IN RE JACOB W. ET AL.*

(SC 20063)

Palmer, McDonald, D'Auria, Mullins, Kahn, Ecker and Vertefeuille, Js.

Syllabus

Pursuant to statute (§ 45a-717 [g] [1] and [2] [C]), a court may approve a petition terminating parental rights if it finds, upon clear and convincing evidence, that termination is in the best interests of the child, there is no ongoing parent-child relationship, and to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interests of the child.

The respondent father appealed from the judgment of the Appellate Court, which reversed the trial court's judgments denying petitions for the termination of his parental rights with respect to his three minor children, J, N and C, filed by the petitioner, the children's grandmother. The respondent, who had been married to M, the mother of the children and the petitioner's daughter, was arrested and charged with multiple crimes as a result of his repeated sexual assault of A, the petitioner's minor child and M's younger sister. M was charged with conspiracy in connection with those sexual assaults. After the respondent and M were incarcerated, the petitioner and her husband were appointed guardians of the children. In addition, a standing criminal protective order was issued, barring the respondent from contacting A and others with whom contact would be likely to cause annoyance or alarm to A. At the time the protective order was issued, A lived in the same home with the children and the petitioner. The respondent subsequently was convicted of multiple counts of sexual assault, among other crimes, and was sentenced to a term of twenty-nine years of incarceration. The petitioner sought to terminate the parental rights of both the respondent and M. M consented to termination, and the case proceeded against the respondent. The petitioner alleged as a ground for termination under § 45a-717 (g) (2) (C) that there was no ongoing parent-child relationship between the respondent and the children. The trial court denied the petitions, concluding, inter alia, that the petitioner had failed to prove that ground by clear and convincing evidence. In reaching its conclusion, the trial court relied on the respondent's efforts while he was incarcerated to maintain contact with the children in light of the protective

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

order, including his request that the grandparents provide him with updates concerning the children. The trial court found that the grandparents had interfered with the respondent's efforts to maintain a relationship with the children, citing the grandparents' failure to provide the respondent with any updates about the children and their false explanation to the children that the respondent was incarcerated for a domestic violence incident involving M that the children previously had witnessed. In reversing the trial court's judgments and remanding the case for a new termination hearing, the Appellate Court concluded that the trial court applied an incorrect legal test in determining that the petitioner had failed to prove the lack of an ongoing parent-child relationship. On the granting of certification, the respondent appealed to this court. *Held*:

1. The Appellate Court properly reversed the trial court's judgments on the ground that the trial court applied an incorrect legal test in determining that the petitioner had failed to prove the lack of an ongoing parent-child relationship by clear and convincing evidence pursuant to § 45a-717 (g) (2) (C): this court clarified that, when a custodial parent or guardian seeks to terminate the parental rights of a noncustodial parent, and that parent or guardian has engaged in conduct that inevitably leads to the noncustodial parent's lack of an ongoing parent-child relationship, the custodial parent or guardian cannot rely on the lack of such a relationship to terminate the noncustodial parent's rights, and, except in cases involving infant children, the existence of an ongoing parent-child relationship is determined by looking at the present feelings or memories of the child toward the respondent parent rather than by the respondent parent's conduct in maintaining that relationship; furthermore, the trial court failed to determine that the grandparents' conduct inevitably led to the lack of an ongoing parent-child relationship between the respondent and the children, as it failed to explain how the grandparents' failure to update the respondent about the children or how the grandparents' failure to explain the real reason for the respondent's incarceration would have affected the children's feelings toward the respondent, and, in the absence of such a determination, the trial court could not conclude that the petitioner could not rely on the lack of an ongoing parent-child relationship as a basis for termination; moreover, the court, in denying the petitions, improperly focused on the respondent's conduct rather than focusing on whether the children had present memories or feelings for the respondent that were positive in nature.
2. The respondent could not prevail on his claim that, even if the trial court had applied an incorrect legal test in concluding that the petitioner had failed to prove the lack of an ongoing parent-child relationship, this court must reverse the Appellate Court's judgment on the ground that the trial court also determined that the petitioner had failed to prove by clear and convincing evidence that allowing the respondent additional time to reestablish the parent-child relationship would be detrimental to the best interests of the children, as that determination was predicated

on a clearly erroneous factual finding that there was no evidence presented with respect to that issue; the trial court's finding that there was no evidence presented that would support a claim that additional time to reestablish such a relationship would be detrimental to the children's best interests could not be reconciled with the record, which revealed the existence of such evidence, including evidence regarding J's and N's negative feelings toward the respondent, the fact that C had little or no memory of the respondent, the preclusive effect that the protective order had on the respondent's ability to maintain a relationship with the children, and the fact that the Department of Children and Families, and the guardian ad litem and attorney for the minor children recommended termination of the respondent's parental rights.

(*Three justices dissenting in one opinion*)

Argued September 11, 2018—officially released February 15, 2019**

Procedural History

Petitions to terminate the respondents' parental rights with respect to their minor children, brought to the Probate Court for the district of Ellington and transferred to the Superior Court in the judicial district of Tolland, Juvenile Matters at Rockville, where the respondent mother consented to termination; thereafter, the case was tried to the court, *Westbrook*, *J.*; judgments denying the petitions as to the respondent father, from which the petitioner appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Prescott* and *Mihalakos*, *Js.*, which reversed the trial court's judgments and remanded the case to that court for a new trial, and the respondent father, on the granting of certification, appealed to this court. *Affirmed.*

Benjamin M. Wattenmaker, assigned counsel, with whom, on the brief, was *Amir Shaikh*, assigned counsel, for the appellant (respondent father).

James P. Sexton, assigned counsel, with whom were *Matthew C. Eagan*, assigned counsel, and, on the brief, *Megan L. Wade*, assigned counsel, for the appellee (petitioner).

** February 15, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

KAHN, J. This certified appeal requires us to clarify the circumstances under which a petitioner is precluded from relying on an alleged lack of an ongoing parent-child relationship as a basis for terminating a noncustodial parent's rights.[1] The respondent father, Daniel W., appeals from the judgment of the Appellate Court, which reversed the judgments of the trial court denying the petitions for termination of the respondent's parental rights with respect to his three minor children and remanded the case for a new trial. *In re Jacob W.*, 178 Conn. App. 195, 219, 172 A.3d 1274 (2017). The respondent contends that the Appellate Court improperly concluded that the trial court had applied an incorrect legal test in determining that the petitioner,[2] the maternal grandmother of the minor children, had failed to prove the nonexistence of an ongoing parent-child relationship by clear and convincing evidence. See id.,

[1] This court granted the respondent father's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly reverse the trial court's judgment[s] denying the custodian's petition[s] to terminate the father's parental rights when it determined that the trial court's judgment[s] [were] legally and logically inconsistent?" *In re Jacob W.*, 328 Conn. 902, 177 A.3d 563 (2018). After hearing the parties and considering the case more fully, we conclude that the certified question does not properly frame the issues presented in the appeal because it inaccurately reflects the holding of the Appellate Court. The Appellate Court reversed the judgments of the trial court on the basis that the trial court applied an incorrect legal test to determine whether the petitioner had proven the lack of an ongoing parent-child relationship. *In re Jacob W.*, 178 Conn. App. 195, 198–99, 172 A.3d 1274 (2017). We therefore rephrase the certified issue as whether the Appellate Court properly reversed the trial court's judgments on the basis that the court applied an incorrect legal test to deny the petitions. See, e.g., *Stamford Hospital* v. *Vega*, 236 Conn. 646, 656, 674 A.2d 821 (1996) (court may rephrase certified question to more accurately reflect issues presented on appeal).

[2] As the Appellate Court explained, "[t]he maternal grandmother is the petitioner pro forma. Both maternal grandparents are currently custodians, and the maternal grandfather signed the applications for termination of parental rights . . . ." *In re Jacob W.*, 178 Conn. App. 195, 198 n.1, 172 A.3d 1274 (2017).

207. The respondent claims that, in so concluding, the Appellate Court incorrectly reasoned that the trial court improperly rested its analysis on inconsistent propositions.[3] The respondent further contends that, even if the trial court applied an incorrect legal test to determine that the petitioner had failed to prove the lack of an ongoing parent-child relationship, the judgment of the trial court may be upheld on the basis that the court also found that the petitioner failed to prove that allowing further time for a parent-child relationship to develop would be detrimental to the best interests of the children. Although we agree with the Appellate Court that the trial court applied an incorrect legal test, our conclusion rests on different grounds. Specifically, we conclude that the trial court incorrectly concluded that, under the facts of the present case, it was required to depart from the usual test to determine whether a petitioner has established a lack of an ongoing parent-child relationship. As we explain in this opinion, the facts as found by the trial court did not support a departure from the ordinary inquiry and instead required the court to base its decision on the present feelings and memories of the children rather than the actions of the respondent. We further conclude that the trial court's determination that the petitioner failed to prove that allowing further time for a parent-child relationship to develop would be detrimental to the best interests of the children was predicated on a clearly erroneous factual finding. Accordingly, we affirm the judgment of the Appellate Court.

The record reveals the following relevant facts, found by the trial court or otherwise undisputed, and proce-

[3] Because we do not rest our affirmance of the judgment of the Appellate Court on the basis of any inconsistent statements in the trial court's memorandum of decision, we need not resolve whether the Appellate Court properly concluded that any inconsistent statements in the memorandum of decision required the conclusion that the trial court applied an incorrect legal test.

dural history. The respondent and his then wife, J, had three children, Jacob, born in 2006, N, born in 2008, and C, born in 2012. Jacob, N and C have been living in the home of their maternal grandparents since May, 2012, when the respondent, J and the children moved in with them. When the grandfather asked the respondent to leave in October, 2012, he moved in with his mother, while J and the children remained with the grandparents. The respondent continued to have contact with the children until he was arrested on April 2, 2014, and charged with multiple counts of sexual assault of a minor. On July 3, 2014, J also was arrested and charged with conspiracy in connection with the same set of incidents that gave rise to the respondent's arrest.

As a result of the criminal charges against him, the respondent was convicted, following a jury trial, of six counts of risk of injury to a child in violation of General Statutes (Rev. to 2013) § 53-21 (a) (2), five counts of sexual assault in the first degree in violation of General Statutes (Rev. to 2013) § 53a-70 (a) (2), one count of attempt to commit sexual assault in the first degree in violation of § 53a-70 (a) (2) and General Statutes § 53a-49, one count of sexual assault in the fourth degree in violation of General Statutes (Rev. to 2013) § 53a-73a (a) (1) (A), one count of risk of injury to a child in violation of § 53-21 (a) (1), one count of conspiracy to commit risk of injury to a child in violation of § 53-21 (a) (2) and General Statutes § 53a-48, and one count of attempt to commit risk of injury to a child in violation of §§ 53-21 (a) (2) and 53a-49. The respondent was sentenced to a total effective term of twenty-nine years of incarceration, followed by sixteen years of special parole. See *State* v. *Daniel W.*, 180 Conn. App. 76, 79, 84, 182 A.3d 665, cert. denied, 328 Conn. 929, 182 A.3d 638 (2018).

The minor that the respondent was convicted of assaulting was J's younger sister, A, the children's aunt.

At the time of the respondent's arrest, a criminal protective order was put in place preventing the respondent from contacting A "in any manner, including by written, electronic or telephone contact . . . ." The order also barred the respondent from contacting A's "home, workplace or others with whom the contact would be likely to cause annoyance or alarm to [A]." At the respondent's January, 2016 sentencing hearing, the court issued a standing criminal protective order to remain in effect until September 6, 2068. During the sentencing hearing, upon the request of the respondent's counsel for clarification of the scope of the order, the court explained that the standing protective order, which was identical to the one already in place, barred the respondent from having contact not only with A, but also with her immediate family, including her parents, the children's grandparents, but not the respondent's children themselves. Because the children lived with A in their grandparents' home, the protective order had the practical effect of prohibiting the respondent from contacting the children's home and the children's guardians. During the sentencing hearing, the respondent did not request any modification to the scope of the standing criminal protective order.

On the day that J was arrested, the grandparents petitioned the Probate Court for the district of Ellington for immediate temporary custody of the children on the basis that both parents were now incarcerated. The court granted the petitions and, five months later, granted the grandparents' petitions for the removal of the parents and the appointment of the grandparents as the guardians of the children, to which both the respondent and J consented. Approximately one year after the grandparents were appointed guardians of the children, the petitioner filed the petitions to terminate the parental rights of both the respondent and J. The respondent indicated through counsel his intent to con-

test the termination, and, on that basis, the guardian ad litem for the children filed a motion pursuant to General Statutes § 45a-715 (g) to transfer the case from the Probate Court to the Superior Court, which the court granted. J subsequently consented to the termination of her parental rights, and the case proceeded against the respondent alone.

The original petitions alleged that the children had been denied the care, guidance, or control necessary for their physical, educational, moral, or emotional well-being, by reason of acts of parental commission or omission. In an amendment to the petitions filed on November 16, 2016, the petitioner withdrew that allegation and instead alleged abandonment and the lack of an ongoing parent-child relationship as grounds for termination.

Following a trial, the court denied the petitions. In its memorandum of decision, the trial court first turned to the question of whether the petitioner had proven that the respondent abandoned the children pursuant to General Statutes § 45a-717 (g) (2) (A). In concluding that she had not, the court relied on the actions undertaken by the respondent to maintain contact with the children. Prior to the respondent's incarceration, the court found that he provided for the children financially, participated in their daily activities and had hosted birthday parties for the children. The court evaluated the respondent's efforts to maintain contact with the children during his incarceration in light of the protective order, which greatly limited his ability to contact them. The court observed that, despite that obstacle, the respondent had made some efforts to maintain contact with the children. The court noted that the respondent had requested assistance from the Department of Children and Families (department) in facilitating visitation

with the children[4] and, in 2014, participated in a program that sends Christmas gifts to children of incarcerated parents. The trial court also found that, in 2014, during a Probate Court proceeding, the respondent requested that the grandparents provide him with updates on the children. Relying on these facts, the court concluded that the petitioner had failed to prove by clear and convincing evidence that the respondent had abandoned the children.

The court next turned to the petitioner's claim that there was no ongoing parent-child relationship pursuant to § 45a-717 (g) (2) (C). The court began its analysis by recognizing that § 45a-717 (g) (2) (C) requires a two part inquiry. Turning to the first part of the inquiry—whether the petitioner had established no ongoing parent-child relationship by clear and convincing evidence—the court cited to the same facts it had relied on to conclude that the petitioner had failed to prove abandonment, that is, the court looked to the respondent's conduct. Although the court had made findings regarding the children's negative feelings toward or lack of memory of the respondent, it did not consider the feelings or memories of the children in resolving the first part of the inquiry under § 45a-717 (g) (2) (C).

In its analysis, the court cited to an Appellate Court decision, *In re Carla C.*, 167 Conn. App. 248, 251, 143 A.3d 677 (2016), which held that a custodial parent or guardian who has "interfered [with a noncustodial parent's] visitation and other efforts" cannot terminate the noncustodial parent's rights on the basis of an alleged lack of an ongoing parent-child relationship. The trial court found that the grandparents had interfered with the respondent's efforts to maintain a relationship with his children. In support of that finding,

[4] Because the children were not in its custody, the department was unable to assist the respondent.

the court cited to the failure of the grandparents to provide updates to the respondent concerning the children. In reaching its finding of interference, the trial court also relied on evidence that the grandparents had not told the children the truth about why the respondent was incarcerated. Specifically, the grandparents initially had not provided the children with any explanation for the respondent's absence, and, when they eventually told the children that the respondent was incarcerated, rather than tell them that he had sexually assaulted their aunt, the grandparents told the children he was in prison for beating J.

As a consequence of its finding that the grandparents had interfered with the respondent's efforts to maintain a relationship with the children, the trial court did not conclude that the petitioner was barred from relying on the ground of no ongoing parent-child relationship as a basis for termination. Instead, the trial court suggested that the combination of two of its findings—namely, that the grandparents had interfered and that the respondent had made efforts to maintain contact with the children—supported the conclusion that the petitioner had not proven by clear and convincing evidence a lack of an ongoing parent-child relationship.

The court next turned to the second part of the inquiry under § 45a-717 (g) (2) (C)—whether the petitioner had proven by clear and convincing evidence that allowing the respondent additional time to reestablish the parent-child relationship would be detrimental to the best interests of the children. The court's entire discussion of this prong encompassed two sentences: "There was no evidence presented by the petitioner at trial that would support a claim that additional time to reestablish a relationship with the children would be detrimental. The statements of dislike by very young children with false information about their father does not estab-

lish by clear and convincing evidence that reestablishing a relationship would be detrimental."

The petitioner appealed from the trial court's judgments denying the petitions to the Appellate Court. That court concluded that the trial court had applied an incorrect legal test in denying the petitions. In so concluding, the court focused on inconsistencies that it had discerned in the trial court's memorandum of decision. See *In re Jacob W.*, supra, 178 Conn. App. 198–99. The Appellate Court identified two inconsistencies in the trial court's analysis: (1) a conclusion that an ongoing parent-child relationship existed and simultaneously did not exist because the grandparents' "unreasonable interference inevitably prevented the respondent from maintaining an ongoing parent-child relationship"; id., 211; and (2) a finding "both that the grandparents' unreasonable conduct constituted interference and that there was no evidence of unreasonable interference by any person." Id., 215–16.

I

We first consider whether the Appellate Court properly concluded that the trial court applied an incorrect legal test to determine whether the petitioner had proven by clear and convincing evidence the lack of an ongoing parent-child relationship. Because that question presents a question of law, our review is plenary. See *In re Egypt E.*, 327 Conn. 506, 525–26, 175 A.3d 21 (setting forth applicable standards of review for subordinate factual findings [clear error], ultimate conclusion that ground for termination has been proven [evidentiary sufficiency] and legal questions [plenary]), cert. denied sub nom. *Morsy E.* v. *Commissioner, Dept. of Children & Families*, U.S. , 139 S. Ct. 88, 202 L. Ed. 2d 27 (2018).

Section 45a-717 (g) provides in relevant part: "At the adjourned hearing or at the initial hearing where no

investigation and report has been requested, the court may approve a petition terminating the parental rights . . . if it finds, upon clear and convincing evidence, that (1) the termination is in the best interest of the child, and (2) . . . (C) there is no ongoing parent-child relationship which is defined as the relationship that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interests of the child . . . .'' We have explained that the inquiry under § 45a-717 (g) (2) (C) is a two step process. First, the court must determine whether the petitioner has proven the lack of an ongoing parent-child relationship. Only if the court answers that question in the affirmative may it turn to the second part of the inquiry, namely, ''whether allowance of further time for the establishment or reestablishment of the relationship would be contrary to the child's best interests.'' (Emphasis omitted.) *In re Juvenile Appeal (Anonymous)*, 177 Conn. 648, 675–76, 420 A.2d 875 (1979); see id. (''[t]he 'best interests' standard . . . comes into play only if it has been determined that no ongoing parent-child relationship exists, *in order to decide whether allowance of further time for the establishment or reestablishment of the relationship would be contrary to the child's best interests*'' [emphasis altered]); see also *In re Carla C.*, supra, 167 Conn. App. 265 (''[t]he best interest standard . . . does not become relevant until *after* it has been determined that no parent-child relationship exists'' [emphasis added; internal quotation marks omitted]); *In re Michael M.*, 29 Conn. App. 112, 128, 614 A.2d 832 (1992) (same); *In re Juvenile Appeal (84-3)*, 1 Conn. App. 463, 480, 473 A.2d 795, cert. denied, 193 Conn. 802, 474 A.2d 1259 (1984) (same).

In interpreting the parameters of § 45a-717 (g) (2) (C), we must be mindful of what is at stake. "[T]he termination of parental rights is defined, in [what is now General Statutes § 45a-707 (8)], as the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and his parent . . . . It is, accordingly, a most serious and sensitive judicial action. . . . Although the severance of the parent-child relationship may be required under some circumstances, the United States Supreme Court has repeatedly held that the interest of parents in their children is a fundamental constitutional right that undeniably warrants deference and, absent a powerful countervailing interest, protection. *Stanley* v. *Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) . . . ." (Citation omitted; internal quotation marks omitted.) *In re Valerie D.*, 223 Conn. 492, 514, 613 A.2d 748 (1992).

Moreover, because the respondent is incarcerated, we emphasize that "the fact of incarceration, in and of itself, cannot be the basis for a termination of parental rights. . . . At the same time, a court properly may take into consideration the inevitable effects of incarceration on an individual's ability to assume his or her role as a parent. See, e.g., *In re Katia M.*, 124 Conn. App. 650, 661, 6 A.3d 86 (parent's unavailability, due to incarceration, is an obstacle to reunification), cert. denied, 299 Conn. 920, 10 A.3d 1051 (2010); see also *In re Gwynne P.*, 346 Ill. App. 3d 584, 597–98, 805 N.E.2d 329 (2004) (parent's repeated incarceration may lead to diminished capacity to provide financial, physical, and emotional support for . . . child . . .), aff'd, 215 Ill. 2d 340, 830 N.E.2d 508 (2005). Extended incarceration severely hinders the department's ability to offer services and the parent's ability to make and demonstrate the changes that would enable reunification of the family. . . . This is particularly the case when a

parent has been incarcerated for much or all of his or her child's life and, as a result, the normal parent-child bond that develops from regular contact instead is weak or absent." (Citations omitted; internal quotation marks omitted.) *In re Elvin G.*, 310 Conn. 485, 514–15, 78 A.3d 797 (2013).

The lack of an ongoing parent-child relationship is a " 'no fault' " statutory ground for the termination of parental rights. *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 669. This court has explained that the ground of " 'no ongoing parent-child relationship' " for the termination of parental rights contemplates "a situation in which, regardless of fault, a child either has never known his or her parents, so that no relationship has ever developed between them, or has definitively lost that relationship, so that despite its former existence it has now been completely displaced." Id., 670. The ultimate question is whether the child has "some present memories or feelings for the natural parent that are positive in nature." (Internal quotation marks omitted.) *In re Jessica M.*, 217 Conn. 459, 469, 586 A.2d 597 (1991).

In its interpretation of the language of § 45a-717 (g) (2) (C), this court has been careful to avoid placing "insurmountable burden[s]" on noncustodial parents. Id., 467. Because of that concern, we have explicitly rejected a literal interpretation of the statute, which defines the relationship as one "that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child . . . ." General Statutes § 45a-717 (g) (2) (C). "[D]ay-to-day absence alone," we clarified, is insufficient to support a finding of no ongoing parent-child relationship. *In re Jessica M.*, supra, 217 Conn. 470. We also have rejected the notion that termination may be predicated on the lack of a "*meaningful* relationship," explaining that the statute "requires that

there be *no* relationship." (Emphasis added.) *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 675.

We have emphasized that, as to noncustodial parents, "[t]he evidence regarding the nature of the [parent's] relationship with [his] child at the time of the termination hearing must be reviewed in the light of the circumstances under which visitation had been permitted." *In re Jessica M.*, supra, 217 Conn. 473. For instance, in *In re Jessica M.*, we concluded that there was insufficient evidence to prove a lack of an ongoing parent-child relationship between a noncustodial mother and her child. Id., 472–73. Although that conclusion was based primarily on the fact that the child had "present memories or feelings for her mother [and] that at least some aspects of [those] memories and feelings [were] positive"; id., 474–75; we also took into account the circumstances under which visitation had been permitted. Specifically, we considered it relevant that the child's legal guardians, who had petitioned for termination of the mother's parental rights, had placed restrictions on her ability to visit the child during the duration of their guardianship. Id., 472–73.

We later applied these principles to conclude that, when the department engages in conduct that inevitably leads to a noncustodial parent's lack of an ongoing parent-child relationship, the department cannot rely on the lack of that relationship to terminate the noncustodial parent's rights. *In re Valerie D.*, supra, 223 Conn. 531, 535. In other words, we did not hold that the consequence of such conduct was that the test for determining whether there was an ongoing parent-child relationship was altered. Instead, we held that, as a result of its conduct, the department was precluded from relying on that ground as a basis for termination. Id., 532. In *In re Valerie D.*, the department was granted temporary custody of the child within days after she was born, primarily because the mother, who had used

cocaine throughout her pregnancy, had injected herself with cocaine hours prior to delivery, as a result of which the child was born addicted to cocaine and suffered from withdrawal. Id., 499–504. Soon after it had obtained temporary custody, the department filed coterminous petitions for custody and termination of the parental rights of the mother. Id., 499–503. The amended petition for termination relied, inter alia, on the ground that there was no ongoing parent-child relationship. Id., 504. As a result of the department's success in obtaining custody of the child, from the time that the department was granted temporary custody a few days after the child's birth to the date of the termination hearing three and one-half months later, the child remained in foster care. Id., 527. During that time, primarily due to the placement of the child in a foster home, the mother had been able to visit the child only eight times. Id., 528.

Two factors led this court to conclude that, under the circumstances of that case, termination of the mother's parental rights could not be permitted on the basis that there was no ongoing parent-child relationship. Id., 532. First, the court observed that, at the time of the termination hearing, the child was not yet four months old. Id., 527. The court recognized that the usual test for an ongoing parent-child relationship is not appropriate when the child is "virtually a newborn infant whose present feelings can hardly be discerned with any reasonable degree of confidence." Id., 532. Under those circumstances, the court reasoned, it simply makes no sense to inquire as to whether an infant has some present memories or feelings for the natural parent that are positive in nature. Id. Instead, "the inquiry must focus, not on the feelings of the infant, but on the positive feelings of the natural parent." Id.

Second, even assuming that the department had established that the mother lacked such positive feel-

ings, the court concluded that principles of statutory construction precluded the department from gaining and maintaining "custody of a newborn infant pursuant to [General Statutes] § 46b-129 under circumstances . . . that will lead almost inevitably" to termination on the basis of a lack of an ongoing parent-child relationship. Id., 532 n.34, 533. The statutory problem, the court explained, stemmed from the different standards governing custody and termination. Under the facts of the case, "a factual predicate for custody, established by the lesser standard of a preponderance of the evidence, led inexorably, for all practical purposes, to the factual predicate for termination required to be established by the higher standard of clear and convincing evidence." Id., 533–34. The problem highlighted by the court in *In re Valerie D.* was that it was the very party who petitioned to terminate the mother's parental rights—the department—whose conduct inevitably had led to the lack of a parent-child relationship. That is, by filing the petitions coterminously in the case of a child who was so young, the department virtually ensured that, upon the grant of custody at the lower standard of proof, and in the absence of heroic efforts by the mother or significant additional services provided by the department, there would be no parent-child bond by the time of the termination hearing.

This court has not had the opportunity to consider whether the principle we relied on in *In re Valerie D.* would apply to a petitioner who is a private party. The Appellate Court, however, has extended the holding of *In re Valerie D.* to apply to a custodial parent whose conduct inevitably led to the noncustodial parent's lack of an ongoing parent-child relationship. In *In re Carla C.*, supra, 167 Conn. App. 251, the court concluded that, under those circumstances, the petitioner was precluded from relying on the lack of an ongoing parent-child relationship as a basis for termina-

tion. Specifically, the court held that "a parent whose conduct inevitably has led to the [other parent's] lack of an ongoing parent-child relationship may not terminate parental rights on this ground." Id., 262. The petitioner in that case, the mother and custodial parent of the child, used her status as the custodial parent and engaged in conduct that interfered in a variety of ways with the ability of the father, who was incarcerated, to maintain a relationship with the child. The mother's interference with the father's efforts to maintain contact with the child began after she "met and began a relationship with [Steve], whom she described as a 'real man' and '[the] father figure that [Carla] deserves.' " Id., 252. The mother's interfering conduct included the following. She obtained an order from the MacDougall-Walker Correctional Institution, where the father was incarcerated, directing him to cease all oral and written communication with her and the child, either directly or through a third party, or face disciplinary action. Id., 253. She also threw away cards and letters that the father had sent to the child, without first showing them to the child. Id. She later successfully moved to suspend the father's visitation, on the basis that the existing arrangement, which relied on the paternal grandmother to facilitate visitation, had proven unworkable. Id., 255–56. Under those circumstances, the Appellate Court concluded, the mother was precluded from relying on the lack of an ongoing parent-child relationship as a ground for termination of the father's parental rights because it was her conduct that had inevitably led to the lack of that relationship. Id., 262.

We agree with the Appellate Court that the reasoning of *In re Valerie D.*, supra, 223 Conn. 492, should extend to individuals who are custodial parents or guardians. We observe that, in *In re Carla C.*, supra, 167 Conn. App. 280, the Appellate Court accurately characterized the mother's conduct as "interference." The concept of

"interference" fit particularly well with the facts of that case. We consider it unnecessary, however, as a general rule, to limit the exception that we set forth in *In re Valerie D.* to instances in which the actions of a custodial parent or guardian necessarily constitute "interference." That term carries with it the connotation that the conduct at issue was undertaken with the express purpose of preventing the noncustodial parent from having access to the child. The question is not whether a petitioner—the department or a private party—intends to interfere with the noncustodial parent's visitation or other efforts to maintain a relationship with the child. For example, there was no suggestion in *In re Valerie D.*, supra, 223 Conn. 492, that the department filed coterminous petitions with the express purpose of preventing the mother from having access to her child, nor did the department's intent play any part in our analysis. It was sufficient that the department's conduct inevitably led to the lack of an ongoing parent-child relationship. Id., 533. Our inquiry properly focuses not on the petitioner's intent in engaging in the conduct at issue, but on the consequences of that conduct. In other words, the question is whether the petitioner engaged in conduct that inevitably led to a noncustodial parent's lack of an ongoing parent-child relationship. If the answer to that question is yes, the petitioner will be precluded from relying on the ground of "no ongoing parent-child relationship" as a basis for termination regardless of the petitioner's intent—or not—to interfere.

In summary, the following is the proper legal test to apply when a petitioner seeks to terminate a parent's rights on the basis of no ongoing parent-child relationship pursuant to § 45a-717 (g) (2) (C). We reiterate that the inquiry is a two step process. In the first step, a petitioner must prove the lack of an ongoing parent-child relationship by clear and convincing evidence. In

other words, the petitioner must prove by clear and convincing evidence that the child has no present memories or feelings for the natural parent that are positive in nature. If the petitioner is unable to prove a lack of an ongoing parent-child relationship by clear and convincing evidence, the petition must be denied and there is no need to proceed to the second step of the inquiry. If, and only if, the petitioner has proven a lack of an ongoing parent-child relationship, does the inquiry proceed to the second step, whereby the petitioner must prove by clear and convincing evidence that to allow further time for the establishment or reestablishment of the relationship would be contrary to the best interests of the child. Only then may the court proceed to the disposition phase.

There are two exceptions to the general rule that the existence of an ongoing parent-child relationship is determined by looking to the present feelings and memories of the child toward the respondent parent. The first exception, which is not at issue in the present case, applies when the child is an infant, and that exception changes the focus of the first step of the inquiry. As we have explained, when a child is "virtually a newborn infant whose present feelings can hardly be discerned with any reasonable degree of confidence," it makes no sense to inquire as to the infant's feelings, and the proper inquiry focuses on whether the parent has positive feelings toward the child. *In re Valerie D.*, supra, 223 Conn. 532. Under those circumstances, it is appropriate to consider the conduct of a respondent parent.

The second exception, which is at issue in this appeal, applies when the petitioner has engaged in conduct that inevitably has led to the lack of an ongoing parent-child relationship between the respondent parent and the child. This exception precludes the petitioner from relying on the lack of an ongoing parent-child relationship as a basis for termination. Under these circumstances,

even if neither the respondent parent nor the child has present positive feelings for the other and, even if the child lacks any present memories of the respondent parent, the petitioner is precluded from relying on § 45a-717 (g) (2) (C) as a basis for termination.

In view of the foregoing principles, it is clear that the Appellate Court correctly concluded that the trial court applied an incorrect legal test to deny the petitions to terminate the respondent's parental rights. Nowhere in the trial court's decision did the court suggest that it had determined that the conduct of the grandparents or their alleged interference inevitably led to the lack of an ongoing parent-child relationship between the respondent and the children. The only conduct of the grandparents that the trial court pointed to in its decision was their failure to provide the respondent with updates about the children and to tell the children the truth about the reason for the respondent's incarceration.

As to the updates, the court provided no explanation as to how those updates, even if the respondent had received any, would have affected the children's feelings toward him. We also observe that, at the termination hearing, the respondent conceded that the protective order rendered it impossible for the grandparents to provide any such updates to the respondent.

Similarly, the trial court did not explain how the children's feelings toward the respondent would have improved had the grandparents told them the truth—that their father was incarcerated for sexually assaulting their aunt when she was between seven and twelve years old. See *State* v. *Daniel W.*, supra, 180 Conn. App. 80–81. We observe that the court suggested that the children's negative feelings toward the respondent were at least in part due to the false information provided to them by the grandparents, including both

the initial failure to provide any explanation for the respondent's absence and the subsequent false explanation provided to the children—that the respondent was incarcerated for beating J. That suggestion falls far short of the required determination for purposes of applying the exception—that the false information provided to the children by the grandparents inevitably led to the lack of an ongoing parent-child relationship. In the absence of a determination that the grandparents engaged in conduct that inevitably led to the lack of an ongoing parent-child relationship, the trial court improperly concluded that the exception applied.

We further observe that the department's studies submitted to the court in connection with the petitions for temporary custody and removal of guardianship, both of which were admitted into evidence at the termination hearing, reflect that the children had witnessed the respondent beating J. According to the studies, the department received a referral on June 14, 2013, alleging physical and emotional neglect of Jacob, N and C by the respondent and J. The department's investigation of the allegations revealed that, on June 6, 2013, J reported to the police that the respondent had placed her in a headlock and hit her in the face several times in the presence of all three children. Jacob confirmed J's account, informing the police when questioned that he had witnessed the respondent hitting J, despite Jacob's pleas to the respondent to "stop," and that he had seen the respondent "physically hurting" J on a prior occasion. The respondent admitted that the children were present during the incident. As a result of the investigation, the allegation of emotional neglect was substantiated regarding Jacob. At the termination hearing, the respondent did not challenge the evidence that the children had witnessed him beating J.

In light of this evidence, the trial court's failure to provide any explanation as to how the grandparents'

prevarication to the children prejudiced them against the respondent is puzzling. The only misrepresentation conveyed to the children was that the domestic violence was the reason for the respondent's incarceration. If anything, the grandparents' prevarication painted the respondent in a more favorable light than the facts warranted. Rather than inform the children of the new information about their father's incarceration that likely would have reinforced or even increased their already negative feelings toward the respondent, the grandparents told the children that he was in prison for a misdeed of which the children were already aware and had personally witnessed. Evidence was presented at trial that the children were unaware that the respondent had been convicted of sexually assaulting their aunt. Accordingly, by determining that the grandparents had prejudiced the children against the respondent when they attributed his incarceration to the domestic violence against J that the children had witnessed, the trial court implied that the children somehow would have held more positive views of him if they had known that he not only had beaten their mother but had also been convicted of sexually assaulting their aunt.

It is significant that the trial court acknowledged that it was the protective order that prevented the respondent from contacting the children, rather than any actions of the grandparents. It is undisputed that the grandparents played no role in setting the protective order. Accordingly, the present case is distinguishable from *In re Carla C.*, supra, 167 Conn. App. 253, in which the petitioner mother obtained an order from the prison barring the respondent father from all oral or written communication with her and the child. Because protective orders are commonly issued in cases of sexual assault, applying the rule of *In re Valerie D.*, supra, 223 Conn. 492, and *In re Carla C.*, supra, 253, to the present case would yield the bizarre result that a noncustodial

parent who has been convicted of a sexual assault that results in a protective order that has the direct or practical effect of preventing the parent from maintaining a relationship with his or her child would nonetheless automatically be immune from termination on the basis of no ongoing parent-child relationship.

Even if the trial court had determined that the grandparents had engaged in conduct that inevitably prevented the respondent from maintaining a relationship with his children, the court's subsequent analysis did not properly apply the applicable exception. Specifically, rather than concluding that, as a result of the court's finding of "interference," the petitioner was precluded from seeking termination of the respondent's parental rights on the basis of no ongoing parent-child relationship, the court appears to have determined that the conduct of the grandparents justified a departure from the ordinary inquiry as to whether the petitioner had proven no ongoing parent-child relationship. That is, in denying the petitions, rather than considering the children's feelings, the trial court looked to the respondent's conduct.

As we have explained, however, an inquiry that focuses on the conduct of the respondent parent to resolve a petition for termination on the basis of § 45a-717 (g) (2) (C) is appropriate only upon a finding by the trial court that a child is "virtually" an infant whose present feelings and memories cannot be determined by the court. See *In re Valerie D.*, supra, 223 Conn. 532. An inquiry that focuses on a respondent parent's conduct also is the key inquiry under the abandonment ground pursuant to § 45a-717 (g) (2) (A); see, e.g., *In re Juvenile Appeal (Docket No. 9489)*, 183 Conn. 11, 14, 438 A.2d 801 (1981) ("[a]bandonment focuses on the parent's conduct"); the court already had independently addressed and rejected the ground of abandonment in its memorandum of decision, applying the correct

principles to that ground. An inquiry similar to that of the abandonment ground cannot be applied to assess whether a petitioner has established a lack of an ongoing parent-child relationship unless the child is an infant at the time of the inquiry. The court made no finding that any of the children, even the youngest child, was an infant at the time of trial.[5] The trial court, therefore, improperly considered the respondent's conduct in determining that the petitioner had failed to prove a lack of an ongoing parent-child relationship. Because no exception to the general rule applied under the facts found by the trial court, the court's inquiry properly should have focused on the present feelings and memories of the children.[6] The Appellate Court properly con-

[5] The respondent reiterates his claim, rejected by the Appellate Court; *In re Jacob W.*, supra, 178 Conn. App. 209 n.12; that the "virtual infancy exception" should apply to C, who was one year old at the time of the respondent's incarceration. As the Appellate Court acknowledged, the parties "concede" that the virtual infancy exception applied to C. Id. That court correctly concluded, however, that the parties' concession was irrelevant. The trial court did not rely on the virtual infancy exception and made no finding that C qualified as an infant. We further observe that the parties are incorrect. It is not C's age at the time of the respondent's incarceration three years prior to the termination hearing that controls for purposes of the application of the virtual infancy exception, but C's age, four years old, at the time of the termination hearing. To determine whether a petitioner has established the lack of an ongoing parent-child relationship, the trial court must be able to discern a child's present feelings toward or memories of a respondent parent. The virtual infancy exception takes account of the particular problem that is presented when a child is too young to be able to articulate those present feelings and memories. See *In re Valerie D.*, supra, 223 Conn. 532 (referring to difficulty of trial court's discerning child's "present" feelings). It would make no sense to require a trial court to resolve whether a child's feelings *could have been determined* at some time prior to the termination hearing. The inability of the court to discern or to be presented with evidence regarding a virtual infant's present feelings drives the exception. That finding must be made at the time of the termination hearing. The present case serves as an apt illustration. The trial court had no difficulty discerning C's present memories of or feelings toward the respondent. The court expressly found that C had "little to no memory" of him. Accordingly, there was no need to apply the virtual infancy exception.

[6] The respondent contends that, even if we conclude that the Appellate Court properly held that the trial court applied an improper legal test to

cluded that the trial court had applied an incorrect legal test to determine whether the petitioner had proven the lack of an ongoing parent-child relationship.

II

We next turn to the respondent's claim that, even if the trial court applied an incorrect legal test to conclude that the petitioner failed to prove the lack of an ongoing parent-child relationship, we must reverse the Appellate Court's judgment on the basis that the trial court found that the petitioner had failed to prove by clear and convincing evidence that allowing the respondent additional time to reestablish the parent-child relationship would be detrimental to the best interests of the children. We agree with the petitioner, however, that the trial court's finding was clearly erroneous.

We begin by observing that the trial court correctly turned to the second prong of § 45a-717 (g) (2) (C) only after first addressing whether the petitioner had established the first prong—whether the petitioner had established the lack of an ongoing parent-child relationship. Although a petitioner must establish both prongs by clear and convincing evidence, and, accordingly, a petition may fail under either prong, the inquiries under

conclude that the petitioner had failed to prove the lack of an ongoing parent-child relationship, the error was harmless because the trial court independently determined in the disposition phase that termination was not in the best interests of the children. The respondent's claim ignores the fact that the trial court's analysis of the best interests of the children was affected by its application of an incorrect legal test during the adjudicatory phase. The court's consideration of the children's best interests reflects the same focus on the facts that the court improperly relied on in concluding that the petitioner had failed to prove no ongoing parent-child relationship. Specifically, in determining that termination was not in the best interests of the children, the court relied heavily on the possible motives of the grandparents in failing to tell the children the true reason for the respondent's incarceration, the efforts that the respondent had made to maintain a relationship with the children, and the grandparents failure to provide updates about the children to the respondent.

the two prongs are intertwined. That is, logic dictates that the question of whether it would be detrimental to the children's interests to allow further time for the development of a parent-child relationship will depend to some extent on the findings made and reasoning employed by the trial court in resolving whether there was an ongoing parent-child relationship. See, e.g., *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 675–76; *In re Carla C.*, supra, 167 Conn. App. 265; *In re Michael M.*, supra, 29 Conn. App. 128; *In re Juvenile Appeal (84-3)*, supra, 1 Conn. App. 480.[7]

The trial court, however, did not provide any analysis as to the second prong of § 45a-717 (g) (2) (C). Instead, the court grounded its decision on the conclusory finding that "[t]here was no evidence presented by the petitioner at trial that would support a claim that additional time to reestablish a relationship with the children would be detrimental [to their best interests]." That finding cannot be reconciled with the record, which reveals that there *was* evidence presented that was relevant to this question.

"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." (Internal quotation marks omitted.) *Powell-Ferri* v. *Ferri*, 326 Conn. 457, 464, 165 A.3d 1124 (2017).

In arriving at its finding that the petitioner had presented no evidence that it would be detrimental to allow the respondent more time to develop or reestablish a relationship with the children, the trial court did not

[7] We emphasize that our decision today is grounded in our review of the trial court's analysis of *both* prongs of § 45a-717 (g) (2) (c).

accord any effect to evidence that had been presented at trial that was relevant to that precise question. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1. By finding that no evidence was presented as to the second prong, the court did not consider the negative feelings that Jacob and N had expressed toward the respondent, despite the fact that the court made a finding that the children had those negative feelings.[8] Specifically, evidence was presented during the termination hearing that both Jacob and N had told department social workers that they "hate," "fear," and "distrust" the respondent. The court also had evidence before it that Jacob had told his teachers at school that the respondent was a "bad parent" and that both Jacob and N had told a department social worker that they did not want *any* present contact with the respondent. Indeed, as of the time of trial, none of the children was requesting opportunities to visit with or speak to the respondent, and both Jacob and N had indicated that they never wanted to see him again. Both Jacob and N specifically refused to call him "Dad," insisted on referring to him by his first name, and indicated that they wished to have their last name changed. Regarding C, who was approximately four years old at the time of trial, the court heard evidence that she had no present recollection of the respondent. The intensity of the negative feelings that Jacob and N harbored toward the respondent, as well as C's lack of any memory of him, was highly relevant to the likelihood that the respondent could succeed in reestablishing a relationship with them, and, if so, how long that would

[8] We note that the court also found that Jacob had previously had more positive feelings toward the respondent. It is the child's *present* feelings and memories, however, that are relevant for purposes of § 45a-717 (g) (2) (C).

take. The court should have been considered both of those factors in determining whether allowing more time would have been detrimental to the children's best interests.

It is particularly problematic that the court provided the same explanation for its refusal to consider the negative feelings of Jacob and N toward the respondent that it had provided for its conclusion that the grandparents had "interfered" with the respondent's efforts to maintain a relationship with them. As we explained in part I of this opinion, one of the flaws of the trial court's analysis of the first prong of § 45a-717 (g) (2) (C) was its determination to discount the negative feelings of the children on the basis of the grandparents' alleged "interference." The trial court relied on that same principle in declining to consider the children's negative feelings in the second prong. Thus, the court's finding as to the second prong suffers from the same flaw. Specifically, in its analysis of the first prong, the court discounted those negative feelings on the basis that the children had been biased against the respondent as a result of the grandparents' failure to tell them that he was incarcerated because he was convicted of sexually assaulting their aunt. As we explained in part I of this opinion, this aspect of the trial court's reasoning is questionable at best. Moreover, the grandparents' false explanation of the reason for the respondent's incarceration has no relevance whatsoever to C's lack of any memories of the respondent. The court took no account of the fact that C did not remember the respondent. This failure cannot be reconciled with the " 'paramount importance' " of the feelings of the child in the application of § 45a-717 (g) (2) (C). See *In re Alexander C.*, 67 Conn. App. 417, 422, 787 A.2d 608 (2001), aff'd, 262 Conn. 308, 813 A.2d 87 (2003).

In addition to expressly declining to consider the relevant evidence regarding Jacob's and N's negative

feelings toward the respondent, the court failed to consider significant, additional relevant evidence that had been presented, which would have supported a finding that allowing further time for a relationship to develop would be detrimental to the children's best interests. The elephant in the room, so to speak, was the protective order. As we have noted, even the respondent conceded at trial the overarching preclusive effect that the protective order had on his ability to maintain a relationship with the children. We note that the respondent has not claimed that he ever attempted to have the protective order modified. See id., 425 (deeming respondent parent's failure to seek modification of protective order relevant to analysis under § 45a-717 [g] [2] [C]). That order, which will remain in effect until 2068—long after the children reach adulthood—would function as a significant obstacle to any future efforts that the respondent might make to reestablish a relationship with the children. It is also relevant that the respondent will not be released from prison until 2043, long after the children have reached adulthood. See *In re Elvin G.*, supra, 310 Conn. 514–15 (recognizing that, although incarceration cannot be sole basis for termination of parental rights, courts properly may consider length of incarceration and its effects on parent-child bond). The court also failed to take into account the positions of the department, the guardian ad litem, and the attorney for the minor children, all of whom recommended termination of the respondent's parental rights. The department based its position in part on its conclusion that, with the protective order in place and the respondent incarcerated, the respondent could not be expected to be able to reestablish a relationship with the children until they reached adulthood. The unlikelihood that the respondent will be able to reestablish a relationship with the children prior to adulthood is relevant to the question of whether allowing further time would

be detrimental to the best interests of the children. This court has repeatedly recognized that "stability and permanence" are "necessary for a young child's healthy development." *In re Egypt E.*, supra, 327 Conn. 531; see also *In re Davonta V.*, 285 Conn. 483, 495, 940 A.2d 733 (2008) ("[t]ermination of a biological parent's rights, by preventing further litigation with that parent, can preserve the stability a child has acquired in a successful foster placement and, furthermore, move the child closer toward securing permanence by removing barriers to adoption").

In light of the abundance of evidence in the record contrary to the trial court's statement that there was *no evidence* presented that it would be detrimental to the best interests of the children to allow additional time for the respondent to develop a relationship with them, we are left with a firm conviction that a mistake has been made and, therefore, conclude that the trial court's finding was clearly erroneous.

We emphasize that we take no position as to whether the trial court, after considering all of the relevant evidence, properly could have found that the petitioner failed to prove by clear and convincing evidence that it would be detrimental to the children's interests to allow the respondent more time to reestablish the relationship. Our conclusion that the trial court's finding was clearly erroneous is predicated on the court's reliance on its determination that the petitioner had presented *no evidence* relevant to this issue. That determination finds no support in the record. The trial court's failure to consider its own express factual findings regarding Jacob's and N's negative feelings toward the respondent, to provide any relevant explanation for discounting its finding that C had little to no memory of the respondent, as well as to acknowledge the abundant, additional relevant evidence pertaining to this issue leaves us with a firm con-

viction that a mistake has been made.[9] The court should have considered all of the relevant evidence before resolving the issue.

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, MULLINS and VERTEFEUILLE, Js., concurred.

D'AURIA, J., with whom McDONALD and ECKER, Js., join, dissenting. I would reverse the Appellate Court's judgment and remand the case to that court with direction to affirm the trial court's denial of the petitions filed by the petitioner, the maternal grandmother of the three minor children at issue, to terminate the parental rights of the respondent father, Daniel W., as to those children.

My disagreement with the Appellate Court centers on what I view as its failure to adequately address the fact that in addition to finding that the petitioner had failed to prove that there was no ongoing parent-child relationship at the time of trial—a ruling the Appellate

[9] Of course, because this court cannot engage in fact-finding, we cannot go any farther than to conclude that the trial court's finding—that there was no evidence in the record to support the petitioner's claim that allowing further time for a parent-child relationship to develop would be detrimental to the children's best interests—was clearly erroneous. Accordingly, we disagree with the dissent's statements that the majority opinion "awards the petitioner no real practical relief" and that it would have been appropriate for this court to direct judgment terminating the respondent's parental rights. The petitioner did not request that this court order a directed judgment. Even if she had, we could not order that relief. Our decision today merely affirms the judgment of the Appellate Court setting aside the denial of the petitions. The respondent retains the right to present evidence and to hold the petitioner to her burden of proof. The proper venue for the respondent to exercise that right is in the trial court. The petitioner received the sole relief that she sought from this court: the affirmance of the judgment of the Appellate Court, which remanded the case to the trial court for a new termination hearing. Further, whether the petitioner would file new petitions for termination if we were to reverse the judgment of the Appellate Court is not relevant to our decision today.

Court concluded was in error—the trial court also found that the petitioner had failed to prove that "to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interest of the child." This latter finding independently would have sufficed to deny the petitions.[1]

My disagreement with the majority is similar. I believe that by focusing on the trial court's isolated and subordinate statement that "[t]here was no evidence presented by the petitioner at trial that would support a claim that additional time to reestablish a relationship with the children would be detrimental," and declaring *that* statement clearly erroneous, the majority has mistakenly avoided the fact that the latter finding was equally dispositive of the trial court's denial of the petitions. In my view, the majority (1) misreads the meaning of the trial court's memorandum of decision; (2) in essence, substitutes its judgment for the trial court's judgment on an issue of fact entrusted to trial judges in our juvenile session; and (3) ultimately awards the petitioner no real practical relief. I, therefore, respectfully dissent.

I

The respondent is serving a total effective sentence of twenty-nine years in prison. The conduct that landed him in prison (sexually abusing his children's young aunt, who lives with them) is reprehensible. His children are not aware of that conduct, but the conduct that

[1] The petitioner originally alleged that the children had been denied the care, guidance, or control necessary for their physical, educational, moral, or emotional well-being by reason of acts of parental commission or omission. See General Statutes § 45a-717 (g) (2) (B). In her amended petitions, the petitioner withdrew that allegation and instead alleged abandonment and the lack of an ongoing parent-child relationship as grounds for termination. See General Statutes § 45a-717 (g) (2) (A) and (C). The trial court ruled against the petitioner on both grounds. The only ground relevant to this appeal, however, is the ground of no ongoing parent-child relationship. See General Statutes § 45a-717 (g) (2) (C).

they *believe* landed him in prison (beating their mother, which they witnessed) is also reprehensible. It is not difficult to predict that this respondent might well be on the road to having his parental rights terminated. If I had been the trial judge, I might have ruled on the record presented to terminate his parental rights. But no one on this court was the trial judge in this case.

The trial court judge who did address the petitions in the present case was confronted with an issue that is not unusual in juvenile cases in which a parent faces a long term of incarceration: whether and when to terminate the parental rights of the parent-inmate. The reality is that some parents serving lengthy prison sentences may not play any significant role in the upbringing of their children and will not do so because of their own conduct. Without extraordinary effort of their own or active cooperation from the children's caregivers, parent-inmates might have little or no contact with their children at all.

But, as the majority observes, although a court may consider the "inevitable effects of incarceration" on an individual's ability to parent, "the fact of incarceration, in and of itself, cannot be the basis for a termination of parental rights." *In re Elvin G.*, 310 Conn. 485, 514, 78 A.3d 797 (2013); see also *In re Juvenile Appeal (Docket No. 10155)*, 187 Conn. 431, 443, 446 A.2d 808 (1982). Termination of parental rights implicates a fundamental constitutional right; *In re Yasiel R.*, 317 Conn. 773, 792, 120 A.3d 1188 (2015); and has implications beyond a child's childhood. When parental rights have been terminated, it becomes unlikely that the child and the parent will ever have any relationship, even as adults.

Children, of course, also have rights, as well as a need for a continuous, stable home environment. See *In re Davonta V.*, 285 Conn. 483, 494, 940 A.2d 733

(2008). In some cases, terminating a parent's rights is exactly the right thing for a child's best interests. Perhaps this is such a case. My point in dissenting from the majority should not be read as suggesting that this respondent is a good example of someone who should necessarily play a parental role in the lives of his children, given his conduct and the other circumstances relevant to that determination. My point is that we are not well positioned to make that determination. Rather, this is a difficult decision assigned to our trial court judges sitting in the juvenile session. Specifically, as it relates to the ground asserted and solely pursued by the petitioner in the present case—"no ongoing parent-child relationship"—the trial court is entrusted not just with determining *whether* to terminate a parent's rights, but *when* to do so. In adjudicating this particular ground, as applied to a parent who will be incarcerated throughout a child's childhood, General Statutes § 45a-717 (g) (2) (C) places discretion in the hands of the trial court to determine whether the "effects of incarceration" are indeed "inevitable" under the particular facts of the case, or whether allowing more time for the relationship to establish or reestablish is detrimental to the children's best interest.

II

Section 45a-717 (g) provides in relevant part that "the court may approve a petition terminating . . . parental rights . . . if it finds, upon clear and convincing evidence, that (1) the termination is in the best interest of the child, and (2) . . . (C) there is no ongoing parent-child relationship which is defined as the relationship that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child and *to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interests of the child* . . . ."

(Emphasis added.) Thus, to satisfy subsection (g) (2) (C) of the statute, the court must find both (1) that the petitioner has established that there is no ongoing parent-child relationship (the "no ongoing parent-child relationship" prong) *and* (2) that permitting the parent further time to establish or reestablish such a relationship would be detrimental to the children's best interests (the "further time" prong). See *In re Jonathon G.*, 63 Conn. App. 516, 525, 777 A.2d 695 (2001). The petitioner must prove both prongs by clear and convincing evidence. See *In re Baby Girl B.*, 224 Conn. 263, 300–301, 618 A.2d 1 (1992).

The trial court in the present case found that the petitioner had failed to establish either prong by clear and convincing evidence. Specifically, the court found "that the petitioner has not demonstrated that there is a lack of parent-child relationship *nor* that it would be detrimental to allow further time for the establishment of the relationship." (Emphasis added.) Regarding the "further time" prong, the trial court stated that "[t]here was no evidence presented by the petitioner at trial that would support a claim that additional time to reestablish a relationship with the children would be detrimental." The trial court also found that terminating the respondent's parental rights would not have been in the best interest of the children.[2]

[2] In support of these findings, the trial court made the following subordinate findings: The respondent is the father of three children, Jacob, N, and C. Because of a protective order put into place to prevent the respondent from having contact with the children's maternal aunt, with whom they live, the respondent has not been able to contact his children while in prison. Nevertheless, while incarcerated, he has requested assistance to arrange visits with and updates about his children, and participated in programs to send Christmas gifts to them. Although Jacob initially stated that he missed the respondent, he has since called him a "bad parent." N has stated that he hates the respondent, and C has little to no memory of him. Both Jacob and N have stated that they want no contact with the respondent. The children have bonded with the petitioner, their maternal grandmother, who wants to change their last name. Additionally, the guardian ad litem has opined that termination of the respondent's parental rights is in the children's

III

Rather than awaiting the "further time" contemplated by § 45a-717 (g) (2) (C) and either amending her petitions or bringing new petitions,[3] the petitioner appealed to the Appellate Court, claiming that all three of the trial court's critical findings were clearly erroneous. Specifically, she argued to the Appellate Court that upon the record presented, the trial court should have found by clear and convincing evidence that (1) there was no ongoing parent-child relationship between the respondent and his children; (2) permitting the respondent further time to establish or reestablish such a relationship would be detrimental to the children's best interests; and (3) termination of the respondent's parental rights would be in the children's best interests. The petitioner claimed that if she was correct that the trial

best interest because there would be no benefit in the children forming a relationship with him, as he will be incarcerated for the remainder of their childhood.

[3] My research identifies nothing that prevents (or would have prevented) the petitioner from pursuing termination on the "no ongoing parent-child relationship" ground, or any other ground, at some point after the trial court ruled against her on the present petitions. This court has held that a party can file an amended or new petition alleging either new grounds or a material change in circumstances so as to avoid both res judicata and collateral estoppel issues. See *In re Baby Girl B.*, supra, 224 Conn. 293–94 ("it makes no difference whether [the Department of Children and Families] chooses to honor its obligation by filing an amended petition or by filing a second independent petition alleging [a material change in circumstances or] new grounds for termination"); see id., 294 n.19; *In re Juvenile Appeal (83-DE)*, 190 Conn. 310, 318–19, 460 A.2d 1277 (1983) ("[T]he doctrines of res judicata and collateral estoppel ordinarily afford very little protection to a parent who has once successfully resisted an attempt to terminate his [or her parental] rights to a child. . . . An adjudication that a ground for termination did not exist at one time does not mean such ground has not arisen at a later time." [Citations omitted.]). This is because § 45a-717 (g) (2) (C) looks at whether there is a *present* ongoing relationship, which necessarily must be assessed as of the time of trial. See *In re Juvenile Appeal (83-DE)*, supra, 318 ("the issue of whether termination of parental rights is appropriate must be decided upon the basis of conditions as they appear at the time of trial").

court erred in each of its findings, she would be entitled to directed judgments terminating the respondent's rights, rather than merely the new trial the Appellate Court ordered and the majority today affirms. See *In re James T.*, 9 Conn. App. 608, 644, 520 A.2d 608 (1987) ("[f]rom the facts presented in the court's memorandum, to the effect that [the Department of Children and Families (department)] 'clearly established' that it is not in the child's best interest to allow further time to establish a relationship, we conclude that [the department] did meet its burden of clear and convincing proof, and the petition should have been granted").

As the majority notes, the Appellate Court did not address the petitioner's claims on appeal that the trial court's findings were clearly erroneous. Nor did it address at all the trial court's finding that it had not been proven to the court that allowing further time would be detrimental to the children's best interests. Instead, the Appellate Court reversed the trial court's judgments denying the petitions, holding that the trial court's reasoning was legally and logically inconsistent, and that its factual findings were fatally inconsistent. *In re Jacob W.*, 178 Conn. App. 195, 215, 172 A.3d 1274 (2017). Specifically, the Appellate Court held that the trial court had applied the wrong legal test to determine whether there was an ongoing parent-child relationship. Id., 211. It determined that the trial court's findings were legally inconsistent in that the trial court found both "that an ongoing parent-child relationship exists and that unreasonable interference inevitably prevented the respondent from maintaining an ongoing parent-child relationship." (Emphasis omitted.) Id. It also determined that the trial court's findings were factually inconsistent in that the trial court "found both that the grandparents' unreasonable conduct constituted interference and that there was no evidence of unreasonable interference by any person." Id., 215–16.

The Appellate Court therefore ordered a new trial on the petitioner's amended petitions. Id., 219.

Although the trial court's memorandum of decision is not entirely clear—and is in one place inconsistent—neither the parties nor the Appellate Court saw fit to ask the trial court to clarify or articulate its ruling.[4] See Practice Book § 66-5; see also *In re Jason R.*, 306 Conn. 438, 460, 51 A.3d 334 (2012) (trial court states burden of proof correctly in articulations to clarify ambiguity in memorandum of decision regarding allocation of burden of proof). Trial court judges operate under tremendous time pressure and without the resources available to this court and the Appellate Court. See K. Stith, "The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal," 57 U. Chi. L. Rev. 1, 61 n.99 (1990) ("appellate judges have more resources [time, staff, and so on than trial judges]"). Thus, a trial court "opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding." (Internal quotation marks omitted.) *In re Jason R.*, supra, 453.

More significantly for this case, even if the trial court's decision was in some way unclear, the examples provided by the Appellate Court concerned only the "no ongoing parent-child relationship" prong. The Appellate Court identified no lack of clarity or inconsistency concerning the "further time" prong, which provides an independent basis for upholding the trial court's deci-

[4] In the absence of an articulation, we do not know if the trial court's memorandum of decision truly is inconsistent, or if the legal "inconsistencies" are arguments in the alternative and the factual "inconsistencies" are scrivener's errors. Because we must read a memorandum of decision as a whole; *In re Jason R.*, 306 Conn. 438, 453, 51 A.3d 334 (2012); and because there is a presumption that the trial court properly applied the law and considered the facts; *State* v. *Henderson*, 312 Conn. 585, 598, 94 A.3d 614 (2014); *Walton* v. *New Hartford*, 223 Conn. 155, 165, 612 A.2d 1153 (1992); we should construe these "inconsistencies" to conform to the trial court's holding.

sion. See footnote 6 of this dissenting opinion. Therefore, whatever flaws the trial court's opinion might have contained, I had no trouble understanding from my review that the court found that the time had not yet come to terminate the respondent's parental rights. I therefore would not have reversed the trial court's judgments on the ground that the Appellate Court did.

IV

We granted certification in the present case limited to the following issue: "Did the Appellate Court correctly reverse the trial court's judgment denying the custodian's petition to terminate the father's parental rights when it determined that the trial court's judgment was legally and logically inconsistent?" *In re Jacob W.*, 328 Conn. 902, 177 A.3d 563 (2018). The majority does not affirm the Appellate Court's judgment on the "legally and logically inconsistent" rationale of that court, however, but rather, it concludes that in addressing the "no ongoing parent-child relationship" prong, the trial court did not properly take account of the "children's negative feelings toward or lack of memory of the respondent," improperly focusing instead on the respondent's conduct. I do not believe we need to reach that issue, however (and I do not), because even if the trial court considered the "no ongoing parent-child relationship" prong under an incorrect standard, the trial court also found that the petitioner had failed to establish that "to allow further time for the establishment or reestablishment of the parent-child relationship would be detrimental to the best interest of the child."[5] In my view,

[5] The majority states that the trial court's holding under the dispositional phase of the proceedings that termination was not in the children's best interest also "was affected by its application of an incorrect legal test during the adjudicatory phase" and by these inconsistencies. These concerns do not apply to the trial court's finding under the "further time" prong. The "best interest" analysis under the second prong of § 45a-717 (g) (2) (C) is separate and distinct from the "best interest" analysis under subsection (g) (1).

the trial court's ruling on this second prong sufficed independently to deny the petitions.[6]

The majority does *not* hold, as the petitioner has asked us to hold, that the trial court's ruling on the

[6] Citing *In re Juvenile Appeal (Anonymous)*, 177 Conn. 648, 675–76, 420 A.2d 875 (1979), the majority indicates that "[o]nly if" the trial court determines that the petitioner has proven the lack of an ongoing parent-child relationship "may it turn to the second part of the inquiry . . . ." The majority focuses on a single sentence from *In re Juvenile Appeal (Anonymous)*: "The 'best interests' standard . . . comes into play only if it has been determined that no ongoing parent-child relationship exists, in order to decide whether allowance of further time for the establishment or reestablishment of the relationship would be contrary to the child's best interests." (Emphasis omitted.) Id. The majority and the Appellate Court have interpreted this sentence to mean that the trial court cannot and should not address the "further time" prong unless the "no ongoing parent-child relationship" prong has been established. If there is an ongoing relationship, then there is no reason or purpose for affording further time to establish such a relationship. Thus, according to the majority, if this court determines that the trial court's finding as to the first prong was clearly erroneous, it cannot affirm the trial court's decision on the basis of the second prong, but rather must remand the case for a new trial.

I do not agree with such an interpretation of *In re Juvenile Appeal (Anonymous)*, especially when reading the sentence at issue in context. In *In re Juvenile Appeal (Anonymous)*, the juvenile court found there to be no meaningful ongoing parent-child relationship, and, on appeal, the Superior Court upheld that decision, "characteriz[ing] the decision of the Juvenile Court as holding that 'it was in the best interest of said child that the petition for termination of parental rights be granted.' " *In re Juvenile Appeal (Anonymous)*, supra, 177 Conn. 675. In doing so, the Superior Court combined the first and second prongs of § 45a-717 (g) (2) (C), upholding the juvenile court's finding of no meaningful ongoing parent-child relationship under the first prong because it was in the children's best interest. This court in *In re Juvenile Appeal (Anonymous)* was holding that the Superior Court improperly upheld the juvenile court's finding as to the first prong on the basis of the child's best interest, which could be considered only as a part of the second prong. Based on this context, I do not read the sentence cited by the majority as prohibiting a trial court from considering the "further time" prong unless the "no ongoing parent-child relationship" prong is first established. Rather, this sentence establishes simply that "best interest" is considered only as part of the second prong, not the first prong.

If the cited sentence in *In re Juvenile Appeal (Anonymous)* is read to mean that the trial court cannot consider the second prong ("further time") before it has found the first prong to be established, in my view this court should overrule that holding. Although it is obvious that the trial court may not *grant* a termination petition if it does not find the lack of an ongoing parent-child relationship, because both prongs must be established, the petition can fail under either prong. Similarly, even if the trial court finds there is not clear and convincing evidence of no ongoing parent-child rela-

"further time" prong is clearly erroneous and that, therefore, this prong has in fact been established by clear and convincing evidence. This would be a difficult chore. Determining that a trial court's finding that the *failure to prove* an element by clear and convincing evidence is clearly erroneous is even more challenging an undertaking than contesting any other pedestrian finding.

The majority instead takes on a subordinate statement of the trial court: "[t]here was no evidence presented by the petitioner at trial that would support a claim that additional time to reestablish a relationship with the children would be detrimental." The majority protests that there *was* in fact "evidence presented that was relevant to this question" and that for the trial court to say otherwise was so clearly erroneous that a new trial is warranted. The examples the majority provides, however, are not in my view *directly* relevant to the finding that further time would not be *detrimental*, but instead relate to whether additional time will be *productive*.

For example, the majority states that there was evidence that the children had intensely negative feelings about the respondent (including feelings that he is a bad parent) or no present feelings at all. The children were not asking to see or speak with him and wanted to have their last name changed. The majority also claims that the trial court did not consider the recommendations of the department, the guardian ad litem, and the children's attorney to terminate the respondent's parental rights, along with whether the little "likelihood" of reestablishing a relationship, and the time it

tionship, there is no reason why the court cannot go on to determine whether further time would be detrimental as an alternative reason for denying the petitions. See *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 724, 183 A.3d 1164 (2018) ("whenever feasible, the far better practice would be for the trial court to fully address the merits of all theories litigated, even those that are legally inconsistent").

would have taken to do so, would have been detrimental to the children's best interest.

However, I do not agree with the majority that the trial court did not give consideration to all of the evidence the majority cites. In my view, a full and fair reading of the memorandum of decision does not support a conclusion that the trial court "did not accord any effect to," "did not consider," or "took no account of" such evidence. Judges presumptively consider whatever evidence is in front of them. See *Lewis* v. *Commissioner of Correction*, 117 Conn. App. 120, 128, 977 A.2d 772 ("There is nothing in the record that suggests that the court failed to review thoroughly the testimony and evidence submitted to it. . . . [A] judge is presumed to have performed his duty properly unless the contrary appears [in the record]." [Internal quotation marks omitted.]), cert. denied, 294 Conn. 904, 982 A.2d 647 (2009). And here, the trial court *did* expressly find and take note in its memorandum of decision of the children's negative and nonexistent feelings, as well as the department's report and the guardian ad litem's recommendation.

Thus, unlike the majority, I would not so strictly scrutinize the trial court's statement that there was "no evidence . . . that would support a claim that additional time to reestablish a relationship with the children would be detrimental." The majority finds fault with this statement because, in its view, there was relevant evidence. Just because evidence is relevant, however, does not mean it clearly and convincingly establishes a fact. I read the trial court's statement as more likely meaning that the court found "no *direct* evidence"[7] or "no *persuasive* evidence" that more time

[7] In my view, an example of what would be direct evidence (or at least more direct evidence) might be where termination will lead to a different placement or some other contingency. But here, these children will be with the grandparents, regardless.

would be detrimental. "[W]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Internal quotation marks omitted.) *In re Jason R.*, supra, 306 Conn. 453. The trial court might not have been *persuaded* by the evidence the majority believes it should have been persuaded by, but instead determined that there was not clear and convincing evidence that affording additional time would be detrimental to the children's best interests. Although the trial court's analysis may be sparse, it is clear to me from its factual findings that it considered all the evidence in reaching its determination as to the "further time" prong. In my view, the majority has substituted its judgment for the discretion of the trial court and called it clearly erroneous review.

For example, the trial court could have found that, although relevant, the children's statements of dislike of the respondent were not *direct* evidence of further time being detrimental to their best interest.[8] Although a trial court could have found that further time would be detrimental because the children were upset and any further contact with the respondent would serve only to upset them further, it also could have found that those negative feelings were going to exist regardless of whether the respondent's parental rights are termi-

[8] The majority takes issue with the trial court's statement that "[t]he statements of dislike by very young children with false information about [the respondent] does not establish by clear and convincing evidence that reestablishing a relationship would be detrimental." According to the majority, the trial court improperly discounted "the negative feelings of the children on the basis of the grandparents' alleged 'interference,' " and, if properly considered, these negative feelings would have been at least some evidence that further time would be detrimental, making the trial court's finding of "no evidence" clearly erroneous. The problem with this argument, however, is that it presupposes that the children's negative feelings necessarily equate to evidence that further time would be detrimental to their best interest. As explained previously, the children's negative feelings reasonably can be considered not to be direct evidence of detriment, but rather are open to interpretation by the trial court.

nated, that termination will not affect those feelings, and that additional time might provide an opportunity for the respondent to attempt to repair his relationship with his children. In fact, in many of such "no ongoing parent-child relationship" cases, the present feelings of the children may be negative or nonexistent. That is why the relationship has to be reestablished. And, that is what the additional time is for: things can change. Thus, when the trial court stated that "[t]he statements of dislike by very young children with false information about [the respondent] does not establish by clear and convincing evidence that reestablishing a relationship would be detrimental," I think that means no more than that: the quantum of evidence necessary was not met by the cited evidence.

Further, although the trial court acknowledged that the department had recommended termination of the respondent's parental rights, and that the guardian ad litem found it unlikely that further time would be productive on the basis of the respondent's incarceration and the ongoing protective order preventing contact between him and the children, it did not find this to be direct evidence of detriment if it allowed further time. Lack of productivity does not necessarily equate to detriment, but rather is a factor to consider in determining whether further time would be detrimental. Although the trial court in this case could have found that there was little likelihood of productivity because of the protective order, it also could have found that because the respondent could have sought to modify the protective order or set up some arrangement to have contact with his children, there was a possibility that further time would give the respondent an opportunity to reestablish his relationship with his children. Thus, although relevant, this evidence does not necessarily support a claim that additional time to reestablish a relationship with the children would be detrimental.

It is for the trial court to determine whether there is a lack of productivity and, if so, whether it would be detrimental. The trial court in the present case determined that any predicted lack of productivity in providing additional time did not equate to detriment—in *this* case, at *that* time—especially in light of the fact that the children had been thriving with their grandparents. In my view, this finding is not clearly erroneous. It is important that in reviewing such a finding, we do not substitute our own judgment for the trial court's judgment on an issue of fact entrusted to trial judges in our juvenile session because, especially in cases involving incarcerated parents, it will be a highly fact-bound question whether additional time is not likely to establish or reestablish the relationship. It is not necessarily true that in each of those cases, granting the additional time would be detrimental. Rather, this is, in my view, an issue best left to the trial judge, who is in the best position to weigh the evidence before her or him.

V

Hard cases make bad law. In my view, this case qualifies. The respondent's appalling conduct and its consequences would seem to make it highly unlikely that he will play a significant parenting role in his children's lives. I am concerned, however, that the majority's opinion will be read to require trial court judges to consider the "further time" prong to be more of a predictor of the *likelihood* of reestablishing a relationship. Although I agree that the likelihood that further time will be productive may be a factor in determining whether further time would be detrimental to the children's best interest, I am concerned that judges sitting in our juvenile session will interpret the majority's opinion as equating the probable lack of productivity with detriment.

Thus, in this case, I do not believe that any assumed lack of productivity should not be considered by the

trial court, but rather I believe that the trial court *did indeed* consider it and did not find it to be evidence of detriment. There is no requirement that a trial court make a finding of detriment even if there is little foreseeability of reestablishing a relationship. Rather, this is a fact-based issue that will differ under the circumstances of each case. Unless the court's finding is clearly erroneous, we should defer to the trial court's judgment on such an issue. Otherwise, I am concerned that appellate scrutiny will override and overshadow the trial court's prerogative to weigh the evidence and determine not only whether parental rights should be terminated, but when. I am simply unwilling to arrogate to myself the authority to make this determination, and unwilling to so strictly scrutinize the trial court's memorandum of decision in such a pursuit.

I am especially unwilling to do so when the reward the majority confers upon the petitioner is so meager. The majority's decision today will not hasten the termination of the respondent's parental rights. In fact, the appellate process might very well have delayed it. This is because all the petitioner has gained by prevailing before both the Appellate Court and this court is a new trial on a trio of two year old petitions. A Pyrrhic victory to be sure. Practically, this is no relief at all because any new trial that follows from a reversal of the trial court's denial of the petitions will necessarily have to measure any "ongoing" relationship as of the time of the new trial, not based on the date of the prior trial. See *In re Juvenile Appeal (83-DE)*, supra, 190 Conn. 318 ("the issue of whether termination of parental rights is appropriate must be decided upon the basis of conditions as they appear at the time of trial"). If a new trial on these petitions would be any different from a trial on *new* petitions alleging no ongoing parent-child relationship, that difference is lost on me. See footnote 3 of this dissenting opinion. It is little wonder that that

is not the relief the petitioner sought in the Appellate Court, but rather that she sought directed judgments based upon an appellate determination that all of the trial court's findings on the elements of the no ongoing parent-child relationship prong were clearly erroneous.[9] Thus, although my disagreement with the majority is fundamental, it results in little difference to the parties in this case. I therefore respectfully dissent.

WILLIAM O'BRIEN *v.* CITY OF NEW HAVEN (SC 20069)

Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Argued December 13, 2018—officially released February 26, 2019

Procedural History

Action for indemnification of attorney's fees and costs incurred by the plaintiff in defending a separate action brought against him, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Frechette, J.*; judgment for the plaintiff, from which the defendant and the plaintiff filed separate appeals with the Appellate Court, where the appeals were consolidated; thereafter, the Appellate Court, *Sheldon*, *Prescott* and *Elgo*, *Js.*, affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Appeal dismissed.*

Proloy K. Das, with whom was *Rachel Snow Kindseth*, for the appellant (defendant).

Vincent F. Sabatini, for the appellee (plaintiff).

[9] In her appeal to the Appellate Court, the petitioner specifically asked the court to direct judgments terminating the respondent's parental rights on the ground that the trial court's findings as to § 45a-717 (g) (2) (C) were clearly erroneous because its subordinate findings establish that there was no ongoing parent-child relationship and that allowing further time would be detrimental to the children's best interest. Although the petitioner has repeated this argument before this court as an alternative ground for affirming the judgment of the Appellate Court, she has not specifically requested directed judgments from this court.

Opinion

PER CURIAM. The plaintiff, William O'Brien, the former tax assessor of the defendant, the city of New Haven (city), commenced this action, seeking indemnification pursuant to General Statutes § 7-101a (b)[1] for the attorney's fees and costs he incurred in successfully defending himself in a prior action brought by a third party, Tax Data Solutions, LLC. Following a court trial, the court rendered judgment for O'Brien and awarded him the attorney's fees and costs he incurred in that prior action. On appeal to the Appellate Court, the city claimed that the trial court incorrectly concluded that O'Brien's claim was not time barred under § 7-101a (d), which provides that no action against a municipality for indemnification under § 7-101a may be maintained unless that action is "commenced within two years after the cause of action therefor arose nor unless written notice of the intention to commence such action and of the time when and the place where the damages were incurred or sustained has been filed with the clerk of such municipality within six months after such cause of action has accrued." The Appellate Court rejected the city's claim, holding that the "cause of action" referred to in § 7-101a (d) is the cause of action for indemnification and not, as the city had maintained, the earlier, underlying action in which the attorney's fees and costs were incurred. See *O'Brien* v. *New Haven*, 178 Conn. App. 469, 487–88, 175 A.3d 589 (2017). The Appellate Court therefore concluded that the pre-

[1] General Statutes § 7-101a (b) provides generally that a municipality shall indemnify any municipal officer or employee who, having been sued for malicious, wanton or wilful acts, or ultra vires acts in the discharge of his or her duties, incurs "financial loss and expense, including legal fees and costs," arising out of such action, unless a judgment has been rendered against that officer or employee for any such acts. In its separate action against O'Brien, Tax Data Solutions, LLC, alleged that he had engaged in malicious, wanton or wilful acts or ultra vires acts, but the trial court in that case rendered judgment for O'Brien.

sent indemnification action did not arise until judgment had been rendered for O'Brien in the action brought against him by Tax Data Solutions, LLC. See id. Because O'Brien commenced the present action within two years of that date and provided the statutorily required notice within six months of that date, the Appellate Court further concluded that the trial court properly had determined that the present action was timely. See id., 488. We granted the city's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly affirm the judgment of the trial court interpreting when [O'Brien's] cause of action for indemnification accrued for the purposes of the notice requirement and time limitations set forth in . . . § 7-101a (d)?" *O'Brien* v. *New Haven*, 328 Conn. 909, 178 A.3d 1041 (2018).

After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we have determined that the appeal in this case should be dismissed on the ground that certification was improvidently granted.

The appeal is dismissed.

STATE OF CONNECTICUT *v.* MITCHELL HENDERSON (SC 19947)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

The defendant, who had been convicted of, among other crimes, robbery in the first degree and attempt to escape from custody, appealed to the Appellate Court from the trial court's denial of his motion to correct an illegal sentence. The sentence imposed in connection with the defendant's robbery conviction had been enhanced pursuant to statute ([Rev. to 1991] § 53a-40 [a]) after he entered an *Alford* plea to the charge of being a persistent dangerous felony offender, and the sentence imposed

in connection with his conviction of attempt to escape from custody had been enhanced pursuant to § 53a-40 (b) after he entered an *Alford* plea to the charge of being a persistent serious felony offender. On appeal to the Appellate Court, the defendant claimed that the trial court improperly had denied his motion to correct because his enhanced sentences violated the multiple punishments provision of the double jeopardy clause of the United States constitution and were contrary to the legislative intent underlying the sentence enhancement provisions of § 53a-40 (a) and (b). The Appellate Court affirmed the trial court's denial of the defendant's motion. The Appellate Court concluded that there was no double jeopardy violation because the elements of the underlying crimes were entirely different and the robbery and attempt to escape from custody charges arose from two separate and distinct incidents or transactions. That court also concluded that the plain language of § 53a-40 (a) and (b) and the relevant legislative history did not limit the application of such sentence enhancements to one offense when a defendant stands convicted of multiple, qualifying offenses. On the granting of certification, the defendant appealed to this court. *Held* that the Appellate Court having fully addressed the issues concerning the propriety of the trial court's denial of the defendant's motion to correct, this court adopted the Appellate Court's thorough and well reasoned opinion as a proper statement of the issues and the applicable law concerning those issues, and, accordingly, the judgment of the Appellate Court was affirmed.

Argued September 13, 2018—officially released February 26, 2019

Procedural History

Substitute two part information charging the defendant, in the first part, with two counts of the crime of assault in the third degree and one count each of the crimes of robbery in the first degree, criminal mischief in the third degree, threatening, and attempt to escape from custody, and, in the second part, with being a persistent dangerous felony offender and being a persistent serious felony offender, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford, where the defendant was presented to the court, *Espinosa*, *J.*, on a plea of guilty to the crime of criminal mischief in the third degree and where the remaining counts were tried to the jury before *Espinosa*, *J.*; verdict of guilty of one count each of assault in the third degree, robbery in the first degree, threatening,

and attempt to escape from custody; thereafter, the defendant was presented to the court, *Espinosa*, *J.*, on a plea of guilty to the second part of the information; judgment of guilty in accordance with the verdict and the pleas, from which the defendant appealed to the Appellate Court, *O'Connell*, *Heiman* and *Schaller*, *Js.*, which affirmed the trial court's judgment; subsequently, the court, *Alexander*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to the Appellate Court, *Keller*, *Prescott* and *Harper*, *Js.*, which affirmed the trial court's denial of the defendant's motion, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Judie Marshall and *Walter C. Bansley IV*, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy* and *Anne F. Mahoney*, state's attorneys, for the appellee (state).

Opinion

PER CURIAM. In 1993, a jury found the defendant, Mitchell Henderson, guilty of robbery in the first degree and attempt to escape from custody, among other offenses.[1] Following the jury verdict, the defendant entered an *Alford*[2] plea to the charge in each of two part B informations, one of which charged him with

[1] The evidence adduced at the defendant's trial established that, on January 17, 1992, the defendant, who was wielding a knife, assaulted and robbed the victim, Victorene Hazel, on Baltimore Street in the city of Hartford after she and a companion left the Shawmut Bank. Shortly thereafter, the defendant was apprehended and arrested by the police and placed in a police cruiser. As he was being transported from the scene, the defendant attempted to escape from custody by kicking out the cruiser's rear window and trying to climb out of the cruiser while it was in motion. *State* v. *Henderson*, 37 Conn. App. 733, 736–38, 658 A.2d 585, cert. denied, 234 Conn. 912, 660 A.2d 355 (1995).

[2] *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

being a persistent dangerous felony offender pursuant to General Statutes (Rev. to 1991) § 53a-40 (a)[3] in connection with his conviction of first degree robbery, and the second of which charged him with being a persistent serious felony offender pursuant to § 53a-40 (b)[4] in connection with his conviction of attempt to escape from custody. Thereafter, the trial court, *Espinosa*, *J.*, sen-

[3] General Statutes (Rev. to 1991) § 53a-40 (a) provides in relevant part: "A persistent dangerous felony offender is a person who (1) stands convicted of manslaughter, arson, kidnapping, sexual assault in the first or third degree, sexual assault in the first or third degree with a firearm, robbery in the first or second degree, or assault in the first degree; and (2) has been, prior to the commission of the present crime, convicted of and imprisoned, under a sentence to a term of imprisonment of more than one year or of death, in this state or in any other state or in a federal correctional institution for any of the following crimes: (A) The crimes enumerated in subdivision (1), the crime of murder, or an attempt to commit any of said crimes or murder . . . ."

Hereinafter, all references to § 53a-40 are to the 1991 revision.

Section 53a-40 further provides in relevant part: "(f) When any person has been found to be a persistent dangerous felony offender, and the court is of the opinion that his history and character and the nature and circumstances of his criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 53a-35a for the crime of which such person presently stands convicted . . . may impose the sentence of imprisonment authorized by said section for a class A felony."

[4] General Statutes (Rev. to 1991) § 53a-40 (b) provides: "A persistent serious felony offender is a person who (1) stands convicted of a felony; and (2) has been, prior to the commission of the present felony, convicted of and imprisoned under an imposed term of more than one year or of death, in this state or in any other state or in a federal correctional institution, for a crime. This subsection shall not apply where the present conviction is for a crime enumerated in subdivision (1) of subsection (a) and the prior conviction was for a crime other than those enumerated in subsection (a)."

Section 53a-40 further provides in relevant part: "(g) When any person has been found to be a persistent serious felony offender, and the court is of the opinion that his history and character and the nature and circumstances of his criminal conduct indicate that extended incarceration will best serve the public interest, the court in lieu of imposing the sentence of imprisonment authorized by section 53a-35a for the crime of which such person presently stands convicted . . . may impose the sentence of imprisonment authorized by said section for the next more serious degree of felony. . . ."

tenced the defendant to a term of imprisonment of twenty-five years for the crime of robbery in the first degree as a persistent dangerous felony offender, and to a consecutive term of imprisonment of twenty years, execution suspended after ten years, with five years of probation, for the crime of attempt to escape from custody as a persistent serious felony offender. The Appellate Court affirmed the judgment of the trial court. *State* v. *Henderson*, 37 Conn. App. 733, 749, 658 A.2d 585, cert. denied, 234 Conn. 912, 660 A.2d 355 (1995).

In 2014, the defendant filed a motion to correct an illegal sentence, which the trial court, *Alexander*, *J.*, denied. The defendant appealed from the trial court's ruling to the Appellate Court, claiming that the trial court improperly had denied his motion because (1) his sentence violated the multiple punishments provision of the double jeopardy clause of the fifth amendment to the United States constitution,[5] and (2) his sentence was contrary to the legislative intent underlying the two sentence enhancement provisions, namely, § 53a-40 (a) and (b). See *State* v. *Henderson*, 173 Conn. App. 119, 123, 128, 163 A.3d 74 (2017).

With respect to his first claim, the defendant maintained that his sentence violated the double jeopardy clause "because his classifications, and resulting enhanced sentence, as both a persistent dangerous felony offender and a persistent serious felony offender . . . arose out of the same occurrences [insofar as] they were both based on his prior felony convictions." Id., 128. The defendant further argued "that [subsections (a) and (b) of] § 53a-40 . . . are the same offense under [the test adopted in] *Blockburger* v. *United States*,

[5] The double jeopardy clause of the fifth amendment to the United States constitution is made applicable to the states through the due process clause of the fourteenth amendment. See *Benton* v. *Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)[6] [for determining whether two statutes criminalize the same offense], because § 53a-40 (b) does not require proof of any fact that § 53a-40 (a) does not also require." (Footnote added.) *State* v. *Henderson*, supra, 173 Conn. App. 128. With respect to his second claim, the defendant contended that the "legislature did not intend to simultaneously punish an individual as both a persistent dangerous felony offender and as a persistent serious felony offender." Id., 134.

In response to the defendant's first claim, the state asserted that the defendant had misapplied the *Blockburger* test because the relevant inquiry for purposes of determining whether a double jeopardy violation exists under *Blockburger* examines the underlying substantive crimes of which he was convicted, namely, robbery in the first degree and attempt to escape custody, and not the elements of § 53a-40 (a) and (b), which merely serve as the basis for a sentence enhancement. Id., 128. The state observed correctly that no double jeopardy violation occurred in the present case because the elements of the underlying crimes are entirely differ-

[6] "Traditionally we have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [When] the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact [that] the other does not. . . . This test is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial. . . .

"Our analysis of [the defendant's] double jeopardy [claim] does not end, however, with a comparison of the offenses. The *Blockburger* test is a rule of statutory construction, and because it serves as a means of discerning [legislative] purpose the rule should not be controlling [when], for example, there is a clear indication of contrary legislative intent. . . . Thus, the *Blockburger* test creates only a rebuttable presumption of legislative intent, [and] the test is not controlling when a contrary intent is manifest." (Citations omitted; internal quotation marks omitted.) *State* v. *Wright*, 319 Conn. 684, 689–90, 127 A.3d 147 (2015).

ent. See id. As the state further observed, the robbery and attempt to escape custody charges arose from two separate and distinct incidents or transactions. Id. In response to the defendant's claim that his sentence contravened the legislative intent behind the two sentence enhancement provisions, the state argued that the plain language of those provisions and the relevant legislative history "do not limit the application of [such] sentence enhancements to one offense when the defendant stands convicted of multiple qualifying offenses." Id., 134. The Appellate Court agreed with the state's arguments as to each of the defendant's claims; id., 128, 134; and, therefore, it affirmed the trial court's denial of the defendant's motion. See id., 143.

We granted the defendant's petition for certification to appeal, limited to the following question: "Did the Appellate Court properly conclude that the defendant's sentence was not illegal, does not violate the double jeopardy clause [of the United States constitution], and does not run contrary to legislative intent?" *State* v. *Henderson*, 326 Conn. 914, 173 A.3d 389 (2017).

After examining the record and briefs on appeal and considering the arguments of the parties, we conclude that the judgment of the Appellate Court should be affirmed. The Appellate Court's thorough and well reasoned opinion fully addresses the certified question, and, accordingly, there is no need for us to repeat the discussion contained therein. We therefore adopt the Appellate Court's opinion as the proper statement of the issues and the applicable law concerning those issues. See, e.g., *Anderson* v. *Commissioner of Correction*, 308 Conn. 456, 462, 64 A.3d 325 (2013).

The judgment of the Appellate Court is affirmed.