CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

DANIEL GREER *v.* STATE OF CONNECTICUT
(AC 46055)

Cradle, Westbrook and DiPentima, Js.

Syllabus

The petitioner, who had previously been convicted of four counts of the crime of risk of injury to a child, sought a new trial on the basis of allegedly newly discovered evidence that, if credited by a jury, would support a finding that he was innocent of the charges against him. The petitioner was a rabbi, dean and teacher at a private, Orthodox Jewish school when he sexually abused the victim, E, a student at the school, on various dates in 2002 and 2003, when E was fourteen and fifteen years old. The purported new evidence came to light as a result of testimony given by H, a rabbi and an assistant dean at the school when E attended, during a deposition in a federal civil lawsuit that E had brought against the petitioner. H testified in his deposition that he had had a sexual relationship with the petitioner that started when H himself was a student at the school. H also testified that he was involved in a sexual relationship with the petitioner at the same time that the petitioner was abusing E. The petitioner argued that H's testimony at a new trial would establish with certainty that any sexual misconduct by the petitioner toward E could not have begun until after E's sixteenth birthday. It was an essential element of the crime for which the petitioner had been convicted, risk of injury to a child under the applicable statute (§ 53-21 (a) (2)), that E had been under the age of sixteen at the time of the petitioner's sexual misconduct. The petitioner attached to his petition for a new trial an affidavit sworn by H that stated, to H's knowledge, no acts of misconduct by the petitioner toward E occurred prior to E's sixteenth birthday. At the trial on the petition, H testified, inter alia, that E had called him sometime during the winter of 2020 to

2021 to ask if he had been "really under sixteen at the time." The court denied the petition for a new trial and, in its memorandum of decision, noted that the petitioner's defense strategy had changed since his criminal trial, at which his primary defense had been to attack E's credibility and, by implication, the veracity of his allegations of sexual abuse. The court noted that the petitioner now conceded that some of the alleged sexual acts with E had occurred but only after E had turned sixteen years old. The court stated that H had admitted in his testimony at trial that he had not been present during any sexual acts between the petitioner and E. *Held* that the trial court did not abuse its discretion in determining that the petitioner's purported new evidence, which consisted wholly of H's affidavit and testimony, would not, if introduced at a new trial, likely result in a different outcome, and, accordingly, properly denied the petition for a new trial: contrary to the petitioner's claim, the court gave due consideration to H's testimony regarding E's statement to him because the court specifically addressed that aspect of the new evidence in its memorandum of decision and concluded that the evidence would have done little to undermine the clear evidence in the criminal trial that E was indeed under the age of sixteen when he was sexually assaulted by the petitioner, and the court did not, as suggested by the petitioner, fail to recognize the significance of E's posttrial uncertainty as to how old he was when the sexual assault started, rather, the court simply was unconvinced that a jury hearing the evidence would have reached a different conclusion regarding the petitioner's guilt in light of the totality of the evidence presented, and the court's overall finding that H's testimony lacked credibility, and thus was unlikely to be credited by a jury, applied equally to his testimony regarding the alleged new statement by E; moreover, E's purported statement to H was vague, as E never affirmatively stated that he was sixteen years old or older when the petitioner first abused him, and, at best, his statement indicated possible confusion or doubt on E's part, but it certainly did not amount to a retraction of his trial testimony that helped to establish a timeline from which the jury reasonably could have found that his sexual abuse by the defendant started prior to E turning sixteen years old, and the only evidence before the court regarding the exact wording and context of E's purported posttrial statement to H was H's testimony, which the petitioner did not present any evidence to corroborate; furthermore, it was axiomatic that this court, in reviewing a trial court's decision on a petition for a new trial based upon newly discovered evidence could not substitute its own assessment as to the proper weight, if any, to be given to any piece of evidence offered or to revisit a trial court's assessment regarding the credibility of a witness, and the trial court provided a number of reasons why H was not a credible witness, including that H admitted that he had evaded service of process in both the federal civil action and the criminal trial,

further weakening the persuasiveness of H's testimony and making it less likely that a jury would find his testimony credible.

Argued November 15, 2023—officially released February 27, 2024

Procedural History

Petition for a new trial following the petitioner's conviction of four counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of New Haven, where the matter was tried to the court, *Hon. Jon C. Blue*, judge trial referee; judgment denying the petition for a new trial, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

David T. Grudberg, for the appellant (petitioner).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *John P. Doyle, Jr.*, state's attorney, and *Seth R. Garbarsky* and *Craig P. Nowak*, supervisory assistant state's attorneys, for the appellee (respondent).

Opinion

WESTBROOK, J. The petitioner, Daniel Greer, appeals following the granting of his petition for certification to appeal from the judgment of the trial court denying his petition for a new trial based on newly discovered evidence. On appeal, the petitioner claims that the court improperly concluded that the proffered new evidence likely would not lead to a different result at a new trial because the court (1) failed to give sufficient weight to an alleged posttrial statement by the victim that the petitioner asserts raises doubt regarding an essential element of the crimes underlying his conviction, and (2) erroneously determined that, even if a new trial was granted, it was unlikely that the defense would introduce the new evidence because it was highly prejudicial to the petitioner and, thus, would undermine, rather than aid, his defense. For the reasons that follow,

we are not persuaded that the court abused its discretion by denying the petition for a new trial. Accordingly, we affirm the judgment of the court.

This court, in its decision affirming the petitioner's judgment of conviction on direct appeal, set forth the following relevant facts and procedural history underlying the petitioner's criminal case. See *State* v. *Greer*, 213 Conn. App. 757, 759–64, 279 A.3d 268, cert. denied, 345 Conn. 916, 284 A.3d 299 (2022), cert. denied, U.S. , 143 S. Ct. 1061, 215 L. Ed. 2d 282 (2023). "The [petitioner], who is a rabbi, founded Yeshiva of New Haven, Inc. (yeshiva), a private, Orthodox Jewish school, and served as a dean, rabbi, and teacher at the yeshiva. The victim, E,[1] attended the yeshiva for high school, beginning his freshman year in August or September, 2001, when he was thirteen years old. E's birthday is in October, and he turned fourteen years old during his freshman year. . . .

"In 2002, when he was fourteen years old, E returned to the yeshiva for his sophomore year. At some point during the beginning of the school year, the [petitioner] told E to meet him at an apartment adjacent to the school, and E complied. At the apartment, the [petitioner] offered E [snacks] and an alcoholic drink . . . . They proceeded to drink and talk about E's family and his future, and E began to get emotional and his head felt 'fuzzy . . . .' At some point, the [petitioner] touched E's thigh or crotch area and attempted to kiss him on the lips. When E pulled away and asked the [petitioner] what he was doing, the [petitioner] said that '[i]t wasn't a big deal and that this is what he does to his kids.' Nothing further transpired, and E returned to his dormitory.

[1] "In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e." *State* v. *Greer*, supra, 213 Conn. App. 759 n.2.

"After the initial incident at the apartment, E and the [petitioner] met at least once a week during his sophomore year at various locations—often in New Haven or at a motel in Branford—and engaged in oral or anal sex. During these encounters, the [petitioner] and E often would consume alcohol. E acknowledged that 'the encounters meld together' but was 'very sure' that he and the [petitioner] engaged in anal and oral sex during his sophomore year, during which time he was fourteen and fifteen years old. He testified that, during that period, he and the [petitioner] frequently performed oral sex on each other, that he performed anal sex on the [petitioner] 'many' times, and that, when the [petitioner] attempted to perform anal sex on E, E forced him to stop because it was too painful. After these encounters, E would feel 'shame, guilt, [and] confusion.' At the yeshiva, the [petitioner] gave E preferential treatment and would not yell at him as he regularly did with other students. When E attempted to end the sexual relationship, the [petitioner] stopped giving him preferential treatment and became 'nasty' instead of 'nice and charming . . . .' The [petitioner] continued to engage in sexual acts with E after he turned sixteen years old in October, 2003.

"After graduating in 2005, E went to an Orthodox yeshiva in Israel to continue his Jewish studies and met S, his future wife . . . . In 2006, E told S that the [petitioner] had molested him during high school, but he did not provide any details about the abuse. In the summer of 2006, E returned to Connecticut and met the [petitioner] at the Branford motel, where they had their last sexual encounter.

"In December, 2007, E and S were married, and the [petitioner] was one of the witnesses at the ceremony, which is a position of honor. E explained that he gave the [petitioner] this honor because he respected the

[petitioner] and 'still felt part of the New Haven community . . . .' For several years following their marriage, E and S would travel to New Haven for Jewish holidays, where they would share meals with members of the yeshiva community, including the [petitioner]. When E and S had a son in June, 2010, E asked the [petitioner] to hold the baby during the circumcision, which is also a position of honor.

"In 2013, E and S bought a house in New Jersey, and E found a rabbi in that community. Around that time, E stopped traveling to New Haven and communicating with the [petitioner]. At some point before 2016, E disclosed the abuse to his therapist and two family friends, one of whom was working at the yeshiva. In May, 2016, E filed a civil action in federal court against the [petitioner] seeking money damages stemming from the sexual abuse.[2] In August, 2016, while the civil action was pending, E reported the sexual abuse to the New Haven Police Department.

"On July 26, 2017, the [petitioner] was arrested and charged with four counts of sexual assault in the second degree under General Statutes § 53a-71 (a) (1) and four counts of risk of injury to a child under [General Statutes] § 53-21 (a) (2). In the operative long form information, the state alleged that the charged conduct occurred when E was fourteen and fifteen years old, 'at the city of New Haven on divers dates between 2002 up to October 27, 2003' . . . . [T]he sexual assault and risk of injury charges were premised on the same conduct—anal intercourse and fellatio.

"The case proceeded to a jury trial, and, at the close of evidence, defense counsel moved for a judgment of

[2] As indicated by the trial court in its decision on the petition for a new trial, the petitioner eventually was ordered in the federal civil lawsuit to pay $21,749,041 in damages for his sexual abuse of E.

acquittal as to the charges of sexual assault in the second degree on the ground that the prosecution was barred by the statute of limitations set forth in § 54-193a because E had not notified a police officer or state's attorney within five years after the commission of the offense. After a brief recess, the state conceded that the sexual assault charges are barred under § 54-193a, and the court granted the motion for a judgment of acquittal as to the four counts of sexual assault in the second degree . . . . Thereafter, the state filed a new information limited to the four counts of risk of injury to a child, and the jury found the [petitioner] guilty of those charges."[3] (Footnote added; footnote in original; footnotes omitted.) Id., 759–63. The court thereafter sentenced the petitioner to twenty years of incarceration, execution suspended after twelve years, followed by ten years of probation. Id., 764.

On November 12, 2021, the petitioner commenced the underlying action pursuant to Practice Book § 42-55 and General Statutes § 52-270.[4] In the operative

[3] "The [petitioner] filed postverdict motions for a judgment of acquittal and a new trial. . . . [T]he [petitioner] claimed, inter alia, that the same limitation period applicable to sexual assault in the second degree should apply to the risk of injury charges because all of the charges were based on the same conduct. After hearing argument, the court rejected the [petitioner's] statute of limitations claim and denied the motions." (Footnote omitted.) *State* v. *Greer*, supra, 213 Conn. App. 763–64. On direct appeal, this court affirmed the trial court's ruling regarding the statute of limitations claim and rejected a claim that the court improperly had instructed the jury regarding uncharged misconduct evidence. Id., 775, 786.

[4] Practice Book § 42-55 provides: "A request for a new trial on the ground of newly discovered evidence shall be called a petition for a new trial and shall be brought in accordance with General Statutes § 52-270. The judicial authority may grant the petition even though an appeal is pending."

General Statutes § 52-270 (a) provides: "The Superior Court may grant a new trial of any action that may come before it, for mispleading, the discovery of new evidence or want of actual notice of the action to any defendant or of a reasonable opportunity to appear and defend, when a just defense in whole or part existed, or the want of actual notice to any plaintiff of the entry of a nonsuit for failure to appear at trial or dismissal for failure to prosecute with reasonable diligence, or for other reasonable cause, according to the usual rules in such cases. The judges of the Superior Court

amended petition for a new trial, filed on September 28, 2022,[5] the petitioner argued that he was entitled to a new trial on the basis of newly discovered evidence. According to the petitioner, the new evidence, if credited by a jury, would support a finding that the petitioner "was factually innocent of the charges against him."

The purported new evidence came to light as a result of testimony given by another rabbi, Aviad Hack, during a deposition in the federal civil lawsuit. Hack had "deep familiarity" with both E and the petitioner. Hack had been the assistant dean for the yeshiva at the time E attended, and, according to Hack, at the same time that the petitioner had been abusing E, the petitioner also was involved in a sexual relationship with Hack that had started when Hack himself was a student at the yeshiva. The petitioner argued that Hack's testimony at a new trial would establish "with certainty" that any sexual misconduct by the petitioner toward E could not have begun until after E's sixteenth birthday. An affidavit sworn by Hack and dated October 29, 2021, was attached to the original petition for a new trial. In this affidavit, Hack averred that he had given deposition testimony in E's federal civil action but that he later evaded service of process in both the federal action and the state court criminal trial. He further stated in his affidavit that, "*to my knowledge*, no acts of misconduct by [the petitioner] toward [E] occurred *prior* to [E's] 16th birthday. The first such act, *to my memory*, occurred in or about January, 2004." (Emphasis added.) It was an essential element of the risk of injury to a child counts of which the petitioner was convicted that the child be "*under* the age of sixteen years . . . ."

may in addition provide by rule for the granting of new trials upon prompt request in cases where the parties or their counsel have not adequately protected their rights during the original trial of an action."

[5] The petitioner initially proceeded at trial on the original petition, but the court later permitted him to amend the petition in part to conform with the evidence that had thus far been presented at trial.

(Emphasis added.) General Statutes § 53-21 (a) (2).[6] It is undisputed that E was sixteen years old in January, 2004.

The court, *Hon. Jon C. Blue*, judge trial referee, conducted a trial on the petition for a new trial on July 20 and September 23, 2022. In support of his petition, the petitioner presented testimony from himself and Hack, who testified, inter alia, regarding his civil deposition testimony and the factual basis for the statements in his affidavit regarding E's age. The respondent, the State of Connecticut, called no witnesses of its own. Following the trial, the parties submitted simultaneous posttrial briefs, and the petitioner thereafter submitted a reply brief. The court heard additional postevidence arguments on November 9, 2022.

On November 17, 2022, the court issued its second corrected memorandum of decision in which it denied the amended petition for a new trial. The court first noted that the petitioner's defense strategy had changed since his criminal trial at which his primary defense was to attack E's credibility and thus, by implication, the veracity of his allegations of sexual abuse. The court also noted that the petitioner was now conceding that some of the alleged sexual acts occurred, but only after E had turned sixteen. The court next turned to a discussion of the petitioner's proffered new evidence, which the court found less than compelling for several reasons. The court explained in part: "The evidence submitted to establish [the petitioner's] new [theory of defense] is the testimony of [Hack and his affidavit]. . . . Hack's affidavit is cautiously worded—the phrases

[6] General Statutes § 53-21 provides in relevant part: "(a) Any person who . . . (2) has contact with the intimate parts . . . of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

'to my knowledge' and 'to my memory' allow for a great deal of wiggle room. The obvious question that arises is 'How does he know?' His testimony on the stand failed to answer this question satisfactorily.

"Hack admitted in his testimony that he had not been present during any sexual acts between [the petitioner] and E. He additionally admitted that he had not been present with E twenty-four hours a day, seven days a week during the time in question. It is clear that all manner of sexual misconduct could have occurred between [the petitioner] and E prior to E's sixteenth birthday that Hack simply would not have observed or known of.

"Hack's 'knowledge' turns out to be a series of inferences, some of them quite thin. He reasoned that since [the petitioner] had not sexually abused him prior to his sixteenth birthday, the same pattern would necessarily apply to E. On cross-examination, however, Hack admitted that [the petitioner] had 'groomed' him prior to his sixteenth birthday. In addition, [the petitioner] first abused Hack in 1992, whereas E testified [at the criminal trial] that [the petitioner] had first abused him . . . a decade later, [and] so it is not unreasonable to conclude that [the petitioner's] seduction timetable may have altered in the intervening years.

"Hack testified that one location at which he and [the petitioner] had (adult) sexual relations was 139 West Park. On one occasion, apparently in late fall 2003, [the petitioner] told Hack, 'I was just here with [E].' . . . Assuming this to be true, this statement hardly establishes that [the petitioner] had been there with E for the first time, or even were that to be the case, that [the petitioner] and E had not previously engaged in sexual acts in a variety of other locations.

"Hack's additional theory is that [the petitioner] could not have engaged in sexual acts with E prior to October

27, 2003, because [the petitioner] 'detested' E until later in the academic year. The flaw in this theory is obvious. [The petitioner's] relationship with E was not a relationship based on love. It was a relationship based on predation. [The petitioner] may not have liked E but nevertheless found him to be a convenient object of sexual desire.

"Hack additionally testified that E called him during the winter of 2020–2021 and asked Hack whether [E] was 'really under sixteen at the time.' This purported statement does not amount to a retraction of E's clear evidence in the criminal trial that E was indeed under the age of sixteen when he was sexually assaulted by [the petitioner].

"In addition to obvious logical issues with his theories, Hack turns out to have credibility issues as well. He admits that he repeatedly evaded service of process in both the federal and state actions. His testimony that coming forth at this late date was the 'right' thing to do rests uneasily with his deliberate failure to accept service of process on occasions when coming forth would have been yet more 'right.'

"Beyond this, on cross-examination, Hack admitted to a remarkable series of events. Sometime after the federal court awarded E over $21 million in damages against [the petitioner] for sexual abuse, [the petitioner] brought an action against Hack in a rabbinical court, called a Din Torah, alleging that Hack was liable to [the petitioner] for the full amount of the judgment. The last hearing in the rabbinical court was in the summer of 2021. Although Hack's testimony leaves the exact litigational details murky . . . he and [the petitioner] reached a settlement in the fall of 2021 in which Hack agreed to sign an affidavit and appear in court to give his testimony in the present case." In short, the court found significant issues regarding Hack's credibility

that further weakened the persuasiveness of his testimony.

For purposes of its analysis, the court assumed without deciding that the petitioner had established that the evidence he proffered in support of his petition for a new trial was, in fact, newly discovered; that the evidence would be material in a new trial; and that it was not merely cumulative of other evidence. The court concluded, however, that the petitioner "assuredly [had] not" established that the proffered new evidence would probably produce a different result in a new trial. It was on this basis that the court denied the petition for a new trial.

The court reasoned as follows: "After a careful consideration of all of the evidence, the court is not persuaded that a jury would find [the petitioner] not guilty after hearing the new evidence submitted in the present case. If anything, the new evidence, if submitted to a jury, would seal [the petitioner's] doom.

"It is one thing to claim, as [the petitioner's] able counsel did in the original trial, that E's testimony concerning the [petitioner's] sexual abuse was not credible. The obvious implication of counsel's argument was that the alleged acts of sexual abuse had not been proven. It is another thing to claim, as Hack testified in the present case, that the acts of sexual abuse did occur, but at a slightly later time.

"Beyond this, if the jury were to hear that [the petitioner] had previously preyed upon Hack, 'grooming' him prior to his sixteenth birthday, the likelihood of conviction would approach a near certainty. Defense attorneys ordinarily attempt to exclude evidence of previous sexual misconduct. It is the rare defense attorney who affirmatively attempts to introduce such evidence.

"For all these reasons, it is exceedingly unlikely that Hack would even be called as a witness by the defense

in a new trial. If anything, it is the state that would attempt to introduce such evidence." (Emphasis omitted.) The court denied the petition, and this appeal followed.

We begin our discussion of the petitioner's claims by setting forth governing legal principles, including our standard of review. "Pursuant to § 52-270, a convicted criminal defendant may petition the Superior Court for a new trial on the basis of newly discovered evidence. See Practice Book § 42-55. A trial court's decision on that ground is governed by the standard set forth in *Asherman* v. *State*, 202 Conn. 429, 434, 521 A.2d 578 (1987), and further refined in *Shabazz* v. *State*, 259 Conn. 811, 827–28, 792 A.2d 797 (2002). Under *Asherman*, a court is justified in granting a petition for a new trial [if] the petitioner demonstrates that the evidence offered in support thereof: (1) is newly discovered such that it could not have been discovered previously despite the exercise of due diligence; (2) would be material to the issues on a new trial; (3) is not cumulative; and (4) is likely to produce a different result in the event of a new trial." (Internal quotation marks omitted.) *Carter* v. *State*, 159 Conn. App. 209, 222, 122 A.3d 720, cert. denied, 319 Conn. 930, 125 A.3d 204 (2015). "This strict standard is meant to effectuate the underlying equitable principle that once a judgment is rendered it is to be considered final, and should not be disturbed by posttrial motions except for a compelling reason." (Internal quotation marks omitted.) *Asherman* v. *State*, supra, 202 Conn. 434.

In *Shabazz* v. *State*, supra, 259 Conn. 811, our Supreme Court explained that "trial courts should utilize the following approach when applying the fourth element of the *Asherman* test. The trial court must always consider the newly discovered evidence in the context of the evidence presented in the original trial. In so doing, it must determine, first, that the evidence

passes a minimum credibility threshold. That is, if, in the trial court's opinion, the newly discovered evidence simply is not credible, it may legitimately determine that, even if presented to a new jury in a second trial, it probably would not yield a different result and may deny the petition on that basis. . . . If, however, the trial court determines that the evidence is sufficiently credible so that, if a second jury were to consider it together with all of the original trial evidence, it probably would yield a different result or otherwise avoid an injustice, the fourth element of the *Asherman* test would be satisfied." (Citation omitted.) Id., 827–28.

"[T]he petitioner has the burden of alleging and proving facts [that] would, in conformity with our settled equitable construction of the statutes, entitle him to a new trial on the grounds claimed . . . ." (Internal quotation marks omitted.) *Carter* v. *State*, supra, 159 Conn. App. 226. "It is within the discretion of the trial court to determine, upon examination of all the evidence, whether the petitioner has established substantial grounds for a new trial, and the judgment of the trial court will be set aside on appeal only if it reflects a clear abuse of discretion." *Asherman* v. *State*, supra, 202 Conn. 434.

We now turn to the petitioner's claims on appeal. The petitioner claims that, in denying his petition for a new trial premised on newly discovered evidence, the court improperly concluded that the purported new evidence would not lead to a different result if a new trial was granted because the court (1) failed to give sufficient weight to the recent statements by E to Hack that, if credited, raised doubt regarding E's age when the sexual abuse underlying the petitioner's conviction occurred, and (2) erroneously found that it was not likely that a defense attorney would introduce Hack's testimony at a new trial if granted because the testimony would be highly prejudicial to the petitioner and likely

would undermine, rather than aid, his defense. We conclude that the court did not abuse its discretion in concluding that the proffered new evidence was not likely to produce a different result in the event of a new trial.[7]

"The burden of proving the probability of a different result is upon the [petitioner], and in determining that issue the trial court exercises a discretion [that] cannot be set aside unless its discretionary power has been abused.[8] . . . The petitioner must overcome a high hurdle to establish such an abuse of discretion. To meet the fourth element of *Asherman*, [t]he [petitioner] must persuade the court that the new evidence he submits will *probably*, not merely possibly, result in a different verdict at a new trial . . . . It is not sufficient for him to bring in new evidence from which a jury *could* find him not guilty—it must be evidence [that] persuades the judge that a jury *would* find him not guilty." (Citations omitted; emphasis in original; footnote added; internal quotation marks omitted.) *Mitchell* v. *State*, 338 Conn. 66, 97, 257 A.3d 259 (2021).

The petitioner asserts on appeal that the court failed to give sufficient weight to that portion of Hack's testimony in which he recounted that E recently made statements to Hack regarding whether E in fact was under

[7] Because we conclude that the court properly determined that the proffered new evidence, if presented to a jury, would not likely produce a different result, it is unnecessary for us to review the court's alternative finding that, even if it granted a new trial, it was unlikely that defense counsel would introduce Hack's testimony because it would be highly prejudicial to the petitioner and significantly increase rather than decrease his likelihood of conviction.

[8] In *Jones* v. *State*, 328 Conn. 84, 87, 177 A.3d 534 (2018), our Supreme Court recognized an exception in which appellate courts would exercise de novo review if the petition for a new trial was decided by a judge who did not preside over the original trial and no fact finding was necessary because both parties agreed that the new evidence was fully credible. Here, although Judge Blue did not preside over the original trial, there was no agreement by the parties that the new evidence was fully credible; to the contrary, Hack's credibility and, by implication, the credibility of his testi-

sixteen years old when the sexual abuse underlying the petitioner's conviction occurred. The petitioner argues that, if credited by a jury, these statements likely would raise reasonable doubt regarding the petitioner's guilt.

There can be no doubt that the court gave due consideration to Hack's testimony regarding E's statement because the court specifically addressed that aspect of the new evidence in its memorandum of decision. The court concluded that this evidence would have done little to undermine the "clear evidence in the criminal trial that E was indeed under the age of sixteen when he was sexually assaulted by [the petitioner]." In other words, the court did not, as suggested by the petitioner, fail to recognize the significance of E's posttrial uncertainty, it simply was unconvinced that a jury hearing this evidence would have reached a different conclusion regarding the petitioner's guilt in light of the totality of the evidence presented. The court's overall finding that Hack's testimony lacked credibility and, thus, was unlikely to be credited by a jury, applied equally to his testimony regarding the alleged new statements by E.

Moreover, we agree with the trial court's assessment that E's purported statement to Hack was vague. According to Hack's testimony, E never affirmatively stated that he was sixteen years old or older when the petitioner first abused him. At best, his statement indicated possible confusion or doubt on E's part, but it certainly did not amount to a retraction of his trial testimony that helped to establish a timeline from which the jury reasonably could have found that his sexual abuse by the defendant started prior to E turning sixteen. As the petitioner recognizes, E's testimony during the criminal trial contained statements suggesting that he was not able to discern precise dates and details of

mony was in dispute. Accordingly, it is appropriate to apply the abuse of discretion standard.

every sexual encounter with the petitioner; nonetheless, he testified that he was "very sure" that the sexual contact at issue had occurred in 2002 and 2003, and the jury presumably credited that portion of his testimony. The only evidence before the trial court regarding the exact wording and context of E's purported posttrial statement to Hack was Hack's testimony. The petitioner, who had the burden of proof with respect to the petition for new trial, did not present any evidence corroborating Hack's testimony.[9] See *Skakel* v. *State*, 295 Conn. 447, 484–85, 991 A.2d 414 (2010) (it was proper for court hearing petition for new trial to consider lack of corroboration when applying forth prong of *Asherman* test). Finally, it is axiomatic that this court, in reviewing a court's decision on a petition for new trial based upon newly discovered evidence, cannot substitute its own assessment as to the proper weight, if any, to be given any piece of evidence offered; see *Jones* v. *State*, 328 Conn. 84, 94, 177 A.3d 534 (2018); or revisit a trial court's assessment regarding the credibility of a witness. See *State* v. *Lawrence*, 282 Conn. 141, 156–57, 920 A.2d 236 (2007) (appellate courts defer to trial court's assessments concerning credibility and will not retry such credibility determinations on appeal).

In the present case, Judge Blue made express statements questioning the credibility of Hack and his testimony. The court found that Hack's use of the phrases "to my knowledge" and "to my memory" in his affidavit coupled with the fact that he later admitted in his testimony at the hearing on the petition for a new trial that

[9] The petitioner argues that the state could have called E to testify at the hearing on the petition for a new trial about his statements if it wished to try and contradict Hack's testimony. It is not the state's burden, however, to disprove the credibility of the evidence offered in support of a petition for new trial. The burden of persuasion is on the petitioner, and a petitioner's failure to demonstrate the credibility of the evidence proffered is a reasonable ground on which a court may deny a petition for new trial. See *Shabazz* v. *State*, supra, 259 Conn. 827.

he could not account for E's whereabouts at all times during the relevant period made it possible that "all manner of sexual misconduct could have occurred between [the petitioner] and E prior to E's sixteenth birthday that Hack simply would not have observed or known of."

More importantly, in addition to noting a number of unreasonable inferences that Hack advanced in support of his statement that E could not have been under the age of sixteen at the time he was first abused by the petitioner, the court provided a number of reasons why Hack was not a credible witness. First, Hack admitted that he had acted to evade service of process in both the federal civil action and the state criminal action. He came forward with his current affidavit and testimony only after reaching a settlement agreement with the petitioner to resolve the action that the petitioner had brought against him in rabbinical court seeking to hold him liable for the $21 million federal civil judgment. In short, the court found significant issues regarding Hack's credibility, further weakening the persuasiveness of his testimony and making it less likely that a jury would find his testimony credible.

Although the petitioner makes various arguments as to why a court might reach a different conclusion regarding Hack's credibility, as previously stated, this court will not revisit a court's credibility determinations. *State* v. *Lawrence*, supra, 282 Conn. 157. "[I]t is solely within the discretion of the trial court to determine, upon examination of both the newly discovered evidence and that previously produced at trial, whether the petitioner has established substantial grounds for a new trial." *Shabazz* v. *State*, supra, 259 Conn. 821–22. Having reviewed the record and the arguments of the parties, we conclude that the court did not abuse its discretion in determining that the petitioner's purported new evidence, which consisted wholly of Hack's affidavit and

testimony, would not, if introduced at a new trial, likely result in a different outcome.

The judgment is affirmed.

In this opinion the other judges concurred.

FATIMA K. DE ALMEIDA-KENNEDY *v.* JAMES KENNEDY (AC 46050)

Alvord, Cradle and Clark, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court denying his motion for modification of unallocated alimony and child support. At the time of dissolution in 2010, the parties had two minor children. The judgment of dissolution incorporated a separation agreement, which provided, inter alia, that the plaintiff would have legal and physical custody of the parties' children and that the defendant would pay unallocated alimony and child support in the amount of $1000 weekly. In 2014, by agreement of the parties, the defendant's unallocated alimony and child support was reduced from $1000 to $900 weekly. The 2014 agreement did not specify the amount of child support due to the plaintiff as a portion of the defendant's unallocated support, nor did the agreement expressly prohibit the modification of alimony. The defendant sought modification of the unallocated alimony and child support after the plaintiff and the children moved to Tennessee. During the hearing on the motion, the defendant identified, as substantial changes in circumstances, the plaintiff's cohabitation and the change in residence in 2021 of his older child, who was then eighteen years old, from the plaintiff's home to the home of the defendant. In support thereof, the defendant sought to have his older child testify as to his change in residence as well as to the plaintiff's cohabitation, which the trial court denied, stating that it did not need the older child's testimony. The trial court also heard the testimony of a private investigator as to the plaintiff's cohabitation, and the defendant entered exhibits in support thereof. The plaintiff was not present at the hearing. In denying the defendant's motion, the court found, inter alia, that the defendant had failed to prove a substantial change in circumstances and that the testimony of the private investigator was insufficient and not credible to support a finding of cohabitation. *Held*:

1. The trial court abused its discretion in denying the motion for modification with respect to the child support component of the unallocated support obligation because the court's finding that the defendant failed to demonstrate a substantial change in circumstances was clearly erroneous: this court concluded, on the basis of the undisputed evidence in the record, that the change in residence of the parties' older child, from the home of the plaintiff to the home of the defendant, amounted to a substantial change in circumstances pursuant to statute (§ 46b-86 (a)); moreover, the trial court's finding to the contrary was not supported by the evidence, as the court did not have any evidence before it that the defendant was not providing for the older child's necessary expenses and it did not make any findings based on the undisputed evidence that established a change in the older child's residence.
2. The trial court improperly denied the defendant's motion for modification without determining the child support component of the unallocated order, and this court, having determined that the defendant was entitled to a new hearing with respect to his motion to modify the child support component of the unallocated order, set forth the procedure applicable to the financial aspects of the modification of child support in the context of an unallocated support order on remand; the trial court should first unbundle the child support from the unallocated alimony and child support by determining the parties' net weekly income with the assistance of the 2014 financial affidavits, which the trial court had access to as they were part of the record, second, the trial court must calculate the presumptive support amount for the two children who, at that time, were minors, using the 2005 Child Support and Arrearage Guidelines in effect at the time of the parties' 2014 agreement, third, the trial court must ascertain the intent of the parties as to how the $900 weekly sum was to be divided because the 2014 agreement was not clear, and, finally, the trial court must consider the newly determined 2014 child support award against the parties' current financial circumstances, which also must be determined due to the passage of time since the trial court initially addressed the defendant's request for modification.
3. The trial court abused its discretion in denying the defendant's motion for modification with respect to the alimony component of his unallocated support obligation: under the totality of the circumstances in the present case, this court concluded that the trial court misapplied the law at the time of the hearing on the motion for modification, as the trial court was under the misapprehension that the separation agreement precluded the termination of alimony, including on the basis of cohabitation, until the death of either party, and, contrary to the trial court's remarks during the hearing, the separation agreement did not provide that the unallocated support obligation was nonmodifiable as to amount or term pursuant to statute (§ 46b-86 (a)); moreover, the trial court, having incorrectly expressed that cohabitation could not form a basis for modification of alimony, essentially misled the defendant in forgoing his opportunity to present his older child's testimony, which the court had not

precluded on evidentiary grounds, as additional evidence in support of the defendant's allegation of the plaintiff's cohabitation; furthermore, despite the trial court having determined that the defendant failed to provide satisfactory evidence of cohabitation, the trial court did not identify any particular aspects of the private investigator's testimony that it specifically discredited, nor did it offer any explanation of its determination that the private investigator's testimony, as a whole, was not credible; accordingly, the defendant was entitled to a new hearing on the motion for modification.

Submitted on brief January 10—officially released February 27, 2024

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Gould*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Egan*, *J.*, granted the plaintiff's motion to dismiss the defendant's motion to modify unallocated alimony and child support obligations, from which the defendant appealed to the Appellate Court, *Alvord*, *Elgo* and *Alexander*, *Js.*, which reversed the trial court's judgment and remanded the case to that court for further proceedings; subsequently, the court, *Hon. Eddie Rodriguez*, *Jr.*, judge trial referee, denied the defendant's motion for modification of unallocated alimony and child support, from which the defendant appealed to this court. *Reversed in part*; *further proceedings.*

James Kennedy, self-represented, filed a brief as the appellant (defendant).

Opinion

ALVORD, J. In this postjudgment dissolution matter, the self-represented defendant, James Kennedy, appeals from the judgment of the trial court denying his motion for modification of his unallocated alimony and child

support obligation. On appeal, the defendant claims[1] that the court abused its discretion in (1) determining that the change in residence of the parties' older child did not constitute a substantial change in circumstances, (2) denying the defendant's motion without determining the child support component of the unallocated order, (3) interpreting the unallocated support obligation as set forth in the parties' separation agreement to be nonmodifiable, and (4) disallowing the testimony of the parties' older child as to the alleged cohabitation of the plaintiff, Fatima K. De Almeida-Kennedy.[2] We reverse in part the judgment of the court.[3]

The following facts and procedural history are relevant to our resolution of this appeal. The court, *Gould, J.*, dissolved the parties' marriage on August 2, 2010. At the time of the dissolution, the parties had two minor children.[4] The judgment of dissolution incorporated by reference the parties' separation agreement dated August 2, 2010 (separation agreement). The separation agreement provided, inter alia, that the plaintiff would have legal and physical custody of the parties' children and the defendant would have supervised visitation.

Section 3.1 of the separation agreement provided that the defendant would pay unallocated alimony and child support to the plaintiff in the amount of $1000 weekly.

[1] We address the claims in a different order from that in which they were briefed, and we address the third and fourth claims together because they are interrelated.

[2] On September 20, 2023, this court ordered the plaintiff to file her overdue brief on or before October 4, 2023. The plaintiff failed to file a brief as ordered. This court granted the defendant's request to waive oral argument. We, therefore, have considered this appeal on the basis of the defendant's brief, the appendix, and the record. See *Marino* v. *Marino*, 222 Conn. App. 902, 903 n.1, 302 A.3d 953 (2023).

[3] The defendant also requested other modifications in his motion. The court denied the defendant's motion in its entirety. The defendant's appeal is limited to the issues of child support and alimony.

[4] The parties' children were born in November, 2003, and August, 2005.

It further provided: "Said unallocated alimony and child support shall end on the death of either [p]arty. The [p]arties agree that at present both children have been determined to be [s]pecial [n]eeds [c]hildren as defined by the Connecticut [s]tatutes." In Article IV of the separation agreement, titled Alimony, the parties agreed in § 4.2 that "[t]he unallocated alimony and child support provided in 3.1 above is based on an earning capacity of the [defendant] of $90,000. The [plaintiff] shall not ask for an increase until the [defendant's] actual weekly earnings exceed this annualized amount." Section 4.3 of Article IV further provided that "[t]he [defendant] agrees to not seek a downward modification of unallocated alimony and child support until the [plaintiff's] annualized earnings exceed $50,000 per year."

On December 9, 2014, the dissolution judgment was modified by agreement of the parties (2014 agreement) to provide, inter alia, that the defendant's unallocated child support and alimony would be reduced to $900 weekly.[5] The 2014 agreement also removed the provision in Article IV, § 4.3, that prohibited the defendant from seeking a downward modification in his support payment until the plaintiff's annualized earnings exceeded $50,000 per year. The 2014 agreement provided the parties joint legal custody of their children, with primary physical custody remaining with the plaintiff.

On April 4, 2018, the defendant filed the motion for modification at issue in this appeal, in which he sought, inter alia, modification of his unallocated alimony and child support obligation. The defendant's motion requested that "the court . . . enter an order establishing the child support portion of unallocated, as established by the financial affidavits provided by both parties on August 2, 2010, to be $179 per week dating from

[5] The parties stipulated to an arrearage of $43,090, and the 2014 agreement provided that the defendant would pay $200 weekly toward that arrearage.

August 2, 2010, through present." It further requested that the court enter an order terminating alimony as of the date of service of the motion to modify. In the event that the court declined to terminate alimony, the defendant requested that alimony be set at $1 per year until the child support for the minor children terminated and that, at that point, alimony be terminated.

The defendant recited, as the legal basis for his requested modification, that "no court . . . has ever followed Connecticut statutory law nor case law in terms of making a determination on the record of the amount of child support due commencing August 2, 2010."[6] In support of his requested modification, the defendant alleged, inter alia, that the "proper amount of child support due to the plaintiff" had not been determined by a court; the plaintiff had sought, by herself and through various state and federal agencies, to collect from the defendant 100 percent of the unallocated support "as though it were child support"; the defendant had lost his primary client in January, 2018; the defendant was under the care of a psychiatrist; and the "termination date of alimony that was contemplated by the

[6] The defendant also alleged in his motion for modification that "[t]here has been a substantial change in circumstances since the entry of the last order by the court, on September 29, 2017." In December, 2015, the defendant had filed a prior motion for modification, seeking, inter alia, that his unallocated alimony and child support obligation be modified. After several hearings, on September 29, 2017, the court, *Wenzel*, *J.*, granted in part and denied in part the motion. The court denied the defendant's requested modification of his unallocated support obligation, stating: "The defendant admits there is no claim for any substantial change in circumstance in the motion and the court finds there was no sufficient evidence of such in any event." *De Almeida-Kennedy* v. *Kennedy*, 188 Conn. App. 670, 673 n.2, 205 A.3d 704, cert. denied, 332 Conn. 909, 210 A.3d 566 (2019). On appeal, this court concluded that the court did not abuse its discretion in denying the requested modification. Id., 682. Because the court's order of September 29, 2017, did not modify the defendant's unallocated support obligation, the operative date for the determination of a substantial change in circumstances remains the date of the 2014 agreement. See *Demartino* v. *Demartino*, 79 Conn. App. 488, 495, 830 A.2d 394 (2003).

parties at the time of dissolution is not reflected within the [separation] agreement."

The court, *Egan*, *J.*, dismissed the motion on the basis that it lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (act), General Statutes § 46b-115 et seq., because all parties no longer lived in Connecticut. See *De Almeida-Kennedy* v. *Kennedy*, 207 Conn. App. 244, 253, 262 A.3d 872 (2021). The court noted, inter alia, that the defendant had moved to Florida in October, 2017, that the plaintiff had averred in an affidavit that she and the parties' children had moved to Tennessee in April, 2018, and that they had lived in Franklin, Tennessee for at least seven months as of November 7, 2018.[7] Id., 251–52. On appeal, this court determined that the court improperly dismissed the portion of the defendant's motion to modify that related to his support obligation, as it was beyond the purview of the act. Id., 264. Accordingly, this court reversed the judgment with respect to the defendant's motion to modify the unallocated alimony and child support order and remanded the case for further proceedings. Id., 265.

On May 13, 2022, the court, *Hon. Eddie Rodriguez, Jr.*, judge trial referee, held a hearing on the defendant's motion to modify. The defendant appeared and the plaintiff did not.[8] A motion to compel, filed by the defendant, also was scheduled for hearing on that day.

[7] "[T]he plaintiff filed a memorandum of law in support of her motion to dismiss, which was accompanied by multiple exhibits, including a copy of the individual educational program for her minor son prepared by Williamson County Schools in Franklin, Tennessee for the period beginning May 7, 2018, and an electrical bill dated June 5, 2018, that lists the plaintiff as the account holder for a 'service address' located in Franklin, Tennessee. In addition, the plaintiff submitted an affidavit that recited certain details regarding her relocation to Tennessee." *De Almeida-Kennedy* v. *Kennedy*, supra, 207 Conn. App. 256.

[8] The clerk stated on the record that notice of the hearing had been provided to the plaintiff to a post office box in Thompson Station, Tennessee, which was the address on file in her appearance. The court found that the plaintiff was provided notice of the hearing.

Addressing that motion, the defendant argued that, "as of today, I have no updated financial affidavit nor any financial compliance from the plaintiff and have not had it for now going on four and a half years. And, at this point I . . . realize that a . . . motion to compel probably—I'm prepared to go forward in absence of her compliance, but I have . . . if the court pleases, I do have copies of depositions where she has not appeared. But at this time, I'd just . . . like to say that, you know, I . . . haven't been able to get anything, any information, and I've sent out multiple requests for production in the past. I get the same response every time which is either, well, no response, or . . . that she doesn't have to comply." The court stated that it was denying the defendant's motion to compel, without prejudice, because "there's no evidence anywhere in the file, no filing that that motion has been served."

The court then held a hearing on the defendant's motion for modification. The defendant testified to his understanding of the separation agreement's support provision, pursuant to which he contended that the only restriction on modification was related to the parties' earnings. The defendant also explained that, as a result of the plaintiff seeking to collect on a child support arrearage he owed, he lost the ability to travel internationally. He specifically requested that the court make a determination "of what child support should've been in 2010 at the time of" the separation agreement. The defendant represented to the court that, "according to the [Child Support and Arrearage Guidelines] at the time, [child support] would've been [$]193 a week for two—for my two sons." The defendant identified, as substantial changes in circumstances, the plaintiff's cohabitation and the change in residence of the parties'

The court denied three motions filed by the plaintiff for failure to prosecute.

older child, from the plaintiff's home to the defendant's home, in November, 2021.

With respect to alimony, the defendant stated: "In 2018, when my ex-wife went to Tennessee, she started cohabitating with a gentleman named Joseph Meade. I have two witnesses that are prepared here today to testify as to the cohabitation; one who was living in the house and one who's a private investigator. At that time, I was requesting—or I—I would like to have the court order that alimony be terminated as of that cohabitation on the basis of a change in circumstances and on the basis that we had a nine year marriage and already this is now—we're now looking at thirteen years later where alimony is still in the discussion. It was never my understanding, ever, that alimony was going to be as long as it has been."

The defendant also presented the testimony of Amy Drescher, a licensed private investigator from Franklin, Tennessee, who participated in an investigation of the plaintiff at the defendant's request from December, 2018, through spring, 2019. Drescher testified that she saw the parties' two children being picked up and dropped off by the school bus at 266 Rich Circle, in Franklin, Tennessee (Rich Circle address). Although she never saw the plaintiff at the Rich Circle address, she did observe a vehicle registered to the plaintiff consistently parked in the driveway. The address for the vehicle's registration was the plaintiff's post office box in Thompson Station, Tennessee. Drescher also testified that she observed a vehicle registered to the Rich Circle address in the name of Joseph Meade and a large box at the end of the driveway addressed to Meade. The defendant entered into evidence a photograph of the Rich Circle address showing the driveway, the residence, and the box at the end of the driveway. On one occasion, Drescher testified that she saw Meade drop one of the children off at the Rich Circle address.

She also testified that she had access to a proprietary database, which pulls information from different sources, and that the Rich Circle address did appear in that database for Meade. Drescher testified that she did not have any additional information connecting the plaintiff to the Rich Circle address. Drescher then testified regarding her training and experience,[9] in response to questions posed by the court. Drescher also testified that Meade is the owner of the Rich Circle property and that he is a licensed real estate agent. Drescher testified that the plaintiff had a licensed business in Tennessee called Tasty Good Eats. She testified that the filing information for the business showed that it was registered to an address in Murfreesboro, Tennessee, which location also was owned by Meade.

On May 27, 2022, the defendant filed a memorandum in support of his proposed orders with respect to his motion for modification. On November 10, 2022, the court issued an order denying the defendant's motion for modification. The order stated in relevant part: "Although the defendant claimed to be entitled to a reduction and modification of the unallocated alimony and child support, he failed to prove a substantial change in circumstances. The initial judgment called for payment of unallocated alimony and child support by an agreement filed on August 2, 2010. A few handwritten changes were made to the agreement by the parties at the last minute. It precluded specific child support but included unallocated child support and alimony in the amount of $1000 per week. At that time, there were two minor children.

[9] Drescher testified that she has been licensed as a private investigator for twenty years and is also a licensed private investigation agency owner. She testified that she was required to pass an examination in order to become licensed. She further testified that she participates in continuing education in her field and has served as a guest speaker for the Tennessee Bar Association.

"The court finds that at no time did [the defendant] comply with any of the support orders. He essentially paid whatever amounts which he chose to pay, and he always paid less than the original order.

"As a result, and over the years, a substantial arrearage has accumulated. The court finds that [the defendant] has moved for modification of a judgment with unclean hands.

"Also, [the defendant] has attempted but failed to provide the court satisfactory evidence of cohabitation. He did not provide the court sufficient evidence to warrant a finding of cohabitation.

"Equally as important is the fact that the judgment file sought to be modified has consistently been unallocated alimony and child support throughout the long history of hearings.

"The testimony of Amy [D]rescher (who traveled from Franklin, Tennessee [to] appear as a witness), is found to be not credible, also insufficient to prove cohabitation as required by law." This appeal followed.[10]

Before turning to the defendant's claim on appeal, we set forth the well settled standard of review in family matters. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate

[10] The defendant filed a motion for articulation, which the trial court summarily denied. Although the defendant attempted to file a motion for review with this court, it was returned by the Office of the Appellate Clerk for noncompliance with the rules of appellate procedure, and the defendant did not refile it thereafter.

review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Therefore, to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *O'Neill* v. *O'Neill*, 209 Conn. App. 165, 171–72, 268 A.3d 79 (2021); see also *Gabriel* v. *Gabriel*, 324 Conn. 324, 336, 152 A.3d 1230 (2016) ("[n]otwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law" (internal quotation marks omitted)).

I

We first address the defendant's claim that the court abused its discretion in denying his motion for modification with respect to the child support component of his unallocated support obligation because the court improperly determined that the change in residence of the parties' older child, from the plaintiff's home to the defendant's home, did not constitute a substantial change in circumstances. We conclude that the court's finding that the defendant failed to demonstrate a substantial change in circumstances is clearly erroneous.

"[General Statutes §] 46b-86 governs the modification or termination of an alimony or support order after the date of a dissolution judgment. When, as in this case,

the disputed issue is alimony [or child support], the applicable provision of the statute is § 46b-86 (a), which provides that a final order for alimony [or child support] may be modified by the trial court upon a showing of a substantial change in the circumstances of either party. . . . Under that statutory provision, the party seeking the modification bears the burden of demonstrating that such a change has occurred. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order." (Footnote omitted; internal quotation marks omitted.) *Fox* v. *Fox*, 152 Conn. App. 611, 619–20, 99 A.3d 1206, cert. denied, 314 Conn. 945, 103 A.3d 977 (2014). "A finding of a substantial change in circumstances is subject to the clearly erroneous standard of review." (Internal quotation marks omitted.) *Flood* v. *Flood*, 199 Conn. App. 67, 78, 234 A.3d 1076, cert. denied, 335 Conn. 960, 239 A.3d 317 (2020). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Tilsen* v. *Benson*, 347 Conn. 758, 796–97, 299 A.3d 1096 (2023).

As our Supreme Court has explained, "ensuring that the custodian receives the support payments is consistent with the fundamental purpose of child support, which is to provide for the care and well-being of minor children. . . . General Statutes § 46b-84 (a), which impos[es] a duty on divorced parents to support the

minor children of their marriage, creates a corresponding right in the children to such support. . . . This right does not come through their [parental custodian]. . . . Child support therefore furnishes the custodian with the resources to maintain a household to provide for the care and welfare of the children; in essence, the custodian holds the payments for the benefit of the child. Consequently, once custody changes, there is no immediately apparent reason for the former custodian to continue to receive the payments because the presumption is that the former custodian is no longer primarily responsible for providing the children's necessary living expenses, including food, shelter and clothing. In turn, permitting the diversion of funds away from the parent providing for the care and well-being of minor children when custody changes, pursuant to the parents' contractual agreement, would contravene the purpose of child support." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 555, 46 A.3d 112 (2012).

In the present case, the defendant testified that the parties' older child, who was eighteen years old at the time of the hearing, had moved to live with him in November, 2021.[11] In addition, the defendant represented that the child was present in court on the date

[11] The following colloquy occurred:

"[The Defendant]: Once my ex-wife started cohabitating, that was a change in circumstance, and then I've had further changes in circumstance. In November of last year my son, my eldest son moved in with me. Since November of last year, he's been living with us.

"The Court: November of what year?

"[The Defendant]: November, 2021.

"The Court: How old's your son now?

"[The Defendant]: Eighteen.

"The Court: As of when?

"[The Defendant]: November . . . 2021.

"The Court: So he turned 18.

"[The Defendant]: Yes.

"The Court: And how old is the younger one?

of the hearing to testify. The plaintiff failed to attend the hearing and, consequently, the court did not have before it any evidence that the defendant was not providing for the child's necessary expenses.

In its order denying the defendant's motion for modification, the court did not make any findings based on the undisputed evidence establishing a change in the child's residence. The court stated only that the defendant had "failed to prove a substantial change in circumstances." See *Munson* v. *Munson*, 98 Conn. App. 869, 875, 911 A.2d 1158 (2006) (reversing judgment because decision and articulation were irreconcilable, and noting that, where party seeking modification of child support had alleged that parties' two minor children were residing primarily in his care, "the factual question of the children's residence must be resolved for a determination of the disputed financial issues").[12]

On the basis of the wholly undisputed evidence in the record, we are persuaded that the change in residence of the parties' older child from the home of the

"[The Defendant]: Sixteen.

"The Court: Who's the sixteen year old living with?

"[The Defendant]: His mom.

"The Court: All right. Please continue."

[12] The court also "found" that the defendant had moved for modification with unclean hands on the basis of his failure to comply with the support orders. "The doctrine of unclean hands expresses the principle that where a [party] seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . For a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protections of the parties but for the protection of the court. . . . It is applied . . . for the advancement of right and justice. . . . The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation." (Internal quotation marks omitted.) *Nuzzi* v. *Nuzzi*, 164 Conn. App. 751, 763–64, 138 A.3d 979, cert. granted, 323 Conn. 902, 150 A.3d 684 (2016) (appeal withdrawn October 12, 2017).

We need not address the court's reference to the doctrine of unclean hands because it appears to be of no consequence given that the court decided the defendant's motion to modify on the basis of its conclusions

plaintiff to the home of the defendant amounted to a substantial change in circumstances, and the court's finding to the contrary is not supported by the evidence.[13] The proper remedy is for this court to reverse the judgment in part and remand the case for a new hearing on the motion for modification of the child support component of the defendant's unallocated support obligation as set forth in the 2014 agreement.

II

We next address the defendant's claim on appeal that the court improperly denied his motion for modification without determining the child support component of the unallocated order. Although we already have determined in part I of this opinion that the defendant is entitled to a new hearing with respect to his motion to modify the child support component of the unallocated order, in order to provide guidance on remand, we set forth the procedure applicable to the financial aspects of the modification of child support in the context of an unallocated support order, a process this court has described as "unbundling." See *Ross* v. *Ross*, 200 Conn. App. 720, 731, 239 A.3d 1280 (2020).

Our Supreme Court has explained that, "[e]ven though an unallocated order incorporates alimony and child support without delineating specific amounts for

that he failed to demonstrate a substantial change in circumstances and failed to prove cohabitation.

[13] In his appellate brief, the defendant relies on General Statutes § 46b-224, which provides in relevant part: "Whenever . . . the Superior Court, in a family relations matter . . . orders a change or transfer of the . . . custody of a child who is the subject of a preexisting support order, and the court makes no finding with respect to such support order, such . . . custody order shall operate to: (1) Suspend the support order if . . . custody is transferred to the obligor under the support order . . . ." We need not address his argument pursuant to § 46b-224 because we conclude that the court's determination that the undisputed change in residence of the parties' older child did not amount to a substantial change in circumstances is clearly erroneous.

each component, the unallocated order . . . necessarily includes a portion attributable to child support in an amount sufficient to satisfy the guidelines." *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 558.[14] Accordingly, to decide a motion to modify, "a trial court must determine what part of the original decree constituted . . . child support and what part constituted . . . alimony." Id.; see also *Brown* v. *Brown*, 199 Conn. App. 134, 152, 235 A.3d 555 (2020) ("[i]n other words, before the court may rule on the motion to modify, it must unbundle the unallocated support").

The court in *Tomlinson* further explained that, "[g]iven that [t]he original decree [of dissolution] . . . is an adjudication by the trial court as to what is right and proper *at the time it is entered* . . . the trial court must first determine what portion of the unallocated order represented the child support component at the time of the dissolution." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 558. The absence of a specific finding from the court that issued the original order or prior modification as to the amount of child support does not prevent the trial court from ruling on a motion for modification. *Gabriel* v. *Gabriel*, supra, 324 Conn. 338. "Instead . . . if the court issuing the original support order fails to make the necessary specific findings, the appropriate remedy is for the court hearing the motion for modification to make the necessary findings." Id. "Additionally, because questions

[14] In *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 543, the parties' separation agreement provided that the unallocated alimony and child support was nonmodifiable as to the amount and term of payments. Our Supreme Court determined that such an order was modifiable upon a change in custody because General Statutes § 46b-224 provides for the modification of child support upon a change of custody. Id., 549–50.

Although the present case differs from *Tomlinson* in that the present unallocated order was not, by its terms, nonmodifiable; see part III of this opinion; the same unbundling requirements apply. See *Ross* v. *Ross*, supra, 200 Conn. App. 731 n.9.

involving modification of alimony and support depend . . . on conditions as they exist *at the time of the hearing* . . . it is necessary to evaluate the parties' present circumstances in light of the passage of time since the trial court's original calculation." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Tomlinson* v. *Tomlinson*, supra, 558.

Finally, "[i]n modifying the [unallocated child] support [and alimony] order in a subsequent proceeding, a trial court may consider the same factors applied in the initial determination to assess any changes in the parties' circumstances since the last court order. . . . [General Statutes §] 46b-215b (c) mandates that the guidelines shall be considered in addition to and not in lieu of the criteria for such awards established in [§§] 46b-84 [and] 46b-86 . . . . Specifically, § 46b-84 (d) stipulates that the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 559.

In the present case, because the defendant's unallocated support obligation was modified by the parties' 2014 agreement, the defendant was required to demonstrate, and did demonstrate; see part I of this opinion; a substantial change in circumstances that had arisen subsequent to that modification.[15] See *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 169, 138 A.3d 1069 (2016) ("[i]t

[15] The defendant maintains in his appellate brief that "the trial court did not have the discretion not to make a determination of the amount of child support that would have applied per the guidelines on August 2, 2010, calculate the payments made toward that amount, and declare the amount past due, if any, prior to addressing the modifiability or termination of

is . . . well established that when a party, pursuant to § 46b-86, seeks a postjudgment modification of a dissolution decree that earlier had been modified, he or she must demonstrate that a substantial change in circumstances has arisen subsequent to the entry of the earlier modification" (emphasis omitted; internal quotation marks omitted)). Our review of the file reveals that the trial court, in fact, had before it materials to assist it in determining the child support portion of the unallocated order, as modified by the parties' 2014 agreement. Specifically, the court had on file financial affidavits filed by both the plaintiff and the defendant at the time of the 2014 agreement and a child support guidelines worksheet prepared by the defendant and submitted in connection with the 2014 agreement.

On remand, the court should unbundle the child support from the unallocated alimony and child support. See *Ross* v. *Ross*, supra, 200 Conn. App. 738 (failure to unbundle child support and alimony awards from unallocated order and failure to apply child support guidelines required reversal and remand for further proceedings). First, the court must determine the parties' net weekly income with the assistance of the 2014 financial affidavits. See *Malpeso* v. *Malpeso*, supra, 165 Conn. App. 171. Second, the court must calculate the presumptive support amount for the two children who, at that time, were minors, using the 2005 Child Support and Arrearage Guidelines, which were the guidelines in effect at the time of the parties' 2014 agreement. Id. Third, the court must also ascertain the intent of the parties because the 2014 agreement was not clear as

aspects of the unallocated order." We are not persuaded that the court was required to make a determination as of August 2, 2010, because the defendant's unallocated support obligation was modified by the parties' 2014 agreement, rendering 2014 the operative date.

to how the $900 weekly sum was to be divided.[16] See id., 172 ("[b]ecause support agreements that are not in accordance with the financial dictates of the guidelines are not enforceable unless one of the guidelines' deviation criteria is present, such as when the terms of the agreement are in the best interest of the child . . . the court must determine what was intended to be child support within the unallocated alimony and child support order to ensure the agreement did not run afoul of the guidelines" (citation omitted; internal quotation marks omitted)).[17] Finally, the court must consider the newly determined 2014 child support award against the parties' current financial circumstances. Additionally, we note that, due to the passage of time since the trial court initially addressed the defendant's request for modification, reconsideration of the parties' present circumstances is necessary. See *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 561.

III

The defendant's remaining two claims on appeal are interrelated, and we address them together. The defendant claims that the court improperly denied his motion

[16] If the plaintiff again fails to participate in the hearing on remand, the court may consider the materials in its file together with the defendant's presentation of evidence.

[17] In *Tomlinson*, our Supreme Court noted that "the trial court improperly may have relied solely on the presumptive guidelines amount in calculating the portion attributable to child support at the time of dissolution. Although there is a rebuttable presumption that the figure arrived at under the guidelines is the proper amount of child support; see General Statutes § 46b-215b (a); the trial court at the original dissolution proceeding in 2005 had discretion to deviate from such amount upon consideration of factors, such as the coordination of total family support, shared physical custody, extraordinary disparity in parental income and the best interests of the children. Although it is reasonable to conclude that the trial court found that the unallocated order provided adequate support when it incorporated the parties' separation agreement into the judgment, it does not follow necessarily that the child support portion was equivalent to the presumptive guidelines amount." *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 560–61.

for modification of the alimony component of his unallocated support obligation because the court interpreted the unallocated support provision of the separation agreement as nonmodifiable and disallowed the parties' older child from testifying, while concurrently ruling the defendant's witness not credible. We agree with the defendant that the court abused its discretion.

We first set forth relevant principles of law with respect to the modification of alimony on the basis of cohabitation. "Our Supreme Court has allowed a party obligated to pay alimony to request, pursuant to § 46b-86 (b), that alimony be suspended, reduced, or terminated in the event of cohabitation in cases where a dissolution judgment requires payment of alimony, but contains no provision regarding the effect of cohabitation on the obligation to pay alimony. . . . This court, however, has held that, because the provisions in an incorporated separation agreement prevail over § 46b-86 (b), if the incorporated separation agreement limits modification of the amount or duration of alimony, and does not make an exception for modification in the event of cohabitation, the court does not have access to its remedial powers pursuant to § 46b-86 (b)." (Citation omitted.) *Fazio* v. *Fazio*, 162 Conn. App. 236, 249–50, 131 A.3d 1162, cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016).

"[U]nder § 46b-86 (b), a finding of cohabitation requires that (1) the alimony recipient was living with another person and (2) the living arrangement caused a change of circumstances so as to alter the financial needs of the alimony recipient. . . . Pursuant to § 46b-86 (b), the nonmarital union must be one with attendant financial consequences before the trial court may alter an award of alimony. . . . The change in the need of the alimony recipient need not be substantial . . . [but] the difference must be measurable in some way . . . . [T]he court must have the ability to compare the

plaintiff's financial needs at different points in time to determine whether those needs either have increased or decreased over time." (Citations omitted; internal quotation marks omitted.) *Murphy* v. *Murphy*, 181 Conn. App. 716, 722, 188 A.3d 144 (2018).

The following additional procedural history is relevant to resolving this claim. During the hearing, the court was under the misapprehension that the separation agreement precluded the termination of alimony, including on the basis of cohabitation, until the death of either party.[18] Specifically, in response to the defendant's stated concern that the plaintiff "will continue to collect child support as unallocated as . . . long as

[18] The following colloquy occurred:

"The Court: Said [provision reads that] unallocated alimony and child support shall end on the death of either party. You're aware of that?

"[The Defendant]: Yes.

"The Court: Okay. And no one's died yet, right, thank God?

"[The Defendant]: Right.

"The Court: Right. And then it goes on to talk about other things that are not really relevant to this proceeding. So, I just want to make sure that that is what you agreed to.

"[The Defendant]: Yes. And I—I want to point out to the court that our agreement was nothing—the shall end on the death of either party, was done for tax reasons.

"The Court: Doesn't matter why it was done. It was an agreement.

"[The Defendant]: Yes."

The court continued: "The agreement is in writing for a good reason. The agreement is signed and the judges, myself included, we always ask the parties about the agreement. Do you understand the agreement, are you voluntarily entering, do you have any questions about the agreement, are you satisfied with the legal representation you have received by the attorney of your choice? So, just keep that in mind because we can't go back, you know, to 2010 with what you're presenting me so far. I haven't finished hearing you, and I don't know if I need to hear from your children either, because I don't like to hear from children in divorce cases unless it's really necessary, and so far the only thing he can help me with is where [the plaintiff is] located and maybe her lifestyle and maybe cohabitation. And you mentioned that you have an investigator that has testimony that—that the investigator's willing to offer. That's all well and good, but you made these agreements with your ex-wife and with legal advice, that multiplies the burden you have to modify that. Just want to be very clear here."

. . . she's breathing," the court stated, "that's what you agreed to. You agreed to that." The court continued: "You didn't agree to terminate, you agreed to modify in the event certain events occurred. So, you didn't—and—and it did not include cohabitation either, by the way. It only included in the event of the death of either party it shall terminate. That's what you agreed to. Very clear, it's not ambiguous at all to me."

The court additionally stated: "I will hear you and I will hear from your investigator, but the fact that she's cohabitating is not a grounds to terminate the alimony based on your agreement, based upon the judgment of 2010."

The defendant alerted the court to his understanding that cohabitation may form a basis for the termination of alimony unless expressly barred by the agreement and requested permission to submit a memorandum of law on that point, which the court permitted. In his memorandum of law, the defendant argued that because the parties' separation agreement did not preclude modification of the unallocated support obligation, § 46b-86 (b) permits the termination of alimony upon a finding of cohabitation.

At the end of the hearing, the defendant returned to an issue he had identified at the beginning of the hearing, which was that he wished to have the parties' eighteen year old son, who was present in court throughout the hearing, testify in support of his claim that the plaintiff was cohabitating. In the middle of the hearing, the court expressed its disinclination toward the parties' son testifying, stating: "[E]ven if you had your child come in, and I don't like to bring them in, because unless it's really necessary, and I don't think it is, to be candid, I don't like to see a—any kid testify and pick sides in a dispute between his parents because until either of you die you will be his parents." At the conclusion of the

private investigator's testimony, the court asked the defendant whether he had anything else, and the following colloquy occurred:

"[The Defendant]: Your Honor, I just—I'd just say that I wholeheartedly agree that I'd—I would not—I would not want to have my son as a witness unless Your Honor feels that—

"The Court: I don't need his testimony.

"[The Defendant]: Okay. Great."

In its order denying the defendant's motion for modification, the court stated that the defendant had failed to "provide the court satisfactory evidence of cohabitation," and found the private investigator's testimony "not credible, also insufficient to prove cohabitation as required by law."

Under the circumstances of this case, we are persuaded that the trial court misapplied the law at the time of the hearing and that its misapplication of the law resulted in an abuse of its discretion. First, contrary to the court's remarks during the hearing, the separation agreement at issue in this matter did not provide that the unallocated support obligation was "nonmodifiable" as to amount or term. Section 46b-86 (a) provides in relevant part: "*Unless and to the extent that the decree precludes modification*, any final order for the periodic payment of permanent alimony or support . . . may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . ." (Emphasis added.); see also *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 548 ("unambiguous provisions precluding modification of alimony are enforceable pursuant to the language of § 46b-86 (a)"). The separation agreement provision stating that "[s]aid unallocated alimony and child support shall end on the death of either

party" does not constitute an unambiguous nonmodification provision,[19] nor does it preclude the termination of alimony in the event of cohabitation. Cf. *Gabriel* v. *Gabriel*, supra, 324 Conn. 343 (agreement at issue stated that unallocated alimony and support payments were for defendant's support and were nonmodifiable by defendant as to both amount and duration but were modifiable by plaintiff upon substantial change in circumstances, not including defendant's cohabitation or her earnings up to $100,000). Moreover, as noted previously, the 2014 agreement removed the provision in Article IV that prohibited the defendant from seeking a downward modification in his support payment unless the plaintiff's earnings exceeded $50,000 per year. Accordingly, the court's remarks during the hearing regarding modification reflect an erroneous understanding of the law.

Second, it is difficult for this court to reconcile the court's handling of the defendant's proffer of his son's limited testimony with the court's treatment of this issue in its written order. Having already incorrectly expressed that cohabitation could not form a basis for modification of alimony, the court, when the defendant revisited the subject of his son testifying as to cohabitation, did not preclude the testimony on evidentiary grounds, but rather stated: "I don't need his testimony." The defendant essentially was misled into forgoing his opportunity to present the additional evidence as to

[19] We note that other provisions of the parties' separation agreement reinforce our conclusion that the separation agreement cannot logically be read to require nonmodifiable alimony payments until the death of either party. For example, § 7.2 of the separation agreement, providing that the plaintiff may claim the minor children as dependents for purposes of the tax exemption, provides in relevant part: "In the event the court should modify the unallocated alimony and support, this provision may be modified." Additionally, § 9.3 of the separation agreement requires the defendant to maintain a policy of life insurance with a face value of $500,000, "payable to the [plaintiff] for so long as he shall have an alimony obligation."

cohabitation, which is important in light of the court's written decision, in which it determined that the defendant had failed to provide satisfactory evidence of cohabitation. Additionally, although we are mindful that we must "defer to the trier of fact's assessment of credibility"; (internal quotation marks omitted) *Nuzzi* v. *Nuzzi*, 164 Conn. App. 751, 773, 138 A.3d 979 (2016), cert. granted, 323 Conn. 902, 150 A.3d 684 (2016) (appeal withdrawn October 12, 2017); we are confounded by the court's apparent wholesale discrediting of the uncontroverted testimony of the licensed private investigator. The court did not identify any particular aspects of Drescher's testimony that it specifically discredited, nor did it offer any explanation of its determination that the testimony as a whole was not credible.

Finally, it is difficult for this court to comprehend the significance of the court's finding that "[e]qually as important is the fact that the judgment file sought to be modified has consistently been unallocated alimony and child support throughout the long history of hearings." As described previously in this opinion, our appellate courts consistently and clearly have set forth the steps necessary to modify the components of an unallocated support order. Under the totality of the circumstances in this case, we are convinced that the court applied the wrong standard of law and, consequently, abused its discretion in denying the defendant's motion for modification of the alimony component of his unallocated support obligation and that the defendant is entitled to a new hearing.

The judgment is reversed with respect to the postdissolution order denying modification of the unallocated alimony and child support order and the case is remanded for a new hearing on the defendant's motion for modification; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

MARGARET MARSHALL *v.* JOHN MARSHALL II
(AC 45727)

Alvord, Cradle and Westbrook, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and ordering the plaintiff to pay him certain alimony and child support. At the time of trial, the defendant had been unemployed for approximately five years. On the basis of the defendant's past employment, the trial court found that he had an earning capacity of $350,000 per year. The plaintiff worked as an equity partner at M Co., an investment banking firm that she cofounded in 2012. As a partner of M Co., the plaintiff did not receive a base salary or a draw but, rather, received a percentage of the partnership's yearly net profits in the form of distributions. Each year, the partners of M Co. determine the percentage of yearly net profits that each partner will receive. The plaintiff's percentage of net profit had decreased each year from 2018 through 2021, when the trial began. Her distributions also fluctuated from year to year, and she received a total of $1.3 million in 2020 and $2.3 million in 2021. The distributions were received sporadically throughout the year, usually toward the end of the year or the beginning of the following year. The plaintiff received a Schedule K-1 (K-1) from M Co. every year, which she used to determine her net income. Prior to the commencement of the dissolution action, the plaintiff sent a text message to the defendant stating in relevant part that she was planning to reduce her participation in M Co. and was starting her "exit plan." According to the plaintiff's testimony at trial, this text message was merely the result of her being frustrated and upset and she was not in an "exit process." She also testified that she hoped that the text would persuade the defendant to begin seriously looking for employment. The defendant argued that there was a causal relationship between the plaintiff's suggestion that she would reduce her income and the reduction in her percentage of M Co.'s net profits in 2020, alleging that the plaintiff intentionally reduced her income to decrease the amount of alimony and child support she would have to pay to him. In February, 2022, the plaintiff filed a financial affidavit that reflected her 2020 partnership income as shown on her K-1, with a total gross income of approximately $1 million. The plaintiff testified that she relied upon her 2020 K-1 because she had not yet received the 2021 K-1 by the time of trial. Following the trial, the court issued a memorandum of decision in which it found that the plaintiff utilized income for her February, 2022 financial affidavit from 2020, a year during the height of the COVID-19 pandemic, and that the plaintiff had threatened to reduce her income and that her income was then reduced. The court indicated that it was unable to

determine the plaintiff's current income based solely on her distributions from 2021 and year to date for 2022 based on the evidence presented, and, therefore, the court utilized the plaintiff's income from her February, 2022 financial affidavit to determine alimony and child support amounts. *Held:*

1. The defendant could not prevail on his claim that the trial court abused its discretion by basing its alimony and child support orders on the plaintiff's 2020 income rather than her 2021 partnership distributions: contrary to the defendant's argument that the trial court made a finding that the plaintiff intentionally had caused her income to be diminished in 2020, this court concluded that the trial court did not make such a finding, as, although the plaintiff's percentage of M Co.'s profit in 2020 was lower than in previous years, the court indicated that there were reasons for the reduction, including that additional partners had been added to M Co., that there had been a global pandemic, and that the plaintiff's economic participation at M Co. had decreased; moreover, the trial court was well within its discretion to base its financial orders on the plaintiff's 2020 income because it was unable to determine her current income based solely on her partnership distributions from 2021 and year to date for 2022 and to find that the distributions that the plaintiff thus far had received from M Co. in 2022 did not reflect her actual net income because such distributions were separate from what ultimately was shown on her K-1 as income; furthermore, although the defendant was correct that there was ample evidence of the distributions that the plaintiff had received in 2021, the court was not required to accept his position that the distributions were equal to the plaintiff's income, and the record supported a finding that the plaintiff could not accurately calculate her yearly income until she received a K-1, which reflected adjustments to the partnership distributions made by M Co.'s accountants, and, therefore, because adjustments were made to the total distributions that the plaintiff received from M Co., the amount of resources available for support purposes was not apparent from the partnership distributions alone.
2. The defendant could not prevail on his alternative claim that the trial court abused its discretion by basing the awards of alimony and child support on the plaintiff's income as reflected on her financial affidavit rather than on her earning capacity: this court concluded that, because the trial court properly relied on the plaintiff's February, 2022 financial affidavit in fashioning the support orders, the trial court properly exercised its discretion in declining to determine and rely on the plaintiff's earning capacity; moreover, although the court determined an earning capacity for the defendant, it appeared that the court did so because the defendant had not been recently employed, and the court was not required to determine the plaintiff's earning capacity given her continuous employment at M Co. since its creation in 2012 and income documented by her K-1, on which the court could reasonably rely in crafting the support orders.

Argued December 6, 2023—officially released February 27, 2024

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where it was tried to the court, *M. Moore*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *M. Moore*, *J.*, denied the defendant's motions for clarification and for reconsideration and reargument, and the defendant appealed to this court. *Affirmed*.

Campbell D. Barrett, with whom were *Stacie L. Provencher* and, on the brief, *Dana M. Hrelic*, for the appellant (defendant).

James P. Sexton, with whom were *Thomas D. Colin* and, on the brief, *Gail Oakley Pratt* and *John R. Weikart*, for the appellee (plaintiff).

Opinion

WESTBROOK, J. In this marital dissolution action, the defendant, John Marshall II, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Margaret Marshall, challenging the factual and legal bases for the court's alimony and child support orders. On appeal, the defendant claims that the court improperly (1) relied on the plaintiff's allegedly manipulated 2020 income in fashioning the alimony and child support orders, rather than relying on the plaintiff's 2021 partnership distributions, and, alternatively, (2) based those support orders on the plaintiff's reported income rather than on her earning capacity. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which were either found by the court or are otherwise undisputed, and procedural history are relevant to our resolution of this appeal. The plaintiff and the defendant were married on September 9, 2000. Three children were born of the marriage, two

of whom were minors at the time of the trial. The plaintiff filed for divorce on October 24, 2017.

At the time of the trial, the plaintiff was forty-six years old and worked as an equity partner at M2O, an investment banking firm that she cofounded in 2012. As a partner of M2O, the plaintiff does not receive a base salary or a draw but, rather, receives a percentage of the partnership's yearly net profits in the form of distributions.[1] Each year, the partners of M2O meet to determine the percentage of yearly net profits that each partner will receive.[2] Each partner then receives distributions from M2O equal to his or her percentage of the partnership's net profits. The distributions are not received on a set schedule but, rather, are received sporadically throughout the year, usually toward the end of the year or the beginning of the following year.[3]

[1] According to a partner of M2O, "[payments from clients] are collected over time. We pay a lot of people during that period of time and then what's left over is net profit. And that net profit is then divided up based on our percentages."

[2] M2O "has a very informal manner of determining partner percentages." "Partner percentages" are each partner's percent share in the distribution of M2O's net profit.

At trial, one of the partners of M2O testified that to determine the percentage for each partner, the partners of M2O "get in a room . . . discuss the projects . . . discuss the relative contribution[s] to those projects and [then] try to figure out appropriate levels of compensation going into the next year based on that. It's a much more informal process than you might think for a business that has done this level of revenue." The division of profits, according to a partner of M2O, is "largely based on performance. We are a success based business. How we divide up the pot at the end of a year going into the next year is largely based on contributions to the success of the business."

[3] At trial, the defendant's attorney questioned the plaintiff as follows:

"Q. Okay. And that—you get distributions from M2O on a quarterly basis and also in between a quarterly basis, don't you?

"A. Not necessarily, it's ad hoc.

"Q. So, the quarterly ones that appear on your distribution schedule are paid, and then there are other months where, according to the production provided, shows that there's, for instance, a payment in March as well as April. So, there are times you get other payments in your distributions—at distributions throughout the year, is that correct?

The plaintiff's percentage of net profit was 21 percent in 2018, 15 percent in 2019, 12 percent in 2020, and 11 percent in 2021. She received distributions totaling $2.4 million in 2018, $1.2 million in 2019, $1.3 million in 2020, and $2.3 million in 2021.

The plaintiff receives a Schedule K-1 (K-1) from M2O every year.[4] The plaintiff refers to her annual K-1 to determine her net income, which reflects the adjustments to the partnership distributions made by M2O's accountants.[5]

"A. They're all ad hoc.

"Q. Okay. Well, each—each partner at M2O has a contract describing when their payments would be made, isn't that correct?

"A. No.

"Q. So, the contract—there's no contract in terms of when you get paid?

"A. Not that I'm aware of.

* * *

"Q. Has there ever been a time since you started this business that you haven't gotten a distribution between August and January 1 of the following year?

"A. I have never received—I think I would typically be—I mean, I'm generally receiving distributions in the second half of the year and oftentimes one in January which relates to the following calendar—or the prior calendar year."

[4] "A schedule K-1 is the document that states each individual partner's proportionate income or loss based upon [his or her] percentage ownership. The income or loss on the schedule K-1 is in turn reported on each partner's individual tax return." (Internal quotation marks omitted.) *Grogan* v. *Penza*, 194 Conn. App. 72, 75 n.2, 220 A.3d 147 (2019).

[5] The defendant's attorney questioned the plaintiff as follows:

"Q. Okay. So, there is—the monies [distributions] that you receive are counted as your income, correct? For which you have not had to pay them pay for monies that you've over—been overpaid?

"A. I—I think that my testimony was that the income is gonna be a subset of the distributions.

"Q. I don't think you testified as to that, and I don't understand what that means. What do you mean a subset?

"A. If you look at the K-1, there's two—there—it shows what distributions were made and then there's also, like, an income part and then there's interest and there's other things and there's a whole bunch of deductions and until I have all of that I can't answer your question in terms of my income.

"Q. So, you're saying that the distributions are not income to you? What you receive throughout the year—

"A. Some—

In February, 2022, near the end of the trial, the plaintiff filed a financial affidavit that reflected her 2020 partnership income as shown on her K-1. The plaintiff relied on her 2020 K-1 because she had not yet received the 2021 K-1 by the time of trial.[6] The February, 2022 financial affidavit showed a gross weekly income of $20,994 and a net weekly income of $12,183.

At the time of trial, the defendant was fifty-three years old and was unemployed. He was last employed in 2016 as a senior managing director at Focuspoint Private Capital. Although the defendant testified that he was unable to find employment due to a felony conviction in 2013,[7] he was let go from his job at Focuspoint Private Capital in 2016 because of his poor job performance rather than his conviction.[8] The defendant has had several years to seek employment following the commencement of this action but has failed to do so. The defendant has an earning capacity of $350,000 per year.

Following a trial that began on February 17, 2021, and which was primarily held remotely due to the COVID-19 pandemic, the court, *M. Moore*, *J.*, issued a thorough

"Q. —and in 2021, you received $2.3 million. Are you saying that's not going to be your income for 2021?

"A. That's—that's going to be some portion of my income. . . .

"Q. And why would it be reduced 2.3? What—what portion is not going to be counted as your income?

"A. That's where I don't understand exactly what the—the accountants do at Eisner and Ampner, but they make adjustments."

[6] The defendant's attorney questioned the plaintiff about the timing of the K-1 as follows:

"Q. Okay. And have you received a K-1 for 2021?

"A. No.

"Q. And when do you typically get K-1s?

"A. April."

[7] The court found that, "[i]n 2013, the defendant plead[ed] guilty to assault in the second degree with a motor vehicle. The defendant consumed alcohol before driving head-on into another driver in 2010. He spent approximately thirty days in jail in 2013 and was convicted of a felony."

[8] The court found that the defendant "was let go because he refused to work hard and meet the goals of his employment. The felony conviction played no part in his termination from his employment at Focuspoint . . . ."

memorandum of decision on June 13, 2022, dissolving the parties' marriage and issuing, inter alia, alimony and child support orders.[9] The court concluded that the parties' marriage had broken down irretrievably and that the defendant was more at fault than the plaintiff for the marital breakdown. The court found that "the defendant's failure to continue to make a financial contribution to the family and his unilateral decision not to find employment was the primary reason for the breakdown of the marriage."

The court ordered the plaintiff to pay alimony to the defendant in the amount of $1500 per week "until the first to occur of the following events: the death of either party, the defendant's remarriage or cohabitation pursuant to statute and case law, or five years from the date of dissolution." The court did not order the defendant to pay alimony to the plaintiff. In constructing this alimony order, the court "reviewed the standard of living enjoyed by the parties, including the standard of living prior to the filing of the dissolution of marriage, the standard of living after the filing of the dissolution of marriage, and all of the factors incorporated in [General Statutes] § 46b-82 and relevant case law." The court's determination of the duration of the alimony award to the defendant was based on "the court's consideration of all of the factors set forth in . . . § 46b-82 and its determination that this period of time is reasonable to allow the defendant to fulfill his responsibilities under the parenting plan; provide the necessary income for him to become financially independent and self-sufficient in light of his age, educational background and work history; and allow him to maintain a reasonable standard of living that he enjoyed during the marriage while finding full-time employment at a level he had during the marriage."

[9] The court additionally issued orders that are not at issue on appeal, including orders regarding the division of the parties' marital property, insurance, educational support, and counsel fees.

The court additionally ordered the parties to share joint legal and physical custody of the parties' minor children.[10] To determine the amount of child support to be paid, the court reviewed General Statutes § 46b-84; the Child Support and Arrearage Guidelines (guidelines); relevant case law; the evidence at trial, including the testimony of the parties; the guidelines' worksheets and financial affidavits submitted by the parties; and the expenses of the children. The court determined that the plaintiff's net weekly income is significantly greater than the guidelines' maximum net income of $4000.[11] After considering the proposed presumptive child support amount submitted by each party, the court concluded that "the presumptive minimum weekly child support to be paid from the plaintiff to the defendant [was] $708 per week." The court ultimately ordered the plaintiff to pay the defendant $1500 per week in child support. The court found this figure reasonable "in light of the [principles] in the Connecticut child support guidelines, the needs of the children, and § 46b-84." The court ordered the plaintiff to "pay child support for each minor child until the child reaches the age of eighteen or graduates high school, whichever occurs later, but in no event past the child's nineteenth birthday."

On July 5, 2022, the defendant filed motions for clarification and for reconsideration and reargument. In his motion for clarification, the defendant sought clarification regarding, inter alia, the current net incomes of the parties[12] and the amount of income that the court

[10] The court, in relevant part, awarded the parties parenting time with the two minor children on a week on/week off basis.

[11] Connecticut's child support guidelines; see Regs., Conn. State Agencies § 46b-215a-1 et seq.; contain a schedule of basic child support obligations, "which supplies presumptive levels of support on the basis of the parents' combined net weekly income, but only up to $4000 of such income." *Dowling* v. *Szymczak*, 309 Conn. 390, 393, 72 A.3d 1 (2013).

[12] The defendant argued that "the court did not make findings regarding the current 'net income' of either party. . . . The defendant requests [that]

attributed to the plaintiff at the time of dissolution.[13] The plaintiff filed an objection to the defendant's motion for reconsideration and reargument on July 8, 2022, arguing that the defendant "provides no basis whatsoever, legal or factual, to warrant reconsideration or reargument on any of these subjects, and his requests are very baldly seeking the proverbial second bite of the apple." The court denied the defendant's motions on July 26, 2022. This appeal followed. Additional facts will be set forth as necessary.

The defendant claims on appeal that the court abused its discretion in determining alimony and child support by relying on (1) the plaintiff's February, 2022 financial affidavit, which reflected her 2020 actual earned income of $1.3 million, rather than relying on the evidence of the approximately $2.3 million in distributions the plaintiff received in 2021 as a partner of M2O; and (2) the plaintiff's income rather than determining and relying upon the plaintiff's earning capacity. The defendant argues that these alleged abuses of discretion, "separately and together, implicate the mosaic of the court's financial orders and warrant reversal with direction to remand for a new trial on the same."[14] The plaintiff counters that

the court clarify the amount of its net income determinations for each of the parties and the bases for those determinations."

[13] The defendant argued that he "presented undisputed evidence with respect to the plaintiff's distributions in 2021 and year to date 2022. The court stated in its [memorandum of decision] that the plaintiff received partnership distributions from M2O in 2021 of $2.3 million . . . . However . . . the court stated [that] it relied on the plaintiff's 2020 income, which was reflected in her financial affidavit dated February 25, 2022." (Citation omitted.)

[14] "Financial orders in dissolution proceedings often have been described as a mosaic, in which all the various financial components are carefully interwoven with one another. . . . Because the court's support orders, particularly its spousal support or alimony order, are informed by and reflective of the parties' incomes and assets, as affected by the court's other financial orders, the entirety of the mosaic must be refashioned whenever there is error in the entering of any such interdependent order." (Internal quotation marks omitted.) *Onyilogwu* v. *Onyilogwu*, 217 Conn. App. 647, 657–58, 289 A.3d 1214 (2023).

there was no abuse of discretion and that, therefore, the judgment of the court should be affirmed. We agree with the plaintiff.

As a preliminary matter, we set forth our standard of review and other relevant legal principles. The "standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . .

"Further, [w]e have repeatedly recognized that [i]n determining the assignment of . . . alimony under § 46b-82, a trial court must weigh the station or standard of living of the parties in light of other statutory factors such as the length of the marriage, employability, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. . . . Particularly with respect to alimony, the trial court does not need to give each factor equal weight or make express findings as to each factor, but it must

consider each factor. . . . In addition, it is a long settled principle that the [party's] ability to pay is a material consideration in formulating financial awards. . . . Finally, the trial court's financial orders must be consistent with the purpose of alimony: to provide continuing support for the nonpaying spouse, who is entitled to maintain the standard of living enjoyed during the marriage as closely as possible. . . . When exercising its broad, equitable, remedial powers in domestic relations cases, a court must examine both the public policy implicated and the basic elements of fairness." (Citations omitted; internal quotation marks omitted.) *Tilsen* v. *Benson*, 347 Conn. 758, 796–97, 299 A.3d 1096 (2023).

Section 46b-84 governs the award of child support and provides in relevant part: "(a) Upon or subsequent to the . . . dissolution of any marriage . . . the parents of a minor child of the marriage, shall maintain the child according to their respective abilities, if the child is in need of maintenance. Any postjudgment procedure afforded by chapter 906 shall be available to secure the present and future financial interests of a party in connection with a final order for the periodic payment of child support. . . .

"(d) In determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child. . . ."

General Statutes § 46b-215a provides for a commission to oversee the establishment of child support guidelines "to ensure the appropriateness of criteria for

the establishment of child support awards . . . .'' In support of the application of these guidelines, General Statutes § 46b-215b (a) provides in relevant part: ''The . . . guidelines issued pursuant to section 46b-215a . . . shall be considered in all determinations of child support award amounts . . . . In all such determinations, there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered. A specific finding on the record at a hearing, or in a written judgment, order or memorandum of decision of the court, that the application of the guidelines would be inequitable or inappropriate in a particular case . . . shall be required in order to rebut the presumption in such case.'' See also *Pencheva-Hasse* v. *Hasse*, 221 Conn. App. 113, 123, 300 A.3d 1175 (2023).

In *Dowling* v. *Szymczak*, 309 Conn. 390, 72 A.3d 1 (2013), our Supreme Court provided clear guidance for determining child support obligations in cases of high income families. The court explained that ''the [child support guideline] schedule sets forth a presumptive percentage and resultant amount corresponding to specific levels of combined net weekly income; the schedule begins at $50 and continues in progressively higher $10 increments, terminating at $4000. . . . This court has recognized that the guidelines nonetheless apply to combined net weekly income in excess of that maximum amount. . . . Indeed, the regulations direct that, [w]hen the parents' combined net weekly income exceeds [$4000], child support awards shall be determined on a case-by-case basis, and the current support prescribed at the [$4000] net weekly income level shall be the minimum presumptive amount. . . .

''While the regulations clearly demarcate the presumptive minimum amount of the award in high income cases, they do not address the maximum permissible amount that may be assigned under a proper exercise of the court's discretion. . . . [T]his court has

remained mindful that the guidelines . . . indicate that such awards should follow the principle expressly acknowledged in the preamble [to the guidelines] and reflected in the schedule that the child support obligation as a percentage of the combined net weekly income should decline as the income level rises." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 400–401.

I

The defendant first claims that the court abused its discretion by relying on the plaintiff's February, 2022 financial affidavit, which reflected the plaintiff's 2020 partnership income as stated in her K-1, despite a wealth of evidence demonstrating that the plaintiff received more compensation in 2021. He argues that it was an abuse of discretion to base the alimony and child support orders on the plaintiff's 2020 income because the plaintiff had intentionally reduced her income in order to decrease the amount of alimony and child support she would have to pay to the defendant. We conclude that there was ample evidence in the record to support the court's decision, and, accordingly, the court did not abuse its discretion in basing the support orders on the plaintiff's 2020 income rather than her 2021 distributions.

The following additional facts are relevant to this claim. In 2019, the plaintiff sent a text message to the defendant stating in relevant part that "[t]he current situation is unacceptable, it's bad for my health, and I've already told my partners I would like to begin reducing my economics at M2O this year. I am starting my exit plan. . . ." This text message, according to the plaintiff, was not sincere but, rather, was the result of her being frustrated and upset.[15] Additionally, the

[15] The defendant's attorney questioned the plaintiff as follows:

"Q. So, you were planning to—so you were planning to exit—you were starting your exit plan, meaning you were planning to leave your job so that you would force [the defendant] to get a job, is that what your testimony is?

plaintiff hoped that the text would persuade the defendant to begin seriously looking for employment.[16] According to the defendant, however, there was a causal relationship between the plaintiff's suggestion that she would reduce her income and the reduction in her percentage of M2O's net profits in 2020. He stated that the plaintiff intentionally reduced her income to decrease the amount of alimony and child support she would have to pay to him.[17]

"A. I'd say some of this I wasn't at my best, perhaps, you know, in the best frame of mind because I clearly was upset, throwing a lot in this text, and I never had such a conversation with my partners, and I'm not in an exit process.

* * *

"Q. Did you ever indicate to [the defendant] that you were going to not only leave your job but reduce your income?

"A. I don't remember that. If I said it, it was me being just upset.

"Q. Do you recall saying you were going to renegotiate something with M2O to get around the divorce process?

"A. I don't recall that specifically, but again, if I did, it was probably not my best moment. I'm sure I was upset about something."

[16] The defendant's attorney questioned the plaintiff as follows:

"Q. And—yes, and you said, when I asked you that previously, you said that was a mistake, I was upset. What did—why did you say that was a mistake? Were you trying to reduce your economics at M2O or not?

"A. No, I guess it was, probably, you know, I was hoping that maybe he would actually take seriously the fact that he—he needs to get a job."

[17] The defendant's attorney questioned the plaintiff as follows:

"Q. All right. And since the filing of the divorce, your percentage has dropped each year, isn't that true?

"A. Yes, it has due to changes in the business.

"Q. Okay. Was that a part of your divorce plan? To reduce your income?

"A. No.

"Q. Did you ever—did you ever put in writing that you were going to make an effort to reduce [your] interest in M2O prior to a divorce action?

"A. I remember sending [the defendant] some texts along those lines.

"Q. Okay. And you said to him that you were going to reduce so you didn't have to pay him alimony?

"A. That might not have been my finest hour. I don't remember exactly what I said, but there were some heated moments.

"Q. Okay. So, you admit you have said that to him in the past?

"A. I didn't say—I don't recall saying that exactly, but something like that definitely could've been said.

"Q. Okay. And do you also recall saying that you would want to renegotiate a document to get around paying him alimony with M2O?

"A. I—I don't remember that, but again, there were a lot of heated debates between us, so it's possible."

The court expressly stated that it had considered all relevant statutory factors in crafting its award of alimony and its award of child support.[18] The court also considered the distributions received by the plaintiff in 2021.[19] In determining alimony and child support, "[t]he court consider[ed] the following: [T]he plaintiff utilized income for her [February] 2022 financial affidavit from 2020, a year during the height of the pandemic. The plaintiff threatened to reduce her income, which is exactly what happened. Moreover, her company has a very informal manner of determining partner percentages. The court, however, is unable to determine the plaintiff's current income based solely on her distributions from 2021 and year to date for 2022 based on the evidence presented; therefore, the court utilizes the plaintiff's income from her [February] 2022 financial affidavit."

[18] With regard to alimony, the court stated in its memorandum of decision that it had "reviewed the standard of living enjoyed by the parties, including the standard of living prior to the filing of the dissolution of marriage, the standard of living after the filing of the dissolution of marriage, and all of the factors incorporated in § 46b-82 and relevant case law."

With regard to child support, the court further stated: "The court has reviewed the State of Connecticut Child Support and Arrearage Guidelines effective July 1, 2015, § 46b-84, relevant case law, the evidence at trial, the testimony of the parties, and the guideline worksheets submitted by the parties. The court has reviewed the financial affidavits submitted by the plaintiff and the defendant and the expenses of the children. The plaintiff's net weekly income is significantly greater than the maximum guideline net income of $4000. The plaintiff has submitted child support guidelines which show a presumptive child support amount of $708 to be paid by the plaintiff to the defendant. The defendant submitted child support guidelines attached to his amended proposed orders which show weekly income to the defendant of $1731 gross and $1546 net and the plaintiff's net weekly income of $24,407. The plaintiff lists the presumptive child support per week to be paid from the plaintiff to the defendant in the amount of $2557. The court has also considered the shared physical custody of the children."

[19] The court stated in its memorandum of decision that "[t]he plaintiff testified she utilized her 2020 income for the financial affidavit filed in February, 2022. The plaintiff testified to partnership distributions in 2021 of $2.3 million. She also testified her percentage of income for 2021 and 2022 is 11 percent."

The parties disagree over whether the court found that the plaintiff intentionally reduced her income in 2020. As we previously noted, in its memorandum of decision the court stated that "[t]he plaintiff threatened to reduce her income, which is exactly what happened." The court additionally noted that the plaintiff "testified she was not sincere when she threatened her husband with a reduction of her income; however, it appears the plaintiff's income was in fact reduced during the pendency of this divorce action." The defendant argues that "[t]he trial court . . . very clearly made three findings that reflect deficiencies in the plaintiff's income number from 2020, including its finding that the plaintiff threatened to reduce her income and that her income was thereafter reduced. The trial court nevertheless relied on the 2020 income number despite these glaring deficiencies . . . ."[20] (Emphasis omitted).

The plaintiff counters that "the trial court did *not* make a finding that the plaintiff *intentionally* caused her net income to be diminished. . . . Even read in isolation . . . these sentences do not state that the plaintiff intentionally reduced her income to make good on her threat. . . . All that is clear from those two sentences is that the plaintiff made a threat to reduce her income and that the plaintiff's income appeared to have been reduced. The trial court does not state explicitly that the plaintiff caused her income to drop, intentionally or otherwise." (Emphasis altered.) The plaintiff additionally argues that the sentences should not be read in isolation. In the same section of the memorandum of decision, the court references additional events, such as the global pandemic and the addition of partners to M2O, that may have reduced her income at the time in question. She therefore argues

[20] The defendant additionally refers to the plaintiff's 2020 income as "intentionally depleted . . . income," "intentionally reduced income," and "intentionally manipulated income" throughout his appellate brief.

that, "[w]hen the decision is read as a whole, the court did not find that the plaintiff intentionally had reduced . . . her income." We agree with the plaintiff and conclude that the court did not find that the plaintiff had intentionally reduced her 2020 income.

The record reflects that the plaintiff's percentage of M2O's profit in 2020 was lower than previous years.[21] It, however, also indicates that there were reasons for this reduction, including that additional partners had been added to M2O, thereby reducing the percentage of distributions received by each preexisting partner,[22] that there had been a global pandemic,[23] and that the plaintiff's "economic participation" at M2O has decreased since 2019.[24] Additionally, M2O has a payment structure in which its clients may pay M2O for

[21] As a partner of M2O, the plaintiff receives a percentage of its profits each year. "The plaintiff . . . testified her percentage of income for 2021 and 2022 is 11 percent. In 2016, her percentage of income was 27.9 percent and in 2017 it was 27 percent. In 2018, her percentage dropped to 21 percent because, the plaintiff testified, M2O added a partner. In 2019, the plaintiff's percentage was reduced to 15 percent and then to 12 percent in 2020."

[22] The defendant's attorney questioned Michael Custar, a partner of M2O, as follows:

"Q. And was the reason for [the percentage decline from 2020 to 2021] because your secondary market, which you run, was affected by COVID?

"A. No. I believe the principal reason was because we had a new partner admitted. So, we were all diluted."

[23] The court noted that the reduction in the plaintiff's income occurred at "the height of the pandemic."

[24] The defendant's attorney questioned Michael Custar, a partner of M2O, as follows:

"Q. Okay. Is there a reason that a new partner has . . . [a] very similar [profit] percentage to [the plaintiff] while the other partners' percentages are higher?

"A. Yes, based on production.

* * *

"Q. What aspect of her performance in the prior year caused her to be at 11 percent profit percentage?

"A. No origination that resulted in revenue I believe and a relatively lower distribution percentage relative to other partners in terms of sales percentage."

its services over time, rather than in a lump sum.[25] As a result, depending on the payment schedule permitted by M2O and each of its clients, the distributions fluctuate from year to year.[26] The difference in distributions received by the plaintiff in 2020 and 2021 is an example of the variability in M2O's payment structure. In 2020, the plaintiff's percentage of the partnership profits was 12 percent and she received approximately $1.3 million in distributions from M2O. In 2021, the plaintiff received approximately the same percentage, or 11 percent, but she received about $2.3 million in distributions. The evidence in the record therefore supports the assertion

[25] The defendant's attorney questioned Luke Belcastro, a partner of M2O, as follows:

"Q. Okay. And how and when are these fees paid?

"A. They are paid upon—they are earned upon success.

"Q. Okay.

"A. We typically allow our clients to pay us over time and that time can be anywhere [from] four quarters to ten quarters typically, probably six to ten is more typical quarter. So, if you were to earn a dollar of revenue, we would allow them to pay us over time.

"Q. So, a year and a half to three years?

"A. To two years, exactly, yeah.

"Q. And but you are only paid once the funding mandate is completed, once you secure the funds, right, then your part is done but they then have, as you say, six to ten quarters to pay those fees?

"A. As we have closings, we earn the fee. From that point on, they would pay us on a schedule based on what was negotiated at the outset. So again, if it's eight quarters, on whatever date we had a closing where the manager has collected the—has the committed dollars to their fund, we earn a fee. And in the case quarters, we would get paid pro rata over the next eight quarters for that fee."

[26] The defendant's attorney questioned Luke Belcastro, a partner of M2O, as follows:

"Q. Okay. So, if you have a great year [of] accounts receivable, you might only have a so-so year that same year with revenue because those receivables will be paid out over, as you said, six to ten months? The receivables and distributions might be different.

"A. Right. Clients could also elect to pay us in a lump sum or they could elect to pay us over time. So, the difference—you know, our distributions can change and fluctuate based on what our clients chose to do, either paying us as agreed in the schedule or deciding to pay us in—to prepay a portion of that. It all depends on what our clients do."

that the plaintiff's 2020 income was reflective of the changes to the partners of M2O, the global pandemic, and the plaintiff's decreased economic participation at M2O, as well as other variabilities of the partnership's payment structure.

The court, additionally, was well within its discretion in basing its financial orders on the plaintiff's 2020 income because it was "unable to determine the plaintiff's current income based solely on her distributions from 2021 and year to date for 2022 based on the evidence presented . . . ." The plaintiff had not yet received her 2021 K-1 by the time of trial,[27] and she accordingly based her February, 2022 financial affidavit on the last K-1 she had received, her 2020 K-1.[28] The distributions that the plaintiff thus far had received from M2O in 2022 did not reflect her actual net income.[29] The plaintiff testified that "distributions are completely separate from what ultimately is shown on [her] K-1 for income" and that she "need[s] the K-1 and the tax return in order to determine what [her] income is."

[27] See footnote 6 of this opinion.

[28] The plaintiff has consistently based the partnership income reported on her financial affidavits on her K-1 from two years prior. When she filed her March, 2021 financial affidavit, she used her 2019 K-1 because she had not received her 2020 K-1 from M2O by the date of filing.

[29] The plaintiff's attorney questioned the plaintiff as follows:

"Q. Can you explain the difference [between income and distributions]?

"A. The distributions are completely separate from what ultimately is shown on my K-1 for income. I mean, certainly there's some portion of those distributions [that] wind up being income, but I can't know, until the audit is complete, and the taxes are ready to be filed, what the income is.

"Q. And that hasn't happened yet for calendar year [2021]?

"A. That hasn't happened yet for [2021]."

The defendant's attorney also questioned the plaintiff as follows:

"Q. Okay. So, in spite of the fact that you have received distributions this year in 2021, and we are in August, you did not include the income that you have received in 2021, but you relied on 2020 income for this [August, 2021] financial affidavit?

"A. Distributions don't necessarily equal income so until I have my K-1 for 2021, I—I cannot give you an exact figure for what that is."

Although the defendant is correct that there is ample evidence of the distributions the plaintiff received in 2021, the court was not required to accept his position that the distributions are equal to the plaintiff's income. The record supports a finding that the plaintiff cannot accurately calculate her yearly income until she receives a K-1, which reflects adjustments to the partnership distributions made by M2O's accountants.[30] The plaintiff's February, 2022 financial affidavit states that "[e]arnings [are] based on [the plaintiff's] 2020 M2O income less qualifying business deductions and do NOT reflect [the plaintiff's] current cash flow. Early-year distributions are generally made only to pay estimated taxes, and [the plaintiff] typically does not receive a substantial portion of her total annual income until the end of the year." (Emphasis in original.) Because adjustments are made to the total distributions that the plaintiff receives from M2O, "the amount of resources available for support purposes"; (internal quotation marks omitted) *Onyilogwu* v. *Onyilogwu*, 217 Conn. App. 647, 654, 289 A.3d 1214 (2023); is not apparent from the distributions alone.

The court's decision to base the support orders on the plaintiff's February, 2022 financial affidavit, which reflected the plaintiff's latest K-1 available at the time of trial, was therefore reasonable in light of the evidence before it. We accordingly conclude that the court soundly exercised its discretion in determining the financial orders based on the plaintiff's 2020 income, despite evidence of later distributions.[31]

[30] See footnote 4 of this opinion.

[31] The defendant is not precluded from filing a motion for modification of the support orders in the event of a substantial change to the plaintiff's income. Pursuant to General Statutes § 46b-86, "[u]nless and to the extent the decree precludes modification, any final order for the periodic payment of permanent alimony or support . . . may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . ." But see *McKeon* v. *Lennon*, 321 Conn. 323, 334–35, 138 A.3d 242 (2016) (increase in supporting spouse's income alone ordinarily will not justify modification of alimony

II

The defendant also claims, in the alternative, that the court abused its discretion by not basing the awards of alimony and child support on the plaintiff's earning capacity, rather than the plaintiff's income as reflected on her financial affidavit. Because we conclude that the court properly relied on the plaintiff's February, 2022 financial affidavit in fashioning the support orders, we conclude that the court properly exercised its discretion in declining to determine and rely on the plaintiff's earning capacity.

"[I]t is well established that the trial court may under appropriate circumstances in a marital dissolution proceeding base financial awards on the earning capacity of the parties rather than on actual earned income. . . . Earning capacity, in this context, is not an amount [that] a person can realistically earn, nor is it confined to actual income, but rather it is an amount [that] a person can realistically be expected to earn considering such things as his [or her] vocational skills, employability, age and health." (Internal quotation marks omitted.) *Tilsen* v. *Benson*, supra, 347 Conn. 799. While the court may consider the earning capacity of each party, it is not required to do so. See *Ingles* v. *Ingles*, 216 Conn. App. 782, 798, 286 A.3d 908 (2022). "It is well settled that [w]hether to base its financial orders on the parties' actual net income or their earning capacities is left to the sound discretion of the trial court." (Internal quotation marks omitted.) Id.

The court in this case did not determine the plaintiff's earning capacity. It, however, was not required to do so. See id. Although the court did determine an earning

award but "the trial court may consider a substantial increase in the supporting spouse's income, standing alone, as sufficient justification for granting a motion to modify a child support order . . . .").

capacity for the defendant, finding that he had an earning capacity of $350,000 gross yearly income, it appears the court did so because the defendant had not been recently employed.[32] The plaintiff, comparatively, has been continuously employed at M2O since its creation in 2012 and, unlike the defendant, has income as documented by her K-1 on which the court could reasonably rely in crafting the support orders. The court was therefore well within its discretion in choosing to rely on the plaintiff's February, 2022 financial affidavit in determining the financial orders, rather than exercising its discretion to instead calculate and rely upon her earning capacity. Accordingly, we conclude that the court did not abuse its discretion in declining to determine and rely on the plaintiff's earning capacity to determine its financial orders.

The judgment is affirmed.

In this opinion the other judges concurred.

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[32] The defendant was last employed as a senior managing director at Focuspoint Private Capital in 2016, five years prior to the start of trial.