides in her ability to manage her life and may have achieved a level of stability within her limitations, such improvements, although commendable, are not dispositive on the issue of whether, within a reasonable period of time, she could assume a responsible position in the life of her child. Id.

Our standard of review of the court's finding regarding personal rehabilitation pursuant to § 17a-112 (j) (3)

(B) 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 conclusion. *In re Fayth C.*, 220 Conn. App. 315, 320, 297 A.3d 601, cert. denied, 347 Conn. 907, 298 A.3d 275 (2023). In applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. Id.

In its memorandum of decision, the court found that the respondent "minimally complied with her specific steps as ordered by the court on January 4, 2021. Despite numerous attempts by [the department] to assist and engage [the respondent], she failed to adequately engage in, participate or benefit from substance abuse and mental health treatment programs in order to sufficiently address her substance use and mental health issues. She failed to keep [the department] apprised of her whereabouts on a regular basis and failed to maintain adequate housing and a legal income. [The respondent], to her credit, did engage in some of her treatment services but failed to consistently and successfully do so. It is abundantly clear that she has not sufficiently benefitted from those services as she continues to struggle with her sobriety issues. Most concerning to the court is her failure to visit with Maci since 2019 although repeatedly encouraged by [the department] to do so. [The respondent] has clearly failed to demonstrate the desire and ability to adequately and safely parent Maci." The court found by clear and convincing evidence that the respondent had not achieved sufficient personal rehabilitation to the extent that she could assume a responsible position in Maci's life within a reasonable period of time given Maci's age and need for permanency.

There is ample evidence in the record to support the court's finding that the respondent failed to achieve a sufficient degree of personal rehabilitation.[6] The respondent has not visited Maci since 2019, after an incident wherein she overdosed on heroin at the home of Maci's paternal grandparents, and, thereafter, her whereabouts were unknown to the department, despite efforts to locate her, until she resurfaced sometime in January, 2022. Thereafter, the respondent engaged in services at Coventry House and was discharged to Hallie House but failed to comply with her treatment at Hallie House and was unsuccessfully discharged in January, 2023. She continued to test positive for fentanyl numerous times in 2022 and 2023. Although she attended Narcotics Anonymous several times per week as of the time of trial, she tested positive during her work in that program in May and June, 2023. She began services at Catherine's Heart Counseling Services due to her desire to have a better relationship with Maci and successfully maintain sobriety but failed to engage in services and was discharged in May, 2023. Although the respondent made some strides, the court noted that she "has clearly not sufficiently benefitted from her services, and any limited progress she has made is much too little and much too late for Maci, especially in light of her failure to visit with Maci since 2019." In addition, in assessing rehabilitation, the critical issue is not whether the parent has improved her ability to manage her own life but, rather, whether she has gained the ability to care for the particular needs of her child. *In*

[6] Although a trial court generally is limited to considering evidence of events preceding the filing of the petition in the adjudicatory phase of a termination proceeding; see Practice Book § 35a-7 (a); a trial court retains discretion to consider events and behavior that occurred after the filing of the termination petition to determine if the respondent had failed to achieve sufficient personal rehabilitation to allow her to assume a responsible position in her child's life within a reasonable time. *In re Yolanda V.*, 195 Conn. App. 334, 346–47, 224 A.3d 182 (2020). In the present case, the court exercised that discretion.

re Eric M., 217 Conn. App. 809, 829, 290 A.3d 411, cert. denied, 346 Conn. 921, 291 A.3d 1040 (2023). The court determined that the respondent continues to struggle with sobriety and that, "[m]ost concerning," was the respondent's failure to visit Maci since 2019 despite repeated encouragement from the department to do so. For the foregoing reasons, the court's finding by clear and convincing evidence that the respondent failed to demonstrate the desire and ability to adequately and safely parent Maci and failed to achieve sufficient personal rehabilitation within the meaning of § 17a-112 (j) (3) (B) is sufficiently supported by the record.

III

The respondent last claims that the court improperly determined that the termination of her parental rights was in the best interest of Maci. We disagree.

We first set forth the relevant principles and the standard of review. "[A]n appellate tribunal will not disturb a trial court's finding that termination of parental rights is in a child's best interest unless that finding is clearly erroneous. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling. . . . In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . In the dispositional phase . . . the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in . . . § 17a-112 [(k)]. . . . The seven factors serve simply as guidelines for the court and are not statutory

prerequisites that need to be proven before termination can be ordered. . . .

"In addition to considering the seven factors listed in § 17a-112 (k), [t]he best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [her] environment. . . . Furthermore, in the dispositional stage, it is appropriate to consider the importance of permanency in [a child's life]." (Citation omitted; footnotes omitted; internal quotation marks omitted.) *In re Autumn O.*, 218 Conn. App. 424, 442–44, 292 A.3d 66, cert. denied, 346 Conn. 1025, 294 A.3d 1026 (2023).

"[T]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . Although a judge [charged with determining whether termination of parental rights is in a child's best interest] is guided by legal principles, the ultimate decision [whether termination is justified] is intensely human. It is the judge in the courtroom who looks the witnesses in the eye, interprets their body language, listens to the inflections in their voices and otherwise assesses the subtleties that are not conveyed in the cold transcript." (Internal quotation marks omitted.) *In re Malachi E.*, 188 Conn. App. 426, 444–45, 204 A.3d 810 (2019).

The court made findings under each of the seven statutory factors of § 17a-112 (k) before determining by clear and convincing evidence that, under the totality of the circumstances, termination of the respondent's parental rights was in the best interest of Maci. In so finding, the court stated that it was "clear" that Maci could not be returned to the respondent in the foreseeable future, the respondent has not made sufficient progress in addressing her long outstanding issues, she

has not sufficiently availed herself of the services offered by the department in order to improve her circumstances to the extent that she can play a responsible role in Maci's life, she has not been able to put Maci's interests ahead of her own, she is not able to provide a safe, competent, and nurturing environment for Maci, she is not able to provide Maci with the necessary structure for her basic needs, she has not exhibited the ability to address appropriately or understand Maci's needs, Maci has been committed to the petitioner's care since January 4, 2021, and has resided with her preadoptive foster parents for her entire life, and, most significantly, the respondent has not visited with Maci since 2019 and is a "virtual stranger" to her. The court determined that, in light of the respondent's "significant ongoing issues, it is clearly not in Maci's best interests to wait additional time for [the respondent] to rehabilitate. [The respondent has] had significant time and opportunity to address [her] issues and comply with the services required of [her] and [has] failed to do so.

"The court has balanced the child's intrinsic need for stability, sustained growth, development, well-being, and permanency against the potential benefits of maintaining a connection with [the respondent]. . . . In consideration of all these factors and after weighing all of the evidence, the court finds that the clear and convincing evidence has established that it is in the best interests of Maci to terminate the parental rights of [the respondent] to ensure that she has a secure and safe placement so she can grow and mature to become a productive child and adult in a healthy manner. She has a strong bond with her foster mother and foster family who are meeting all of her needs and with whom she shares a mutual love and affection. Her foster parents plan to adopt her if she becomes legally free for her to do so. Maci needs the permanency and stability her foster parents continue to provide for her which

cannot be provided by [the respondent] within the foreseeable future. While [the respondent] appear[s] to love [Maci], [the respondent's] bond with her is minimal at best." (Citation omitted.)

The respondent argues that the court erred in determining that it was in Maci's best interest to terminate her parental rights in light of her consistent engagement with services, the progress she has made, and her having cared for her newborn infant son.[7] She further contends that, "[e]ven though [she] will have to work at reestablishing her relationship with her daughter, it is in Maci's best interest to allow [her] to do so because Maci deserves the right to have a relationship with her mother."

Although the respondent highlights the strides she has made, whatever progress she arguably has made toward rehabilitation is insufficient to reverse the court's factually supported best interest finding. See *In re Aubrey K.*, 216 Conn. App. 632, 663, 285 A.3d 1153 (2022), cert. denied, 345 Conn. 972, 286 A.3d 907 (2023). "As we have stated previously, the court's inquiry in the dispositional phase of the proceeding was properly focused on whether termination of the respondent's parental rights was in the [child's] best interest." (Internal quotation marks omitted.) Id. The respondent's

[7] The relevant inquiry under § 17a-112 (j) requires the court to analyze the parent's rehabilitative status as it relates to the needs of the *particular child*, and, although a court may consider a respondent parent's history with her other children to gain perspective on the respondent's child caring and parenting abilities to determine if she had achieved rehabilitation, such a consideration is not dispositive of the court's analysis. *In re Serenity W.*, 220 Conn. App. 380, 398, 298 A.3d 276, cert. denied, 348 Conn. 902, 300 A.3d 1166 (2023). A court reasonably may conclude that a respondent parent is unable to assume a responsible position in the life of one child, even though another child remains in that parent's care. Id. Moreover, the court found that the petitioner filed a neglect petition as to the respondent's son on October 3, 2023, due to the respondent's relapse and lack of progress with her treatment services.

efforts to rehabilitate, although commendable, speak to her own conduct, not the best interest of Maci. See id.

There is ample evidence in the record to support the court's determination that it was in the best interest of Maci to terminate the respondent's parental rights. After the respondent overdosed on heroin in the home of Maci's paternal grandparents in August, 2019, she left that home. She has not visited with Maci since July or August, 2019, despite the fact that the department encouraged her to engage in regular visitation with Maci. The court found that Maci has a strong and positive emotional bond with her paternal grandparents with whom she has resided since birth. The respondent continued to test positive for fentanyl in 2022 and 2023. The court found that the respondent has not maintained sufficient income, housing, or insight to the extent that she can demonstrate that she can provide Maci with the care necessary to ensure that her needs are met. This evidence supports the court's finding that the respondent has not made sufficient progress to be able to safely parent Maci and that she has failed to improve her ongoing issues to the extent that she could assume a responsible role in Maci's life in the foreseeable future. On the record before us, we conclude that the court's finding as to Maci's best interest is factually supported and legally sound and we will not substitute our judgment for that of the trial court.

The judgment is affirmed.

In this opinion the other judges concurred.

JENNIFER LENCZEWSKI *v.* VINCENT LENCZEWSKI
(AC 46649)

Alvord, Westbrook and Bear, Js.

Syllabus

The defendant appealed from the trial court's denial of his postdissolution motions for modification of alimony and for contempt and from its granting

of the plaintiff's motion for contempt. He claimed, inter alia, that the court improperly denied his motion for a reduction of his alimony obligation. *Held*:

The trial court did not abuse its discretion in denying the defendant's motion for modification of alimony.

This court declined to review the defendant's claims on appeal regarding the trial court's denial of his motion for modification that did not relate to the bases advanced in his motion to modify, that were not argued in his posttrial brief, and that the trial court appropriately did not address in adjudicating his motion, as those appellate claims were not properly before this court.

This court declined to review the defendant's claim that the court improperly denied his motion for contempt seeking enforcement of a provision in an arbitration award ordering the plaintiff to contribute to the postsecondary education expenses of the parties' minor son, as the claimed error was induced by the defendant's contrary position, which the court adopted, that it lacked authority to enter remedial orders with respect to noncompliance with the arbitration award on the basis that the award was not an order of the court.

The trial court did not abuse its discretion in finding the defendant in contempt, as the defendant's claim that a prior ruling precluded the court from finding him in contempt was conclusory and inadequately briefed, and his request for reconsideration of the judgment of contempt in light of his health and financial condition failed to challenge the basis for the finding of contempt.

The trial court did not abuse its discretion in awarding the plaintiff attorney's fees in connection with her motion for contempt, as the court was authorized to do so pursuant to statute (§ 46b-87), as well as in accordance with the parties' separation agreement.

Argued October 9—officially released December 24, 2024

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Hon. Barbara J. Quinn*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Parkinson, J.*, granted the plaintiff's motion for contempt, denied the defendant's motions for contempt and modification of alimony, and

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

Richard C. H. Marquette, for the appellant (defendant).

Tara C. Dugo, for the appellee (plaintiff).

Opinion

ALVORD, J. In this postjudgment dissolution matter, the defendant, Vincent Lenczewski, appeals from the judgment of the trial court resolving several motions filed by the defendant and the plaintiff, Jennifer Lenczewski. Specifically, the defendant claims on appeal that the court (1) abused its discretion in denying his motion for a reduction in his alimony obligation, (2) improperly denied his motion for contempt with respect to the plaintiff's claimed failure to comply with a provision of an arbitration award, (3) improperly found him in contempt, and (4) abused its discretion in awarding attorney's fees to the plaintiff. We affirm the judgment of the court.

The following facts and procedural history are relevant to our resolution of the claims on appeal. The court, *Hon. Barbara J. Quinn*, judge trial referee, dissolved the parties' marriage on August 4, 2015. The parties have four children. At the time of the dissolution, the parties' oldest child, Alexandra, was an adult. The parties' second child, Kevin, anticipated attending college, and the two youngest children, Matthew and Avery, were minors. The judgment of dissolution incorporated by reference the parties' separation agreement dated August 4, 2015 (separation agreement). The separation agreement provided for the postsecondary educational support of Kevin and stated that the court would retain jurisdiction with respect to the postsecondary educational support of Matthew and Avery. With

respect to alimony, the parties agreed that the defendant would pay the plaintiff $6000 every two weeks and 30 percent of any gross bonus received by him, terminating upon the death of either party, the plaintiff's remarriage, or August 20, 2031. The separation agreement required the parties to furnish each other with copies of their federal income tax returns on an annual basis within seven days of filing.

Following motions for contempt filed by both parties, on September 20, 2018, the court, *Ficeto*, *J.*, directed the parties to pursue binding arbitration.[1] The arbitrator issued an award dated April 8, 2020, and a corrected award on June 10, 2020 (collectively, arbitration award). Relevant to this appeal, the arbitration award contained an order that the terms set forth in the separation agreement with respect to the educational expenses of Kevin would apply to Matthew. Although both parties believed that they were bound by the terms of the arbitration award, neither party filed an application for an order confirming the award. See General Statutes § 52-417.[2]

Approximately one year after the issuance of the arbitration award, the parties each filed several motions. On May 17, 2021, the plaintiff filed four motions for

[1] Article VII of the separation agreement, titled Art, Collectibles and Other Personal Property, contains a provision obligating the parties to participate in binding arbitration if they were unable to resolve disputes under this section. The parties have not raised any claim on appeal relating to the scope of the arbitration provisions of the settlement agreement.

[2] General Statutes § 52-417 provides: "At any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the [S]uperior [C]ourt for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, to any judge thereof, for an order confirming the award. The court or judge shall grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in sections 52-418 and 52-419."

The April 8, 2020 arbitration award and the June 10, 2020 correction were placed in the court file.

contempt, one of which is at issue in this appeal. That motion alleged that the defendant had failed to provide copies of his tax returns in violation of the separation agreement. The plaintiff requested, among other relief, that the court order the defendant to pay the plaintiff's attorney's fees. On May 20, 2021, the defendant filed a motion for contempt, in which he alleged, inter alia, that the plaintiff had failed to pay money toward Matthew's educational expenses. On May 24, 2022, the defendant filed an amended motion for contempt. The parties also filed competing motions for modification of alimony.

The court, *Parkinson*, *J.*, held a hearing on the parties' motions over several days in November, 2022, and February, 2023. Both parties testified, and the court received documentary evidence. The parties also submitted posttrial memoranda.

On May 30, 2023, the court issued a memorandum of decision. The court found the defendant in contempt with respect to his failure to provide the plaintiff with copies of his tax returns within seven days of filing, as required by the separation agreement. The court ordered the defendant to pay attorney's fees in the amount of $5550 for the preparation and prosecution of the plaintiff's contempt motion. The court denied the defendant's motion for contempt with respect to the plaintiff's failure to pay for Matthew's educational expenses. The court also denied both parties' motions for modification of alimony. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim on appeal is that the court abused its discretion in denying his motion for a reduction in his alimony obligation. In support of his claim, the defendant argues that the plaintiff has experienced a decrease in her overall cost of living and liabilities,

she no longer has financial responsibilities related to the children's extracurricular activities or medical expenses, her work qualifications and earning capacity have increased, and the defendant has experienced "substantial and negative changes to his health status" requiring that he reduce the number of hours he works. The plaintiff responds that the defendant's claim is unreviewable because the grounds argued on appeal were not alleged in his motion to modify. We agree with the plaintiff.

The following additional procedural history is relevant to this claim. Paragraph 14.3 of the parties' separation agreement provides: "At any time on or after September 25, 2022, the [defendant] shall have the right to petition the court for a reduction in the amount of alimony based upon one or more of the following factors: 1. The gross income of the parties from his/her employment, with the [plaintiff's] safe harbor and the non-inclusion of on call income of the [defendant] pursuant to this Article. 2. The reasonable expenses of the parties; and/or 3. Whether any or all of the children are no longer eligible for educational support or are receiving educational support pursuant to [General Statutes] § 46b-56c, as amended.

"This provision shall not interfere with or preclude the right of either party to otherwise file a motion to modify alimony pursuant to [General Statutes] § 46b-86 . . . at any time."

On October 21, 2022, the defendant filed a motion for modification seeking a reduction in his alimony obligation. In his motion, he alleged that his expenses had increased substantially; he was working extraordinary hours to meet his expenses; Kevin was no longer eligible for educational support; Matthew continued to be eligible for educational support, which the plaintiff had failed to pay; and a motion was pending for an order

seeking educational support for Avery. In his posttrial memorandum of law filed April 6, 2023, the defendant reiterated the grounds alleged in his motion for modification and requested that the court reduce his alimony obligation from $6000 biweekly to $5000 biweekly.

In the court's memorandum of decision, it made factual findings with respect to both parties' motions for modification. With respect to the defendant, the court found that he "has colon cancer, which resulted in the removal of a significant portion of his colon and life-threatening complications including extensive blood clotting throughout his internal organs. [The defendant] was unable to work for several months in 2018. As recently as 2022, [the defendant] had internal bleeding in his esophagus and stomach. His condition is incurable. He will be taking medication for the rest of his life. Despite these health conditions, [the defendant] presently works up to eighty-four hours per week as an anesthesiologist." The defendant's income increased from $444,808 at the time of the parties' divorce to $863,227 in 2022, and his current expenses total $11,266 weekly, including the alimony payment of $3000 weekly. The defendant's expenses include financial support to the parties' adult son, Kevin; credit card debt; and monthly payments for three out of the four vehicles he owns, including a Maserati, Mercedes-Benz, Porsche, and BMW. He contributes $2400 biweekly to his retirement plans, the value of which totaled $576,324 in February, 2023.

With respect to the plaintiff, the court found that she has a bachelor's degree in business and a master's degree in early education. She was not working at the time of the parties' divorce and also was not working at the time of the hearing. The plaintiff worked for approximately two months, earning $18 per hour, at a sports and physical therapy office in 2021. She moved to Illinois in 2021, because she was displaced from her

lease and for a lower cost of living. She paid $2075 monthly for rent in Connecticut and now pays $1100 monthly in Illinois. The plaintiff's weekly expenses have decreased since the time of the divorce from $2509 to $2018. After paying her expenses, the court stated that the plaintiff is left with a weekly surplus of $596.

The court also made factual findings with respect to the plaintiff's health. "[The plaintiff] was diagnosed with ulcerative colitis when she was in her twenties. The symptoms, which have increased since divorce, include uncontrollable bowels, which can be triggered by stress. [The plaintiff] also suffers from diabetes, which was diagnosed in 2016, for which she was prescribed insulin and other medication. Some of the symptoms include blurry or double vision. [The plaintiff] also has a sixth nerve palsy in her eye, diagnosed in 2017, which is a degenerative disorder that causes weakness in the eye, hypertension, and debilitating anxiety and depression, which hinder her ability to function. [The plaintiff] has not applied for any employment recently. [The plaintiff] has many skills as evidenced by her resume. . . . [G]iven her extensive health concerns and little work experience, [however] it is highly unlikely that [the plaintiff] will ever work again."

The court then separately addressed each party's motion for modification. After denying the plaintiff's motion for modification, the court turned to the defendant's motion. It first rejected the defendant's argument that his alimony obligation should be reduced on the basis that he works an extraordinary number of hours and his expenses have increased. The court noted that the defendant had cited no authority for these reasons as a basis for a reduction in alimony. The court acknowledged the defendant's increase in hours as a healthcare provider during the COVID-19 pandemic and commended him for working lengthy hours, especially in light of his health concerns. The court, however, found

that his income had increased, not decreased, since the imposition of the alimony award. The court acknowledged the significant expenses related to educational support for the parties' children but noted that the obligation belongs to both parties. With respect to the defendant's increased expenses in the form of voluntary provision of financial support to Kevin, voluntary contributions to the defendant's retirement accounts, and maintenance of four motor vehicles, the court found that such expenses did not form a basis for the reduction of his alimony obligation. Accordingly, the court denied the defendant's motion for modification.

We first set forth our standard of review and applicable legal principles. "[W]e will not disturb the trial court's ruling on a motion for modification of alimony or child support unless the court has abused its discretion or reasonably could not conclude as it did, on the basis of the facts presented." (Internal quotation marks omitted.) *Mountain* v. *Mountain*, 189 Conn. App. 228, 233, 206 A.3d 802 (2019). "In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous." (Citation omitted; internal quotation marks omitted.) *Birkhold* v. *Birkhold*, 343 Conn. 786, 808–809, 276 A.3d 414 (2022).

As noted previously, the defendant argues that the plaintiff has experienced a decrease in her overall cost of living and liabilities, she no longer has financial responsibilities related to the children's extracurricular activities or medical expenses, her work qualifications and earning capacity have increased, and the defendant has experienced "substantial and negative changes to his health status" requiring that he reduce the number of hours he works. Although there was evidence presented

and the court did make factual findings related to certain of the circumstances that the defendant claims on appeal should have justified a downward modification, the court did so in connection with its denial of the plaintiff's upward motion for modification, not the defendant's motion.[3] Because the defendant did not allege those factual circumstances in his motion for modification and did not argue those circumstances in the portion of his posttrial brief addressed to his motion for an alimony modification, the court appropriately did not address those circumstances in adjudicating his motion.

Practice Book § 25-26 (e) provides in relevant part that "[e]ach motion for modification shall state the specific factual and legal basis for the claimed modification . . . ." Moreover, "[i]t is fundamental in our law that the right of a [party] to recover is limited to the allegations in his [pleading]. . . . Facts found but not averred

[3] We observe that the defendant's counsel, during the hearing, expressly stated that he sought to raise the health of the defendant in connection with the plaintiff's motion for modification, not the defendant's motion. The following colloquy occurred:

"The Court: Okay. And don't you on behalf of the [defendant], have a motion for reduction of alimony?

"[The Defendant's Counsel]: Yes, Your Honor. The reason for that is that there is a different section, under the—

"The Court: Oh, so that's not related to the health.

"[The Defendant's Counsel]: There's a different section, Your Honor, that relates to, in the divorce agreement on alimony, there's a right to file a motion for reduction on or after September 25, 2022.

"The Court: So, that's like automatic.

"[The Plaintiff's Counsel]: Right, it's unrelated to health, Your Honor."

In connection with the plaintiff's motion, the court found that, although the defendant's increase in salary constitutes a substantial change in circumstances, no modification was warranted because no " 'exceptional circumstances' " existed. The court found that the plaintiff had experienced a serious decline in her health, which would affect her ability to work in the future, but that no evidence was presented that her health issues would affect her financially, given that she also was not employed at the time of the divorce. The court also found that the plaintiff's expenses had decreased. Accordingly, the court denied the plaintiff's motion for an upward modification of the defendant's alimony obligation.

cannot be made the basis for a recovery. . . . Thus, it is clear that [t]he court is not permitted to decide issues outside of those raised in the pleadings." (Internal quotation marks omitted.) *Breiter* v. *Breiter*, 80 Conn. App. 332, 335, 835 A.2d 111 (2003).

This court previously has declined to address a claim that the court erred in rejecting a claim of a substantial change in circumstances where the party's motion for modification did not allege the factual circumstances that formed the basis for the party's claim on appeal. See *Mountain* v. *Mountain*, supra, 189 Conn. App. 233–34 (declining to address claim that court erred in rejecting plaintiff's claim of substantial change in circumstances based on decrease in income and increase in parenting time where motion to modify did not allege those bases); see also *Westfall* v. *Westfall*, 46 Conn. App. 182, 186, 698 A.2d 927 (1997) (court improperly modified order requiring defendant to maintain $100,000 life insurance policy because, although evidence was admitted in support of plaintiff's motion for contempt regarding defendant's failure to provide life insurance, neither party was aware that such evidence would be basis for modification of amount of life insurance).

Because the claims raised by the defendant on appeal do not relate to the bases he advanced in his motion to modify, and the court properly did not address them in ruling on his motion, they are not properly before us now.[4]

With respect to the claims the court did address—the extraordinary hours worked by the defendant and his claimed increase in expenses—the defendant does

[4] We note that the defendant is not precluded from filing a motion for modification on the basis of the deterioration in his health. See *Malpeso* v. *Malpeso*, 189 Conn. App. 486, 505–506, 207 A.3d 1085 (2019) (court did not abuse its discretion in finding that substantial change in circumstances occurred on basis of defendant's health after considering undisputed risk of developing future health problems).

not contend that any of the court's factual findings are clearly erroneous. Nor has he presented any basis to persuade us that the court could not reasonably conclude as it did. Accordingly, the court did not abuse its discretion in denying the defendant's motion for modification of his alimony obligation.

II

The defendant's second claim on appeal is that the court improperly denied his motion for contempt seeking enforcement of the arbitration award provision ordering the plaintiff to contribute to Matthew's postsecondary educational expenses. Specifically, he requests that this court reverse the trial court decision and "enforce only that sole and specific provision" of the arbitration award. (Emphasis omitted.) The plaintiff responds that any error was induced by the defendant, in that his position before the trial court was that the arbitration award was not an order of the court and could not form a basis for a finding of contempt or remedial orders. We agree with the plaintiff that any claimed error was induced by the defendant and, thus, his claim on appeal is unreviewable.

The following additional procedural history is relevant to this claim. In paragraph 5.6 of the parties' separation agreement, the parties agreed that "[t]he [plaintiff] shall pay 37.5% and the [defendant] 62.5% of the parties' son, Kevin's tuition, room and board and books for each of the four years of undergraduate college in an amount not to exceed [said costs at the] University of Connecticut at Storrs for a full time in-state student at the time Kevin matriculates. Said obligation of the parties shall cease when Kevin attains the age of 23 years. Said obligations may be modified in accordance with . . . General Statutes § 46b-56c. The court shall retain jurisdiction with respect to all post majority support obligations of the parties for their minor children, Matthew

and Avery, which shall be subject to the provisions of . . . § 46b-56c."

The arbitration award addressed postsecondary educational support orders and provided that the terms set forth in the separation agreement as relating to Kevin would apply to Matthew.[5]

In the defendant's May 24, 2022 amended motion for contempt, he alleged that the plaintiff had failed to pay her share, as set forth in the arbitration award, of Matthew's educational expenses, that the defendant had made the payments for her, and sought reimbursement of the amounts he paid. He requested that the court find the plaintiff in contempt and order the plaintiff to pay, within twenty-one days, the amount of the educational support obligation, which he had calculated to be $38,946.05. In the event that the plaintiff did not make such payment, the defendant requested that he be permitted to offset the amount against his alimony obligation.

On November 18, 2022, the court, *Parkinson*, *J.*, issued an order to the parties to brief certain issues, including whether the arbitration award became an order of the court, and, if not, what authority the plaintiff relies on for the terms of the arbitration award to form the basis of a motion for contempt.[6] In the plaintiff's January 10, 2023 memorandum of law, she argued that, although the arbitration award was not confirmed by the court and thus did not constitute an order of the court that could support a finding of contempt, the court had the authority to issue remedial orders with

[5] The arbitration award stated that the plaintiff's share of Matthew's educational expenses was $9527.25 for the 2018-2019 academic year and $5652 for the fall, 2019 semester.

[6] The plaintiff claimed contemptuous conduct on the part of the defendant related to the life insurance and personal property provisions of the arbitration award, in addition to the plaintiff's motion for contempt pertinent to this opinion. See part III of this opinion.

respect to the binding and enforceable arbitration award. In the defendant's response, filed January 31, 2023, he agreed with the plaintiff that the arbitration award could not support a finding of contempt, but disagreed with the plaintiff's position that the court had the authority to issue remedial orders based on a party's noncompliance with the arbitration award. Specifically, he argued that, "[w]hile the court has broad discretion to enter remedial orders, a pre-requisite for such an order still necessitates a finding that a party failed to comply with an existing order of the court." Accordingly, he argued that the court lacked authority "to enter remedial orders related to any alleged noncompliance" with the arbitration award.

In the defendant's updated proposed orders filed on April 6, 2023, he argued: "[T]he arbitration decisions . . . are not orders of the court and are not final, binding or enforceable by the court. Therefore, no orders of contempt or otherwise should be ordered by the court in favor of or against either party in this postjudgment matter with respect to the pending motions based upon said decisions of the arbitrator."[7]

In its memorandum of decision, the court denied the defendant's motion for contempt with respect to educational support for Matthew. The court adopted the defendant's position at trial with respect to the arbitration award, determining that the court lacked authority to enter remedial orders with respect to noncompliance with the arbitration award, on the basis

[7] In his proposed orders filed on April 6, 2023, the defendant proposed that the court order the plaintiff to "reimburse the [defendant] the amount of $38,946.05 within thirty (30) days after the entry of the court order, in accordance with the educational support order given to eldest son Kevin pursuant to paragraph 5.6 of the separation agreement. . . . If payment is made by the [plaintiff] to the [defendant] of the amount set forth above in full within the time frame set forth then there shall be no order of contempt of court against the [plaintiff]."

that it was not an order of the court and "noncompliance with the arbitration decision cannot be contempt of court."[8]

The following legal principles are applicable. "[T]he term induced error, or invited error, has been defined as [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the [allegedly] erroneous ruling. . . . It is well established that a party who induces an error cannot be heard to later complain about that error. . . . This principle bars appellate review of induced nonconstitutional error and induced constitutional error. . . . The invited error doctrine rests [on principles] of fairness, both to the trial court and to the opposing party. . . . [W]hether we call it induced error, encouraged error, waiver, or abandonment, the result—that the . . . claim is unreviewable—is the same." (Internal quotation marks omitted.) *Ciarleglio* v. *Martin*, 228 Conn. App. 241, 263 n.16, 325 A.3d 219 (2024).

We are persuaded that the doctrine of induced error is implicated in this case, in that the defendant took one legal position at trial and now takes a contradictory position on appeal. "[O]rdinarily appellate review is not

[8] With respect to its authority to enforce the dissolution judgment provision related to postsecondary educational support orders, the court noted that the defendant had not filed a motion seeking a postsecondary educational support order for Matthew. Additionally, the court found that "it was undisputed at the hearing that the [plaintiff] was . . . denied access to Matthew's academic records and the parent portal where she could obtain pertinent information." Thus, the court found noncompliance with § 46b-56c (f), which requires that in order to qualify for payments due under an educational support order, the child must "make available all academic records to both parents during the term of the order. . . ." Finally, the court found that it lacked authority to order payment for a fifth year of Matthew's college and that, to the extent the defendant sought an order for retroactive postsecondary educational support, such an order was not permissible. On appeal, the defendant does not raise any claims with respect to these findings of the court.

available to a party who follows one strategic path at trial and another on appeal, when the original strategy does not produce the desired result. . . . To allow the [party] to seek reversal now that his trial strategy has failed would amount to allowing him to induce potentially harmful error, and then ambush the [opposing party and the court] with that claim on appeal." (Internal quotation marks omitted.) *Nweeia* v. *Nweeia*, 142 Conn. App. 613, 620, 64 A.3d 1251 (2013). To permit the defendant to challenge the trial court's determination that it lacked authority to enter remedial orders with respect to noncompliance with the arbitration award after the defendant requested in posttrial briefing and proposed orders that the court so conclude "would amount to sanctioning a trial by ambuscade, which we will not do." *Buxenbaum* v. *Jones*, 189 Conn. App. 790, 811, 209 A.3d 664 (2019). We therefore decline to review the defendant's claim.

III

The defendant's next claim on appeal purports to challenge the court's judgment finding him in contempt. We reject his challenge.

The following additional procedural history is relevant. On May 17, 2021, the plaintiff filed a motion for contempt alleging that the defendant had failed to provide her with copies of his tax returns in violation of the provision of the separation agreement requiring each party to "furnish the other with a copy of his and her Federal Income Tax return on an annual basis within seven days of the filing of the same." In her posttrial brief, the plaintiff argued that the defendant's failure to provide his tax returns "was designed to deprive her the ability to seek an increase in alimony . . . ." The plaintiff argued that "[t]he defendant's secreting of his income information is particularly egregious considering the extent his income has increased

postdivorce," from $444,808 at the time of the divorce to $863,228 in 2022.

In its memorandum of decision, the court found the defendant in contempt for failing to provide the plaintiff with his tax returns within seven days of filing. The court first found that the order to exchange tax returns was contained in the separation agreement, which was incorporated into the dissolution judgment. The court found the provisions of the order clear and unambiguous. The court found that the defendant "admitted during the hearing that he understood this provision of the order and offered no excuse as to why he failed to comply other than alleging with no proof that [the plaintiff] is guilty of the same. Though such allegations of 'tit for tat' were raised during the hearing, [the defendant's] counsel offers no legal authority for why [the defendant] should not be found in contempt of court for failing to abide by the court's order."[9] On appeal, the defendant does not claim that the court erred in concluding that the order to exchange tax returns was clear and unambiguous, and he does not brief sufficiently a claim that

[9] During the hearing, the following colloquy occurred between the plaintiff's counsel and the defendant:

"Q. For any year since the date of divorce, you have not provided [the plaintiff] with a copy of your tax returns within seven days of filing, isn't that true?

"A. Up until 2018, [the plaintiff] and I did not exchange tax returns at all with each other, correct. . . .

"Q. Are you stating that in 2019, you provided [the plaintiff] with tax returns within seven days of your filing of same? Is that your testimony?

"A. I don't recall the date, but I did furnish . . . her the 2019 tax returns.

"Q. But you don't recall if it was within the seven days, is that correct?

"A. I don't recall the date. . . .

"Q. So, it's fair to say that you have not followed the court orders, as written in the agreement that you just read, since the date of divorce, isn't that correct?

"A. That's correct.

"Q. Okay. Do you believe you have an obligation to follow these court orders right now?

"A. Correct. I do."

the court abused its discretion in determining that his failure to comply with the order was wilful.[10] See *Birkhold* v. *Birkhold*, supra, 343 Conn. 811 ("It is the burden of the party seeking an order of contempt to prove, by clear and convincing evidence, both a clear and unambiguous directive to the alleged contemnor and the alleged contemnor's wilful noncompliance with that directive. . . . The question of whether the underlying order is clear and unambiguous is a legal inquiry subject to de novo review. . . . We review the trial court's determination that the violation was wilful under the abuse of discretion standard." (Citations omitted; internal quotation marks omitted.)). Instead, the defendant raises only two brief arguments in support of his request that this court "reconsider the trial court's judgment of contempt . . . ." First, he contends that, because Judge Ficeto did not award legal fees or find him in contempt, that "there was no reason for [Judge] Parkinson to retry this case, as it was already determined." Second, he requests this court to reconsider the judgment of contempt in light of "the totality of the circumstances regarding his precarious position including, but not limited to, his deteriorative health condition and financial restrictions with regards to alimony."

These contentions warrant little discussion. With respect to the defendant's conclusory assertion that an unidentified prior ruling by Judge Ficeto precluded the court in the present proceedings from finding him in contempt, the defendant provides no statements of the facts, citations to the record, or citation to relevant

[10] In one sentence of his brief, the defendant asserts that "[i]t was not the purpose of [the] defendant to infringe upon, and violate, a lawful order of the trial court." "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." (Internal quotation marks omitted.) *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022).

legal authority. Accordingly, the defendant's brief is inadequate for us to conduct any meaningful review of this assertion. See *C. B.* v. *S. B.*, 211 Conn. App. 628, 631, 273 A.3d 271 (2022). With respect to his request that we reconsider the judgment of contempt in light of his health and financial condition, he does not argue that such conditions prevented him from complying with the provision of the separation agreement but, rather, argues that "to impress upon him additional fees would thrust upon him a serious financial burden which is, to a great degree, the subject of this appeal." Because this argument, in essence, challenges the court's award of attorney's fees; see part IV of this opinion; rather than the finding of contempt, it does not present a basis for reversal of the judgment of contempt. Accordingly, we conclude that the court did not abuse its discretion in finding the defendant in contempt.

IV

The defendant's final claim on appeal is that the court abused its discretion in awarding the plaintiff attorney's fees in connection with her motion for contempt. We are not persuaded.

The following additional procedural history is relevant to this claim. In the plaintiff's motion for contempt with respect to the defendant's noncompliance with the separation agreement provision requiring that the parties exchange their tax returns, the plaintiff sought, in addition to other requested relief, her counsel fees in relation to the preparation and prosecution of the motion for contempt. As authority for the award of attorney's fees, the plaintiff relied on both General Statutes § 46b-87[11] and paragraph 18.2 of the separation

[11] General Statutes § 46b-87 provides in relevant part: "When any person is found in contempt of an order of the Superior Court . . . the court may award to the petitioner a reasonable attorney's fee . . . such sums to be paid by the person found in contempt . . . ."

agreement, which provides that "[e]ach party agrees to indemnify the prevailing party for all expenses, costs and attorneys' fees resulting from or made necessary by the bringing of any suit or other proceeding to enforce the carrying out by the other of any of the terms, covenants, and/or conditions of this Agreement, or to enforce any of the rights or to recover under any of the provisions of this Agreement. The amount of said attorney's fees shall be as determined by the court." In the plaintiff's posttrial briefing, she requested that the court, in addition to finding the defendant in contempt, order the defendant to pay the plaintiff counsel fees in the amount of $5500 for the preparation and prosecution of her contempt motion. In its memorandum of decision, the court granted the plaintiff's motion for contempt and ordered the defendant to pay "counsel fees in the amount of $5550 for the preparation and prosecution of the contempt motion, in accordance with paragraph 18.2 of the dissolution judgment." In his appellate brief, the defendant incorrectly refers to the standard related to an award of attorney's fees under General Statutes § 46b-62 and premises his argument on that improper standard. "Although the award of attorney's fees pursuant to § 46b-62 is appropriate when a complaining party has brought an unsuccessful contempt action, where contempt is established, the concomitant award of attorney's fees properly is awarded pursuant to § 46b-87 and is restricted to efforts related to the contempt action. . . . Unlike § 46b-62, § 46b-87 does not contain any requirement that the award of attorney's fees is to be determined with reference to the relative financial positions of the parties." (Citation omitted; internal quotation marks omitted.) *Esposito* v. *Esposito*, 71 Conn. App. 744, 749, 804 A.2d 846 (2002).

"The award of attorney's fees in contempt proceedings is within the discretion of the court. . . . In making its determination, the court is allowed to rely on

its familiarity with the complexity of the legal issues involved. Indeed, it is expected that the court will bring its experience and legal expertise to the determination of the reasonableness of attorney's fees. . . . [T]he award of attorney's fees pursuant to § 46b-87 is punitive, rather than compensatory . . . ."[12] (Internal quotation marks omitted.) *Allen* v. *Allen*, 134 Conn. App. 486, 503, 39 A.3d 1190 (2012); see also *L. W.* v. *M. W.*, 208 Conn. App. 497, 512, 266 A.3d 189 (2021) ("[b]ecause an award of attorney's fees in a contempt proceeding is punitive, not compensatory, knowledge of the prevailing party's exact legal expenses is not required for the trial court to properly determine the amount of an award").

In the present case, the court was statutorily authorized to award attorney's fees pursuant to § 46b-87, which provides that a trial court may exercise its discretion to award attorney's fees to the prevailing party in a contempt proceeding. Additionally, the court stated that its award was made in accordance with paragraph 18.2 of the separation agreement. The defendant has advanced no arguments from which we can conclude that the court abused its discretion in awarding attorney's fees.

The judgment is affirmed.

In this opinion the other judges concurred.

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[12] Without citation to any authority, the defendant asserts in passing that he was entitled to an evidentiary hearing on the issue of attorney's fees. We disagree that the court abused its discretion in awarding fees without holding an evidentiary hearing. See *Esposito* v. *Esposito*, supra, 71 Conn. App. 748 (court did not abuse its discretion in awarding attorney's fees in connection with contempt proceeding in absence of evidentiary hearing, where court was familiar with counsel's preparation and presentation of case).

BARBARA HEIBECK ET AL. *v.* MARTIN JOHN HEIBECK ET AL.

(AC 46570)

Elgo, Cradle and Prescott, Js.

Syllabus

The defendants appealed from the judgment of the Superior Court reversing a Probate Court decree that declared null and void a lease executed by the plaintiffs and the owner-lessor, G. The lease instrument, which was incorporated by reference in the will of G, was executed in 2016 and commenced on the date of G's death, which occurred in 2019. On appeal, the defendants claimed that the court improperly concluded that the lease was valid. *Held*:

The trial court properly concluded that the lease was valid, as the lease, which conferred rights in the plaintiffs prior to the death of G, was contractual rather than testamentary in nature and functioned more as a will substitute than a testamentary instrument.

Argued September 9—officially released December 24, 2024

Procedural History

Appeal from the decree of the Probate Court for the district of Norwalk-Wilton granting the motion of the named defendant et al. to invalidate a lease, brought to the Superior Court in the judicial district of Stamford-Norwalk, and tried to the court, *Hon. Charles T. Lee*, judge trial referee; judgment reversing the Probate Court's decree, from which the named defendant et al. appealed to this court. *Affirmed.*

Michael P. Kaelin, for the appellants (named defendant et al.).

Andrew B. Nevas, with whom, on the brief, was *Kristen G. Rossetti*, for the appellees (plaintiffs).

Opinion

ELGO, J. In this probate appeal, the defendants Martin John Heibeck, Thomas Edward Heibeck, Michael William Heibeck, and George Stephen Heibeck appeal

from the judgment of the Superior Court rendered in favor of the plaintiffs, Barbara Heibeck and Skylar Smith.[1] On appeal, the defendants claim that the court improperly deemed valid a commercial lease executed in 2016 whose lease term commenced upon the death of the owner-lessor in 2019. We affirm the judgment of the Superior Court.

The facts of this intrafamily dispute are not contested. At all relevant times, the family patriarch, George W. Heibeck (George), owned commercial real property known as 943 and 951 Danbury Road in Wilton (property). The property contains multiple buildings that house a gas station, a nail salon, a hair salon, and a well-known seasonal restaurant known as the Heibeck Food Stand (food stand) that the Heibeck family opened more than ninety years ago.[2]

As the court found in its memorandum of decision, George entered into a five year lease with an unrelated third party on September 11, 2012, to operate a nail salon in part of the log cabin on the property (nail salon lease). That lease obligated the lessee to pay utility costs and $2000 in monthly rent.[3]

On April 22, 2015, George entered into a lease with the plaintiffs for the food stand "and its adjacent exterior surroundings" on the property (food stand lease). The term of that lease was thirty-five years, concluding on

[1] Although Stephen B. Keough was also named as a defendant, all references herein to the defendants are to Martin John Heibeck, Thomas Edward Heibeck, Michael William Heibeck, and George Stephen Heibeck only. See footnote 6 of this opinion. For clarity, we refer to the parties individually by first name.

[2] In its memorandum of decision, the court found that the hair and nail salons are located in a building on the property known as the log cabin. For convenience, we employ that nomenclature in this opinion as well.

[3] In a June 6, 2022 affidavit submitted in opposition to the defendants' motion for summary judgment, Barbara averred that this nail salon establishment was "no longer operating" on the property. Skylar testified similarly at trial.

April 22, 2050, and provided for a possible extension for two additional terms of five years. The food stand lease obligated the plaintiffs to pay utility costs and $1500 in monthly rent. The food stand lease also included a right of first refusal, which granted the plaintiffs an option to purchase the leased premises in the event that George received a bona fide offer during the term of the lease.

On January 1, 2016, George entered into a ten year lease with Barbara to operate a hair salon in part of the log cabin (hair salon lease). That lease obligated Barbara to pay utility costs and $2000 in monthly rent. The hair salon lease provided for a possible extension for a term of ten years.

On or before June 21, 2016, George entered into a lease with the plaintiffs that pertained to the food stand, the log cabin, and appurtenant parking spaces on the property (99 year lease).[4] The term of that lease was ninety-nine years "commencing on the date of [George's] death." The 99 year lease expressly was subject to the three existing leases on the property—namely, the nail salon, hair salon and food stand leases. In addition, the 99 year lease obligated the plaintiffs to "pay all expenses of the demised premises," to "maintain the buildings and grounds so that they do not fall into disrepair," to "pay real estate taxes" on the leased premises, to pay the plaintiffs' "own utilities," and to "keep the premises insured against liability and fire and other forms of casualty." The 99 year lease further provided that the plaintiffs "may at any time sub-lease" the leased premises, may "mortgage [their] leasehold interest," and "may if they wish cancel or revise the

[4] Skylar was the only witness at trial. In its memorandum of decision, the court found that Skylar testified "without objection" that the third lease had been signed "on or before June 21, 2016." In her sworn affidavit submitted in opposition to the defendants' motion for summary judgment, Barbara likewise averred that the 99 year lease was executed on June 21, 2016.

[n]ail [s]alon lease and the [food stand lease] since [Barbara] is now both [l]essor and [l]essee."[5]

On June 21, 2016, George executed his last will and testament (will). Relevant to this appeal are two "specific legacies" set forth therein. Article VI, § 1, states in relevant part: "I give devise and bequeath to [Barbara] a ninety-nine (99) year [l]ease (which has already been signed but to be effective upon date of my death and recorded upon my death) on the building occupied by her hair salon, by a nail salon rented to a third party, and by the [food stand], and surrounding area all as described in said 99 year [l]ease which has been executed by myself, by my daughter [Barbara], and by my grandson [Skylar]. As set forth in said 99 year [l]ease, there are to be no rent payments but [the plaintiffs are] to pay all expenses related to the leased premises. She may continue to sub-lease to the tenant of the nail salon, as sub-landlord. She shall be in full control of the property [described in the 99 year lease]."

In article VI, § 2, of the will, George bequeathed the entirety of the property to the defendants—including the gas station, the food stand, and the log cabin—subject to the terms of the 99 year lease, stating in relevant part: "This entire gift of the entire [property] is . . . subject to [the 99 year lease] to [the plaintiffs], which lease become[s] effective upon the date of my death."

On January 14, 2019, George entered into a five year lease with a limited liability company formed by the defendants known as Heibeck Motors Sons, LLC, to operate a gas station on the property (gas station lease).

[5] A review of the leases in question, which were admitted into evidence, indicates that Barbara was not a party to the nail salon lease. Rather, she was the sole lessee in the hair salon lease. To the extent that this provision of the 99 year lease appears to contain a scrivener's error, we note that neither party has raised such a claim in these proceedings.

That lease obligated Heibeck Motors Sons, LLC, to pay utility costs and $1370 in monthly rent. The gas station lease provided for a possible extension of five years.

George died on February 26, 2019. On July 26, 2019, Barbara filed a petition to admit his will to probate with the Probate Court for the district of Norwalk-Wilton. In response, the defendants filed an objection to that petition and sought the appointment of a temporary administrator of George's estate. The Probate Court thereafter appointed Attorney Stephen B. Keough as temporary administrator of the estate.[6] On December 30, 2020, the plaintiffs paid one half of the real estate taxes on the property.

On March 23, 2021, the defendants filed a motion with the Probate Court to declare the 99 year lease null and void. The plaintiffs objected to that motion, and the Probate Court heard argument from the parties on May 24, 2021. On August 3, 2021, the Probate Court granted the defendants' motion and issued a decree in which it declared the 99 year lease invalid.

From that decree, the plaintiffs appealed to the Superior Court. In their complaint, the plaintiffs alleged, inter alia, that the 99 year lease "is a valid commercial lease, not a testamentary instrument . . . ." In their answer, the defendants denied that allegation and further alleged, as a special defense, that the plaintiffs had "defaulted in their obligations under the [99 year lease] by not paying their share of real estate taxes under the terms of the lease . . . ." The plaintiffs denied that special defense.

On April 22, 2022, the defendants filed a motion for summary judgment, claiming that they were entitled to

[6] Although Attorney Keough was named as a defendant in the plaintiffs' appeal to the Superior Court, he neither appeared nor participated in that proceeding. He likewise has not appeared or participated in this appeal.

judgment as a matter of law because "there is no genuine issue that the lessor did not own the real property at the time the lease was to become effective and was to commence . . . ." The plaintiffs filed an opposition to that motion, which was accompanied by the sworn affidavit of Barbara dated June 6, 2022. On October 12, 2022, the court denied the defendants' motion, concluding that genuine issues of material fact existed as to "whether the lease was binding when it was executed by the parties . . . ."

The court held a trial de novo on February 1, 2023, at which it admitted documentary evidence from the parties and heard testimony from Skylar. In its subsequent memorandum of decision, the court set forth detailed findings of fact and ultimately concluded that the 99 year lease was valid. The court also rejected the defendants' special defense. It therefore sustained the plaintiffs' appeal, reversed the decree of the Probate Court, and remanded the matter to that court for further proceedings. From that judgment, the defendants now appeal.

At the outset, we note what is not at issue in this appeal. The defendants do not challenge the factual findings of the Superior Court or its decision rejecting their special defense. They likewise do not dispute the court's determinations that George intended to make "his devise of the entire property to [the defendants] subject to the [99 year lease]" and that "[i]t was the intent of [George] that [the plaintiffs] would have the right to occupy and operate [the food stand] and that the businesses in the log cabin would be under [the plaintiffs'] control. . . . George wanted [the food stand] to continue under the management of [the plaintiffs] for a long time after his death, specifically, ninety-nine years."

The defendants' sole claim on appeal is that the court improperly concluded that the 99 year lease was valid

because an owner of real property does not have the legal authority to enter into a lease whose term commences upon the owner-lessor's death. We do not agree.

Our review of the defendants' claim is guided by certain well established precepts. "An appeal from a Probate Court to the Superior Court is not an ordinary civil action. . . . When entertaining an appeal from an order or decree of a Probate Court, the Superior Court takes the place of and sits as the court of probate. . . . In ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or common law jurisdiction, but of a Probate Court." (Citations omitted.) *Kerin* v. *Stangle*, 209 Conn. 260, 263–64, 550 A.2d 1069 (1988). In cases in which no record was made of the proceedings before the Probate Court, "the Superior Court [is] required to undertake a de novo review of the Probate Court's decision."[7] (Internal quotation marks omitted.) *Salce* v. *Cardello*, 348 Conn. 90, 104, 301 A.3d 1031 (2023); see also *Kerin* v. *Stangle*, supra, 264 (function of Superior Court in appeals from order or decree of Probate Court "is to take jurisdiction of the order or decree appealed from and to try that issue de novo"). The defendants' claim regarding the validity of a lease whose term commences upon the death of the owner-lessor presents a question of law over which our review is plenary. See *Salce* v. *Cardello*, supra, 104; see also *Hynes* v. *Jones*, 175 Conn. App. 80, 93, 167 A.3d 375 (2017), rev'd on other grounds, 331 Conn. 385, 204 A.3d 1128 (2019).

We begin by noting the anomalous scenario presented in this case, which involves both a written lease instrument executed by George and the plaintiffs, and a will that incorporates that lease instrument by reference. We therefore consider, as a threshold matter, whether

[7] The parties in the present case have stipulated that no record was made of the Probate Court proceedings.

the 99 year lease is contractual or testamentary in nature.[8]

As our Supreme Court has observed, "[a] lease is a contract." (Internal quotation marks omitted.) *David Caron Chrysler Motors, LLC* v. *Goodhall's, Inc.*, 304 Conn. 738, 749, 43 A.3d 164 (2012); see also *AGW Sono Partners, LLC* v. *Downtown Soho, LLC*, 343 Conn. 309, 342 n.29, 273 A.3d 186 (2022) (noting "the modern trend of treating real property leases as contractual in nature, rather than as assignments of property rights" (internal quotation marks omitted)); *Milford Paintball, LLC* v. *Wampus Milford Associates, LLC*, 117 Conn. App. 86, 89–91, 978 A.2d 118 (2009) (noting that "[a] lease is like any other contract" and concluding that lease in question was "binding and effective on the date on which the lease was executed," despite fact that its lease term commenced on future date (internal quotation marks omitted)). In the present case, the parties agree that the 99 year lease constitutes a bilateral contract between George and the plaintiffs.[9] It imposes specific obligations on the plaintiffs and contains a "default" provision, pursuant to which the lease may be cancelled in the event that the plaintiffs fail to satisfy those obligations.

In *Dutra* v. *Davis*, 70 R.I. 318, 323, 38 A.2d 471 (1944), the Supreme Court of Rhode Island confronted the question of "whether the instrument [at issue] is testamentary or contractual" in nature. In resolving that question, the court emphasized that "[t]he title, form and language of the instrument is not that of a will but rather

[8] As the parties acknowledged at oral argument before this court, Connecticut authority on the novel issue presented in this appeal is scant. Our inquiry, therefore, is aided by relevant authority from sibling jurisdictions and secondary sources.

[9] At oral argument before this court, the defendants' counsel remarked that "there is no disputing that the lease that is at issue here is a bilateral contract that [imposes] obligations from landlord to tenant and from tenant to landlord."

that of contract"; id.; and that "[t]he instrument contains no words that are usually employed in making a testamentary gift." Id., 323–24. The same is true with respect to the 99 year lease at issue here. Moreover, the fact that the 99 year lease and George's will were executed on the same date; see footnote 4 of this opinion; further indicates that the 99 year lease is not testamentary in nature. See *In re O'Connor's Estate*, 273 Pa. 391, 395, 117 A. 61 (1922) ("[w]here a decedent has done two acts, one of which is distinctively testamentary in form, and the other and later act is as distinctively nontestamentary in form, and is couched, with strict technical propriety, in the apt language of contract, there is no reason for holding the latter testamentary" (internal quotation marks omitted)); see also 1 W. Bowe & D. Parker, Page on the Law of Wills (Rev. Ed. 2003) § 6.17, p. 292 ("[e]xecuting an instrument, which is clearly a will, at the same time as the instrument in question, tends to show that the latter is not a will").

Although the term of the 99 year lease commences on the date of George's death, it nonetheless remains that "not every instrument which provides for performance at or after death is testamentary in character. If the instrument creates a right in the promisee before the death of the testator, it is a contract." *In re Howe's Estate*, 31 Cal. 2d 395, 398, 189 P.2d 5 (1948); accord *In re Lundgren's Estate*, 250 Iowa 1233, 1237, 98 N.W.2d 839 (1959) ("[a]n instrument by which the maker grants an estate or interest in praesenti, though possession and enjoyment are postponed until after his death, is not testamentary"); *In re Jacobson*, 256 Md. App. 369, 395, 286 A.3d 600 (2022) (testamentary instrument "creates no present interest in the testator's property"); *In re Galewitz' Estate*, 206 Misc. 218, 221, 132 N.Y.S.2d 297 (1954) ("Whether an instrument is a valid contract or is an attempted testamentary instrument depends upon the intention of the parties. The test in such case

is whether the contract confers a fixed right in the parties to it at the time it is made or whether it is to have no effect at all until the death of either."), aff'd, 285 App. Div. 947, 139 N.Y.S.2d 897 (1955); *In re Murphy's Estate*, 191 Wn. 180, 191, 71 P.2d 6 (1937) ("[v]iewing the provisions of the lease as a whole, we feel that this instrument conveyed some present interest"); 1 W. Bowe & D. Parker, supra, p. 290 ("[i]f the instrument creates a right in the promise before the death of the promisor, the instrument is a contract regardless of the date set for performance").

The 99 year lease creates such a right, providing in relevant part that the plaintiffs "may at any time sublease, assuming that the sub-lease does not violate any then existing leases upon the premises." The grant of a right to the plaintiffs to sublease their interest in the premises "at any time" stands in stark contrast to the rent provision of the 99 year lease, which states that "[t]here shall be no rent *during the term* of this [l]ease." (Emphasis added.) By its plain language, the 99 year lease conveyed a present right to the plaintiffs to sublease their future interest in the premises.[10] Had the parties intended to limit the right of the plaintiffs to sublease that interest *only* during the term of the lease, they could have so provided. See *Connecticut National Bank* v. *Rehab Associates*, 300 Conn. 314, 323, 12 A.3d 995 (2011) ("an examination of the contract as a whole reveals that where the parties intended to include limiting language, they did so"). Instead, the 99 year lease expressly authorized them to sublease that interest at any time.

In addition, the 99 year lease expressly grants the plaintiffs "permission to mortgage [their] leasehold

[10] As but one example, the plaintiffs could agree to sublease the nail salon in the log cabin on the property while continuing to operate the food stand and the hair salon themselves.

interest." Unlike the rent provision of the 99 year lease, that contractual right to mortgage the leasehold interest contains no limiting language whatsoever, which further suggests that the 99 year lease is contractual, rather than testamentary, in nature.

Revocability is another critical distinction between testamentary and contractual instruments. As the Supreme Court of Washington explained, "[t]he difference in effect between a contractual obligation and a testamentary disposition is that the former creates a present enforceable and binding right over which the promisor has no control without the consent of the promisee, while the latter operates prospectively, and not in praesenti, and is wholly ambulatory and subject to change at the testator's wish, until his death." *In re Lewis' Estate*, 2 Wn. 2d 458, 469, 98 P.2d 654 (1940). "[I]f the obligation prescribed by an instrument in the form of a written contract is revocable and the vesting of an interest or title thereunder is postponed until the death of the obligor, the instrument is testamentary in character and ineffective unless executed in the manner prescribed by statute for the execution of wills. On the other hand, a contract does not take on a testamentary character merely because its performance is postponed until after the death of the maker and devolves upon his representatives." *Duemer* v. *Duemer*, 86 Ohio App. 192, 202–203, 88 N.E.2d 603 (1949); see also *Connecticut Mutual Life Ins. Co.* v. *Burroughs*, 34 Conn. 305, 315 (1867) (life insurance policy was not testamentary instrument because it was contractual in nature and irrevocable); *In re Lundgren's Estate*, supra, 250 Iowa 1237 ("[A]n otherwise valid contract is not rendered testamentary by the fact it provides title to the property is to pass, or payment is to be made, at the maker's death. Such an instrument may be enforced as a contract according to its terms."); *Mertens* v. *Mertens*, 314 Mich. 651, 658, 23 N.W.2d 114 (1946) ("a testamentary

instrument is by its nature revocable"); *Chas. J. Smith Co.* v. *Anderson*, 84 N.J. Eq. 681, 686, 95 A. 358 (1915) ("[I]t cannot be logically reasoned that a contract to convey after death is obnoxious to, and in contravention of, our statute of wills. The covenant is in no sense testamentary. It is contractual and irrevocable, and not benefactory and ambulatory, which are distinguishing features of wills."); *In re Tunnell's Estate*, 325 Pa. 554, 560, 190 A. 906 (1937) ("[a] testamentary provision is ambulatory and may be revoked or changed by later testamentary provision"); *In re Estate of Silverman*, 579 S.W.3d 732, 736 (Tex. App. 2019) (written instrument "must be revocable during the maker's lifetime" to be testamentary in nature). The 99 year lease at issue here is neither ambulatory nor revocable by the owner-lessor. In light of the foregoing, we conclude that the 99 year lease is contractual, rather than testamentary, in nature.

Our determination that the 99 year lease is contractual, rather than testamentary, in nature is largely dispositive of the defendants' claim that an owner-lessor lacks legal authority to enter into a lease for real property whose term commences upon the owner-lessor's death. As one noted treatise observes, "[t]here are many examples, too numerous to cite, of contracts providing for performance at the death of one of the parties, or for the termination of performance at the other party's death, that have been upheld as valid contracts as distinguished from wills. A few examples [are] a contract for the sale of property on the death of the owner, or for the devise of property . . . ." 1 W. Bowe & D. Parker, supra, p. 292; see, e.g., *In re Lundgren's Estate*, supra, 250 Iowa 1236–39 (bilateral contract executed during testator's life to convey deed to real property was valid and was not part of testator's estate because "the contract is an absolute one to be performed at [her] death [and] is not ambulatory in character"); *Reece* v. *Reece*,

239 Md. 649, 661, 212 A.2d 468 (1965) ("a promise in a contractual instrument fixing the time for performance at or after death ordinarily will not impair the instrument's validity as a contract"); *In re Rundberg's Will*, 177 Misc. 43, 44, 29 N.Y.S.2d 375 (1941) ("It makes no difference in such circumstances that part of the reward [under the contract] is payable after death. The character of the promise is not changed by the time fixed for its performance." (Internal quotation marks omitted.)); *In re Herr's Estate*, 400 Pa. 90, 97, 161 A.2d 32 (1960) (written instrument that provided for devise of real property to nephew "upon the decease" of his aunt constituted valid contract, and property was not part of aunt's estate); *In re Murphy's Estate*, supra, 191 Wn. 188–99 (lease agreement providing that leased premises would become property of lessee at time of owner-lessor's death if lessee complied with lease obligations was valid contract and not testamentary disposition); *Harris* v. *Harris*, 130 W. Va. 100, 102, 43 S.E.2d 225 (1947) (contract entered into at time of marital dissolution providing that all of decedent's "property . . . shall be divided equally between [former wife] and their two children" at time of his death was not "a testamentary disposition of property" and precluded widow's claim to "dower in [his] real estate"). The defendants have provided this court with no authority to the contrary.[11]

[11] In their principal appellate brief, the defendants rely on *Wooden* v. *Perez*, 210 Conn. App. 303, 309, 269 A.3d 953 (2022), and *Silverstein* v. *Laschever*, 113 Conn. App. 404, 410, 970 A.2d 123 (2009), which both cite various cases for the unremarkable proposition that title to real estate immediately passes to heirs on the death of an owner of real property. *Wooden* and *Silverstein* are inapposite to the present case, as neither concerned the validity or efficacy of a contractual instrument executed prior to the death of the property owner. The issue in *Wooden* was whether an administrator of an estate lacked standing to pursue an adverse possession action on behalf of the estate with respect to property for which the estate had no interest due to an express devise in the decedent's will. See *Wooden* v. *Perez*, supra, 305–307. *Silverstein* involved the question of whether the Probate Court lacked authority in 2005 to order mortgages to be placed on property for

Moreover, it is well established that life estates in real property may be established by contractual agreement.[12] See *Spooner* v. *Phillips*, 62 Conn. 62, 70, 24 A. 524 (1892) ("[l]ife estates are more frequently created by will . . . and sometimes by contract"); *Irish Bend Farm, LLP* v. *Pinney*, Docket No. CV-11-4015325-S, 2011 WL 6945660, *5 (Conn. Super. November 17, 2011) ("a life estate may be established by written contract"); *In re Estate of Aryeh*, 190 N.E.3d 886, 899 (Ill. App. 2021) ("the parties executed a contract that created a life estate in one of the parties"); *Boulls* v. *Boulls*, 22 P.2d 465, 468 (Kan. 1933) ("[t]he contract evidenced an intention of the husband that the widow should have at his death a life estate of all the property possessed by him"); *Strasburg* v. *Clark*, 319 Md. 583, 591, 573 A.2d 1339 (1990) ("there was in effect between [the husband] and [the wife] at the time of [the wife's] death a contract which provided for a life estate for [the husband] in the [r]esidence"); *Swayne* v. *Lone Acre Oil Co.*, 98 Tex. 597, 606, 86 S.W. 740 (1905) ("[a]t common law there were two classes of life estates: [f]irst, conventional life estates, or those which were created by contract; and, second, those which came into existence by operation of law"). We perceive little meaningful distinction between an owner of real property contractually agreeing to provide a life estate in the property that commences upon the owner's death and an owner of real property contractually agreeing to a lease of the property that commences upon the owner's death. In both instances, the owner has utilized a nontestamentary instrument to circumscribe the testamentary beneficiary's interest in the property for a limited period of time.

which it had ordered a final distribution in 1994 following the decedent's death. See *Silverstein* v. *Laschever*, supra, 417.

[12] "A life estate is an interest in real property, the duration of which is limited by the life of some person. Such person may be the party creating the estate, the tenant himself, or some other person or persons." (Internal quotation marks omitted.) *Smith* v. *Planning & Zoning Board*, 3 Conn. App. 550, 553, 490 A.2d 539 (1985), aff'd, 203 Conn. 317, 524 A.2d 1128 (1987).

Because the 99 year lease is not testamentary in nature, it functions more as a will substitute than a testamentary instrument. See, e.g., *In re Verbeek's Estate*, 2 Wn. App. 144, 153, 467 P.2d 178 (1970) ("In a sense the [real estate] contract was a substitute for a will. However, an instrument may be a will substitute and still not be testamentary."). As this court has explained, "[a] will is a unique kind of transfer, with special rules associated with the proper execution and administration thereof." *Bezzini* v. *Dept. of Social Services*, 49 Conn. App. 432, 442, 715 A.2d 791 (1998). Wills become effective after the death of the testator. See *Sigal* v. *Hartford National Bank & Trust Co.*, 119 Conn. 570, 575, 177 A. 742 (1935); see also *Jacobs* v. *Button*, 79 Conn. 360, 362, 65 A. 150 (1906) ("[a] will is the legal declaration of intention as to the disposition of one's property after death"). At the same time, "Connecticut courts have long held that valuable interests which transfer upon the death of another can be executed in instruments other than wills. The classic example is that of a partnership contract providing for the passing of a partner's share to his spouse upon his death. . . . Such a transfer is considered 'nonprobate' because the interest transferred upon the transferor's death is not considered to be a part of the estate for the purposes of probate. Multiple types of nonprobate transfers exist, and are collectively referred to as 'will substitutes.' " (Citations omitted.) *Eberle* v. *Ohlheiser*, Superior Court, judicial district of Hartford, Docket No. CV-12-6029172 (September 27, 2012) (54 Conn. L. Rptr. 852, 855); see also *Bezzini* v. *Dept. of Social Services*, supra, 442–43 (revokable trust is "a will substitute" that is not testamentary in nature).

The Restatement (Third) of Property defines a will substitute as "an arrangement respecting property or contract rights that is established during the donor's

life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor's death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor." 2 Restatement (Third), Property, Wills and Other Donative Transfers § 7.1 (a), p. 69 (2001). The 99 year lease here meets that definition. Moreover, the Restatement recognizes that "[a]n arrangement respecting either property or contract rights can be used as a will substitute." Id., comment (a), p. 71. As it explains, a will substitute is not tantamount to a will because "[a] will transfers ownership of probate property at death. . . . Property subject to a will substitute is not probate property at death because it is then treated as no longer owned by the donor. . . . [A] will substitute transfers ownership during life—it effects a *present* transfer of a *nonpossessory future* interest or contract right, the time of possession or enjoyment being postponed until the donor's death. . . . [A] contract right can be conferred on another even though the contract right is a right to possession or enjoyment of money or other property some time in the future and is subject to a power or other conditions that might not be permanently resolved until the contract right becomes enforceable." (Citations omitted; emphasis in original.) Id., p. 70.

Although George also executed a valid will, that fact has little bearing on whether the 99 year lease operates as a will substitute. As the Appellate Court of Illinois aptly observed, "[a] will and a will substitute may coexist." *Handelsman* v. *Handelsman*, 366 Ill. App. 3d 1122, 1130, 852 N.E.2d 862 (2006). In that case, the plaintiff argued that the agreement in question was "not a 'will substitute,' because [the decedent] executed a valid will." Id. The court rejected that contention, noting that the agreement satisfied the definition of a will substitute

set forth in § 7.1 of the Restatement (Third) of Property "whether or not [he] also executed a will." Id. The court further opined that "to hold that the existence of [the] will means that the [agreement] is not a will substitute would exalt form over substance." Id. We concur with that assessment.

To be sure, George incorporated the 99 year lease by reference in his will. Neither party challenges the propriety thereof in this appeal. See, e.g., *Waterbury National Bank* v. *Waterbury National Bank*, 162 Conn. 129, 139, 291 A.2d 737 (1972) (will incorporated irrevocable trust agreement by reference); *Hechtman* v. *Savitsky*, 62 Conn. App. 654, 661–62, 772 A.2d 673 (2001) (will incorporated antenuptial agreement by reference); *Batterton* v. *United States*, 406 F.2d 247, 249–50 (5th Cir. 1968) (noting "the overwhelming majority rule in the United States that, under proper circumstances a will may incorporate clearly identified existing writings as a part of [a] will"), cert. denied, 395 U.S. 934, 89 S. Ct. 1995, 23 L. Ed. 2d 448 (1969); 1 Restatement (Third), Property, Wills and Other Donative Transfers § 3.6, p. 234 (1998) ("[a] writing that is not valid as a will but is in existence when a will is executed may be incorporated by reference into the will if the will manifests an intent to incorporate the writing and the writing to be incorporated is identified with reasonable certainty"). The fact that the 99 year lease is incorporated by reference into George's will demonstrates that it was executed *prior* to the execution of that will, a distinction noted by the court in its memorandum of decision denying the defendants' motion for summary judgment. See 1 Restatement (Third), supra, § 3.6, comment (b), p. 235 ("[i]f the will refers to a writing as existing when the will was executed, a writing that fits the will's description but is undated is presumed to have been in existence when the will was executed"); see also *In re Ruth Easton Fund*, 680 N.W.2d 541, 547–48 (Minn.

App. 2004) (concluding, in case involving written agreement that was incorporated by reference into will, that "the agreement is presumed to have been in existence when the will was executed" because they "were executed on the same day"). Indeed, the will here states that the 99 year lease "has already been signed" and "has been executed by [George] and [the plaintiffs]."

Incorporating a written agreement into a will serves to memorialize the existence of nontestamentary instruments and aids in ascertaining the testator's intent. See *Waterbury National Bank* v. *Waterbury National Bank*, supra, 162 Conn. 139–41; *Hechtman* v. *Savitsky*, supra, 62 Conn. App. 662; 1 Restatement (Third), supra, § 3.6, comment (h), p. 236. At the same time, the validity and efficacy of such nontestamentary instruments is unaltered by their incorporation into a valid will. The 99 year lease was executed in 2016 and became operative irrespective of whether George prepared a will or died intestate. The contractual rights memorialized therein—including the right to sublease the premises at any time and to mortgage the leasehold interest—passed to the plaintiffs by virtue of that irrevocable nontestamentary instrument, not George's will. For that reason, the bequest of the "entire" property to the defendants in article VI, § 2, of the will would be subject to the 99 year lease *even if* the will contained no reference to that lease.

Lastly, to the extent that any question exists as to the proper interpretation of the bequest of the property to the defendants, we note that there is no dispute as to the testator's intent. As the court found in its memorandum of decision, George intended to make his devise of the entire property to the defendants subject to the 99 year lease. The defendants do not argue otherwise in this appeal. Rather, they submit that it is inherently inequitable to permit George to bind them as property owners to a lease for which they had no opportunity

to agree. Yet the same could be said of the food stand lease, which too was executed prior to George's death and binds the defendants as successor lessors until April 22, 2050. Moreover, that contention rings hollow in light the defendants' concession at oral argument that, had the term of the 99 year lease commenced *prior* to George's death, they would not be maintaining the present appeal. The scope of the bequest to the defendants remained at all times the prerogative of George, who plainly intended to subject that gift to the 99 year lease. As with any other inherited property, such as silver or china; see *Burnham* v. *Hayford*, 141 Conn. 96, 98, 104 A.2d 217 (1954); the defendants remain free to dispose of the property in the future.

In sum, we conclude that the 99 year lease is contractual, rather than testamentary, in nature and conferred rights in the plaintiffs prior to the death of the owner-lessor. For that reason, the court properly concluded that the 99 year lease was valid despite the fact that its lease term commenced upon George's death.

The judgment is affirmed.

In this opinion the other judges concurred.

VINCENT P. LAROBINA *v.* ALTICE MEDIA SOLUTIONS, LLC
(AC 46539)

Elgo, Moll and Pellegrino, Js.

Syllabus

The plaintiff consumer appealed from the trial court's judgment for the defendant Internet and telephone service provider holding, inter alia, that the arbitration provision in the parties' agreement may be enforced by the defendant against the plaintiff. The plaintiff claimed, inter alia, that the court incorrectly concluded that his request for a declaratory judgment seeking to invalidate the "infinite arbitration clause" of the arbitration provision was nonjusticiable. *Held*:

Although the trial court properly concluded that the plaintiff's request for a declaratory judgment seeking to invalidate the infinite arbitration clause of the arbitration provision was nonjusticiable, the court should have dismissed, rather than denied, that claim because justiciability implicates the court's subject matter jurisdiction.

The trial court did not improperly conclude that there was neither fraud nor an absence of mutual assent with regard to the formation of the parties' agreement, as the plaintiff had notice of the arbitration provision in the agreement and a duty to read the agreement, which he did not do.

The trial court properly concluded that the arbitration provision was not procedurally unconscionable as applied to the underlying service dispute because the plaintiff presented no evidence of overreaching by the defendant, and he retained the ability not to accept or to terminate the agreement if the terms and conditions, including the arbitration provision, were unacceptable to him.

The trial court properly concluded that the arbitration provision was not substantively unconscionable, as the plaintiff was notified of the existence of the terms and conditions, the arbitration provision was not unreasonably favorable to the defendant, and it contained an opt-out provision and a severability clause.

Argued September 16—officially released December 24, 2024

Procedural History

Action seeking, inter alia, a declaratory judgment that the arbitration clause in a contract between the parties was illegal, invalid and unenforceable, and other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Edward T. Krumeich II*, judge trial referee; judgment for the defendant, from which the plaintiff appealed to this court. *Improper form of judgment*; *reversed in part*; *judgment directed.*

Vincent P. Larobina, self-represented, the appellant (plaintiff).

Thomas P. Lambert, with whom, on the brief, was *Matthias J. Sportini*, for the appellee (defendant).

Opinion

MOLL, J. The self-represented plaintiff, Vincent P. Larobina, appeals from the judgment of the trial court,

rendered after a bench trial, in favor of the defendant, Altice Media Solutions, LLC. On appeal, the plaintiff claims that the court incorrectly concluded that (1) his request for a declaratory judgment—to the extent it sought to invalidate the arbitration provision incorporated into his services agreement with the defendant on the basis that it contained an improper, so-called "infinite arbitration clause"—was nonjusticiable, (2) the services agreement was lawfully formed, and (3) insofar as the arbitration provision applied to the parties' underlying telephone service dispute, the provision was not unconscionable.[1] We disagree and, accordingly, affirm in part the judgment of the trial court; we reverse in part the judgment to correct its form.

The following facts, as set forth by the trial court or as are undisputed in the record, and procedural history are relevant to our resolution of this appeal. On April 9, 2021, the plaintiff accepted a promotional offer for Internet and telephone services from the defendant. The services agreement entered into by the parties contains an arbitration provision that was set forth in the general terms and conditions of service incorporated into the agreement (arbitration provision). The arbitration provision provides in relevant part: "Any and all disputes arising between [the plaintiff] and [the defendant], including its respective parents, subsidiaries, affiliates, officers, directors, employees, agents, predecessors, and successors, shall be resolved by binding arbitration on an individual basis in accordance with this arbitration provision. *This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to*: [c]laims arising out of or relating to any aspect of the relationship between [the parties], whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory; [c]laims that arose

[1] We address the plaintiff's claims in a different order than they are set forth in his principal appellate brief.

before this or any prior [a]greement; and [*c*]*laims that may arise after the termination of this* [*a*]*greement*." (Emphasis added.) The emphasized language reflects a so-called infinite arbitration clause.

"On April 23, 2021, the Internet service was installed, but the [landline] telephone service failed to function properly because the plaintiff could not receive incoming telephone calls. This problem persisted until October, 2021." As alleged by the plaintiff, "[f]rom April, 2021, through August, 2021, despite repeated demand, [the defendant] failed, neglected or refused to install operational telephone service to the plaintiff's residence. Nevertheless, [the defendant] deducted a monthly telephone charge from the plaintiff's credit card for the months of nonservice" (telephone service dispute).

In July, 2021, the plaintiff commenced a prior action against the defendant "seeking to compel [the defendant] to install the contracted telephone service . . . ." See *Larobina* v. *Altice Media Solutions, LLC*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-21-6053004-S (first action). Shortly thereafter, on November 9, 2021, the defendant filed a motion to stay the proceedings in the first action and to compel arbitration pursuant to the arbitration provision. On November 19, 2021, the plaintiff withdrew the first action while the defendant's motion to stay and to compel arbitration was pending.

On November 15, 2021, shortly before withdrawing the first action, the plaintiff commenced against the defendant the present action, which is the subject of this appeal.[2] In his three count second amended complaint

[2] On December 14, 2021, the defendant moved to stay the proceedings in the present action and to compel arbitration pursuant to the arbitration provision. On December 22, 2021, the plaintiff filed an objection. On January 24, 2022, the trial court, *Hon. Kenneth B. Povodator*, judge trial referee, denied the motion.

dated March 17, 2022 (operative complaint), the plaintiff sought a declaratory ruling that the arbitration provision was illegal, invalid, and unenforceable because it was procedurally and substantively unconscionable (count one). The plaintiff also sought a declaratory ruling that his claim pursuant to the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., as asserted in the first action, was not arbitrable (count two). Lastly, the plaintiff sought a declaratory ruling that the substance of the arbitration provision and the defendant's manner of delivery thereof to Connecticut consumers violated CUTPA (count three). On January 18, 2023, the defendant filed an answer denying the material allegations of the plaintiff's operative complaint.

On March 1, 2023, the matter was tried to the court, *Hon. Edward T. Krumeich II*, judge trial referee.[3] The court admitted into evidence several exhibits in full and heard testimony from the plaintiff and a corporate designee of the defendant. On May 4, 2023, the court issued a memorandum of decision denying the plaintiff's requests for declaratory relief in count one, holding that "the arbitration [provision] may be enforced by [the defendant] against [the plaintiff] . . . ."[4] Specifically, the court concluded that the plaintiff was on notice of the arbitration provision and assented to its

[3] On March 17, 2022, the plaintiff moved for summary judgment as to count one. On June 1, 2022, the defendant filed an objection. On December 22, 2022, the court, *Hon. Kenneth B. Povodator*, judge trial referee, denied the motion.

In addition, on April 18, 2022, the defendant filed a motion to dismiss count three and its corresponding demand for relief. On May 18, 2022, the plaintiff filed an objection. On August 31, 2022, the court, treating the defendant's motion as a motion to strike, granted in part the motion and struck the demand for injunctive relief sought in connection with count three.

[4] Additionally, in a footnote, the court denied the plaintiff's requests for declaratory relief in counts two and three, concluding that the plaintiff's CUTPA claims were arbitrable. The plaintiff does not challenge those particular conclusions on appeal.

terms when he agreed to accept the defendant's services and that "[t]here was no evidence of coercion, fraud or mistake . . . ."

Second, the court concluded that the arbitration provision, as applied to the telephone service dispute, was neither procedurally nor substantively unconscionable. In support of its conclusion that the arbitration provision was not procedurally unconscionable, the court found that, notwithstanding that the arbitration provision was a "classic contract of adhesion," the "plaintiff retained the ability to not accept or to terminate the order [for telephone services] if the disclosed terms were unacceptable" and the "arbitration [provision] should not have been a surprise." In support of its conclusion that the arbitration provision was not substantively unconscionable, the court found that "[t]he arbitration provision is mutual, and the terms are standard, not one-sided, and are amenable to an expeditious, nonjudicial, alternate resolution of the matters in dispute." In this connection, the court also noted the fact that there was a thirty day opt-out provision and a severability clause.

Lastly, the court addressed the plaintiff's claim challenging the arbitration provision's inclusion of "an 'infinite arbitration clause' condemned by various judges and legal scholars because its scope exceed[ed] the agreement in which it is contained . . . ." The court noted that the plaintiff was seeking "a declaration that the 'infinite arbitration clause' in the general terms and conditions could never be enforced because it [was], by its terms, overbroad and, if enforced, literally . . . would apply to disputes that have no connection with his [services] agreement with [the defendant] or with those persons and entities with whom he dealt in connection with his subscription." The court determined that this particular request for declaratory relief was nonjusticiable, stating that "[t]he court will not render

an advisory opinion on hypothetical situations where the 'infinite arbitration clause' might not be enforced and to issues on which the plaintiff would lack standing. There is an actual dispute between the parties that is justiciable concerning the offer accepted by the plaintiff and the services provided to the plaintiff pursuant to the service[s] [agreement] that incorporated the arbitration [provision]. The only question on which this court may render a declaratory judgment is whether the present dispute between the parties may be arbitrated pursuant to the arbitration [provision] in the general terms and conditions, which the court answers affirmatively in denying the plaintiff's request for a declaration [that] the arbitration [provision] is unenforceable against him." This appeal followed. Additional facts and procedural history will be provided as necessary.

I

We construe the plaintiff's principal claim on appeal to be that the trial court improperly concluded that his request for a declaratory judgment seeking to invalidate the infinite arbitration clause of the arbitration provision was nonjusticiable. In connection with this claim, the plaintiff contends that "an active justiciable dispute" arose as soon as the defendant disagreed with the plaintiff's assertion that the arbitration provision was "illegal and against public policy." We disagree.

The following legal principles and standard of review govern our resolution of this claim. "The [declaratory judgment] procedure has the distinct advantage of affording to the court in granting any relief consequential to its determination of rights the opportunity of tailoring that relief to the particular circumstances. . . . A declaratory judgment action is not, however, a procedural panacea for use on all occasions, but, rather, is limited to solving justiciable controversies. . . . A court will not resolve a claimed controversy on the

merits unless it is satisfied that the controversy is justiciable. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . As we have recognized, justiciability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter. . . . Finally, because an issue regarding justiciability raises a question of law, our appellate review is plenary."[5] (Citations omitted; internal quotation marks omitted.) *Shenkman-Tyler* v. *Central Mutual Ins. Co.*, 126 Conn. App. 733, 738–39, 12 A.3d 613 (2011); see also Practice Book § 17-55.

"In light of the rationale of the ripeness requirement, to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . we must be satisfied that the case before the court does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire." (Citation omitted; internal quotation marks omitted.) *Milford Power Co., LLC* v. *Alstom Power, Inc.*, 263 Conn. 616, 626, 822 A.2d 196 (2003).

Additionally, "[i]t is a basic principle of our law . . . that the plaintiffs must have standing in order for a court to have jurisdiction to render a declaratory judgment. . . . Standing is established by showing that the party claiming it is authorized by statute to bring suit

[5] "A case that is nonjusticiable must be dismissed for lack of subject matter jurisdiction." (Internal quotation marks omitted.) *Francis* v. *Board of Pardons & Paroles*, 338 Conn. 347, 358, 258 A.3d 71 (2021).

or is classically aggrieved. . . . The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . The determination of aggrievement presents a question of fact for the trial court and a plaintiff has the burden of proving that fact. . . . The conclusions reached by the trial court cannot be disturbed on appeal unless the subordinate facts do not support them. . . . Where a plaintiff lacks standing to sue, the court is without subject matter jurisdiction." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Steeneck* v. *University of Bridgeport*, 235 Conn. 572, 578–80, 668 A.2d 688 (1995).

"In deciding whether the plaintiff's complaint presents a justiciable claim, we make no determination regarding [the complaint's] merits. Rather, we consider only whether the matter in controversy [is] capable of being adjudicated by judicial power according to the aforestated well established principles." (Internal quotation marks omitted.) *Schoenhorn* v. *Moss*, 347 Conn. 501, 508, 298 A.3d 236 (2023).

In the present action, the plaintiff seeks a declaratory ruling that if, in the future, he suffers harm at the hands of the defendant that has no nexus with the Internet and telephone services provided by the defendant, the arbitration provision is unenforceable as to any resulting claim. The fundamental flaw with the plaintiff's request for declaratory relief in this regard, however, is that it hinges entirely on "a hypothetical injury or a claim contingent upon some event that has not

and indeed may never transpire." *Milford Power Co., LLC* v. *Alstom Power, Inc.*, supra, 263 Conn. 626. A ruling on such request would result in a judgment that is purely advisory in nature. See *Village Mortgage Co.* v. *Garbus*, 201 Conn. App. 845, 851, 244 A.3d 952 (2020) ("the declaratory judgment procedure may not be utilized merely to secure advice on the law" (internal quotation marks omitted)). Simply put, because the plaintiff has not alleged harm caused by the defendant other than that underlying the telephone service dispute, his request for a declaratory judgment seeking to invalidate the infinite arbitration clause, which by its terms does not apply to the telephone service dispute, is not justiciable.

The plaintiff claims that a dispute between the parties as to the validity of the infinite arbitration clause renders this claim justiciable. The plaintiff's argument is untenable, however, because it ignores the justiciability requirements discussed previously in this opinion, as well as the related doctrines of standing and ripeness, which require actual aggrievement of the complaining party. See *Steeneck* v. *University of Bridgeport*, supra, 235 Conn. 578–80 (discussing standing); see also *Milford Power Co., LLC* v. *Alstom Power, Inc.*, supra, 263 Conn. 626 (discussing ripeness).

In sum, the court properly concluded that the plaintiff's request for declaratory relief regarding the enforceability of the infinite arbitration clause was nonjusticiable. Nevertheless, because justiciability implicates the court's subject matter jurisdiction, the court should have dismissed, as opposed to have denied, this claim (i.e., that portion of count one). See *Francis* v. *Board of Pardons & Paroles*, 338 Conn. 347, 358, 258 A.3d 71 (2021).

II

The plaintiff also claims that the court erred in concluding that the parties' services agreement incorporating the arbitration provision was lawfully formed. Specifically, the plaintiff contends that the services agreement is not enforceable because of fraud and a lack of mutual assent. We disagree.

"The existence of a contract is a question of fact to be determined by the trier on the basis of all of the evidence. . . . On appeal, our review is limited to a determination of whether the trier's findings are clearly erroneous. . . . This involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Internal quotation marks omitted.) *MD Drilling & Blasting, Inc.* v. *MLS Construction, LLC*, 93 Conn. App. 451, 454, 889 A.2d 850 (2006).

"In order to form a binding and enforceable contract, there must exist an offer and an acceptance based on a mutual understanding by the parties. . . . The mutual understanding must manifest itself by a mutual assent between the parties. . . . In other words, [i]n order for an enforceable contract to exist, the court must find that the parties' minds had truly met. . . . If there has been a misunderstanding between the parties, or a misapprehension by one or both so that their minds have never met, no contract has been entered into by them and the court will not make for them a contract which they themselves did not make. . . . Meeting of the

minds is defined as mutual agreement and assent of two parties to contract to substance and terms. It is an agreement reached by the parties to a contract and expressed therein, or as the equivalent of mutual assent or mutual obligation." (Internal quotation marks omitted.) *Krasko* v. *Konkos*, 224 Conn. App. 589, 605, 314 A.3d 34 (2024).

"The general rule is that where a person [who is] of mature years and who can read and write, signs or accepts a formal written contract affecting his pecuniary interests, it is [that person's] duty to read it and notice of its contents will be imputed to [that person] if [that person] negligently fails to do so. . . . This rule is qualified by the intervention of fraud, artifice or mistake not due to negligence. . . . The rule applies only if nothing has been said or done to mislead the person sought to be charged or to put a [person] of reasonable business prudence off . . . guard in the matter." (Citation omitted; internal quotation marks omitted.) *Abele Tractor & Equipment Co.* v. *Sono Stone & Gravel, LLC*, 151 Conn. App. 486, 506, 95 A.3d 1184 (2014). "A fraudulent representation in law is one that is knowingly untrue, or made without belief in its truth, or recklessly made and for the purpose of inducing action upon it." (Internal quotation marks omitted.) *Smith* v. *Frank*, 165 Conn. 200, 202, 332 A.2d 76 (1973).

In the present action, the court determined that "[t]here was no evidence of coercion, fraud or mistake here. The plaintiff was repeatedly presented with written notice of the general terms and conditions that applied to the services provided to him by [the defendant], which he refused to read. The order pages on the website related to the offer the plaintiff accepted indicated that by accepting the services, the plaintiff was also accepting the terms of service. The plaintiff assented to these terms when he accepted the offer online. No written signature or checked box was

required to accept the terms of service online. . . . Where the parties execute a contract which refers to another instrument in such a manner to establish that they intended to make the terms and conditions of that other instrument a part of their understanding, the two may be interpreted together as the agreement of the parties. . . . Here, the general terms and conditions were linked by hyperlink to the page in which the plaintiff accepted the services offered, they were available for review before acceptance of the service[s] and installation, and he was bound by the disclosed terms under which the offer was made and the services provided.

"No facts have been presented that suggest fraud, artifice, mistake, or coercion that could be attributed to [the defendant]. The plaintiff assumed, because there was no annual contract and he was billed monthly, no additional terms applied, despite repeated written and verbal reminders there were additional terms and conditions to the services ordered by the plaintiff. It was unreasonable for the plaintiff to assume no additional terms and conditions applied; his failure to use available means to discover the general terms and conditions is inexcusable. Knowledge of the general terms and conditions are properly imputed to the plaintiff, including the arbitration [provision], upon his acceptance of the written offer." (Citations omitted; footnote omitted; internal quotation marks omitted.) In a footnote, the court further stated that "[t]he plaintiff argues that he was misled into believing that there was no contract by the promotional material's statement that there was 'no annual contract.' That statement was true; there was no annual contract and either party could terminate the month-to-month agreement for services at any time."

In arguing that the court's factual findings regarding fraud and mutual assent were erroneous, the plaintiff

maintains that (1) the defendant represented that (a) there was "no annual contract" involved and (b) the contract offered by the defendant was for telephone service, and (2) the defendant falsely made those representations because of the inclusion of the arbitration provision, which was "infinite" in nature and extended to matters beyond Internet and telephone services. These assertions are unavailing, however, in light of the court's findings, as supported by the record, that the plaintiff had notice of the arbitration provision. Specifically, the court found that the plaintiff was notified, in person, of the existence of the general terms and conditions, which contained the arbitration provision, during an installation appointment and that the plaintiff agreed to continue with the installation and contracting for services despite that notice. The testimony of the plaintiff supported this finding, as he stated that he was presented with the hyperlink to the general terms and conditions of his services agreement with the defendant, which contained the arbitration provision, in various email communications from the defendant before the telephone service was installed. The record also contains documentary evidence of such warnings and disclaimers regarding the general terms and conditions. Moreover, the plaintiff testified that, despite the notices provided by the defendant, he did not read the warnings and did not follow the hyperlink that would have led him to the terms and conditions because he "believe[d] this wasn't germane to [him] . . . ." Thus, the record supports the court's determination that there was no fraud or mistake during the formation of the contract, and, therefore, the plaintiff had a duty to read the contract. See *Phoenix Leasing, Inc.* v. *Kosinski*, 47 Conn. App. 650, 654–55, 707 A.2d 314 (1998) ("There was no evidence of coercion, fraud or mistake. Thus, the [contracting party] had a duty to read the [contract] and cannot now plead his self-induced ignorance of its contents.").

In sum, we reject the plaintiff's claims that the court improperly concluded that there was neither fraud nor an absence of mutual assent vis-à-vis the formation of the parties' services agreement.

III

The plaintiff also claims that the trial court improperly held that the arbitration provision was neither procedurally nor substantively unconscionable. We conclude that the court properly determined that the arbitration provision, as applied to the plaintiff's underlying telephone service dispute with the defendant, was not procedurally or substantively unconscionable.[6]

We begin by setting forth the applicable standard of review and relevant legal principles. "It is well established that [t]he question of unconscionability is a matter of law to be decided by the court based on all the facts and circumstances of the case. . . . Thus, our review on appeal is unlimited by the clearly erroneous [or abuse of discretion] standard. . . . This means that the ultimate determination of whether a transaction is unconscionable is a question of law, not a question of fact, and that the trial court's determination on that issue is subject to a plenary review on appeal. . . . It also means, however, that the factual findings of the trial court that underlie that determination are entitled

[6] The plaintiff takes the position on appeal that the telephone service dispute is not the subject of this appeal and that he is contending that the infinite arbitration clause renders the arbitration provision, as a whole, unenforceable. The operative complaint requested in relevant part "[a] declaratory judgment that [the defendant's] arbitration clause is procedurally and/or substantively unconscionable, unlawful, unenforceable and/or otherwise void *in connection with the plaintiff's underlying dispute with* [*the defendant*]." (Emphasis added.) Thus, the court properly construed the plaintiff's claims to encompass a challenge to the arbitrability of the underlying telephone service dispute in the present action. Moreover, we conclude that the plaintiff's claim of unconscionability on appeal encompasses the arbitration provision as applied to the underlying telephone service dispute.

to the same deference on appeal that other factual findings command. Thus, those findings must stand unless they are clearly erroneous. . . .

"The classic definition of an unconscionable contract is one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other. . . . The doctrine of unconscionability, as a defense to contract enforcement, generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party . . . ." (Citations omitted; internal quotation marks omitted.) *R. F. Daddario & Sons, Inc.* v. *Shelansky*, 123 Conn. App. 725, 740–41, 3 A.3d 957 (2010). "In practice, we have come to divide this definition into two aspects of unconscionability, one procedural and the other substantive, the first intended to prevent unfair surprise and the other intended to prevent oppression." *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, 247 Conn. 342, 349, 721 A.2d 1187 (1998).

A

The plaintiff first contends that the arbitration provision was procedurally unconscionable because it is a contract of adhesion, which, in some jurisdictions, constitutes procedural unconscionability. In connection with his first claim, the plaintiff also argues that the defendant "wilfully deceives consumers by soliciting business by proclaiming in banner print 'no annual contracts' " while also imposing the arbitration provision in the general terms and conditions. Lastly, the plaintiff contends that the opt-out provision in the arbitration provision was "inherently confusing and is intended to cause confusion." The defendant argues that the court

properly concluded that the arbitration provision was not procedurally unconscionable, as the plaintiff presented no evidence of overreaching by the defendant. We agree with the defendant.

Procedural unconscionability may be found "where bargaining or contractual improprieties were committed . . . ." *Rockstone Capital, LLC* v. *Caldwell*, 206 Conn. App. 801, 813, 261 A.3d 1171, cert. denied, 339 Conn. 914, 262 A.3d 136 (2021); see also *Emeritus Senior Living* v. *Lepore*, 183 Conn. App. 23, 29, 191 A.3d 212 (2018) (reversing trial court's finding that agreement was procedurally unconscionable because contracting party was provided "reasonable notice" and evidence did not reveal that contracting party "had no meaningful choice whether to select the plaintiff as the provider" of services); *Shoreline Communications, Inc.* v. *Norwich Taxi, LLC*, 70 Conn. App. 60, 70, 797 A.2d 1165 (2002) ("we know of no case . . . in which a party may invoke unconscionability without a showing of some kind of relevant misconduct by the party seeking enforcement of a contract"). Additionally, we note that principles of unconscionability do not negate "the duty of a contracting party to read the terms of an agreement or else be deemed to have notice of the terms." *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, supra, 247 Conn. 351–52; see also *Rockstone Capital, LLC* v. *Caldwell*, supra, 812 ("a contracting party's negligent failure to read and understand an agreement has consistently been rejected as an unconscionability defense to contract enforcement").

In the present case, the plaintiff retained the ability not to accept or to terminate the agreement for telephone service if the general terms and conditions, including the arbitration provision, were unacceptable to him. Moreover, there was no unfair surprise about the existence of the arbitration provision, as the court found that the "plaintiff was on notice that the Internet

[and telephone] services agreement was subject to the terms and conditions that were available for his review and that by accepting the services offered he was agreeing to the general terms and conditions." See *Smith* v. *Mitsubishi Motors Credit of America, Inc.*, supra, 247 Conn. 349. The court explicitly found that the plaintiff "was repeatedly notified there were conditions that applied to his service[s] arrangement with [the defendant] and he was provided the hyperlinks necessary to access the general terms and conditions, including the arbitration [provision], but he failed to read the notices or follow the hyperlinks." The promotional materials the plaintiff received, which induced him to contract for telephone service with the defendant, all described the terms of the offer and explicitly warned that "[o]ther terms and conditions apply . . . ." Similar language appeared in the plaintiff's order confirmation for enrolling in autopay.

The plaintiff did not present any evidence of "bargaining or contractual improprieties"; *Rockstone Capital, LLC* v. *Caldwell*, supra, 206 Conn. App. 813; or "misconduct"; *Shoreline Communications, Inc.* v. *Norwich Taxi, LLC*, supra, 70 Conn. App. 70; nor did he present evidence that he "had no meaningful choice whether to select the [defendant] as the provider" of telephone service. *Emeritus Senior Living* v. *Lepore*, supra, 183 Conn. App. 29. Although the plaintiff testified that he chose not to read the general terms and conditions, which contained the arbitration provision, a "negligent failure to read and understand [the] agreement has consistently been rejected as an unconscionability defense to contract enforcement." *Rockstone Capital, LLC* v. *Caldwell*, supra, 812.

In sum, we conclude that the court properly determined that the arbitration provision was not procedurally unconscionable as applied to the underlying telephone service dispute.

B

The plaintiff next contends that the arbitration provision was substantively unconscionable because it "completely favors [the defendant] . . . ." In connection with this claim, the plaintiff asserts that the arbitration provision (1) transcends the contract, (2) violates public policy, (3) contains illusory terms, (4) contains one-sided provisions, (5) gives the defendant the power to create the rules of arbitration, (6) includes waivers as to jury trials, class actions, and private attorney general actions, (7) covers a "constellation of nonparty beneficiaries, unconnected to the contracted telecommunication services," and (8) is ambiguous. The defendant argues that the arbitration provision was not substantively unconscionable because (1) the plaintiff was notified of the existence of the terms and conditions, (2) the arbitration provision was "not unfair so as to make it substantively unconscionable," and (3) the court can sever portions of the agreement that are deemed to be unconscionable. We agree with the defendant.

Substantive unconscionability is slightly different from procedural unconscionability, as it "focuses on the content of the contract . . . . That is, whether the contract terms . . . are unreasonably favorable to the other party . . . . In general, the basic test is whether, in the light of the general . . . background and the . . . needs of the particular . . . case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." (Citations omitted; internal quotation marks omitted.) *Velasco* v. *Commissioner of Correction*, 214 Conn. App. 831, 842, 282 A.3d 517, cert. denied, 345 Conn. 960, 285 A.3d 52 (2022).

In the present case, the arbitration provision is not "so one-sided as to be unconscionable under the circumstances existing at the time of the making of the

contract," nor is the provision "unreasonably favorable" to the defendant; (internal quotation marks omitted) id.; because, as noted by the court, "[t]he arbitration provision is mutual" and both sides are bound to arbitrate any covered disputes between the parties. Moreover, in concluding that the provision was not substantively unconscionable, the court correctly considered the opt-out provision, which permitted a new subscriber an opportunity to opt out of the arbitration agreement within thirty days from the effective date of the agreement.[7] The court also properly considered the severability clause, which provides in relevant part: "If any other portion of this arbitration provision is determined to be unenforceable, then the remainder of this arbitration provision shall be given full force and effect." These two provisions further bolster our conclusion that the agreement was not so one-sided as to be unconscionable, nor unreasonably favorable to the defendant, because (1) the plaintiff had the power to opt out of the agreement within thirty days and (2) in the event that any portions are determined to be unconscionable, the court can sever such portions from the remainder of the agreement.

In sum, we conclude that the court properly determined that the arbitration provision was not substantively unconscionable as applied to the underlying telephone service dispute.

The form of the judgment with respect to the plaintiff's claim for a declaratory ruling pertaining to the

[7] The plaintiff claims that the opt-out provision is confusing and illusory. We disagree, as the plain language of the provision indicates that a subscriber has thirty days to opt out of the arbitration provision. The opt-out provision also gives clear instructions to the subscriber on how to opt out of the arbitration provision, which could be done via email or mail to the defendant. Moreover, despite the plaintiff's claim that the opt-out provision was "concealed," the plaintiff could have discovered the opt-out provision, which is written in capital and bold letters, if he had clicked on the hyperlink to the general terms and conditions.

infinite arbitration clause is improper, the judgment is reversed only as to that claim and the case is remanded with direction to render judgment dismissing that claim; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

COLCHESTER ESTATE VENTURES, LLC *v.* PETER MADDEN (AC 46972)

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

Syllabus

The defendant tenant appealed from the trial court's denial of his motion to restore to the docket the summary process action filed against him and then subsequently withdrawn by the plaintiff landlord. He claimed that the court abused its discretion in denying his motion because he had acquired a vested right to litigate various allegations of malfeasance by the plaintiff. *Held*:

The trial court did not abuse its discretion in denying the defendant's motion to restore the action to the docket, as the only outstanding filing by the defendant on the docket at the time the plaintiff withdrew the action was the defendant's motion to dismiss and for summary judgment, which was purely defensive in character and which did not request affirmative relief or other redress, and, thus, the court lacked the authority to restore the case to the docket when the defendant, following the plaintiff's withdrawal, sought to revive the case to litigate requests for relief he had not made while the case was pending.

Argued October 17—officially released December 24, 2024

Procedural History

Summary process action, brought to the Superior Court in the judicial district of New London, Housing Session at Norwich, where the case was withdrawn; thereafter, the court, *Hon. Francis J. Foley III*, judge trial referee, denied the defendant's motion to restore the case to the docket, and the defendant appealed to this court. *Affirmed.*

Peter Madden, self-represented, the appellant (defendant).

Gary J. Greene, for the appellee (plaintiff).

Opinion

PER CURIAM. The self-represented defendant, Peter Madden, appeals from the trial court's denial of his motion to restore to the docket (motion to restore) the summary process action filed against him by the plaintiff, Colchester Estate Ventures, LLC. On appeal, the defendant claims that the court abused its discretion in denying his motion to restore because he had acquired a vested right to litigate various allegations of malfeasance by the plaintiff. We affirm the judgment of the court.

The following procedural history is relevant to this appeal. On January 20, 2023, the plaintiff served a notice to quit possession on the defendant for nonpayment of rent for his apartment in Colchester. The plaintiff commenced a summary process action against the defendant on February 1, 2023. On February 15, 2023, the defendant filed a combined motion to dismiss and for summary judgment, accompanied by an affidavit, various other exhibits, and a supporting memorandum of law. In support of his motion, the defendant argued that the notice to quit and the complaint were jurisdictionally defective and that the plaintiff's attempt to evict him was retaliatory. He sought judgment in his favor and dismissal of the action.

The plaintiff filed its opposition to the defendant's motion on June 21, 2023. On July 5, 2023, the defendant moved for an extension of time to file his reply to the plaintiff's opposition. The court, *Hon. Francis J. Foley III*, judge trial referee, granted that motion on July 6, 2023, and ordered that "[t]he reply may be filed on the date set for trial." On July 19, 2023, prior to trial and

before the defendant had filed his reply, the plaintiff withdrew the summary process action.[1]

On July 28, 2023, the defendant filed a motion to "open" the withdrawal (motion to open), accompanied by a supporting memorandum and exhibits, in which he alleged that the plaintiff, its managing agent, and its attorneys had perpetrated a "fraud on the court" in the defendant's case and other cases by, inter alia, filing perjured affidavits, fraudulent motions, and bad faith complaints. The exhibits submitted in support of the motion to open included motions and submissions that the defendant had not filed with the trial court prior to the plaintiff's withdrawal, including the defendant's reply to the plaintiff's opposition to his motion to dismiss; a motion "to change the order of the trial, for a stay of plaintiff's affirmative case, and separate trials"; and a motion to "dismiss, for summary judgment, contempt and sanctions" that sought various sanctions against the plaintiff. In his motion to open, the defendant averred that he had intended to serve and file these various papers on the trial date of the summary process action, but that he had been "preempted by the plaintiff's withdrawal."

The court denied the defendant's motion to open on August 15, 2023, on the ground that a motion to open was not the proper procedural vehicle to restore a case to the docket. Thereafter, on September 11, 2023, the defendant filed the motion to restore, which incorporated by reference the motion to open and its supporting exhibits. The court denied this motion on September 14, 2023, stating in relevant part: "At no time [prior to trial] did the defendant file any pleadings seeking

[1] Although the plaintiff's withdrawal form does not state a reason for the withdrawal, the plaintiff represents in its appellee's brief that it withdrew the summary process action because, "[u]pon review of the file and the pleadings in preparation [for] trial," it concluded that "certain deficiencies did in fact exist."

affirmative relief. He now seeks to have this case restored to the docket to seek orders and relief that were never sought while the case was pending. The motion to restore is denied." This appeal followed.[2]

The defendant claims that the court erred in denying his motion to restore because he had a vested right to litigate the allegations of malfeasance made in that motion and the supporting attachments. Relying heavily on this court's decision in *Palumbo* v. *Barbadimos*, 163 Conn. App. 100, 134 A.3d 696 (2016), he argues that the plaintiff's withdrawal was an improper tactical maneuver designed to avoid an unfavorable ruling on his allegations of wrongdoing and request for sanctions, and that the court should have restored the case in order to afford him a speedy resolution of his claims. We disagree.

The following legal principles and standards of review govern our resolution of the defendant's claim. General Statutes § 52-80 provides in relevant part that a plaintiff "may withdraw any action so returned to and entered in the docket of any court, before the commencement of a hearing on the merits thereof. . . ." "The right of a plaintiff to withdraw his action before a hearing on the merits, as allowed by . . . § 52-80, is absolute and unconditional." (Internal quotation marks

[2] While this appeal was pending, the plaintiff filed a new summary process action against the defendant for nonpayment of rent. See *Colchester Estate Ventures, LLC* v. *Madden*, Superior Court, judicial district of New London at Norwich, Docket No. CV-24-6109938-S. In connection with the present appeal, the defendant filed a motion requesting that we take judicial notice of this new action, which we granted on October 15, 2024. On October 31, 2024, following oral argument before this court in the present case, the trial court dismissed the new summary process action, finding that the plaintiff had submitted "knowingly false or intentionally misleading" affidavits pursuant to the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020), and that the plaintiff had failed to provide the defendant with thirty days' notice to vacate, as required under the CARES Act.

omitted.) *Travelers Property Casualty Co. of America* v. *Twine*, 120 Conn. App. 823, 826–27, 993 A.2d 470 (2010). "Under [the] law, the effect of a withdrawal, so far as the pendency of the action is concerned, is strictly analogous to that presented after the rendition of a final judgment or the erasure of the case from the docket. . . . The court unless [the action] is restored to the docket cannot proceed with it further . . . ." (Internal quotation marks omitted.) *Doe* v. *Bemer*, 215 Conn. App. 504, 513–14, 283 A.3d 1074 (2022).

A plaintiff's broad authority pursuant to § 52-80 to unilaterally withdraw an action, however, "does not automatically extend to the plaintiff the additional right to commence an essentially identical action following that withdrawal if the primary purpose for doing so is to undermine an order of the court rendered in the prior litigation or if the withdrawal and subsequent refiling implicates a substantial right that vested in another party to the litigation and that likely will be jeopardized should the plaintiff proceed with the new action. . . . In either instance, if seasonably requested by the defendant or other third party, the court should exercise its discretion to restore the original action to the docket." (Citation omitted; footnote omitted.) *Palumbo* v. *Barbadimos*, supra, 163 Conn. App. 115–16. "[A] 'vested right' in this context simply refers to a right acquired and presently held by a party to the withdrawn action that would be injuriously affected as a result of the withdrawal." Id., 113 n.13.

Practice Book § 10-55 provides in relevant part that the plaintiff's withdrawal of an action after the defendant has filed a counterclaim "shall not impair the right of the defendant to prosecute such counterclaim as fully as if said action had not been withdrawn . . . ." Therefore, when a defendant has a pending counterclaim at the time of the plaintiff's withdrawal, that counterclaim survives the withdrawal as a matter of law,

and if that counterclaim is wrongly stricken from the docket along with the plaintiff's action, the court has the authority to restore the case to the docket to permit the defendant to prosecute that counterclaim. See *Sovereign Bank* v. *Harrison*, 184 Conn. App. 436, 443, 194 A.3d 1284 (2018). A counterclaim "is a cause of action . . . on which the defendant might have secured affirmative relief had he sued the plaintiff in a separate action." (Internal quotation marks omitted.) *Historic District Commission* v. *Sciame*, 152 Conn. App. 161, 176, 99 A.3d 207, cert. denied, 314 Conn. 933, 102 A.3d 84 (2014).

In *Sovereign Bank* v. *Harrison*, supra, 184 Conn. App. 444–47, however, this court clarified that when a defendant's pleading filed prior to the plaintiff's withdrawal seeks *no* affirmative relief or redress, but simply asserts a special defense, that pleading does not survive the withdrawal. In such a circumstance, the court lacks the authority to restore a case to the docket to permit the defendant to seek relief that he was not seeking at the time of the withdrawal. See id., 443 ("it would be anomalous to conclude that the court has the authority to restore a counterclaim to the docket where the defendant had not effectively pleaded a counterclaim").

"This court has stated previously that [t]he question of whether a case should be restored to the docket is one of judicial discretion . . . therefore, we review a court's denial of a motion to restore a case to the docket for abuse of that discretion." (Footnote omitted; internal quotation marks omitted.) *Doe* v. *Bemer*, supra, 215 Conn. App. 512–13. To the extent that the defendant's claim involves a question as to the proper interpretation of pleadings, however, our review is plenary. *Sovereign Bank* v. *Harrison*, supra, 184 Conn. App. 442. Likewise, "[a]ny determination regarding the scope of a court's . . . authority to act presents a question of law over which our review is plenary." *Tarro* v. *Mastriani*

Realty, LLC, 142 Conn. App. 419, 431, 69 A.3d 956, cert. denied, 309 Conn. 912, 69 A.3d 308, and cert. denied, 309 Conn. 912, 69 A.3d 309 (2013).

We conclude, on the basis of our review of the record in this case, that the court did not abuse its discretion in denying the defendant's motion to restore. At the time the plaintiff withdrew this action, the only outstanding filing by the defendant on the docket was the defendant's motion to dismiss and for summary judgment, which had not yet been fully briefed. This motion was purely defensive in character. In it, the defendant sought only dismissal of the action and summary judgment in his favor on the grounds that the notice to quit and the complaint were jurisdictionally defective and the proceeding retaliatory.[3] The defendant made no request for affirmative relief or other redress, nor did he allege any facts from which the court reasonably could have inferred that he was entitled to such relief. Given this court's holding in *Harrison*, the court lacked the authority to restore the case to the docket when the defendant, following the plaintiff's withdrawal, sought

[3] We recognize that, unlike the defendant in *Harrison*—who only asserted a special defense—the defendant in this case both asserted a special defense (retaliatory eviction) *and* challenged the court's subject matter jurisdiction. This distinction, however, does not change our conclusion. This court's holding in *Harrison*—that the court lacks the authority to restore a case to the docket to prosecute a claim for affirmative relief when no such claim is pending as of the plaintiff's withdrawal; see *Sovereign Bank* v. *Harrison*, supra, 184 Conn. App. 447; requires a court to assess whether or not any defense allegations pending at the time of withdrawal represent a claim for affirmative relief or redress. If they do not, then the mere fact that they are made in a different form from the defense at issue in *Harrison* does not save them from being erased from the docket when the plaintiff withdraws the case or mean that the court is authorized to subsequently restore the case to the docket so that the defendant may prosecute new claims for affirmative relief. See id., 446, 447 (explaining that court lacked authority to restore case to docket because "[n]othing in [the defendant's] allegation can reasonably be interpreted as a claim of entitlement to affirmative relief" and "the defendant would not be entitled to any affirmative relief under this allegation").

to revive the case to litigate requests for relief he had not made while the case was pending. Moreover, because the court lacked this authority, we cannot say that the defendant had any "vested right" to prosecute his claims in the context of this case.[4]

The judgment is affirmed.

CHRISTOPHER BURGOS *v.* COMMISSIONER OF CORRECTION (AC 46538)

Elgo, Moll and Pellegrino, Js.

Syllabus

The petitioner, who had been convicted of sexual assault in the first degree, risk of injury to a child, aggravated sexual assault of a minor and attempt to escape from custody, appealed, on the granting of certification, from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner claimed that the court improperly concluded that he failed to establish that his criminal trial counsel rendered ineffective assistance by stipulating to the petitioner's competence to stand trial. *Held*:

Even assuming, without deciding, that it was deficient performance for the petitioner's criminal trial counsel to stipulate to the petitioner's competency under the circumstances presented by this case, the habeas court properly concluded that the petitioner failed to prove that he had been prejudiced thereby.

Argued September 16—officially released December 24, 2024

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[4] After he filed his principal appellate brief, the defendant filed several notices of supplemental authority with this court pursuant to Practice Book § 67-10. In his notices, he cites several cases from this court and our Supreme Court for the proposition that he has a "vested right" to mandatory attorney's fees under General Statutes § 42-150bb. We disagree. First, the defendant never filed a motion for attorney's fees pursuant to Practice Book § 11-21 and, thus, has not availed himself of the appropriate vehicle for requesting such fees under § 42-150bb. See *Traystman, Coric & Keramidas, P.C.* v. *Daigle*, 282 Conn. 418, 432, 922 A.2d 1056 (2007). Second, and more fundamentally, the defendant has represented himself since the inception of this case and, therefore, is not entitled to attorney's fees. See *Dunn* v. *Peter L. Leepson, P.C.*, 79 Conn. App. 366, 372, 830 A.2d 325, cert. denied, 266 Conn. 923, 835 A.2d 472 (2003).

Procedural History

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

Mary Boehlert, assigned counsel, for the appellant (petitioner).

Alexander A. Kambanis, deputy assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, Christopher Burgos, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly concluded that he failed to establish that his criminal trial counsel rendered ineffective assistance by stipulating to the petitioner's competency to stand trial. We disagree and, accordingly, affirm the judgment of the habeas court.

As the court noted in its memorandum of decision, the petitioner "was convicted by a jury in the judicial district of Hartford of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), one count of aggravated sexual assault of a minor in violation of General Statutes § 53a-70c (a) (1), and, in a separate information, one count of attempt to escape from custody in violation of General Statutes §§ 53a-49 (a) (2) and 53a-171 (a) (1). At trial, he was represented by

Attorney William O'Connor. The trial court . . . sentenced [the petitioner] to a total effective sentence of fifty years [of] incarceration followed by five years [of] special parole."

On direct appeal to this court, the petitioner raised several claims regarding his competency and the process by which he was found competent to stand trial, including, inter alia, that "the trial court erred in not sua sponte ordering pretrial and posttrial competency hearings and canvassing him on his purported right to testify at those hearings . . . ."[1] *State* v. *Burgos*, 170 Conn. App. 501, 505, 155 A.3d 246, cert. denied, 325 Conn. 907, 156 A.3d 538 (2017). In deciding those claims, this court set forth the following relevant facts. "On September 1, 2011, the [petitioner] was arraigned and appointed counsel from the public defender's office. During arraignment, [O'Connor] noted that the [petitioner] was a 'client' of a mental health facility and that '[h]e appears to have been steady with his treatment there.' The court, *Newson*, *J.*, stated that 'mental health attention should be noted on the [mittimus].' During the [petitioner's] first six court appearances, between September 1, 2011 and December 12, 2011, his courtroom behavior was unremarkable.

"On January 17, 2012, the [petitioner] was unable to be transported to court because 'while in the custody of [the Department of Correction (DOC)] he covered himself in feces and refused to be transported.' [O'Connor] moved for a competency examination pursuant to

[1] The petitioner also claimed that the court (1) committed plain error by permitting defense counsel to waive the reconsideration of competency hearing because General Statutes § 54-56d (k) allows only the defendant to waive such a hearing; (2) violated his due process rights and committed plain error by not ordering, sua sponte, an evidentiary hearing to evaluate his competency; and (3) violated his due process rights and committed plain error by failing to order a retrospective competency hearing in light of his posttrial conduct. See *State* v. *Burgos*, 170 Conn. App. 501, 512–13, 155 A.3d 246, cert. denied, 325 Conn. 907, 156 A.3d 538 (2017).

General Statutes § 54-56d, and the court granted the motion and issued an order for a competency examination.[2] On March 28, 2012, the Department of Mental Health and Addiction Services, Office of Forensic Evaluations, submitted a competency report, in which the clinical team unanimously concluded that, while the [petitioner] was presently not competent to stand trial, there was a substantial probability that he could be restored to competency within the statutory time frame. On March 29, 2012, the court held a competency hearing, at which the court agreed with the clinical team's assessment, ordered that the [petitioner] receive treatment in an inpatient setting, and continued the case until May 31, 2012.

"On May 25, 2012, Dr. Mark S. Cotterell, a forensic psychiatrist, submitted a second competency report to the court, in which he concluded that the [petitioner] had not yet been restored to competency but was still capable of restoration within the statutory time frame. Cotterell's report acknowledged that the [petitioner] had a history of mental health treatment and engaging in behaviors indicative of mental illness. However, Cotterell also observed that 'there appears to be a volitional component to [the petitioner's] presentation. It appears that he knows more than he is willing to admit.' On May

[2] General Statutes § 54-56d provides in relevant part: "(b) A defendant is presumed to be competent. The burden of proving that the defendant is not competent by a preponderance of the evidence and the burden of going forward with the evidence are on the party raising the issue. The burden of going forward with the evidence shall be on the state if the court raises the issue. . . .

"(c) If, at any time during a criminal proceeding, it appears that the defendant is not competent, counsel for the defendant or for the state, or the court, on its own motion, may request an examination to determine the defendant's competency.

* * *

"(e) . . . A defendant and the defendant's counsel may waive the court hearing only if the examiners, in the written report, determine without qualification that the defendant is competent. . . ."

31, 2012, the court held a competency reconsideration hearing at which it concluded that the [petitioner] was not competent but was restorable to competency and ordered the [petitioner] to continue to receive treatment in an inpatient setting. See General Statutes § 54-56d (k).

"On August 16, 2012, Cotterell submitted a third competency report to the court in which he concluded that the [petitioner] was competent to stand trial. In that report, Cotterell noted that the [petitioner] had consistently refused to participate in formal evaluations. However, Cotterell detailed aspects of the [petitioner's] behavior that indicated that 'he has the capacity to understand his legal situation and the capacity to assist his attorney if he were to choose to do so.' The report observed that 'there is definitely a volitional component' to [the petitioner's] refusal to engage in a formal evaluation and that '[i]t is clear that he knows more than he is willing to admit.' The report also stated that '[the petitioner] is not currently taking psychiatric medication, and he has not demonstrated any symptoms of a serious mental illness that would require such treatment.' On August 31, 2012, the court held a competency reconsideration hearing to reassess the [petitioner's] competency to stand trial. At the hearing, Cotterell's report was marked as an exhibit, and [O'Connor] and the state stipulated that the [petitioner] was competent to stand trial. The court then found that the [petitioner] was competent to stand trial based on Cotterell's report.

"On September 26, 2012, the [petitioner] attempted to escape from the custody of the judicial marshals after being brought into the courtroom. When court reconvened after a recess, the [petitioner] was not present. The court indicated that he was 'not behaving in any appropriate manner in the lockup,' was 'spitting at the cell door' and was 'giving the correction officers a difficult time . . . .' [O'Connor], who had represented

the [petitioner] over the last year, agreed that the [petitioner] 'appear[ed] to be in a somewhat agitated state.' The court stated that the [petitioner's] next court appearance would be conducted by video conference 'to minimize the further potential of any harm to any correction[al] and/or judicial marshal staff.' Despite this arrangement, the [petitioner's] behavior prior to the next two court hearings prevented him from participating in those hearings, even via video conference.

"Trial commenced on October 9, 2013. When court reconvened after the first morning recess, the court announced that there had been 'a major problem with the [petitioner]' because '[h]e decided to flush his jumpsuit down the toilet' and urinated on the floor. The court directed [O'Connor] to find substitute clothing for him and stated that 'if [the petitioner] continues to act up, he will have handcuffs put on eventually.' The court observed that '[the petitioner] has been behaved in the courtroom and I'm not concerned about his behavior in the courtroom.' The court further noted that problems arose only when he leaves the courtroom. While the court was discussing the [petitioner's] conduct with [O'Connor], the [petitioner] interjected that he was acting out when outside the courtroom 'because [the judicial marshals] put handcuffs on me in a—in a secured cell where they ain't supposed to do that.' The court admonished the [petitioner] that the judicial marshals were the ones in control, not him, and gave [O'Connor] an opportunity to speak with the [petitioner]. The jury was then brought back into the court and evidence continued without the [petitioner] being present in the courtroom. Later that morning, after another recess, the court observed that '[the petitioner] is back in the courtroom. . . . [He] has been very well behaved in court. And that's what I see and that's what I care about, primarily. So, there has been no problem in the courtroom itself.'

"On October 10, 2013, the second day of trial and the final day of evidence, the [petitioner] testified with respect to the escape charge. After [O'Connor] declined to conduct a redirect examination of the [petitioner], the [petitioner] interjected: 'You're an idiot.' The court excused the jury and engaged in the following colloquy with the [petitioner] after he was returned to the defense table:

" 'The Court: . . . [Y]our last comment was totally gratuitous.

" '[The Petitioner]: I'm sorry, ma'am. I'm on frustration, I kind of lost a little control. I apologize. It's kind of hard, you know, to sit there and like, you know.

" 'The Court: Your apology is accepted. You don't have to go any further. However, do be advised that calling anyone [names], your attorneys, the state's attorney, anyone in the building, that is unacceptable, and if you weren't facing [such serious charges], you would be facing a contempt charge. But you did apologize, and it's just not worth even considering the contempt because you are facing so many other serious charges. All right, sir?

" '[The Petitioner]: Yes.

" 'The Court: But thank you for the apology.

" '[The Petitioner]: All right.'

"The jury then was brought back into the courtroom, and the [petitioner] did not make any other comments or cause any additional disruptions. On October 11, 2013, the third and final day of trial, the jury heard closing arguments from counsel and was charged by the court. The [petitioner] did not make any comments or cause any disruptions in court that day." (Footnote added; footnotes omitted.) *State* v. *Burgos*, supra, 170 Conn. App. 508–12.

After his trial and conviction, on May 1, 2017, the petitioner, acting in a self-represented capacity, filed an application for a writ of habeas corpus.[3] The petitioner then applied for and received appointed counsel. He thereafter filed an amended petition in 2020, claiming that O'Connor rendered ineffective assistance of counsel by stipulating to the petitioner's competency to stand trial.[4] The court heard testimony on January 3, 2023, from O'Connor, Dr. Eric Frazer, and the petitioner. The petitioner's counsel also submitted exhibits, all without objection, and both parties filed posttrial briefs.

In its memorandum of decision dated March 3, 2023, the court explained that O'Connor made a motion for a competency evaluation because "he had concerns about [the petitioner's] ability to understand the seriousness of the situation and to work with him to resolve the matter. This was based on his interactions with [the petitioner] and his impression that [the petitioner] was young, oppositional and did not want to engage in serious conversations about his situation. He believed [the petitioner] was experiencing psychiatric symptoms. He and [his social worker] met with [the petitioner] and both agreed that [the petitioner] might not be competent." O'Connor then reviewed the first competency report and, "[b]ased on the [first competency] report, he asked the trial court to find [the petitioner] not competent in accordance with the report." O'Connor retained a defense expert, sometime in 2011, to evaluate

[3] We note that the petitioner also filed a petition for a writ of habeas corpus in the United States District Court for the District of Connecticut in May, 2021, alleging, inter alia, ineffective assistance of counsel and due process violations related to his competency. That petition was dismissed, for failure to exhaust state court remedies, in June of that same year. See *Burgos* v. *Connecticut*, Docket No. 3:21-cv-00688 (VLB), 2021 WL 2515730 (D. Conn. June 17, 2021).

[4] In his amended petition, the petitioner also alleged ineffective assistance stemming from trial counsel's failure to challenge the admissibility of DNA evidence. The petitioner withdrew that claim prior to trial.

the petitioner's competency. At the petitioner's habeas trial, O'Connor testified that this expert would not have testified that the petitioner was incompetent and that the defense expert, in fact, agreed that "there was a volitional aspect" to the petitioner's presentation.

The court further noted that, at the time of the second competency hearing, the petitioner "had been cooperative with efforts to restore him to competency and had been taking his medication, controlling his behavior and attending groups. He had further participated in psychological testing. [Cotterell] had conducted a competency evaluation and as a result concluded that [the petitioner] had not yet been restored to competency."

At the third competency hearing, Cotterell's report found the petitioner to have been restored to competency. As the court noted, the petitioner was no longer taking medication and was interviewed by a psychiatrist on June 4, 2012; the psychiatrist did not note any symptoms of psychosis, mania or depression. The court further found that the report indicated that the petitioner "had the ability to cooperate with his attorney, but he chose not to [do so]." Given the results of this report, the court noted that, according to O'Connor, "the stigma of malingering makes it extremely difficult to convince a judge that the individual is not malingering when Whiting [Forensic Hospital] says they are. Given that [the petitioner] had already been transported to DOC, Whiting's conclusion that he was malingering and was competent, and knowing the presiding judge, [O'Connor] believed that challenging competency would be futile."

The court summarized the testimony of Frazer, who reviewed the various competency reports, court transcripts, police records, the amended petition, and an April 15, 2013 psychological evaluation of the petitioner. Frazer believed that the third competency report did

not reach the correct conclusion, testifying that "the refusal to take . . . medication is a symptom of a mental illness by itself and specifically . . . in light of [the petitioner's] documented mental health history." According to Frazer, the refusal to consent to medication, as well as inconsistent self-reporting on mental health, are, themselves, consistent with mental illness. Thus, Frazer noted that, although the competency reports noted manipulative behavior, such behavior could also be a symptom of mental illness. As the court summarized, "Frazer ultimately opined that it was extremely unusual, given the circumstances of [the petitioner's] mental health history, his prior determinations that he was not competent, his refusal to take medication, [and] the lack of involuntary medication being sought, for him to then summarily be found competent."

The petitioner testified at the habeas trial as well. The petitioner was placed in the care of the Department of Children and Families when he was ten years old and received residential treatment. He was hospitalized several times and the petitioner also testified that his first mental health diagnosis was schizophrenia, when he was thirteen years old.

The court summarized the petitioner's testimony of his experience at Whiting, noting that the petitioner claimed that he was "unable to convey any symptoms he was experiencing because he was heavily medicated at that time. He testified that he did not show up to several court dates after his escape attempt because he was concerned about what would happen to him. He felt out of control through the pretrial and trial stages. He described it as moving his arm and not feeling like it was him who was moving the arm."

The court nonetheless concluded that the petitioner had not established deficient performance on the part of his trial counsel or prejudice resulting therefrom.

Although the court found Frazer's testimony "persuasive" in establishing that there was sufficient basis "to consider" a challenge to the third competency report's finding that the petitioner was competent, the "tactical decision" not to challenge the third competency report's determination that the petitioner was competent was "reasonable." As the court noted, "[w]hile it can always be argued that [O'Connor] should have contested the competency report, that is not the same as saying that his decision not to was unreasonable." The court further concluded that, even if O'Connor had performed deficiently, the petitioner had not proven that he was prejudiced—that there was a reasonable probability of a different outcome—as a result of any alleged deficiency on the part of O'Connor. The court described the scenario: "The 'different outcome' that [the petitioner] alleges is him being found 'not yet competent' at the hearing, which would have been conducted had [O'Connor] not stipulated to his competency. He does not allege that the 'different outcome' is that he would have been found not competent and not restorable or that he would have been found not guilty by reason of mental disease or defect at trial."

The court, therefore, denied the amended petition for a writ of habeas corpus. The court subsequently granted the petitioner's motion for an extension of time to file a petition for certification to appeal and then granted the petition for certification to appeal. This appeal followed.

On appeal, the petitioner claims that the court improperly concluded that he failed to establish that O'Connor rendered ineffective assistance of counsel in stipulating to the petitioner's competency to stand trial. We disagree.

At the outset, we note that every defendant has, under the sixth and fourteenth amendments to the United

States constitution as well as article first, § 8, of the Connecticut constitution, a right to adequate and effective assistance of counsel at all critical stages of a criminal proceeding. See *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 775, 138 A.3d 908 (2016); see also *Strickland* v. *Washington*, 466 U.S. 668, 685–86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "The standard of review in a habeas corpus proceeding challenging the effective assistance of trial counsel is well settled. When reviewing the decision of a habeas court, the facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . The issue, however, of [w]hether the representation [that] a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . . Under the [test set forth in *Strickland* v. *Washington*, supra, 687], when a petitioner alleges ineffective assistance of counsel, he must establish that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . Furthermore, because a successful petitioner must satisfy both prongs of [that] test, failure to satisfy either prong is fatal to a habeas petition." (Internal quotation marks omitted.) *Foster* v. *Commissioner of Correction*, 217 Conn. App. 658, 667, 289 A.3d 1206, cert. denied, 348 Conn. 917, 303 A.3d 1193 (2023). Thus, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . A court deciding an ineffective assistance of counsel claim need not address the question of counsel's performance, if it is easier to dispose of the claim on the

ground of insufficient prejudice." (Internal quotation marks omitted.) *Bethea* v. *Commissioner of Correction*, 36 Conn. App. 641, 644, 652 A.2d 1044, cert. denied, 232 Conn. 918, 655 A.2d 260 (1995).

The criminal trial of an incompetent defendant violates due process. See *Cooper* v. *Oklahoma*, 517 U.S. 348, 354, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996); see also General Statutes § 54-56d (a). "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope* v. *Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); see also *State* v. *Randolph*, 227 Conn. App. 732, 751, 322 A.3d 1080 ("the test for competency must be whether [the individual] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him" (internal quotation marks omitted)), cert. denied, 350 Conn. 920, 325 A.3d 218 (2024). "Even if the petitioner [can] demonstrate to the habeas court that he was either mentally ill or mentally disabled at the trial, this would not suffice for purposes of prejudice unless he showed that his condition precluded him from assisting in his own defense. Such a showing would allow a habeas court to conclude that, because of the unprofessional error of trial counsel in not requesting an examination under § 54-56d, the petitioner was unable to assist in his own defense, thereby sustaining an actual prejudice and not a speculative one." (Footnote omitted.) *Bethea* v. *Commissioner of Correction*, supra, 36 Conn. App. 645–46.

In the present case, the court denied the amended petition on both prongs of the *Strickland* test, finding that, although Frazer's testimony was "persuasive" and

there was "sufficient basis to consider a challenge to [the petitioner's] competency," it was still a "reasonable tactical decision" to forgo challenging the petitioner's competency. Assuming, without deciding, that it was deficient performance for counsel to stipulate to competency under the circumstances presented by this case, the petitioner still must demonstrate actual prejudice so as to warrant reversal of the court's decision to deny his amended petition.[5]

[5] We note that the petitioner argues that the standard applied by the habeas court in this case is "unfair and unjust" because it required him to demonstrate that, but for the ineffectiveness of his counsel, he would have been found both incompetent and nonrestorable. In its memorandum of decision, the court noted that our Supreme Court has held that proving prejudice in order to defeat procedural default in the context of a freestanding due process claim requires a showing that a petitioner was both not competent and not restorable. The court therefore reasoned that this standard "must be the same" to prove prejudice in an ineffective assistance of counsel claim. It is true that, where the petitioner had the burden of overcoming procedural default in the context of a freestanding due process claim, our Supreme Court has noted that, "[*t*]*o excuse a defendant from standing trial*, the trial court is required to find both that the defendant is incompetent and not restorable to competency. . . . Because the prejudice prong of the cause and prejudice standard requires the petitioner to show that the trial court would have found him incompetent had the issue been raised at trial or on direct appeal, this inquiry must necessarily include the additional showing that the petitioner was not restorable to competency at the time of trial." (Citation omitted; emphasis added.) *Saunders* v. *Commissioner of Correction*, 343 Conn. 1, 29 n.15, 272 A.3d 169 (2022). We are not persuaded that our Supreme Court's requirement that a petitioner prove both incompetency and nonrestorability in order to establish prejudice in the context of a claim of procedural default applies in this case. In *Saunders*, the petitioner effectively asserted a substantive due process violation, claiming that he had been incompetent at trial and should be excused from standing trial. Here, the petitioner pursues an ineffective assistance of counsel claim, alleging that, but for his attorney's deficient performance in stipulating to his competency, he would have been found incompetent to stand trial.

In arguing that the *Saunders* prejudice standard applies, the respondent, the Commissioner of Correction, has not provided this court with any authority indicating that the petitioner would have to demonstrate both incompetency *and* nonrestorability in the context of an ineffective assistance of counsel claim. Indeed, cases cited by the respondent, as well as those disclosed during our own research, suggest that restorability is not properly a consideration in the ineffectiveness of counsel context. See, e.g., *United States* v. *Avila-Gonzalez*, 757 Fed. Appx. 353, 357 (5th Cir. 2018) (In the context of a failure to investigate competency claim, in addition to proving deficient performance, "[the petitioner] must also demonstrate a reasonable

The petitioner claims that he met his burden simply by pointing to various reasons O'Connor should not have stipulated to his competency. Additionally, the petitioner claims that trial counsel was ineffective for failing to consult with him before so stipulating.[6] The petitioner claims that these two lapses of performance by counsel resulted in prejudice in that, but for these

probability that the court would have found him incompetent. Otherwise, there is no prejudice."); *Hummel* v. *Rosemeyer*, 564 F.3d 290, 303 (3d Cir.) (requiring petitioner alleging ineffectiveness of counsel in stipulating to competency to demonstrate reasonable probability he would have been found incompetent to stand trial), cert. denied sub nom. *Pitkins* v. *Hummel*, 558 U.S. 1063, 130 S. Ct. 784, 175 L. Ed. 2d 541 (2009); *Eddmonds* v. *Peters*, 93 F.3d 1307, 1317 (7th Cir. 1996) ("[o]nly if there is a reasonable probability that [the petitioner] was not fit . . . will confidence in the outcome of the trial be deemed undermined for purposes of an ineffective assistance claim" (internal quotation marks omitted)), cert. denied sub nom. *Eddmonds* v. *Washington*, 520 U.S. 1172, 117 S. Ct. 1441, 137 L. Ed. 2d 548 (1997); *Futch* v. *Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989) (to demonstrate prejudice from counsel's failure to investigate competency, it is necessary to show that there is reasonable probability that psychological evaluation would have revealed that petitioner was incompetent to stand trial); *Dadabo* v. *Secretary, Dept. of Corrections*, Docket No. 8:15-cv-2250-T-33 (TGW), 2017 WL 238279, *17–18 (M.D. Fla. January 19, 2017) (petitioner did not establish prejudice by alleged ineffectiveness of counsel because he did not demonstrate that he would have been found incompetent to stand trial); *Hampton* v. *State*, 219 So. 3d 760, 770–72 (Fla. 2017) (no discussion of restorability in prejudice analysis, where petitioner alleged ineffectiveness of counsel in stipulating to competency); *State* v. *Dixon*, 254 So. 3d 828, 835–36 (La. App. 2018) (no discussion of restorability where petitioner's counsel stipulated to competency), cert. denied, 298 So. 3d 176 (La. 2020). Because § 54-56d provides for a determination of restorability to protect a defendant's due process right to participate in his own defense, a standard of nonrestorability would eliminate that right if a criminal defendant was in fact restorable, even if incompetent *to stand trial at the time that the trial was actually conducted*. In addition, because we conclude that the petitioner has not demonstrated that there is a reasonable probability that he would have been found incompetent; see *Bethea* v. *Commissioner of Correction*, supra, 36 Conn. App. 645–46 (petitioner must demonstrate that he was incapable of assisting in his own defense to establish prejudice); we need not reach the issue of restorability. We note, nonetheless, that, during oral argument before this court, counsel for the petitioner conceded that the record contains no evidence that he was not restorable.

[6] At oral argument before this court, counsel for the respondent, the Commissioner of Correction, agreed "full heartedly" that it would be "wrong" for an attorney to stipulate to a client's competency without discussing that decision with the client.

alleged lapses, the result of the proceeding would have been different. We are not convinced, however, that, even if we agreed with the petitioner that O'Connor's performance was deficient, there was any evidence that the petitioner was unable to assist counsel in his defense or that he could not understand the nature of the proceedings against him.

The petitioner has provided little in support of the claim that he has met the appropriate standard, such that he can demonstrate prejudice under *Strickland*. The petitioner points to his medical and psychiatric history, as well as the three competency reports prepared prior to his trial, arguing that "[t]he petitioner's mental illness did not start and stop at the August, 2012 hearing" and that he was diagnosed with schizophrenia around age thirteen or fourteen. We iterate, however, that a psychiatric diagnosis and history are not, on their own, evidence of incompetency to stand trial. *Bethea* v. *Commissioner of Correction*, supra, 36 Conn. App. 645–46 (mental illness or disability alone is insufficient to establish prejudice unless condition precludes petitioner from assisting in his own defense).

The petitioner also claims that the third competency report changed his diagnosis "without explanation." Similarly, the petitioner claims that there are "inconsistencies" and "irregular changes in diagnosis" across the reports, noting that the third competency report contains previously undocumented alcohol, cannabis and cocaine abuse history, dropping the diagnosis of schizoaffective disorder. While we acknowledge that Frazer testified that the petitioner's "mixed presentation"—his inconsistent engagement and cooperation with treatment—can result from either volitional malingering or psychiatric illness, this possibility does not, itself, demonstrate that the petitioner was incapable of assisting in his own defense or understanding the case against him. Moreover, the one consistency across all

three pretrial competency reports, as well as the defense expert's opinion, was that there was some volitional aspect to the petitioner's behavior.

The petitioner has not pointed to any evidence in the record that he was unable to assist O'Connor or understand the nature of the proceedings against him. Indeed, the petitioner testified on his own behalf at trial and engaged in an apologetic colloquy with the court after his one outburst. It is true that the petitioner did act out on the first day of trial, but this was outside the courtroom itself. As the court noted at the time, the petitioner "behaved in the courtroom" and the problems only arose "when he [left] the courtroom." In any event, misconduct, especially in the context of suggestions of malingering by the petitioner, also does not establish a lack of competency. Put simply, there is no indication that the petitioner was unable to understand the proceedings against him and to assist in his defense. The petitioner has failed to demonstrate that there is a reasonable probability that, but for O'Connor's decision to stipulate to competency, the outcome of the competency hearing would have been different.

The judgment is affirmed.

In this opinion the other judges concurred.