



Family Law Year in Review

**September 15, 2020
2:00 p.m. – 4:00 p.m.**

**CT Bar Association
Webinar**

CT Bar Institute Inc.

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Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

Table of Contents

- Agenda 4
- Faculty Biographies 5
- CT Appellate and Supreme Court Cases Part 1 8
- CT Appellate and Supreme Court Cases Part 2 40

Annual Review of Family Law Cases

Agenda

Time	Speaker	Topic
0 – 120 minutes	Alexander Cuda Steven Dembo Amy Calvo MacNamara Louise Truax Aidan R. Welsh	Panel Discussion and Review of Recent Appellate and Supreme Court Case Law from July, 2019 to August, 2020

Faculty Biographies

Alexander J. Cuda, Needle | Cuda

Alexander J. Cuda is a highly respected family and matrimonial law attorney. He received his BA from Cornell University and his J.D. and LL.M. from Tulane University Law School. With numerous published articles and speaking engagements, Alex's leadership in family law is well-known. He has been named one of the "Top 10 Family Law Attorneys in Southern Connecticut" by such organizations as the National Academy of Family Law Attorneys (2017). The Connecticut Law Tribune recognized him as a "New Leader in the Law," in 2014. He has been deemed a "Rising Star" by both SuperLawyers (2012-present) as well as the Connecticut Bar Association Family Law Section (2010-2011). He was honored to receive the Connecticut Bar Association Pro Bono Award (2009) and has a 10 star "superb" featured attorney rating on Avvo. He is also the current Connecticut Bar Association CLE Program Chair and a member of the Executive Committee. Alex is an experienced negotiator and advocate whether in litigation, mediation, or arbitration. He also provides representation in family and matrimonial appeals. Alex is known for his vigorous advocacy, responsiveness, and personalized representation and understanding of each client's needs. He handles both custody and financial matters. Alex lives with his family in Fairfield County.

Steven R. Dembo, Berman Mickelson Dembo & Jacobs LLC, Hartford

Attorney Dembo is a skilled litigator with substantial experience in matrimonial, civil, personal injury, criminal cases and appeals. He is widely respected & routinely handles complex cases involving multiple legal issues. Recognized by Super Lawyers in the area of Family Law for years 2008-2013.

A James W. Cooper Fellow of the Connecticut Bar Foundation, Attorney Dembo is a Special Master, Family Division, with the Hartford and Middletown Superior Courts. He is also a member of the Town of West Hartford's Board of Personnel.

Attorney Dembo holds a B.S. from the State University of New York at Binghamton and earned his J.D. from Western New England College of Law. He is admitted to practice in Connecticut (1990) and is a member of the Hartford County, Connecticut and American Bar Associations.

Amy C. MacNamara, The Law Offices of Amy Calvo MacNamara, Greenwich

Attorney MacNamara handles all aspects of complex matrimonial and family law matters, including cases which involve significant assets, executive compensation, child custody issues, and substance abuse/mental health issues. She has worked exclusively in the area of matrimonial and family law since 2009 and has extensive experience litigating and settling complex and sensitive matters. Preparation, effective communication, and practicality are the cornerstones of her practice. She takes a firm yet compassionate approach to the practice of family law, and works diligently to understand the individual issues raised in each case.

Attorney MacNamara received her B.A., magna cum laude, from Fordham University in 2006. She received her J.D., cum laude, from Quinnipiac University School of Law in 2009, where she earned an Academic Concentration, with honors, in Family and Juvenile Law. She is certified to act as a Guardian ad Litem (GAL) and Attorney for a Minor Child (AMC) in Connecticut. She was also the founding research assistant for the

Committee for the Training of Professionals Serving as Guardians ad Litem and Attorneys for Minor Children, commonly known as the “GAL Training Academy.”

Attorney MacNamara frequently lectures and presents on the field of family and matrimonial law. She currently serves as the Vice Chair of the Connecticut Bar Association’s Family Law Section and the co-chair of the Fairfield County Bar Association's Family Law Section.

Louise T. Truax, Reich & Truax PLLC, Southport

Lax & Truax LLC was formed in December 1998 by Attorney Truax and Sandra Lax. Attorney Truax is a fellow of the American Academy of Matrimonial Lawyers. She practices throughout the State of Connecticut in both the trial and appellate courts. She is a member of the Association of Family and Conciliation Courts.

Attorney Truax is frequently appointed to represent children in contested custody cases as both an attorney for minor children (AMC) or guardian ad Litem (GAL). She regularly serves the Connecticut Superior Court as a Special Master in family cases, including at the Regional Trial docket in Middletown, where contested custody trials are usually conducted.

Attorney Truax is an active member of the Connecticut Bar Association Family Law Section, having previously served as the Section President. She is active with the American Academy of Matrimonial Lawyers having served on the Child Custody Evaluation Standards Committee and Standards for Attorneys for Children in Custody or Visitation Proceedings Committee. She is a member of the planning committee and faculty for the State of Connecticut AMC/GAL training program.

Aidan R. Welsh, Schoonmaker George Colin Blomberg Bryniczka & Welsh PC, Old Greenwich

Attorney Welsh is a Partner at the law firm. She became a partner in 2015 and a named partner in 2020. Attorney Welsh is a Fellow in the American Academy of Matrimonial Lawyers and an Officer of the Connecticut Bar Association Family Law Section. She handles all aspects of complex family law matters including alimony and child support issues, division of assets, child custody disputes, cases involving substance abuse issues, negotiating and drafting premarital agreements, litigation, and mediation.

Attorney Welsh was recently selected to become a Fellow of the American Academy of Matrimonial Lawyer and she joins only 34 other Connecticut members in the AAML. The AAML is an organization of the most dedicated and professional family lawyers who are recognized by the bench and bar as leaders in the field. Attorney Welsh was also recently selected to be included in Best Lawyers in America, 2019 © in the field of Family Law. She is also recognized by SuperLawyers Magazine as a Rising Star in the Field of Family Law for 2013-2019. The Connecticut Law Tribune recognized Attorney Welsh as a New Leader in the Law in 2012.

Attorney Welsh is an active member of the Connecticut Bar Association (CBA). She is the current Secretary of the CBA Family Law Section and the immediate past Assistant Treasurer – Secretary of the entire CBA.

Attorney Welsh frequently speaks on issues related to Family Law for the CBA and has authored several publications in this field. Most recently she co-wrote an article for CT Lawyer Magazine about hedge funds in the context of matrimonial actions. She was the Co-Editor for the Connecticut Family Law Forms book published by the Connecticut Law Tribune. She also authored the article “Initial Client Interview” in the MCLE publication on Connecticut Family Law. Attorney Welsh also serves as a Special Master in the Stamford/Norwalk judicial district, assisting other attorneys and parties in resolving family cases.

Attorney Welsh serves on the Board of Directors for YWCA Darien-Norwalk and is an active volunteer with Person 2 Person.

Attorney Welsh resides locally, with her husband, Walter, and her children.

**CT APPELLATE AND SUPREME
COURT CASES
David McGrath
Louden, Katz & McGrath LLC
June, 2020 to August, 2020**



- Barr (P.1 – 2)
- Brown (P.2 – 4)
- Chang (P.4 – 5)
- D.S (P.6 – 7)
- Fazio (P.8)
- Flood (P.9 – 10)
- Foisie (P.10 – 12)
- Hall (P.12 – 13)
- Halperin (P.14)
- Igersheim (P.15 – 16)
- Kammili (P.16 – 17)
- Longbottom (P.17 – 18)
- Moyher (P.18 – 19)
- Nietupski (P.19 – 20)
- Parisi (P.20 – 22)
- Powers (P.22 – 25)
- Reem Al-Fikey (P.26)
- Rosario (P.27)
- Wells (P.28)
- Zhou (P.28 – 30)

Barr v. Barr, 195 Conn. App. 479 (2020) (post-judgment contempt; service of process and personal jurisdiction)

In Short: you must serve a post-judgment motion for contempt.

The parties were divorced in 2015. In 2016, Wife filed five multiple post-judgment motions for contempt citing non-compliance with the Judgment. In 2017, the trial court granted three of Wife's motions for contempt.

In 2018, Wife filed an additional motion for contempt alleging Husband failed to comply with the 2017 orders made upon the prior contempt findings. Wife certified that the 2018 contempt motion was mailed to Husband's address in Georgia and emailed the email address on file for Husband.

The trial court held a hearing in June of 2018. Husband did not file an appearance and was not present at the hearing. The trial court found Husband had notice of the hearing and the motion. No finding was made as to whether the out-of-state Husband was served with process in accordance with the applicable long arm statutes. The trial court issued a memorandum granting Wife's motion for contempt. Husband appealed.

Husband argued on appeal that emailing and mailing the motion to the address on file was insufficient service of process. The issue of personal jurisdiction was raised for the first time on appeal. A personal jurisdiction challenge is generally waived if not raised in a motion to dismiss within thirty days of filing an appearance. However, that rule is inapplicable where there has been no service of process or attempt of service. The court cannot render a judgment without personal jurisdiction. The Appellate Court noted that Husband could have filed a motion to open the judgment, but nevertheless did not waive his right to challenge personal jurisdiction.

The Appellate Court also noted in a footnote that the *Golding* rule would allow review under these circumstances even if the Constitutional due process claim was raised for the first time on appeal. The *Golding* rule allows review of a claim that was not preserved where "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." *State v. Golding*, 213 Conn. 233, 239-40 (1989).

A challenge to jurisdiction of the court is subject to plenary review. Due process of law requires that the individual charged with contempt be advised of the charges against him and have reasonable opportunity to make defense or explanation.

Service of process in post-judgment motions requires service of the contempt complaint and summons. A post-judgment contempt proceeding must be initiated by way of an Application for Order to Show Cause and for Contempt Citation. In a post-judgment contempt proceeding, knowledge of the proceedings is insufficient to confer personal jurisdiction over a party that has not been served. Such the method of serving process is set forth by statute, it must be followed, and if it is not, the court does not acquire jurisdiction.

Judgment was reversed and remanded with direction to dismiss the 2018 motion for contempt.

Brown v. Brown, 199 Conn. App. 134 (2020) (child support modification & substantial change in circumstances; contract interpretation)

In Short: A substantial change in circumstances is a condition precedent to a modification of child support; be careful when affixing child support to specify the basis; modifying to allocate a previously unallocated order of alimony and support, address all aspects of retroactivity simultaneously.

The parties were divorced by separation agreement which provided that Husband was to pay a percentage of his gross annual compensation in any calendar year, to terminate upon remarriage of Wife. Wife remarried in August 2015, automatically terminating Husband's unallocated support. Wife filed a post-judgment motion seeking to "fix" the child support based on termination of unallocated support, and in June of 2016 the parties stipulated to a child support award, retroactive to August 2015.

Thereafter, Husband filed two post-judgment motions, seeking reimbursement of unallocated payments to prorate his payments for, 2015, the year that Wife remarried, and seeking modification of child support based on subsequent loss of employment.

The trial court granted Husband's motion to prorate the unallocated support and ordered Wife to repay some \$80,000.

The trial court had found that Husband's employment, with a base salary of \$400,000, had been terminated in January of 2017, and he obtained new employment in August of 2017 at a base salary of \$250,000. The trial court found, however, that no substantial change had occurred between June of 2016 when the child support number was established, and September of 2018 when it adjudicated the motion. Husband had been able to maintain his lifestyle, net worth, and in totality, had failed to establish a threshold of substantial change under § 46b-86(a). The trial court denied Husband's motion to modify support.

Wife appealed from the trial court's order requiring her to reimburse Husband a certain prorated portion of unallocated support she received in the year she remarried. Husband cross appealed the denial of his motion to modify support.

Review of an unambiguous contract is plenary. The **Appellate Court held** the trial erred by improperly modifying the separation agreement in granting Husband's motion for reimbursement. There was nothing on the record to indicate that the parties intended to prorate the unallocated support for only seven months of 2015. When the parties set forth a retroactive child support number they did not prorate or adjust at that time. The absence of a term does not make a contract incomplete.

The **Appellate Court held** the trial court did not abuse its discretion in denying Husband's motion to modify child support under § 46b-86, based on a lack of change in circumstances.

Notwithstanding Husband's decrease in income surpassing the rebuttable presumption of a 15 percent deviation from the child support guidelines, no prior judge had made a finding as to the presumptive support under the guidelines. The orders, instead, had hewed to the agreements of the parties based on overall financial circumstances, allowing for the rebuttal of the presumption. The basis for Husband's motion was loss of income, not deviation from the guidelines.

Chang v. Chang, 197 Conn. App. 733 (2020) (clear and unambiguous language required to support contempt; the specific order violated must be pled)

In Short: draft stipulations with the “clear and unambiguous” standard in mind to support finding of contempt; construe your contempt pleadings broadly to capture all areas of violation, as the court cannot find contempt as to a violation that was not specifically pled.

The parties filed cross-motions for contempt regarding a post-judgment stipulation. Wife alleged that Husband had violated the stipulation when he was late returning the child’s son to her house four times and by refusing to work with the guardian *adlitem* in mediation to resolve a parenting schedule issue. Husband alleged that Wife had violated the stipulation when she unreasonably withheld consent for treatment by removing the child from physical therapy sessions that had been prescribed by the child’s physician.

The trial court found contempt only as to Husband’s claim that Wife improperly removed the child from physical therapy, basing that finding on failure to make good faith consultation, rather than unreasonably withholding consent. The trial court denied the other claims for contempt.

Husband appealed claiming that the trial court improperly granted Wife’s motion for contempt regarding Husband’s alleged failure to work with the guardian *adlitem*. Wife cross-appealed claiming that the trial court improperly denied her motion for contempt regarding timely return of the child and improperly granted Husband’s motion for contempt regarding withheld consent for physical therapy.

Regarding Husband’s claim that the trial court improperly held him in contempt for failure to work with the guardian *adlitem*, the **Appellate Court** held that the language of the stipulation “work with the guardian *adlitem*” was not sufficiently clear and unambiguous to sustain a finding of contempt, where Husband engaged in a 45-minute phone call with the guardian but refused to participate in mediation. The **Appellate Court** reversed as to this finding.

Regarding Wife’s claim that the trial court improperly failed to hold Husband in contempt for alleged belated return of the child, the **Appellate Court** determined that the language of the stipulation, again, was not sufficiently clear and unambiguous, where it specified “timely return” but did not specify a time, and where the child stayed after school on the requisite occasions for legitimate purposes such as tutoring or music practice. The **Appellate Court** affirmed the trial court’s declination to find contempt.

Regarding Wife’s claim that the trial court improperly found her in contempt for her “failure to engage in good faith consultation with the defendant about proper medical care...” The **Appellate Court noted** that this was not one of the bases pled by Husband in his motion for contempt, which claimed, instead, that Wife unreasonably withheld consent for such care. The **Appellate Court** applied plenary review where the Judgment did not conform to the pleadings, and found that the requirement of the stipulation of good faith consultation was distinct from the requirement of not unreasonably withholding consent. Thus, the **Appellate Court** reversed as to this finding.

D.S. v. R.S., 199 Conn. App. 11 (2020) (restraining order & stalking; evidentiary objections; statutory definitions)

In Short: (1) Make sure the basis of your objection is clear on the record; (2) advise the court of the appropriate definition to be used under a given statute; (3) this case provides an example of a pattern of stalking successfully being used to support § 46b-15 on behalf of a child.

Applicant filed for a restraining order pursuant to § 46b-15 on behalf of herself, her child and her mother. Respondent is the Applicant's father and the former husband of applicant's mother. Applicant alleged that Respondent showed up at the child's bus stop, school, summer camp and activity meetings, trespassed on Applicant's property and used the "Find My iPhone" application on the child's iPad to locate the Applicant's new home. Applicant further alleged that the child is afraid of respondent and gets "extremely upset" when he arrives. Lastly, Applicant alleged that Respondent sent harassing texts to her mother and threatening letters, emails and text messages to Applicant.

The trial court denied the application as applied to Applicant. The trial court stated it was applying the stalking definition from §53a-181d, which defines the crime of stalking in the second degree. The trial court thereafter granted the application as to the child.

Respondent appealed, claiming that the trial court (1) applied the wrong definition of stalking, and (2) allowed testimony of the applicant on behalf of the minor child.

The **Appellate Court** found that the application of the § 53a-181d definition was harmless error, as there was sufficient evidence to support a finding of stalking as commonly defined.

The **Appellate Court** found that the evidentiary claim was unpreserved, as the objection was not made clearly enough at time of trial. Although Respondent complained of the testimony, he did not object on the basis of hearsay.

The Judgment was affirmed.

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The **Appellate Court** found that the application of the § 53a-181d definition was harmless error, as there was sufficient evidence to support a finding of stalking as commonly defined.

The **Appellate Court** found that the evidentiary claim was unpreserved, as the objection was not made clearly enough at time of trial. Although Respondent complained of the testimony, he did not object on the basis of hearsay.

The Judgment was affirmed.

Fazio v. Fazio, 199 Conn. App. 282 (2020) (alimony provisions and incorporation of elements of the cohabitation statute).

In Short: the scope of a remand is a matter of law; be careful when drafting language regarding co-habitation, as to whether you intend to terminate on co-habitation or for all statutory remedies to apply upon co-habitation.

The parties were divorced by separation agreement. Husband moved to terminate alimony. The trial court found co-habitation and terminated alimony. Wife appealed but did not challenge the finding by the trial court as to co-habitation. A prior appellate decision determined that the separation agreement was ambiguous and that the trial court should have considered extrinsic evidence as to whether the agreement required immediate termination of alimony upon a finding of co-habitation, or provided for other possible remedies.

On remand, the trial court terminated Husband's alimony obligation again. After an evidentiary hearing about the intent of the separation agreement, the trial court held that the agreement required immediate termination of alimony upon a finding of co-habitation.

Wife appealed, claiming that the trial court erred by (1) holding it was bound to the prior finding of the trial court of co-habitation pursuant to § 46b-86(b), (2) failing to make a factual finding as to the parties' intent regarding whether the separation agreement incorporated the remedial aspects of § 46b-86(b), and (3) exceeding the scope of remand order in prior appeal by making factual findings about a separate portion of the alimony provision.

Determining the scope of remand is a matter of law over which the **Appellate Court** exercises plenary review. The **Appellate Court** determined that Wife failed to raise the issue of cohabitation previously, that the remand instructions were clear, and that the case law doctrine was applicable in that the prior finding should hold.

The **Appellate Court** held that, although the trial court did not specifically state that the parties intended the remedial aspects of the statute would not apply, he was not required to make that statement, and he properly considered the intent of the parties in drafting the separation agreement and complied with the scope of remand.

The **Appellate Court** found no error in the trial court's statements about a separation portion of the alimony provision, and found that that provision was not raised before the trial judge.

The Judgment was affirmed.

Flood v. Flood, 199 Conn. App. 67 (2020) (Child Support Modification & Private Tuition; Above Guideline Support Awards)

In Short: (1) Cessation of a court ordered obligation may constitute a substantial change in circumstances for modification of child support; and (2) the trial court has broad discretion within the *Maturo/Misthopoulos* range.

The parties were divorced pursuant to a separation agreement that required Husband to pay cost of private elementary school through fifth grade. At the time it became enforceable such tuition was \$55,000 per year and the child was in fourth grade.

After the child completed fifth grade and enrolled in public school, Wife filed a motion for modification of support on the grounds that the change in school constituted a substantial change in circumstances. Husband filed a motion requesting to decrease his child support obligation on the ground that Wife's income had increased since the date of the last order.

The trial court found that the savings for Husband in private school tuition represented a substantial change in circumstances, relieving him of substantial preexisting obligation, even though the separation agreement did not expressly link support with tuition or provide for reconsideration upon cessation of tuition. The trial court granted Wife's motion, finding a substantial change in circumstances had been proven by a preponderance of the evidence, and modified child support within the minimum and maximum amounts prescribed by the guidelines. The trial court did not expressly rule on Husband's motion. Husband's obligation was modified from \$464 per week to \$1,246 per week, the maximum within the guideline range.

Husband appealed claiming that the trial court erred in finding a substantial change in circumstances, by failing to consider the needs of the child in fashioning its order and thus improperly transferring wealth, and by entering its order without ruling on Husband's conflicting and simultaneously argued motion.

The **Appellate Court** found no abuse of discretion in the modification of the award. It determined that the trial court's determination as to change in circumstances was reasonable. Relief of such a large legal obligation can constitute a substantial change in circumstances, even where the parties did not expressly contemplate such change as being a basis for modification. The Appellate Court noted that prior cases have found that a substantial increase in wealth may constitute a substantial change in circumstances for modification of alimony.

The **Appellate Court** applied the plenary standard of review to Husband's argument about misapplication of § 46b-84 in the form of wealth transfer, and found no error, as the award fell within the guideline range. The trial court conducted an extensive evidentiary hearing and considered all relevant criteria before entering its orders.

The **Appellate Court** further held that the trial court did not err by failing to rule on Husband's motion formally. It expressly acknowledged the motion was before it and effectively denied it by granting Wife's motion.

Foisie v. Foisie, _____ Conn. _____ (2020) (substitution of the estate of a deceased party; motion to open for fraud; status of marriage on motion to open)

In Short: Death of a party will not prevent the substitution of his or her estate where a motion to open a judgment of dissolution on the basis of fraud was already pending (so long as the motion is not seeking to reinstate the marriage).

Background Facts: The trial court dissolved the parties' marriage in 2011 by separation agreement. Four years later Wife sought to open the Judgment based on fraud, or, in the alternative, mutual mistake. Wife alleged that Husband had failed to disclose assets totaling several million dollars held in bank accounts in Switzerland.

The parties stipulated that the judgment could be opened for the limited purpose of conducting discovery regarding the allegations of fraud. Husband was thereafter held in contempt for failing to comply with orders of discovery. Husband died while the motion to open was pending and after the judgment had been already opened for the limited purpose of discovery.

Wife moved to substitute the coexecutors of Husband's estate in his place pursuant to § 52599. The trial court denied Wife's motion, reasoning that granting the motion to open would reinstate the marriage, which would result in automatic dissolution under § 46b-40 due to his death, preventing any relief under § 52-599(c).

Wife appealed and the appeal was transferred directly to the Supreme Court. Wife argued that the granting of a motion to open judgment of dissolution for purposes of financial orders does not reinstate the parties' marriage and, thus, does not abate upon the death of either party.

The Supreme Court held that a motion to open a judgment of dissolution for the limited purpose of financial fraud does not reinstate the marriage, thus substitution is permissible under § 52-599(a). The Supreme Court further held that Wife's motion to open was for the limited purpose of financial orders.

The Supreme Court held that plenary review was appropriate rather than abuse of discretion, because the appeal called into question the trial court's legal authority to grant the substitution, and to gauge the applicability of statutes. The Supreme Court was guided by the plain meaning rule, § 1-2z.

The Supreme Court held that a motion to open, if granted, *may* vacate the dissolution of marriage and pointed to prior cases where such orders had been entered. However, it held that not every such motion necessitates vacating the dissolution nor does every such motion seek that relief. The Supreme Court also noted that when such motions have been granted for the limited purposes of financial orders, the date for valuation of property is the original dissolution date, providing the inference that the original judgment of dissolution remained intact. This is also consistent with valuation of property when dissolution judgments have been reversed for reconsideration of financial orders. *Sunbury v. Sunbury*, 216 Conn. 673 (1990).

The Supreme Court held that, where the motion does not explicitly seek to open the Judgment only as to financial award, the court may look to the substance of the motion and relief sought to determine whether such limited opening is appropriate. The Supreme Court found that Wife's motion sought relief consistent with opening the Judgment for the limited purposes of the financial orders.

The Judgment was reversed as to the denial of the motion to substitute.

Foisie v. Foisie, _____ Conn. _____ (2020) (substitution of the estate of a deceased party; motion to open for fraud; status of marriage on motion to open)

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Wife moved to substitute the coexecutors of Husband's estate in his place pursuant to § 52599. The trial court denied Wife's motion, reasoning that granting the motion to open would reinstate the marriage, which would result in automatic dissolution under § 46b-40 due to his death, preventing any relief under § 52-599(c).

Wife appealed and the appeal was transferred directly to the Supreme Court. Wife argued that the granting of a motion to open judgment of dissolution for purposes of financial orders does not reinstate the parties' marriage and, thus, does not abate upon the death of either party.

The Supreme Court held that a motion to open a judgment of dissolution for the limited purpose of financial fraud does not reinstate the marriage, thus substitution is permissible under § 52-599(a). The Supreme Court further held that Wife's motion to open was for the limited purpose of financial orders.

Hall v. Hall, _____ Conn. _____ (2020) (trial court's discretion to find contempt & reliance on advice of counsel)

In Short: The trial court may enforce its own orders even where the parties agree otherwise; testimony that a party consulted with counsel is not the same as testimony that the party relied up on the advice of counsel; there is no case law standing for the proposition that relying on the advice of counsel is a shield to a finding of contempt.

Prior to dissolution, the parties entered into a pendente lite stipulation providing that certain funds be released for deposit into a joint account requiring the signatures of both parties prior

to any withdrawals. Thereafter, the parties deposited the funds into an account without the requisite protections.

Defendant filed a motion for contempt alleging that Plaintiff transferred a portion of those funds into his own personal account. Plaintiff testified that he consulted with his attorney but did not testify that he relied on advice of counsel in withdrawing the funds. Plaintiff was found in contempt. Plaintiff's filed a motion to reconsider which was denied.

The parties entered into an agreement that was incorporated into a judgment of dissolution. As part of that agreement, the parties agreed to file a joint motion seeking to open and vacate the finding of contempt, ostensibly because they believed it could hinder future employment. Argument was made at a hearing on the joint motion to open and vacate, but no evidence was presented. Plaintiff spoke on his own behalf but was not sworn in. The joint motion to open and vacate motion was denied.

Plaintiff appealed the finding of contempt, the denial of his motion for reconsideration and the denial of the joint motion to open and vacate the finding of contempt. The Appellate Court affirmed the Judgment of the trial court and Plaintiff appealed to the Supreme Court.

Plaintiff argued that the Appellate Court incorrectly concluded that the trial court acted within its discretion in finding contempt on the basis of a willful violation, where claims he relied upon the advice of counsel in taking his actions. The **Supreme Court** found no evidence in the record that Plaintiff relied upon the advice of counsel in his contemptuous conduct and referenced the fact that *O'Brien v. O'Brien*, 161 Conn. App 575 (2017) relied upon by Plaintiff, does *not* stand for the proposition that a party may shield himself from a finding of contempt based on the advice of counsel.

Plaintiff argued that the Appellate Court incorrectly concluded that the trial court did not abuse its discretion by denying the parties joint motion to open and vacate the judgment of contempt. Plaintiff argued that the trial court improperly ignored the stipulation of the parties that they believed a finding of contempt "could interfere with the parties' future employment." **The Supreme Court** reviewed for abuse of discretion, noting that the agreement of the parties to vacate the finding of contempt does not limit the broad discretion the trial court enjoys, nor the fact that the trial court may enforce its own order. The **Supreme Court** found that the trial court emphasized Plaintiff's failure to produce evidence that a finding of contempt would impact his career, and found no error in the trial court's mention of possible motives for Defendant to have agreed to the stipulation nor the discussion of the amount of time the court allocated to the contempt hearings.

The Judgment was affirmed.

Halperin v. Halperin, 196 Conn. App. 603 (2020) (contract interpretation of separation agreement; income derived from assets)

In Short: be careful when crafting definitions of income; proceeds from the sale of a marital asset may be distinct from income that is generated from an asset that has been purchased with the proceeds from sale of a marital asset. That is a very important distinction.

The parties were divorced in 2010 via separation agreement. The separation agreement provided for payment of unallocated support based on a formula. It defined “income” as total income referencing income that had “historically been listed on line 22 (or the equivalent) of their joint 1040 federal tax returns.” It specifically excluded dividend and capital gain income realized from assets divided as part of the property distribution.

In 2014, Wife filed (and amended) a motion for contempt arguing that Husband had underpaid unallocated support in various years. The trial court declined to find Husband in contempt, finding that any non-compliance was not willful. The trial court ordered Husband to include money from certain post-judgment investments (made with proceeds from assets divided in the dissolution) in the calculation of unallocated support. The trial court ordered statutory interest and directed the parties to agree as to a rate or return that issue to court, and they subsequently agreed upon a rate. Husband appealed.

On Appeal husband argued (1) that the separation agreement explicitly excluded certain post-judgment investments from the calculation of income for unallocated support, (2) that conversion of cash assets awarded at time of dissolution to shares of another asset does not create income for calculation of support, and (3) that equitable principles require the exclusion of those incomes.

If a contract is unambiguous, then consideration of the contract is limited to its four corners and interpretation is subject to plenary review. If it is ambiguous, extrinsic evidence may be admitted regarding the parties’ intent. The trial court initially excluded extrinsic evidence but opened the matter up to such evidence during the hearing. **The Appellate Court determined** that this meant the trial court found ambiguity in the contract, and the Appellate Court agreed with that determination as to ambiguity. Thus, the findings of fact were subject to the clearly erroneous standard of review.

The **Appellate Court** distinguished the actual proceeds from the sale of marital assets (which it determined were not income for these purposes) from income derived from assets that were purchased using proceeds from sale of marital assets (which it determined were income under the separation agreement). The **Appellate Court** found *Dan v. Dan* to be inapplicable to whether such income was includable under the separation agreement. The **Appellate Court found** no abuse of discretion in the trial court’s interpretation of the separation agreement.

Igersheim v. Bezrutczyk, 197 Conn. App. 412 (2020) (third-party intervention and subject matter jurisdiction)

In Short: Subject matter jurisdiction must be addressed immediately when raised and the jurisdictional requirements of § 46b-59(b) are very difficult to meet.

Grandmother, as a self-represented party, served a verified petition for visitation on the Defendant Mother. Grandmother's petition checked the form boxes for parent-like relationship and real and significant harm. The factual claims made fell short of the statutorily prescribed jurisdictional requirement.

A hearing was held on the petition, at which Defendant Mother orally moved to dismiss the petition for lack of subject matter jurisdiction based on insufficient allegations. The trial court continued the matter for three weeks instead of ruling. Grandmother hired counsel and then filed an amendment to the petition which was not verified. A Guardian *Ad Litem* was appointed for the minor child and a prolonged many-day hearing was held on numerous motions. The trial court thereafter issued a memorandum of decision granting Grandmother's petition.

Defendant Mother appealed, making a number of claims of error. The Appellate Court determined that all of Defendant Mother's claims on appeal were inadequately briefed and declined to review them.

The Guardian *Ad Litem* was represented by counsel and filed a brief in the appeal pursuant to Conn. Practice Book § 67-3, arguing that the trial court lacked subject matter jurisdiction to consider the petition (and two other claims which the Appellate Court did not reach). The Appellate Court applied *de novo* review to the issue of subject matter jurisdiction.

The Appellate Court determined that subject matter jurisdiction must be decided immediately whenever it is raised. After it was raised by Defendant's counsel, it should have been addressed and all other issues halted. As the initial verified petition did not contain the required specific, good faith allegations of real and significant harm, the matter should have been dismissed at that time for lack of subject matter jurisdiction under Conn. Gen. Stat. § 46b-59(b).

The Judgment was reversed and remanded with direction to dismiss the petition.

Disclosure: the drafter of this summary represented the Guardian *Ad Litem* in the appeal.

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The Judgment was reversed and remanded with direction to dismiss the petition.

Disclosure: the drafter of this summary represented the Guardian *Ad Litem* in the appeal.

Kammili v. Kammili, 197 Conn. App. 656 (2020) (docket management; abuse of discretion)

In Short: The trial court has broad discretion in controlling its docket and distributing property, if you do not offer an exhibit you cannot complain about its exclusion.

This dissolution of marriage action was tried over two days. Plaintiff Husband represented himself during trial. The memorandum of decision addressed eleven outstanding pretrial motions.

Plaintiff Husband appealed the judgment dissolving marriage. On appeal, his claims were boiled down to (1) that exhibits were improperly declined from admission into evidence, (2) that pretrial motions were not addressed in a timely manner, and (3) that marital property was inequitably distributed with regard to bank accounts, real estate and jewelry.

The trial court had ruled on a motion *in limine*, that, due to Husband's failure to abide by the trial management orders, it would consider his exhibits on a case by case basis. Four were accepted into evidence. Husband failed to adequately preserve a record for review as to any that were excluded as the transcript did not reveal any of his allegedly excluded exhibits having been marked for identification.

The Appellate Court reviewed management of the docket under the abuse of discretion standard. The Appellate Court found no harm to Husband in the timing of his motions being heard and no abuse of discretion.

The Appellate Court reviewed the claim of inequitable distribution under the abuse of discretion standard. No abuse of discretion was found.

The Judgment was affirmed.

Longbottom v. Longbottom, 197 Conn. App. 64 (2020) (motion to open for fraud & financial affidavit)

In Short: Where stock option proceeds were disclosed under the assets section of a financial affidavit as well as in tax documents, albeit not under the income section of the affidavit, the trial court's denial of a motion to open on the basis of fraudulent non-disclosure was not abuse of discretion.

The parties were divorced in 2012 pursuant to a separation agreement that retained jurisdiction over the issue of post-secondary education.

Defendant filed a post-judgment motion to modify the educational support order, seeking to establish responsibility for their daughter's postsecondary education. The trial court admitted financial documentation and affidavits from both parties and heard argument regarding the same. Thereafter the court made findings regarding each party's finances and entered orders dividing allowable post-secondary education costs 45 percent to Plaintiff and 55 percent to Defendant.

Plaintiff filed a motion to open on the basis of fraudulent nondisclosure. She alleged that Defendant fraudulently misled the court by including \$100,429 from the proceeds of sale of stock options under assets but not under income in his financial affidavit. Plaintiff's expert witness testified in support of this claim. The trial court denied the motion to open, noting that the proceeds were disclosed in Defendant's financial affidavit, as well as his form 1040 and form W-2. Plaintiff appealed.

The Appellate Court summarized Plaintiff's arguments into three categories: (1) the trial court failed to determine whether Plaintiff met her burden of proof to establish the existence of probable cause, (2) the trial court abused its discretion in denying the motion, (3) the trial court failed to understand the implications of its factual determinations and holdings.

The Appellate Court held that it was implied in the trial court's detailed findings that Plaintiff had failed to carry her burden of proof. The trial court detailed that Plaintiff had received the information that she claimed was not disclosed prior to the hearing.

The Appellate Court found no abuse of discretion in denial of Plaintiff's motion to open, noting that the evidence supported the finding that Defendant had disclosed the proceeds of which Plaintiff claimed non-disclosure.

The Judgment was affirmed.

Moyher v. Moyher, 198 Conn. App. 334 (2020) (division of marital property; preservation of issues for appeal, ability to comply with orders and abuse of discretion)

In Short: Real property that you own is subject to distribution (obviously); an order that a party cannot comply with will constitute abuse of discretion; you must preserve your claims for appeal on the record, objecting in chambers will get you nowhere.

Husband appealed judgment of dissolution claiming that the trial court abused its discretion by (1) finding that certain real property located in New Hampshire was a marital assets and

awarding Wife 40% of its value, (2) precluding evidence of a prenuptial agreement at trial, and (3) ordering Husband to pay the awarded share of the New Hampshire residence (\$150,750 plus interest) within five months of judgment.

The **Appellate Court** made short work of Husband's first claim on appeal. Husband owned the New Hampshire property and the trial court properly considered the factors of § 46b-81(c) in making division of such without abuse of discretion.

The **Appellate Court** held that Husband's claim that the trial court improperly precluded him from presenting a prenuptial agreement was not preserved for review. Husband claimed that the trial court indicated in chambers that it would reject such agreement. However, the trial court stated at the opening of trial that it would not consider evidence of the prenuptial agreement and Husband failed to offer it for identification and failed to object to its exclusion from evidence on the record.

The **Appellate Court held** that the trial court abused its discretion in ordering Husband to pay the settlement within five months of dissolution. Husband had only worked sporadically and part-time during the marriage and was unemployed, he had no access to other assets and was ordered not to encumber the New Hampshire property. He had no means to comply, and thus it was abuse of discretion. This aspect was deemed severable and the case was remanded for new orders on the payment issue alone.

Nietupski v. Del Castillo, 197 Conn. App. 31 (2020) (abuse of discretion; free exercise of religion)

In Short: If you want a divorce, you can have a divorce.

Husband filed an action for legal separation and Wife filed a cross complaint seeking dissolution of marriage. The parties had one child.

After a *pendente lite* evidentiary hearing, consistent with the recommendations of the child's Guardian *Ad Litem*, the trial court issued *pendente lite* orders permitting both parties to travel

internationally with the child and selecting a school for the child. Husband appealed that decision. This appeal was mooted by the final judgment, which extinguished the order.

The parties then entered into a parenting plan agreement, which was adopted by the Court. Husband thereafter filed a motion seeking to change school districts. The trial court held a two-day hearing on the underlying action. Wife testified that she needed a divorce, not a legal separation. The trial court dissolved the marriage finding irretrievable breakdown and entered parenting orders consistent with the prior *pendente lite* orders.

Husband appealed the Judgment of dissolution arguing that (1) the court violated the free exercise clause of the first amendment of the United States constitution by granting a dissolution and (2) improperly entered orders regarding the child's school and travel.

Unsurprisingly, the Appellate Court held that the granting of dissolution does not violate a party's right to exercise of religion. The Appellate Court further found no abuse of discretion in the custody orders.

Parisi v. Niblett, ___ Conn. App. ____ (2020) (UCCJEA; jurisdiction to modify a foreign custody determination)

In Short: The UCCJEA provides Connecticut with jurisdiction to modify a foreign custody determination where:

1. Connecticut meets certain criteria of § 46b-115k (1) through (4), **and**
2. Either:
 - a. The foreign court itself makes a determination that it no longer has jurisdiction or is inconvenient, **or**

b. *Any* court makes a determination that neither party nor the child still reside in the original jurisdiction.

Background facts: The parties were divorced in Florida by agreement and equally divided parenting time with their child on a monthly basis. The settlement agreement provided that the parties negotiate a time-sharing schedule when the child reached school age. Defendant moved to Alabama and Plaintiff moved to Connecticut. Each party sought to enroll the child in Kindergarten in his/her own state.

Both parties filed motion for modification in Florida. Plaintiff withdrew his Florida motion and filed a motion to modify in Connecticut, where he had lived for approximately one year. Defendant moved to dismiss Plaintiff's Connecticut motion. The Connecticut trial court conducted a telephone conference with the Florida court, determined that Florida had retained jurisdiction, notwithstanding the fact that the Florida Court acknowledged that neither party nor the child lived in Florida any longer, and dismissed Plaintiff's motion to modify.

Plaintiff appealed the dismissal, arguing that the trial court erred in (1) failing to conclude that it had subject matter jurisdiction pursuant to § 46b-56(a) and (2) deferring to Florida and concluding it lacked subject matter jurisdiction without first conducting an evidentiary hearing. The trial court articulated that it found that Florida did not stay its proceedings or relinquish jurisdiction and that it dismissed the motion pursuant to § 46b-115a, 46b-115k, 46b-11l and 46b-115m. The **Appellate Court** applied plenary review to both claims as they each addressed subject matter jurisdiction.

The **Appellate Court held** that registering a foreign judgment does not automatically confer jurisdiction upon the trial court, which is limited by the UCCJEA, under which the trial court is required to make a determination.

The **Appellate Court** reviewed the history of the PKPA, UCCJA and subsequent development of the UCCJEA. Under the UCCJEA the trial court was bound to refer to § 46b-115m to modify a foreign custody determination. Based on the facts of this case, where the original home state had not relinquished jurisdiction, § 46b-115m still provided a possible path to allow Connecticut jurisdiction.

On the basis of the plain language of § 46b-115m (a), in order for Connecticut to have jurisdiction to modify Florida's initial custody order, there must be two findings in the present case: that the Connecticut trial court has initial custody jurisdiction pursuant to § 46b-115k (a) (1) through (4) and either that Connecticut or Florida determines that neither parent nor the child presently resides in Florida, thereby ending Florida's exclusive, continuing jurisdiction.

The **Appellate Court** noted that the corresponding provision of Florida's UCCJEA statute was substantially similar, providing that either state may make the determination that neither the parties nor the child still reside in Florida. Connecticut could not make the

prerequisite finding as to whether any party or child still resided in Florida without an evidentiary hearing.

The Judgment was reversed and remanded for an evidentiary hearing on Plaintiff's motion for modification. Judge Elgo provided a partial concurrence and partial dissent, disagreeing with the primary analysis of the majority opinion.

Powers v. Hiranandani, 197 Conn. App. 384 (2020) (distribution of real property in probate, assignment of value, extracurricular activities)

In Short: the trial court may distribute real property in probate where the estate is not settled; a party's failure to value his/her own property will not permit that party to induce error in the court's failure to assign a value and the trial court is not required to assign values; the trial court may divide extracurricular costs when asked to do so.

The parties married and had one child. During the course of the marriage, Husband and his brother ("Brother") jointly purchased and mortgaged two properties: the parties' marital residence (99% owned by Husband and 1% owned by Brother) and Brother's residence (99% owned by Brother and 1% owned by Husband). Brother died and devised his interest in both properties to Husband. Brother's wife challenged Brother's will. Wife then filed for divorce.

At time of dissolution, Brother's wife had withdrawn her challenge to Brother's will, but Brother's estate was insolvent and had not yet been settled. Nevertheless, Husband's testimony at trial was that he had inherited his Brother's interest in the properties. The trial court found that the parties had stipulated to facts providing equity of \$142,079 in the marital residence. Husband's financial affidavit stated that Brother's residence had equity of \$167k as of 2014.

In 2016, after a twenty-day trial, the trial court ordered Husband to transfer all of his interest in the marital residence to Wife and awarded Brother's residence to Husband. The trial court awarded certain personal property but ordered that they divide certain furnishings to their mutual satisfaction. The trial court ordered that the parties divide extracurricular expenses for the child 53%-47%.

Husband appealed. The trial court articulated that it relied on Husband's testimony that he had inherited Brother's interests in both properties and that the will contest was resolved. Upon the Appellate Court's order, the trial court further articulated that it relied on Husband's financial affidavit to place that assigned value on Brother's residence.

Husband first argued on appeal that the trial court lacked subject matter jurisdiction over the property it awarded to Wife and that it lacked the authority to order it transferred. **The**

Appellate Court held that the trial court had subject matter jurisdiction over both properties pursuant to § 46b-1(c) and 46b-81.

Although Husband testified at trial that he inherited Brother's 1% interest in the marital residence, on appeal he argued that because the estate was not yet settled, it had not been valued nor been distributed to him. **The Appellate Court found** no abuse of discretion in ordering Husband to transfer all of his interest in the marital residence.

Husband argued that the orders distributing the real property were a mistake and impossible to execute. **The Appellate Court disagreed**, holding that the trial court's finding that Husband was the sole owner of the properties was not clearly erroneous, and the fact that the estate was not settled and might be insolvent was of no consequence.

Husband argued that the court abused its discretion by equitably distributing property without properly determining its value. The **Appellate Court noted** the trial court is not required to assign specific values to the parties' assets. Further, failure to list the value of an asset precludes a party from later seeking to overturn an order on the basis of lack of information about that asset.

Husband argued that the trial court abused its discretion by failing to divide all the parties' personal property. **The Appellate Court agreed** that the trial court abused its discretion by ordering the parties to divide certain personal property themselves. However, it found that the value of such property was insubstantial enough that this issue was severable from the mosaic of financial orders and reversed and remanded was to this discrete issue only.

Husband argued that the trial court abused its discretion because the financial orders were excessive and he lacked the ability to comply, focusing on an order the he pay expenses on the marital residence until he transferred his interest. **The Appellate Court found** no abuse of discretion.

Husband argued that the trial court's order that he pay 53% of the child's extracurricular expenses, to be agreed upon in advance and in writing, constituted abuse of discretion, arguing a lack of evidentiary support and upper limit. **The Appellate Court found** that Husband had failed to establish that this order constituted abuse of discretion. It noted that the order was silent as to what occurs if Husband disagrees with the expense, that there was no evidence that the cost was unreasonable (at trial the cost was listed on Wife's financial affidavit at \$1.00 per week), and that it could be modified in future.

The matter was remanded solely to divide certain items of personal property.

Powers v. Hiranandani, 197 Conn. App. 384 (2020) (distribution of real property in probate, assignment of value, extracurricular activities)

In Short: the trial court may distribute real property in probate where the estate is not settled; a party's failure to value his/her own property will not permit that party to induce error in the court's failure to assign a value and the trial court is not required to assign values; the trial court may divide extracurricular costs when asked to do so.

The parties married and had one child. During the course of the marriage, Husband and his brother ("Brother") jointly purchased and mortgaged two properties: the parties' marital residence (99% owned by Husband and 1% owned by Brother) and Brother's residence (99% owned by Brother and 1% owned by Husband). Brother died and devised his interest in both properties to Husband. Brother's wife challenged Brother's will. Wife then filed for divorce.

At time of dissolution, Brother's wife had withdrawn her challenge to Brother's will, but Brother's estate was insolvent and had not yet been settled. Nevertheless, Husband's testimony at trial was that he had inherited his Brother's interest in the properties. The trial court found that the parties had stipulated to facts providing equity of \$142,079 in the marital residence. Husband's financial affidavit stated that Brother's residence had equity of \$167k as of 2014.

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Husband first argued on appeal that the trial court lacked subject matter jurisdiction over the property it awarded to Wife and that it lacked the authority to order it transferred. **The Appellate Court held** that the trial court had subject matter jurisdiction over both properties pursuant to § 46b-1(c) and 46b-81.

Although Husband testified at trial that he inherited Brother's 1% interest in the marital residence, on appeal he argued that because the estate was not yet settled, it had not been

valued nor been distributed to him. **The Appellate Court found** no abuse of discretion in ordering Husband to transfer all of his interest in the marital residence.

Husband argued that the orders distributing the real property were a mistake and impossible to execute. **The Appellate Court disagreed**, holding that the trial court's finding that Husband was the sole owner of the properties was not clearly erroneous, and the fact that the estate was not settled and might be insolvent was of no consequence.

Husband argued that the court abused its discretion by equitably distributing property without properly determining its value. **The Appellate Court noted** the trial court is not required to assign specific values to the parties' assets. Further, failure to list the value of an asset precludes a party from later seeking to overturn an order on the basis of lack of information about that asset.

Husband argued that the trial court abused its discretion by failing to divide all the parties' personal property. **The Appellate Court agreed** that the trial court abused its discretion by ordering the parties to divide certain personal property themselves. However, it found that the value of such property was insubstantial enough that this issue was severable from the mosaic of financial orders and reversed and remanded was to this discrete issue only.

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Husband argued that the trial court's order that he pay 53% of the child's extracurricular expenses, to be agreed upon in advance and in writing, constituted abuse of discretion, arguing a lack of evidentiary support and upper limit. **The Appellate Court found** that Husband had failed to establish that this order constituted abuse of discretion. It noted that the order was silent as to what occurs if Husband disagrees with the expense, that there was no evidence that the cost was unreasonable (at trial the cost was listed on Wife's financial affidavit at \$1.00 per week), and that it could be modified in future.

The matter was remanded solely to divide certain items of personal property.

Reem Al-Fikey v. Mohamed Obiah, 196 Conn. App. 13 (2020) (abuse of discretion; earning capacity)

In Short: the trial court has broad discretion. Not a lot of in-depth analysis to review.

The parties were married in 1997 and divorced in 2017. During the marriage, Husband engaged in some complicated contracts and relationships regarding real property, including acquiring numerous properties, some with money from his mother, some in his own name, some in his mother's name or on her behalf. Husband argued and presented evidence that a third-party had a contractual claim to one such property.

In 2009, Husband informed Wife he was leaving the marital home, moved to Canada to live with his mother, and the parties remained separated from that time forward despite Wife's attempts to repair the relationship.

In 2012 Husband was laid off from his job as an IT consultant. In 2013 he was temporarily employed with another company. Thereafter, he was employed in customer service making substantially less money.

In 2017, following a 26-day trial, the trial court found Husband at fault for the breakdown of the marriage, found he was intentionally underemployed and awarded alimony based on an earning capacity, and found that certain properties were part of the marital estate.

Husband appealed, claiming that the trial court improperly (1) found him at fault for the breakdown of the marriage, (2) found that he was intentionally underemployed when calculating his earning capacity, and (3) determined which properties were part of the marital estate and awarded one of them to Wife.

The **Appellate Court found** no abuse of discretion as to the cause of the breakdown of the marriage.

The Appellate Court found no abuse of discretion as to the trial court's findings on intentional unemployment and earning capacity. The trial court had deemed Husband's testimony as not credible. There was evidence that, as recently as 2013, Husband had been employed in the IT field but had done little since then to improve his qualifications or pursue employment in the field. Those findings were not clearly erroneous.

The Appellate Court found the trial court's assessment and award of real properties under the circumstances of the case to be within the trial court's broad discretion. There was no in-depth analysis to be found here.

Rosario v. Rosario, 198 Conn. App. 83 (2020) (vacating of order by granting continuance)

In Short: Denial of a contempt motion was vacated when a previously filed continuance request was granted after the order denying the motion.

Wife filed post-judgment contempt motions. She filed motions for continuance but failed to appear on the date of the motions, which were denied. Her motion for continuance was subsequently granted, and ultimately the motions were heard with all parties present, and Husband was found in contempt.

Husband appealed, arguing that the motion had previously were denied and were not pending, and that he had not been served. The **Appellate Court held** that the granting of the continuance had the effect of vacating the prior denial of the motions, and that Husband inadequately briefed (one sentence in thirty pages) his claim regarding lack of service. The judgment was affirmed.

Wells v. Wells, 196 Conn. App. 309 (2020) (separation agreement contract interpretation)

In Short: (1) clear and unambiguous contracts should be enforced as written.

The parties were divorced pursuant to separation agreement. The separation agreement provided an unallocated order of child support and alimony with three tiers of support as percentages of Husband's gross income, which income was defined specifically and broadly.

Wife filed a PJ motion seeking payment of unallocated support owed by Husband, pursuant to the separation agreement. The trial court agreed with Husband's interpretation, that two of the tiers applied solely to his bonus income, notwithstanding a lack of any supporting language to that effect in the separation agreement.

Both parties agreed on appeal that the language of the contract was clear and unambiguous (albeit arguing different interpretations). Applying plenary review to a clear and unambiguous contract, the **Appellate Court Held** that the contract was clear and unambiguous and reversed and remanded to enter orders consistent with its terms, in favor of Wife.

Zhou v. Zhang, 334 Conn. 601 (2020) (post-nuptial agreements & revocation thereof; GAL recommendations with lapse in contact with children)

In Short: (1) The standard for revocation of a post-nuptial agreement is unclear; (2) parol evidence was relevant in review of whether there was a condition precedent for an agreement to revoke a postnuptial agreement, and (3) the fact that the GAL has not personally met with

the children in two years does not necessarily render her investigation invalid nor make it abuse of discretion for the trial court to follow those recommendations.

Background Facts: The parties were married in 2006 and have two minor children. Both parties were natives of China and permanent residents of the United States. Both were highly educated.

In 2012, after consultation with counsel and disclosure of assets, liabilities and financial affidavits, the parties signed a properly acknowledged postnuptial agreement. The postnuptial agreement included a span of time during which, if a dissolution action commenced, Wife would receive, *inter alia*, \$350,000 per year alimony for a time equal to half the length of the marriage, the marital residence, and one third of the parties' aggregate net worth. The postnuptial agreement contained a severability clause.

Thereafter, Wife filed for divorce. The parties entered into mediation. The representations of a mediator's website and communications included: that the parties would maintain control, that the process and all documents and statements would be entirely confidential, and that either party could leave the mediation at any time without sacrificing any rights.

The parties again exchanged full disclosure of assets and liabilities and financial affidavits. With the assistance of the mediator, with Wife having obtained advice of counsel but Husband not yet having done the same, the parties signed a revocation agreement regarding the postnuptial agreement. Husband signed the revocation agreement with the understanding that it would only be effective if the mediation resulted in a settlement, and that mediation and the revocation agreement were an all-or-nothing process. The mediation agreement itself stated that all documents prepared or presented during the mediation were to remain confidential for all purposes, including judicial proceedings.

During mediation, the mediator also prepared a proposed parenting plan. That plan was filed with the court, but the parties were never canvassed, and it was never incorporated into any order of the court.

A dissolution trial took place over the course of eighteen days. The trial court entered orders of joint legal custody with final decision making to Husband.

The trial court acknowledged that there was little legal authority regarding the requirements for effective revocation of a postnuptial agreement, and subjected it to the same scrutiny that would be applied in determining enforceability of a postnuptial agreement. The *Bedrick v. Bedrick*, 300 Conn. 691 (2011) standard was cited by the trial court. The trial court found that Husband lacked legal counsel at the time he signed the revocation and had told the mediator that he had been unable to reach his lawyer during the six-day time period he had the revocation agreement before he signed it. Husband further relied on the representations of the mediator that the documents would only be used if a complete set of terms was reached to settle the entire case. The trial court concluded that the revocation agreement was

unenforceable and proceeded to consider the underlying post-nuptial agreement, which it determined was enforceable.

Wife appealed the Judgment of dissolution, arguing that (1) the trial court improperly declined to enforce the parties' purported written revocation of postnuptial agreement, (2) incorrectly determined that the postnuptial agreement was enforceable, and 3) improperly awarded joint legal custody with Husband having final decision making regarding the minor children.

Regarding the failure to enforce revocation agreement Wife argued that the revocation agreement should not have been subject to the same special scrutiny as enforcement of a post-nuptial agreement, and even if it were subject to such scrutiny, it should have been enforced.

The Supreme Court declined to determine whether special scrutiny should have been applied to the revocation agreement, holding that even without such scrutiny the trial court had sufficient reason to deem it invalid. The trial court had viewed the issue through a lens of misrepresentation by the mediator, but the Appellate Court held it to be an issue of contract, where the enforceability of the revocation was conditioned on a final resolution being reached. The parol evidence rule did not prohibit the use of extrinsic evidence to establish the existence of a condition precedent to the formation of a contract.

Regarding the trial court's determination that the postnuptial agreement was enforceable because it was fair and equitable at time of execution and not unconscionable at time of dissolution, Wife claimed she signed it under duress of threat of divorce and that what she received under it is grossly disproportionate to what she would otherwise be awarded. **The Supreme Court** found no abuse of discretion. The trial court was within its rights not to credit Wife's testimony as to duress. The complicated nature and length of the post-nuptial agreement did not necessarily demonstrate that Wife did not understand it. The trial court was within its discretion to determine that the post-nuptial agreement was not unconscionable.

Regarding Wife's claim of error as to the custody orders, Wife claimed that the trial court improperly relied upon the testimony of the GAL, in light of the testimony of the GAL that she had not seen the children in two years. The GAL had been in frequent contact with the parties, had attended depositions and court proceedings, reviewed the record, obtained information from schools, and spoken with and reviewed the reports of the forensic custody evaluator who had met with the children on multiple occasions. **The Supreme Court held** that there was nothing in the record to indicate that the GAL did not conduct an investigation into the children's best interests. It further found no abuse of discretion in the decision.

The Judgment was affirmed.

CT APPELATE AND SUPREME COURT CASES

Louise T. Truax
Truax & Reich

Alimony

- Wells (P.1)
- Grogan (P.1 – 3)
- Ayres (P.3 – 4)
- Halperin (P.4 – 5)
- Boreen (P.5 – 7)
- Callahan (P. 7 -10)
- Wilson (P.10 – 11)

Attorney's

- Mathog (P.12)
- Dubinski (P.12 – 13)

Attorney Fees

- Puff (P.14 – 15)

Child Custody

- Bolat (P.16 – 17)
- Peters (P.17 – 18)
- Dufrensne (P.18 – 20)
- Bilbao (P.20 – 21)
- Nietupski (P.21 – 22)
- Thunelius (P.22 – 24)
- Hunter (P.24)
- Romeo (P.25 – 26)

Jurisdiction

- Barr (P.27) Restraining Order

Prenuptial – Postnuptial Agreement

- Zhou (P.28 – 30)

Procedure

- Jacques (P.31)
- Fleischer (P.31 – 32)
- Tilsen (P.33)
- M.B (P.33 – 34)
- Hall (P.34 – 35)
- Longbottom (P.35)
- DeChellis (P.35 – 37)
- Foise (P.37)

Property Division

- Almeida (P.38)
- Casablanca (P.38 – 39)
- Morton (P.39 – 40)
- Al-Fikey (P.40 – 41)

- Kathrynne (P.42)



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CBA Recent Developments

2019-2020

Louise T. Truax¹

Alimony

Enforcement - Interpretation of Agreement

Wells v. Wells, 196 Conn. App. 309 (2020)(Alvord, Lavine, and Keller; trial court – Brown) – The parties entered into a separation agreement in 2017 which provided that the Husband was to pay alimony to the Wife in three tiers based upon his gross income– 50% between \$0 and \$220,000 payable on the 15th and 30th of the month; 40% between \$220,000 and \$420,000 payable within 5 days of receipt; and 30% between \$420,000 and \$600,000 payable within 5 days of receipt. The Husband received a gross bonus in 2018 of \$480,000. He paid the full amount due for the 2nd tier and 30% of \$60,000 (\$480,000 – \$420,000) on the second tier. The Husband’s claim was that the second two tiers only dealt with the amount of his bonus income, i.e. he would pay 40% of his bonus between \$220,000 and \$420,000 and 30% of his bonus between \$420,000 and \$600,000. The Wife contended that he needed to pay the full amount on the third tier as his total income – base (\$220,000) and bonus - was \$700,000. The trial court agreed with the Husband’s interpretation of the agreement.

Holding – The trial court erred in finding that the Husband should only pay 30% on the third tier of income of \$60,000 by reading into the second and third tiers the words “gross remaining income”.

Rationale – The language of the agreement is clear. The Husband tried to argue that there would be double counting when applying the tiers to his total income. There was no double counting. There is no language that limits the second and third tiers to his bonus income.

Income – Defined by Separation Agreement

Grogan v. Penza, 194 Conn. App. 72 (2019) (Bear, Lavine and Bright; trial court – Nastri) - The marriage of the parties was dissolved in 2013, at which time the court approved their separation agreement. The agreement specified that the alimony was based upon the Wife’s earning capacity of \$35,000 and the Husband’s annual income from employment at the law firm in which he worked. The Husband’s annual income from employment was **presently** defined to be line 1 on his schedule K-1 from the law firm. The Husband had a monthly component to the alimony, as well as quarterly payments which totaled \$160,000 based upon his first \$550,000 of income. There would be a year-

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end true up alimony payment based upon his gross income between \$550,000 and \$750,000 per year. The true up alimony was 25% of his income between 550,000 and \$700,000 per year and 20% between \$700,000 and \$750,000 per year. The Husband sold his interest in the original law firm and created a new law firm of which he was a named partner.

In 2015, the Husband received two K-1's. One was from the original law firm covering the period January 1 through May 31, 2015, which showed an ordinary loss on line 1 of \$93,463 and guaranteed payments on line 4 of \$605,000. The other was the new firm covering June 1 through December 31, 2015, which showed line 1 payments of \$103,017 and line 4 payments of \$127,178. The Wife filed a motion for contempt claiming that the alimony should have been based upon the total of lines 1 and 4 from both K-1's. The Husband argued that the agreement was clear and only referenced line 1 of the K-1. The trial court agreed with the Husband.

Holding – The trial court properly denied the Wife's motion for contempt. The court did not abuse its discretion in failing to grant the Husband attorney's fees as part of the motion for contempt.

Rationale - The Wife attempted to argue that the court's finding that the agreement was unambiguous renders the qualifier "presently" in the definition of gross income superfluous. Under her reading of the agreement, using this qualifier meant that that was the initial way to read the gross income but did not permanently define income to only include line 1 of the K-1. There was no law cited by the Wife to show that the word "presently" was just an example of language which would then allow the courts to add another line from the K-1 into income. The trial court also noted that the parties made this agreement and were free to define income as they saw fit. Additionally, the Husband reported income through the K-1 with the new law firm and thus any speculation that the court's ruling would preclude consideration of different income reported on different forms is inappropriate. The court also indicated that the general language, which included "presently defined as", had to give way to specific language which included utilizing line 1 of the K-1.

Concurrence and dissent – Justice Bright - Justice Bright would not agree with the majority that the separation agreement is unambiguous. The Wife's expert testified that the Husband's income from his original law firm on the K-1 in 2015 was the total of lines 1 and 4 for on the K-1. However, he acknowledged that the payment on line 4 was related to the Husband's sale of his interest in the business. The majority opinion ignores the "presently defined as" language in paragraph 1.1 of the separation agreement. Had there never been any intent to vary the definition of gross income for purposes of paying alimony, the words "is presently defined as" language would not need to be included. The majority opinion would seemingly indicate that the only income that could ever be used is line 1 of the K-1 and any other income would not be available for purposes of the true

up alimony. In this regard, the agreement is subject to more than one interpretation and therefore ambiguous.

Ayres v. Ayres, 193 Conn. App. 224, cert. denied, 334 Conn. 903 (2019)(Alvord, DiPentima and Lavery; trial court – Bentivegna) - The parties entered into a separation agreement in 2010. The separation agreement defined gross income for alimony purposes. It specifically included base pay and performance-based bonuses received. Moreover, it specifically excluded moving expenses, car allowance, sign on stock options or stock which may be awarded to either party. At the time of the dissolution, the Husband was self-employed as a consultant. One of the companies with whom he consulted offered him a job which included a short-term incentive plan, and a long-term incentive plan which was composed of restricted stock units and performance stock units. When this employment terminated in 2015, he received a severance payment of nearly \$160,000 which included 26 weeks of base pay and 26 weeks of the short-term incentive program payments. Seven weeks later, the Husband became employed by IBM and began paying alimony pursuant to the IBM income amounts, which was higher than his prior employment. There have been three court rulings with respect to a motion for contempt filed by the Wife, as to income to be included for alimony.

In the first court ruling, the Wife claimed that two short-term incentive payments made to the Husband in cash constituted performance-based bonuses for purposes of the separation agreement. The court agreed with the Wife and rejected the Husband's argument that performance-based bonus only applied to the Husband's individual performance. In the second court ruling, the issue was the meaning of "sign on" with respect to stock options or stock awarded to either party as an exclusion to gross income. The trial court in that instance indicated that "sign on" applied only to stock options, and any stock awarded either party was excluded irrespective of when it was awarded.

The issue in front of the court and subject to this appeal was whether the Husband severance payment and the RSUs and PSUs should be included as part of the alimony calculation. The court found that the restricted stock units and the performance stock units were not stock as set forth in the alimony exclusion. In addition, the court concluded that the severance payment must be included in the alimony calculation.

Holding - The trial court erred in finding the restricted stock units as includable within the definition of income for alimony. The trial court did not err in finding the performance stock units as being includable within the definition of income. The receipt of severance by the Husband was in exchange for him releasing his employer from liability, and therefore was not compensation pursuant to the definition of income.

Rationale - The court focused on the composition of the RSU and PSU awards to determine if they constituted income for alimony purposes. The RSUs and PSUs do not represent common stock, but rather represent a phantom ownership interest in a company. The RSUs are payable in stock, but the PSUs are payable in cash. Since the RSU's were received in the form of common stock of Verizon, it constituted stock for

purposes of the alimony exclusion. The Wife could not prevail in her argument that the court should read into the alimony exclusion non-performance-based awards of stock. The manner by which the Wife wants the agreement read would render the language for the exclusion for stock superfluous.

On the other hand, the PSUs were designed and actually distributed in cash, and thus, do not constitute stock under the alimony exclusion. In addition, the Husband had no rights as a shareholder with respect to the PSUs, an indicia of stock ownership. The court then found properly that the PSUs are a form of performance-based bonus, includable in alimony. The literature from the company showed that it was part of the compensation package.

The severance agreement signed by the Husband included a release of liability, which is separate and distinct from base pay and performance-based bonuses. Although the amount received by the Husband was a function of his base pay and eligibility for short-term incentive compensation, it was distinct from base pay and performance-based bonuses and thus excluded from the definition of gross income.

Halperin v. Halperin, 196 Conn. App. 603 (2020)(Alvord, Elgo and Devlin; trial court – Carbonneau) – The parties entered into a separation agreement that provided for the Husband to pay the Wife unallocated alimony and support predicated upon total income that has **historically been listed** on line 22 of the tax return, but specifically excluding interest, dividend and capital gains income realized from assets divided as part of the property distribution. At the time of the uncontested dissolution, the court inquired as to whether the Husband was sure that he wanted the income to be predicated upon line 22 instead of the adjusted gross income line of the tax return. The husband responded in the affirmative.

As part of the property distribution, the Wife retained a piece of real estate, and another property was ordered sold with the Husband receiving the first \$2.1 million from the sale of those properties as an offset for the property retained by the Wife. After the dissolution of the parties' marriage, the Husband acquired ownership interest in two entities, Constitution Surgery Center East (CSCE) and International Spine and Orthopedic Institute (ISOI). The Wife subsequently filed a motion for contempt claiming that the income from CSCE and ISOI should be included as income for purposes of alimony. The Husband argued that it was not monies historically included in his line 22 income and it was acquired through assets that he was awarded at the time of the dissolution. The trial court did find that from the awards he received at the dissolution, he used nearly \$560,000 to buy a 10.622% interest in CSCE and a 1% interest in ISOI.

The trial court ordered the Husband to include within the calculation of the Wife's entitlements to alimony, the income earned from CSCE and ISOI. The trial court dispelled the Husband's fairness argument, i.e. that the Wife should not benefit from his post judgment income for companies that she had no role in on a prejudgment basis, by indicating that she had made an insightful agreement to include such income. The court

further dispelled the contention that these were entities from the conversion of assets and therefore part of the property distribution. The court distinguished between an asset and the income derived from that asset. The Husband attempted to also argue that the language “historically been listed” in terms of income to be included should look back at the income pre-judgment, not the sources of income post judgment. The court rejected that argument.

Holding - In construing the separation agreement, a contract, the Husband’s argument that it is unambiguous and therefore the income from CSCE and ISOI must be excluded is erroneous. The trial court did not abuse its discretion in finding that the Husband’s interest in CSCE and ISOI were distinct from the income derived there from. The Husband was unable to prevail on an argument based upon equitable principles of fairness.

Rationale - Originally, the trial court did not seek extrinsic evidence, but then sua sponte reopened up the hearing to accept extrinsic evidence. As such, clearly the trial court determined that the disputed provision was ambiguous. Thus, it was proper to consider extrinsic evidence. In construing the “historically listed” on the tax return, the court accepted a broader definition of categorical expenses, as opposed to a narrow definition of the entities from which such income was earned. There are exclusions listed with in the separation agreement, which does not include the type of income the Husband received from CSCE and ISOI. This income was reported on schedule E which was specifically included within the definition of the income to be included for alimony purposes.

There is a distinction between an award of assets and a support award that is derived from the income stream generated from the asset. They cannot be treated as one and the same. Here, the Wife is not seeking a portion of the assets purchased by the Husband, but rather to have alimony paid on the income derived therefrom, consistent with the definition of income in the separation agreement for purposes of the payment of alimony.

The Husband attempted to argue that he should not be forced to pay alimony on income derived from an asset purchase post judgment but with assets generated and awarded to him from the dissolution. This argument fails.

Modification – Cohabitation

Boreen v. Boreen, 192 Conn. App. 303, cert. denied, 333 Conn. 941 (2019)(Diana, DiPentima, Alvord; trial court – Shay) - The parties 2009 separation agreement provided that the Husband would pay the Wife alimony until the earliest of the death of either party, her remarriage or her living with another person as defined in article 2.2 of the separation agreement. Under article 2.2, it stated that the Husband’s obligation to pay alimony shall terminate on the date that the court finds that the Wife has commenced living with another person. The article further defined that she will have been deemed living with another person if a court finds that the alimony should terminate or be reduced under Conn. Gen. Stat. §46b-86(b). In December 2009, the Wife began dating Rodriguez. The Husband filed a motion in 2017 to terminate the alimony as a result of the

cohabitation, claiming that she had been living with Rodriguez since July 2013 such that her financial needs have been altered. Rodriguez testified that he maintained his own home but that they spent 3 to 4 nights together each week. He allowed the Wife to have an artist studio at his home free of charge. In addition, in 2015, he added the Wife to his health insurance policy and noted that she was his domestic partner. The trial court found that since at least January 2015 the Wife and Rodriguez have been living together within the meaning of the cohabitation statute. Accordingly, as of January 1, 2015, the court terminated the alimony obligation, finding an overpayment of the alimony by the husband of \$358,000, which was to be repaid by the Wife in \$30,000 semi-annual installments.

Holding - The trial court did not abuse its discretion in finding that the Wife was cohabiting and that the alimony terminated.

Rationale - In order to make a finding of cohabitation, it must be shown that the alimony recipient is living with another person and that such a living arrangement caused a change in circumstances to alter the needs of the alimony recipient. The court also refers to the stated purpose of this statute, when it was enacted in 1977, “was to correct the injustice of making a party pay alimony when his or her ex-spouse is living with a person of the opposite sex, without marrying, to prevent the loss of support.” The court found that the statute is broad enough to apply to this situation, even though they do not reside together every night and maintain separate homes. The court could properly use the fact that the boyfriend was paying medical insurance premiums on behalf of the Wife as part of the cohabitation claim.

At issue as well is the remedy to be applied upon finding of cohabitation i.e. whether alimony should be terminated or if the remedies as set forth in the statute should be employed. The article in the separation agreement, clearly states that a termination event is upon a finding by a court of cohabitation. Although it states that for purposes of a finding of cohabitation, the court must find circumstances that would cause a reduction or termination of alimony pursuant to the statute. This does not modify the termination language in the prior paragraph. Contrary to the Wife’s assertion, there was not an incorporation into the separation agreement of the statutory construct. The courts in the past have construed the words “until” (Nation-Bailey) differently than “pursuant to” (Fazio), where the former is a termination event and the latter can be construed to incorporate the entirety of the statute. Where “pursuant to” is used in the current agreement, it was not done so in a fashion, like Fazio, to incorporate the entirety of the statute in terms of remedies. Instead, this agreement treats cohabitation as a termination event such as death or remarriage. In addition, the court stated “a finding that alimony could be modified upon a finding of cohabitation, as opposed to terminated, would be inconsistent with the structure of the separation agreement as a whole, which contain separate provisions governing discrete circumstances in which one or both parties could seek to modify the alimony obligation.” The court was referring to provisions contained within the agreement limiting modification based upon certain financial thresholds.

Modification – Substantial Change and Retroactivity; Date to Commence Interest Payments

Callahan v. Callahan, 192 Conn. App. 634, cert. denied 333 Conn. 939 (2019)(Alvord, Moll, Pellegrino; trial court – Shay) - The parties' marriage was dissolved in 2012 after a trial with Judge Munro issuing a memorandum of decision. Approximately one month later, the Husband filed a motion to open the judgment, which motion was granted with the court issuing substituted financial orders. Both parties appealed from the courts' decision regarding the motion to open, which appeal was reversed by a decision on May 5, 2015, at which time the Appellate Court reinstated the May 2012 dissolution orders. Subsequently, the Wife filed several motions for contempt for the Husband's failure to comply with the dissolution judgment. At the heart of her motions was the original decision by the trial court for the Husband to pay the Wife \$6 million which would accrue interest at the rate of 5% per annum. He was to pay her the sum of \$1 million per year with the first payment on June 1, 2012 and every June 1 thereafter until it was paid in full. It was to accumulate interest at the rate of 5% per year. In addition, the Husband was to pay the Wife \$600,000 within 90 days and if that was not paid in a timely manner than the entire outstanding some more interested 5% per annum. The trial court denied the Wife's motion for contempt and concluded that the effective date for the interest running was September 8, 2015, four months after the resolution of the appeal.

While the appeal was pending, on May 19, 2014, the Husband filed a motion to modify the alimony. He amended this motion on October 15, 2015. At the time of the original trial, the Husband's earnings/earning capacity were based upon the income derived from the businesses the parties owned jointly, as well as one business owned by the husband alone, which generated income of \$2 million per year. The husband claimed, through his expert, that his income had substantially decreased such that his earning capacity was \$370,000 per year, and the trial court accepted this testimony. In addition, the motion for modification was heard over an extensively long period of time. While the motions were pending, the Wife filed a motion for continuance of a hearing date due to a medical condition. The court indicated it would hear argument about a temporary suspension of the alimony for three months, which ultimately it ordered. The trial court found that the Husband had proven a substantial change in circumstances, modified the alimony retroactive to July 1, 2014 in the amount of \$12,000 per month commencing January 1, 2016 and \$24,000 per month from July 1, 2014 to December 31, 2015, down from \$60,000 per month (the beginning of the month after the Wife had been served with the papers), and found an overpayment of alimony of \$1,330,000.

During the pendency of the current appeal, the Wife filed a motion seeking to have the Husband endorse to insurance checks for damage to the marital residence, which was awarded to the Wife at the time of the dissolution. The dissolution judgment provided that the Husband would have 30 days to execute a quit claim deed to transfer title. Until he transferred title to the property, he would be responsible for all costs associated with the property. Once he transferred title to the property and vacated the same with all of his property, the Wife would be solely responsible for all of the costs. The Husband remained

in the marital home until October 9, 2015. The insurance policy on the property remained in their joint names and he made the payments through March 24, 2017. After he vacated the property, the pipes burst resulting in damage. The first set of insurance checks had just the Wife's name on them and the set of replacement checks included the Husband's name. The Husband would not sign the checks over to the Wife to allow her to repair the damage to the home.

The trial court, Judge Diana, determined that it lacked jurisdiction to make an order regarding the insurance checks as it would constitute a post judgment property distribution.

The original memorandum of decision required the Wife to transfer to the Husband, and sign any necessary documents to do so, her 49% interest in three companies owned by the parties. The Wife claimed that the Husband prepare documents which sought to modify the terms of the memorandum of decision and went beyond the scope of the order. The trial court, Judge Shay, agreed that the vast majority of the documents prepared by the Husband were appropriate it should be modified in certain respects.

Holding – (1) The trial court did not abuse its discretion in finding a substantial change in circumstances to justify a modification of alimony. (2) The trial court did not abuse its discretion in modifying the alimony order retroactive to July 2014. (3) The Appellate Court found that it lacked jurisdiction, due to mootness, with respect to the Wife's claim that the trial court lacked the authority to suspend her alimony payments in granting her continuance. (4) The trial court properly determined that the date for the interest beginning to accrue on the sums owed by the Husband to the Wife was September 2015, after the appeals with respect to the original judgment were resolved. (5) The trial court did not err in ordering the Wife to execute documents to transfer her interest in the business as that was in effectuation of the judgment. (6) the Trial court did not err in determining that it did not have subject matter jurisdiction to order the Husband to endorse the insurance checks to the Wife.

Rationale – (1) The original alimony award was based upon the testimony from the Wife's expert, Barry Sziklay, and the attribution by him of 50% of the profits to the Husband. At the time of the modification, the Husband hired Mark Harrison who use the original methodology employed by Barry Sziklay in arriving at the Husband's new earning capacity of \$370,000 as of January 1, 2016, and from July 1, 2014 to December 31, 2015 was \$850,000. The Husband further testified that he would not be able to go to Wall Street and get a job due to the nature of his business and the fact that he would be considered an insider with respect to approximately 140 businesses. The Wife's expert, Barry Sziklay, testified that the Husband's earning capacity as found in 2012 remained reasonable as of the date of the modification. Here, it was not error for the trial court to find his earning capacity to be what he could earn from these businesses as opposed to what he could earn on Wall Street, since there was testimony that he could not go get a Wall Street job due to him being an insider. Moreover, the Husband had not worked on Wall Street for 20 years.

(2) The Wife was served in hand with the motion for modification on June 9, 2014. The Wife is attempting to claim that the basis of the motion for modification and amendment thereto was based upon the February 2014 judgment which was ultimately vacated. The court may take into account, when determining whether to award retroactivity, a long period of time between filing a motion and the date the motion is heard, as well as the changes in the income and needs of the parties while the motion is pending. The court took those issues into consideration in its retroactive award.

(3) Since the trial court suspended, did not terminate, alimony for three months while the motions were pending, and the lack of payments during that time were taken into account in determining the amount of overpayment, there is no relief that can be afforded to the Wife.

(4) The Husband's motion to open argued that the Wife had made unauthorized withdrawals from the company accounts. As a result of that claim, the trial court opened the judgment and entered alternate financial orders to take that into consideration. The Appellate Court vacated those orders on appeal. The Appellate Court ordered that the judgment be remanded with the direction to reinstate the May 2012 financial orders. The Wife argued that therefore the effective date of the orders was May 2012 and that is the date from which interest should be determined when she filed her motion for contempt. There was not a triggering of the Wife's obligation to transfer stock and the Husband's obligation to prepare a promissory note until the appellate court process on the motion to open was completed in 2015. The opening of a judgment renders the memorandum of decision nonfinal and ineffective pending resolution of that motion to open. This case is in a unique posture because of the motion to open. The motion to open operated to supersede the original financial orders, which were only reinstated as a result of the appeal. It is noteworthy that the Appellate Court did not include within the remand order that it be reinstated retroactive to May 2012. In addition, part of the original order was to permit the Husband the opportunity to sell the businesses as a way of paying the sums due to the Wife. Given the motion to open and the ruling thereon, as well as the Appeal, he was deprived of that opportunity. Somewhat by comparison, the Appellate Court looked at the law with respect to statutory interest under §37-3a, which provides for interest where there is a detention of money after it is due and payable. Here the money was not yet due and payable as a result of the appeals.

(5) The Husband had an expert testify as to the typical practice with corporate transfers in which the term sale and transfer are interchangeable. The primary argument centered around documents requiring the Wife to make representations and warranties with respect to the company entered in the transfer of her interest therein. The Husband's expert testified that without those representations and warranties, the value of these companies would be adversely affected in the event the Husband sought to sell them. The Wife's expert indicated that certain inclusions within the Husband's proposed documents were beyond the scope of the court order. The Wife, despite it being her motion for

contempt, offered no evidence and was content with the court reviewing the original memorandum of decision and the proposed documents prepared by each side. It would be inconsistent with the terms of the judgment to allow the Wife to transfer an interest in the business that would result in a significant reduction in the value of that business. The judgment was construed to have the Wife transfer her interest in a manner that would preserve the value of the business.

(6) Regarding the insurance checks, the gravamen of the Husband's argument was that this was a post judgment property issue over which the court did not have jurisdiction. The Wife argued that this money was needed in order to preserve the value of the home she was awarded and to effectuate that judgment. The Wife sought to compare this to a QDRO under *Cifaldi*, which reliance was misplaced. In *Cifaldi*, the party had not received the pension asset, while here the Wife received the asset awarded to her as part of the dissolution. When the damage occurred and the checks were issued, she owned and was in possession of the home. The court has no authority to rejigger the property distribution based upon post judgment diminution in value. The insurance checks were viewed as a new asset.

Nominal Alimony

Wilson v. DiIulio, 192 Conn. App. 101 (2019)(Moll, DiPentima, Bright; trial court – Olear) - This dissolution of marriage action was instituted in 2016 and the court dissolved it after a trial. The Husband was 70 and the Wife was 57 at the time of trial. The parties have two children of the marriage. The parties had worked out the custodial provisions. The Wife was employed at the Attorney General's office, earning a gross biweekly salary of nearly \$6,000. She was also fully vested in her state pension. The Husband had retired in 2002 or 2003 and they mutually decided that he would retire to care for the children. He took an early retirement, electing irrevocably the 50% option of a reduced retirement income for the benefit of the Wife. His net weekly income between Social Security and pension was \$842 per week. Shortly before the action commenced, the Wife moved out of the home and purchased her own home, the majority of the funds to do so were her premarital or inherited funds. The trial court ordered the Wife to make the monthly mortgage payments on the home in which the Husband resided and to pay off the mortgage within six months from the date of judgment. She had to convey part of her 457 retirement account to the Husband. The Wife could not elect under her pension a survivor beneficiary until she retired and, if she was remarried at the time, it would require the Husband to sign off on the survivor beneficiary. The court awarded the Husband a portion of her pension and nominal alimony in order to enforce his rights with respect to the state of Connecticut pension.

Holding - The trial court did not abuse its discretion in awarding the Husband nominal alimony. The trial court did not abuse its discretion in making the property award enforceable by a modifiable alimony award.

Rationale – The Husband sought \$650 per week as alimony in part to allow him to pay for his housing expenses. By ordering the payoff of the mortgage, the court eliminated

most of the housing expenses. The Wife's proposed orders provided for the payoff of the mortgage in lieu of alimony. Additionally, the court found the Wife to be more credible. The court noted that the Husband was often sarcastic and not credible. Despite being an accountant, he claimed not to understand certain questions related to finances or retirement matters.

The fact that the trial court preserved an alimony claim in order to enforce a property claim, does not translate into the court rendering the property division modifiable. This order was to protect the Husband.

Attorney's

Appointment of an Attorney for the Minor Children

Mathog v. Yontef-Mathog, 69 Conn. L. Rptr. 407 (Nguyen-O'Dowd, 2020) - The parties' separation agreement of June 2017, provided that the Guardian ad litem would have continued involvement with the family for three years post judgment. The Husband has filed a motion for contempt requesting that the Wife be restrained from signing the children up for any activities and that he be granted final decision-making regarding all matters pertaining to the children. There was also a request by the Wife to have an attorney for the children appointed.

Holding - The trial court denied the Wife's motion to have an attorney for the children appointed.

Rationale - Pursuant to Conn. Gen. Stat. § 46b-54, a court may only appoint an attorney for the minor children if it finds it would be in the best interest to do so. In addition, it may only do so with respect to issues concerning the support, custody or visitation of the child once the parties have made reasonable efforts to resolve the matter. Here, the court does not consider a request for a change in decision-making authority as a matter in which the custody, care, education, visitation or support of the children is an actual controversy. The motion filed by the Husband and his claim for relief, is nothing more than a proposal for the court to consider when it issues orders. There is also Guardian ad litem who can opine as to the children's preferences, to the extent they are relevant. There would be an added financial burden, with an attorney for the minor children, both financial and timewise if one were to be appointed.

Malpractice and Breach of Contract Action

Dubinsky v. Riccio, 194 Conn. App. 588 (2019)(Keller, Moll and Eveleigh; trial court – Truglia) - The plaintiff brought this action against his attorney in a dissolution of marriage action for legal malpractice and breach of contract. The parties entered into a custody agreement in July 2013 which was then incorporated by reference into the dissolution judgment at the same time the party separation agreement was presented to the court a month later in August 2013. The plaintiff then filed this action against the defendant sounding in legal malpractice, and claiming a breach of contract. The defendant filed a motion to strike with respect to the breach of contract count which was granted by the court. The defendant then filed a motion for summary judgment with respect to the legal malpractice count, which was granted after hearing. In defense of the legal malpractice count, the defendant provided to the court materials pertinent to her representation of the plaintiff, including detailed written correspondence between them with respect to the terms of the separation agreement. The trial court granted the motion for summary judgment finding that there was no issue of material fact which existed.

Holding - Two of the arguments on appeal by the plaintiff-that the defendant didn't demonstrate she was entitled to summary judgment solely by reason of him entering into a separation agreement and based upon alleged deficiencies in the pleadings-seemed to

challenge arguments made to the trial court, and not claimed errors by the trial court and thus would not warrant reversal of the trial court's decision. The decision by the trial court was upheld on appeal.

Rationale - The Appellate Court summarily upheld the trial court's decision and in fact referred to the trial court's decision as the rationale for such a ruling, citing the trial court's decision as an appendix. The trial court found "Rather, a plaintiff must specify what negligent actions or omissions by counsel because the damages he claims he sustained. Here, the plaintiff is not specified what negligent actions or omissions because the injuries and loss he now claims. The court also agrees with the defendant that the plaintiff provides no evidence in support of any of his general claims of malpractice other than vague allegations and speculative contentions."

Attorney Fees

Contempt and Litigation Misconduct

Puff v. Puff, 334 Conn. 331 (2020)(McDonald, Robinson, D'Auria, Mullins, Kahn and Ecker; trial court – Tindill) - This case has a long, convoluted history. The parties' marriage was dissolved in 2002, and the Husband was required to pay alimony for 10 years. Three years prior to the termination of alimony, the Wife sought a modification of alimony, based upon her deteriorating health and the Husband's increased income. The court granted the motion, increasing the monthly alimony and extending the payments for an additional four years. Subsequently, there was a motion to open since the Husband accepted employment at higher compensation than he was receiving at the time of the modification, which job was final a few days after the modification was ordered. Ultimately, the parties entered into an oral stipulation in front of the court whereby the Husband would pay to the Wife, tax deductible alimony of \$10,000 per month, which she could then assign to a special needs trust, with the understanding that a legal opinion would be obtained indicating that the funds being paid to a special needs trust would not impact the deductibility of the payments. The parties were to have reduced the stipulation to writing and had it approved by the court.

Two months later, the Wife's attorney at the time of the stipulation was permitted to withdraw from the case. The Wife's new attorney did a scattershot approach of filing motions trying to have the stipulation vacated, opened or otherwise rendered in valid. This resulted in a number of hearings and proceedings in front of the court. Ultimately, the court crafted the written decision with respect to the oral stipulation and had it entered as a court order. The Wife filed a motion to reargue and reconsider, to which the Husband objected and also filed a motion for sanctions and contempt.

At the hearing with respect to the sanctions and contempt, there was no evidence taken and the Husband's attorney submitted an affidavit of fees indicating a claim of over \$169,000. The trial court granted the Husband's motion and ordered the Wife to pay the Husband fees and sanctions of \$169,000. In so granting the motion, the trial court found by clear and convincing evidence that the Wife violated the court order and did so willfully.

The Appellate Court found that the underlying stipulation was enforceable, but reversed the trial court's judgment with respect to the contempt order. In reversing the contempt order, the Appellate Court assumed that the only basis for the counsel fee award was the violation of securing a legal opinion with respect to the deductibility. The Appellate Court found that she made some efforts to do that and therefore found that there was not willful contempt.

The Supreme Court granted cert regarding the contempt order, but not with respect to the underlying stipulation. In addition, after oral argument, the Supreme Court ordered the trial court to issue an articulation with respect to: whether the granting of the sanctions was based upon contempt or also litigation misconduct; what part of the

February order was violated and formed the basis of finding a contempt; what were the facts that supported the finding of contempt; what was the competent evidence relied upon; and what was the basis for the award. The trial court's articulation pointed to three sections of the court order that were violated, two of which were never raised or pled, thus implicating due process.

Holding - The court reversed the decision with respect to the finding of contempt and fees, and remanded the case to proceed before a different judge.

Rationale - Here, the judgment of contempt had no factual findings. There was not a hearing and therefore no evidence. A judgment of contempt cannot be based upon representations or argument of counsel, but must be supported by competent evidence. In addition, in the articulation, the court stated that it was undisputed that there was no letter from a certified public accountant in the court file nor was one submitted into evidence. The problem with this articulation, as a basis to support the contempt, is that the draft accountant's letter is appended to a motion in the court file, and the court misdirected and misallocated the burden of proof onto the Wife, when the Husband was the one seeking sanctions and therefore has the burden of proof.

The court's order with respect to litigation misconduct further cannot stand. Litigation misconduct requires the trial court to find that the claims of the litigant were entirely without color and the litigant acted in bad faith. Neither of those findings were made.

Child Custody

Custodial Parent – Defined; Payment Towards a Car; Modification of Child Support

Bolat v. Bolat, 191 Conn. App. 293, cert. denied, 333 Conn. 918 (2019)(Elgo, Lavine and Harper; trial court – Klatt) - The marriage of the parties was dissolved in 2011. The parties have three children. A 2017 stipulation provided that the parties would have joint legal custody and their primary place of residence would be with the Wife. Additionally, the Husband had parenting time every other weekend from Friday after school until Monday at 9 o'clock. The agreement further specified that if the custodial parent cannot be with the children, they are responsible to make arrangements for the children unless the noncustodial parent agrees in writing to take the children. The Wife filed a motion for contempt because the Husband could not be with the children but failed to make arrangements for them during his parenting time, leaving them with her. The trial court granted this motion for contempt. In addition, the court granted the Wife's motion for contempt for the Husband's failure to pay \$3,000 towards a car for one of the children, a requirement under the separation agreement. In addition, the Husband filed a 2017 motion to modify child support, which the court denied claiming he did not demonstrate a significant change in his financial circumstances.

Holding - The parties' agreement with respect to the custodial parent making arrangements for the child if they could not be with them and the provision with respect to the \$3,000 contribution towards a car were clear and unambiguous. The trial court's ruling that the Husband was in contempt for violation of these provisions was not an abuse of discretion. The trial court did not abuse its discretion in denying the Husband's motion for modification.

Rationale - The Husband tried to argue that the custodial parent language in the agreement referred to the Wife. The trial court indicated, and the Appellate Court agreed, that it referred to the parent who is exercising parenting time with the children. When the agreement was presented to the court, the colloquy back and forth between the Husband and the court indicated that to be the Husband's understanding of the agreement. There was, after the motion for contempt was filed but before it was decided, a motion to open and modify the stipulation filed by the Husband, granted by the court, which is of no moment to the finding of contempt here. As of the filing of the motion, there had not been a change in the order.

With respect to the car, the Wife let the Husband know that a Jeep that she was leasing would be purchased at a cost of \$14,000 and she would be allowing the child to drive that car. She only requested a reimbursement of \$3,000 towards that car. The Husband after being informed of this offered the child a car from his father. In addition, the Husband requested that the Wife provide all sorts of information with respect to the Jeep for the son, which she did not do. The Husband cannot use these facts to avoid being held in contempt. There were no conditions upon him paying the \$3,000.

The Husband claimed that his income had decreased by 50%. There were two exhibits that the court found relevant as to his change in financial circumstances. The first was his termination agreement, indicating that he was laid off due to company reorganization. There was no testimony to explain the exhibit or what it was meant to show. The second document was one he prepared for his own company and for which he claimed that the business is dried up. Despite that, there were expenses for travel, office, maintenance and subcontractor expenses that the court did not believe should have been incurred if business had dried up. In addition, the court found that the Husband was moving assets to his current wife's name. The Husband did not list any homes on his financial affidavit, but did deduct mortgage interest on his tax returns. Based upon all of this, the court did not modify his child support obligation.

Modification; Constitutional Right of Equal Access; Counsel Fees

Peters v. Senman, 193 Conn. App. 766 (2019)(Keller, Prescott and Harper; trial court – Quinn) - The parties have never been married. In a prior proceeding, the court awarded joint legal custody of their son and primary residence was with the Father. The Mother filed a motion to modify the joint custody orders, sought shared decision-making and primary residence so that the child could go to school in her district which was better able to provide for his special needs. In addition, she filed an amended motion for modification claiming that her constitutional rights had been infringed upon in a prior custody ruling, for which she sought a declaratory ruling. This is the third round of motions that the Mother has filed seeking the same relief. It is been noted by more than one judge that the parties have no means of coparenting or communicating because of their differing viewpoints and personalities.

In support of her motion, the Mother claimed that the changed circumstances were her changed living circumstances, her marriage, and the birth of her daughter with her new husband. It should be noted that all of these reasons were personal to the Mother, not the child. The Mother alleged that her son's low test scores was the proof the court needed to show that his schooling was inadequate.

The trial court made significant findings with respect to the Mothers claims for custody. It noted that she was seeking a change of residence to demonstrate her adequacy as a parent. She was unable to provide a nuanced account with respect to the child as it related to her demand for change of residence. She does not understand or assign any relevance to the child's connections to his own community. She would not consider what might be best for her child even if it was counter to her own desires. She further opined that since she has not been found to be an unfit parent she was entitled to equal time with her child. In addition, "the court noted its concerns about the plaintiff, indicating that her myopic view of the superior quality of her new family life as the only valid outlook raises questions in the court's mind about what her conduct towards her son might be in the future, should her son reside with her." The Mother also married Peter Szymonik and the court took judicial notice of the memorandum of decision in that case, when assessing the claims of the Father of concerns he had with respect to the Mother's new husband. Despite the trial

court finding in the memorandum of decision “some questionable parenting on Mr. Syzmonik’s part and an appalling lack of sensitivity to his children’s emotional needs in his own high-conflict custody case,” it would not grant the Father’s request for supervised visitation.

The evidence solicited at trial centered around the parties’ difficulty to reach agreement and problems with the physical exchanges. The Mother had frequently been late in returning the child and frequently unable to pick him up without incident. That had decreased since her new Husband started providing the transportation. This, however, did not demonstrate her ability of providing routine and predictability for the child herself. The deficit is apparent that the court found for her is the methods by which she seeks outcomes for her child. She treats the Father dismissively and condescendingly.

As part of the court’s orders, the Mother was ordered to pay the Father \$3,500 in counsel fees.

Holding – The Wife could not prevail in her claim that under the Connecticut and United States constitutions she is entitled to equal rights of access in decision-making as a fit parent. The trial court did not abuse its discretion in determining that there not been a change in circumstances to increase her parenting time or modify decision-making. The trial court did not abuse its discretion in awarding counsel fees to the Father in that it indicated it considered the statutory criteria, evidence and the Father’s financial affidavit.

Rationale - The court set forth the requirements needed to seek a modification of custody or visitation. “First, modification of a custody award must be based upon either a material change of circumstances which alters the court’s finding of the best interests of the child... Or a finding that the custody order sought to be modified was not based upon the best interests of the child.... Second, the court shall consider the best interests of the child and in so doing may consider several factors. General Statutes §46b-56(c).

The cases cited by the Mother with respect to her claims that she’s entitled to equal access physically and for decision-making of her child as a fit parent are based upon claims by the state, against an intact family, where there is abuse or neglect of the child. Those cases have no bearing in the instant action.

Based upon all of the testimony, the court had sufficient facts to buttress its order with respect to legal and physical custody.

The mother tried to indicate that the award of counsel fees was in error because the court had not considered her financial circumstances. If anything, she induced that error in that she refused to file a financial affidavit. Otherwise, the court considered the evidence, the statute and the Father’s financial affidavit in rendering that order which was proper.

Modification – Termination of Therapist

Dufresne v. Dufresne, 191 Conn. App. 532 (2019)(Lavine, Elgo and Pellegrino; trial court – dos Santos) - The parties were married in 2006 and had a daughter in 2008. A dissolution action was commenced in 2010 and six months later, the parties agreed that

the Wife could relocate to Massachusetts. The child's primary residence was to be evaluated by family relations. Ultimately, the parties entered into a detailed parenting plan. In 2015, the matter was again referred to family relations and thereafter the Wife filed a motion for modification which was granted by the court a few weeks later. The court granted the Wife's sole legal custody of the child who was to continue counseling as recommended by the therapist. The Husband was to visit the child as mutually agreed upon by the parties. A year later, the Husband filed a motion to modify access claiming that he has not had access to the child since October 15, 2015. He filed a motion for contempt as well with the same allegations, which was denied by the court. The court also ordered that he would have supervised visitation.

The Husband filed a motion for modification in 2017 which is the motion at issue in this appeal. He claimed he was denied phone communication and visitation with the child. There were five visits with Access Agency between the Husband and child. The Husband did not always follow the rules i.e. he brought photographs and chocolate. There was a second agency, Transitions in Parenting. Both programs issued reports and gave them to the family relations officer working on the case. Neither of the providers who issued the reports testified in court, but the family relations officer testified with respect to the contents of these reports.

At the time of the hearing, there was also testimony from the child's therapist who indicated that she utilize three times a therapeutic process called Trauma Forensic Cognitive Behavior to have the child relive an event where the Husband was taken away in an ambulance after expressing suicidal ideation. The Husband had the presence of mind to call the Wife before being taken away in the ambulance. He does have PTSD as part of his military career. The therapist recommended that the child not have contact with the Husband until she was 23, which is when her brain will be fully developed.

The trial court deemed the statements in the reports read by the family relations officer to be hearsay statements and would not consider them since she did not observe the events. The court found that the child's therapist was doing more harm than good. It further found that the Wife by continuing the therapy with this therapist as well as to arrange play dates for the child on the day she was to see her father was tantamount to alienation. The court did not hear testimony from the Wife. The court granted the Husband's motion for modification.

Holding - The trial court abused its discretion in terminating the child's therapy as there was no motion before the court with respect to that issue. The trial court improperly failed to consider the testimony of the family relations counselor.

Rationale - A court is not permitted to decide issues that are outside of those which are raised in pleadings. Since there was no notice of an intent to address issues with respect to therapy, it was beyond and outside of the scope of the motions.

The basis upon which the trial court would not consider the family relations officer's testimony was hearsay. Hearsay is an evidentiary standard to either admit or not admit

testimony. The Husband did not object on hearsay grounds to the testimony of the family relations counselor. Since this evidence was probative to the issue of supervised visits, it was probative and should have been considered.

Concurrence – Elgo, J. - The distinction that Justice Elgo makes is that she does not agree that the court abused its discretion in failing to credit the family relations counselor’s testimony, but that it committed reversible error in refusing to consider the substance of that testimony. Because the trial court rejected it solely on hearsay grounds and there was no such objection, it was improper not to take it into consideration.

Pre-embryo Storage Agreement

Bilbao v. Goodwin, 217 A.3d 977 (2019)(D’Auria, Robinson, Palmer, McDonald, Mullins, Kahn, Ecker; trial court – Nastri) – The parties, unable to conceive naturally went to a fertility clinic and entered into a pre-embryo storage agreement. As part of the agreement, the parties were given a choice, by way of check the box, of what would happen to the pre-embryos upon death or divorce and they elected to have them destroyed. The parties resolved all of the issues in their dissolution, except for the disposition of the pre-embryos and allocation of liabilities. The Husband sought to have the pre-embryos awarded to him and the Wife sought to have the storage agreement enforced. The trial court found that the pre-embryo storage agreement was not unenforceable. The trial court then analyzed the pre-embryos by considering them as property and awarding them to the Wife.

Holding – The trial court erred in finding that the pre-embryo agreement was unenforceable. In analyzing the disposition of the pre-embryos, the court employed the contract method.

Rationale – There are three methods by which the court may look at pre-embryos and storage agreements. First is the employment of the contract method by which a contract setting forth the disposition of the pre-embryos is presumed valid. Second is the balancing approach where the court looks at each parties’ interest in the pre-embryos and what they would like to do with them. Third is the contemporaneous mutual consent method where the parties need to agree at the time of the disposition as to the disposition. Most courts that have analyzed this question have followed the contract approach which is what the court employed here.

As to the contract, the court found that there was an offer, acceptance and that there was consideration. The consideration was both parties submitting their genetic material to create the pre-embryos. The trial court heavily relied on the fact that the “checkbox” contract was not enforceable because it just required them to check the box. The Supreme Court noted that there are many valid legal forms that are enforceable with check the box items.

The Supreme Court also noted two limitations of its decision. Firstly, this decision does not apply to cases in which there is not a destroy order as it is not opining on what would be required for a party to be forced to be a genetic parent against his or her wishes.

Secondly, this decision does not tell the courts what to do in the event the court finds an agreement to be invalid.

School and International Travel (First Amendment and Dissolution)

Nietupski v. Castillo, 196 Conn. App. 31, cert. denied, 335 Conn. 916 (2020) (Elgo, Alvord and Devlin; trial court – Nastri) - The Husband, who is Polish, commenced this dissolution of action in 2018 against the Wife, a native of Peru. The parties have one child, a son, born in 2013. The Husband filed an action seeking a legal separation, to which the Wife responded by seeking a dissolution of marriage. On a *pendente lite* basis, there was a motion pertaining to the school to which the child would be enrolled and whether the child could travel internationally with either parent. This court, Prestley, J., ordered that the child go to Charter Oak International Academy in West Hartford, which is where the Wife lived. In addition, she permitted either of the parties to travel internationally, recognizing their respective heritages. Within weeks before the trial, the Husband filed a motion to change the child's school district, wanting him to attend public school in Glastonbury, which is where he lived.

At trial, the Wife testified that she needed a divorce from the Husband due to his emotional and physical abuse of herself and her son. She was not willing to entertain a legal separation. The trial court entered a judgment dissolving the parties' marriage. The court made findings similar to Judge Prestley with respect to the school district and ordered that the Wife would determine the school that the child attended. In addition, the court awarded to each parent two weeks of vacation per year with the child which could include travel outside of the United States.

Holding - The trial court did not err in granting the dissolution of marriage instead of a legal separation. The trial court did not abuse its discretion in allowing the Wife to determine where the child attended school. The trial court did not abuse its discretion in making its orders with respect to vacation and permissible international travel.

Rationale - The Husband tried to argue that the court granting a dissolution of the parties' marriage violated his first amendment rights to freedom of religion. In his brief, he cited no law to support his contention, but stated "civil laws granting divorce...are morally wrong because the state therein usurps and authority to which it has no right whatsoever. It is obvious that the state unlawfully invades an area of religious liberty in which it has no competence when it claims the power to dissolve a marriage lawfully contracted by to baptize persons such contract is a sacrament. Marriage belongs to God." As in *Grimm*, the court found that the granting of a divorce is not an impingement of First Amendment rights as one cannot use the First Amendment to relieve their obligation to comply with general laws that are applied in a neutral fashion to all, such as a dissolution of marriage.

At the time of trial, the court found that while the child had started school last in his class, he was making profound strides in his educational development. The Guardian ad litem did not support a change in the child's school as a result of this as well as the proximity to

the Wife's home. In addition, the Wife had worked for 10 years with special needs children and was the one who, being aware of children's milestones, recognize that there was an issue with the child. She is in the best position to advocate for this child.

The primary contention by the Husband with respect to his opposition for international travel was a risk that the Wife would not return to the United States as well as a claim that Peru, her native country, was dangerous. However, the Guardian ad litem testified that there were no travel advisories with respect to Peru. In addition, Peru is a signatory to the Hague convention and therefore any concerns that they would not return, is obviated with that fact. In addition, the Husband had nothing but a vague statement that he did not believe they would return, but no proof upon which he could rely or cause the court to rely in denying such travel.

Sole Legal Custody

Thunelius v. Posacki, 193 Conn. App. 666 (2019)(Bishop, Lavine and Keller; trial court – Tindill) - The parties were never married but were parents of the child born in 2010. In 2012, the Father filed an application seeking sole legal custody of the child. The parties agreed to appoint Attorney Hurwitz as Guardian ad litem. In the original appointment, the guardian's duties and length of appointment were not specified. There was a pendente lite custody agreement providing for the parties to have joint legal custody and primary physical custody with the Mother and visitation with the Father. A year later, the parties agreed to pendente lite financial orders of \$389 per week in child support. Approximately five months thereafter, the Mother filed a motion for contempt with respect to the financial orders. After a 16 day trial, the court issued orders, providing that the Father would have sole legal custody and primary physical custody, having rebutted, by a preponderance of the evidence, the presumption of joint legal custody pursuant to Conn. Gen. Stat. §46b-56a. In addition, the court anticipated on appeal would be filed and entered a protective order to secure the award of sole custody to the Father. The court further ordered that the child should continue to attend Whitby School until completing eighth grade and that the parties would split the costs for private education through 12th grade 56% by the Father and 44% by the Mother. The court also indicated there was insufficient evidence for an educational support order under Conn. Gen. Stat. §46b-56c. The court ordered Attorney Hurwitz to continue to serve as Guardian ad litem until further order of the court and to work to help the parties resolve a dispute by mediation prior to filing a motion in court. The court further ordered that if a motion is filed and litigated, the prevailing party shall be reimbursed for his or her share of the guardian's fees. The court also ordered the parties to work with the coparent counselor until further order of the court. The Mother had filed a motion for contempt with respect to arrearages on the pendente lite support orders which was not decided by the court. The Mother appealed on seven different bases.

Holding – (1) The trial court did not improperly delegate its authority to the Guardian ad litem. (2) The trial court erred in requiring the nonprevailing party to pay the other party share of the Guardian's fees in the event he or she lost a litigated matter that had

been mediated by the Guardian. (3) The original appointment of the Guardian ad litem without having complied with the statutory requirements is moot. (4) The trial court's order of a protective order with respect to the custody awards was proper under *Yontef*. (5) The trial court erred in ordering the parties to divide the private school education for the child through high school. (6) The trial court had sufficient evidence upon which to base the child support orders. (7) The trial court would not review the Wife's claim that the failure to rule on her motion for contempt on the financial issues resulted in a retroactive modification, since the motion was not acted upon.

Rationale – (1) An improper judicial delegation of authority results in a nonjudicial entity or person binding the judicial authority to enter any order or judgment recommended by said person. These orders must affect the parties or the children. None of the duties vested in the Guardian was an improper delegation of judicial authority. They including allowing the Guardian to hold the passport, access our family Wizard, receive copies of the child's telephone bill, investigate facts, make recommendations as to the child's best interest, mediate the parties disputes, act as final arbiter to select the coparent counselor, and to testify in court. These clearly were designed to keep the parties out of court and "reflects the court's confidence in the commitment and talent of the Guardian ad litem." Although the order did allow the Guardian to select the coparent counselor, this counselor had no delegated decisional authority from the court and therefore was not improper. It did not reflect or implicate the best interests of the child so as to require judicial resolution of the matter. "Where the issues involved do not themselves impact directly on the child's best interest, judicial resolution of each disagreement has been characterized as burdensome and counterproductive."

(2) Connecticut adheres to the American rule of legal fees, proscribing that each party should be responsible for their own fees absent statutory authority or a contractual provision. The statutory authority for awarding fees is Conn. Gen. Stat. § 46b-62. There is a requirement under the statute to assess the financial ability of the parties to pay, which cannot be done with an automatic provision for payment based upon whether party wins or loses a motion.

(3) At the time that Judge Heller address the appointment of a guardian post judgment, that then superseded the original order which was then no longer in effect.

(4) The Mother believed that in order to issue the protective order, the court had to establish that there had been domestic violence or abuse or neglect of the child. In essence she was seeking to invoke the requirements of a family violence protective order. In *Yontef v. Yontef*, 185 Conn. 275 (1981), the Supreme Court indicated that "a trial court rendering a judgment in a disputed custody case should consider entering protective orders sua sponte to ensure an orderly transition that protects the primary interests of the children in a continuous, stable custodial placement." Clearly, the court's order, whether described as a protective order or not, was done pursuant to *Yontef*. Such an order was appropriate in this case, which was very high conflict.

(5) The court's conclusion that the child should continue at Whitby School was supported by the evidence as both parties requested the same in their proposed orders. However, with respect to private high school, there was no evidence as to the cost nor an agreement of the parties that the child attended private high school. In addition, the court noted that it lacked the evidence to enter an educational support order, which supports the fact that it did not have evidence for purposes of private high school.

(6) The trial court, in preparing child support guidelines, added to the Mothers income the \$132 per week she deducts for her 401(k) plan. That was added to her gross weekly income to show the figure set forth on the child support guidelines.

Third Party Visitation Actions

Hunter v. Shrestha, 195 Conn. App. 393 (2020)(Alvord, Moll, Beach; trial court – Prestley) - In this third party visitation petition, the plaintiffs allege that they are the grandparents of the child at issue, and one of them is the maternal grandfather and the other the step grandmother to the child. In preparing their petition, they filed the court form on January 26, 2017 stating that they had been the child's primary caregivers for the three years preceding July 15, 2016. This included the child living with them for the first 1 1/2 years seven days per week, and then for the second 1 1/2 years for five days per week. As part of the significant harm, they alleged that denial of visitation would cut the child off from the maternal side of the family. They further alleged that cutting off ties with them would cause the child to feel abandoned. They further allege that they provided financial support for the child. In their motion, they were seeking weekly visitation including every other weekend and weekday overnights. The defendant, the parent of the child, filed a motion to dismiss challenging subject matter jurisdiction, by claiming that the pleadings did not meet the requirements of *Roth v. Weston* and therefore the court did not have subject matter jurisdiction.

Holding - The trial court did not err in granting the defendants motion to dismiss.

Rationale – Under *Roth v. Weston*, in order for the court to have jurisdiction over a petition for visitation against the wishes of a fit parent, there must be a specific and good-faith allegation that the petitioner has a relationship with the child similar to that of a parent child relationship and denial of the visitation will cause real and significant harm. Without meeting both of these criteria, the court does not have subject matter jurisdiction. This criterion must be proven by clear and convincing evidence. The allegations made do not rise to that of real and significant harm. The cutting off of the maternal side of the family does not equate to the level of harm contemplated by *Roth*, despite the fact that it may not be in the child's best interests. Likewise, the absence of a parent or maternal family members may be detrimental to the child but does not arise to the harm required. Additionally, the plaintiffs allege that the denial of the visitation will compound all of the trauma that the child experienced, causing harm. The problem is that this was not pled with specificity.

Romeo v. Romeo, 195 Conn. App. 378 (2020)(Alvord, Prescott and Sullivan; trial court – Murphy, Margaret) - The plaintiffs, the maternal grandparents of the minor child of the Defendant, filed a third-party petition for visitation. In addition to providing the court form, the party supplemented the two jurisdictional assertions with accompanying affidavits. As to the first jurisdictional requirement, i.e. a parent like relationship, they asserted: that the children had lived with them for their entire lives; the grandfather was the only consistent male role model in their lives; they provided child care on a daily and sometimes overnight basis to allow the defendant to maintain employment; they provided food, clothing and shelter to the children; took them on vacations; did homework; upon the grandmother’s retirement she was responsible for getting the children up in the morning, getting them breakfast, ensuring that homework was done, transporting them to and from school and their afterschool activities; and would do asthma treatment for the daughter, including occasional trips to the hospital. With respect to the second jurisdictional requirement, i.e. that deprivation of a relationship would cause real and significant harm to the children, they averred: that “there can be no greater harm to the children than to neglect to promote and foster their roots in family and friends which will directly affect their emotional growth and moral compass and by the deracinating their family roots is real and significant because it undermines a substantial part of who they are.” The defendant filed a motion to dismiss claiming that the allegations in the complaint were insufficient, with respect to the second prong, to support the court’s jurisdiction. The grandparents then filed an expert disclosure for Dr. Sidney Horwitz who was expected to testify as to the real and significant harm. There was no underlying affidavit from Dr. Horwitz. At the time of the hearing on the motion to dismiss, the grandparents filed a motion for continuance, based upon the filing by the defendant of the motion in limine with respect to Dr. Horwitz. The parties met with a different judge who denied the continuance indicating that the matter would proceed and there is no ability to have third parties, referencing that the motion to dismiss should be decided on the allegations contained within the complaint. The trial court granted the motion to dismiss claiming that allegations in the complaint with respect to both findings were jurisdictionally deficient.

Holding – The trial court was correct in not considering the expert disclosure of Dr. Horwitz. The trial court properly granted the motion to dismiss on the second jurisdictional element in *Roth* because there were only general allegations of significant and real harm.

Rationale – *Roth* sets forth the requirements of what should be considered by the court in ruling on a motion to dismiss with respect to a third-party petition. It requires the court to examine the allegations in the petition and whether they meet the jurisdictional requirements set forth in that decision. The expert disclosure was an attempt to provide an addendum or supplement to the petition which is not permitted, especially in light of the fact that it was not a statement attested to by the declarant. Conn. Gen. Stat. § 46b-59(b) requires third-party petitions for visitation to be verified, which would preclude expert representations in a separate pleading where verification is not required. The allegations contained within the petition with respect to the harm to the children are

merely general allegations which do not rise to the level of meeting the jurisdictional standard under *Roth*.

Jurisdiction

Personal Jurisdiction – Post Judgment

Barr v. Barr, 334 Conn. App. 479 (2020)(Keller, Bright and Sheldon; trial court – Heller)
- The parties' marriage was dissolved on December 31, 2015. The Wife filed five Post judgment motions for contempt. The court issued a memorandum of decision with respect to these motions on March 21, 2017. On June 21, 2018, the Wife filed a motion for contempt claiming that the Husband had not complied with the court's March 21 orders. The Wife had the motion for contempt sent to the Husband at his Georgia address and emailed to the Husband. He did not appear at the hearing. He did not file an appearance. No finding was made at the time of the hearing with respect to personal jurisdiction over the Husband. The trial court granted the Wife's motion for contempt, deferring the issue of counsel fees.

Holding - The trial court was without jurisdiction over the Husband because he was not served by order to show cause which is required for post judgment motions. Accordingly, the matter was reversed with instructions to dismiss the Wife's motion for contempt.

Rationale - The Appellate Court dispensed with the theory that the Husband waived the issue with respect to personal jurisdiction by not filing a motion to dismiss within 30 days of filing an appearance in the underlying Superior Court action. There can be no waiver where a party is not served and did not appear in the action.

In order to properly serve process in a post judgment matter, it must be done by order to show cause. Serving the Husband by mail and email is not proper service. *Allred v. Allred*, 132 Conn. App. 430 (2011).

Prenuptial – Postnuptial Agreement

Postnuptial Agreement Enforceability and Revocation Agreement; Custody Orders

Zhou v. Zhang, 334 Conn. 601 (2020) (Palmer, Robinson, D’Auria, Mullins, Kahn and Vertefeulle; trial court – Gould) - The parties were married in 2006. Both were natives of China but permanent US residents. The Wife has a doctorate in mechanical and nuclear engineering. The Husband has a doctoral degree in computer science. Although not employed at the time of the dissolution, the court found the Wife to have an earning capacity of \$77,500, based upon her last employment. The Husband earned a base salary of \$250,000. In 2012, the parties entered into a postnuptial agreement providing that the Wife would receive \$350,000 per year in alimony for time equal to one half of the length of the parties’ marriage. In addition, she would receive the marital residence and one third of the parties’ aggregate net worth, excluding certain retirement assets, as of the date of the dissolution. In 2013, the Wife filed for a divorce and the parties desire to enter into mediation. They agreed to mediate with Maurice Segall.

On the website of Attorney Segall, it indicated that the parties had control over the process, would be able to make informed decisions with the help of the mediator, and that the mediation was informal and confidential. The parties further signed a mediation agreement that all statements and printed material and documents prepared in the mediation would be confidential.

During the mediation, the Wife wanted to have the postnuptial agreement revoked. The mediator indicated that under the umbrella of the mediation they could try to negotiate a resolution without the postnuptial agreement. The mediator drafted a revocation which the Husband signed without the benefit of counsel, but under the belief that it would only apply in the mediation process and not beyond that. In addition, during the mediation, the parties put together a parental responsibility plan which was filed with the court as part of the case management agreement.

Ultimately, mediation did not work out in the parties tried the case. At the time of the trial, the Wife sought to have the court enforce the revocation agreement, while the Husband sought to have the court enforce the postnuptial agreement. The court, with the exception of one provision in the postnuptial agreement, enforced the postnuptial agreement and rejected enforcement of the revocation. In addition, the court awarded the parties joint physical custody of the children with the Husband having final decision-making. The Wife appealed.

Holding - The trial court properly determined that the revocation agreement, under ordinary contract principles, did not apply. The trial court did not abuse its discretion in enforcing the postnuptial agreement. The trial court did not abuse its discretion in entering the custody orders.

Rationale - The trial court applied the heightened standard of *Bedrick* to the revocation agreement and found that it did not meet the heightened standard. Notwithstanding, the Supreme Court found that it would not stand under established contract law principles.

There is no case in Connecticut or nationwide dealing with the legal standard by which to judge a revocation of a postnuptial agreement. The Supreme Court ducked the issue of the standard to be applied, instead choosing to apply ordinary contract principles. Essentially, the Supreme Court found that there was a condition precedent to the enforcement of the revocation agreement, namely that the parties came to an agreement through mediation. This condition precedent is based upon the representations made by the mediator on his website as well as the mediation agreement. The Supreme Court noted that the trial court found as it did, in part, upon a finding of misrepresentation by the mediator that the revocation would apply irrespective of the outcome of mediation. The Wife argued that the court could not consider parole evidence in making its determination. The parole evidence rule does not prevent a party from demonstrating a condition precedent to a contract through extrinsic evidence. What is not permitted under the parole evidence rule is evidence to vary the terms of an agreement. The Supreme Court also determined that the mediator, by not explaining to the parties the manner by which the revocation would materially affect them should the mediation not work and the revocation agreement was to remain in place, clearly did not anticipate that the revocation would extend beyond the mediation.

In terms of enforcing the postnuptial agreement, the Wife claimed it should not be enforced because it was not fair and equitable at the time of the execution in that she signed it under duress and the terms of the agreement were both complex and lengthy. The trial court found that the Wife was not credible. In addition, there was a provision in the agreement stating that the parties read the agreement, understood the agreement, and it was not the product of fraud or duress. Finally, the court found that the Wife was the impetus behind this agreement and therefore cannot claim that there was duress.

With respect to the custodial issues, the court appointed a guardian ad litem and a custody evaluator. The Guardian ad litem met with the children, ages six and eight at the beginning of the dissolution action, but had not seen the children in the two years immediately preceding her testimony. The Guardian ad litem was in frequent touch with the parties, attended court appearances and depositions, and was in contact with the court appointed evaluator. She did not want to meet with the children and drag them any further into the proceedings. The Guardian recommended the parties share joint legal and physical custody with the Husband having final decision-making. The custody of evaluator likewise recommended joint legal custody and that there be a parenting coordinator to help break deadlocks. The custody evaluator noted that the Wife was controlling and rigid, did not want to negotiate with the Husband over anything doing with parenting, marginalize the Husband and at times would intentionally interfere with his time with the children. Despite the fact that the Guardian ad litem had minimal personal contact with the children, “which she apparently believed was in their best interest”, there was nothing to suggest that there was not an investigation into the children’s best interests. The Wife tried to use *Blake* to support her position that the court should not consider the Guardian ad litem’s testimony due to the delay between seeing the children and her testimony. However, the Supreme Court distinguished *Blake*, as in that case, the family relations officer, who testified between eight and 16 months after the

custody evaluation, could not opine as to the present best interests of the children. Here as well, custody evaluator largely agreed with the Guardian ad litem's recommendation.

Procedure

Breach of Contract

Jacques v. Jacques, 195 Conn. App. 59 (2019)(DiPentima, Moll and Bishop; trial court – Adelman) - The Husband and Wife entered into a separation agreement which provided that any asset in excess of \$10,000 owned by the Wife or in which she has an equitable interest and which is not shown on her financial affidavit will become the property of the Husband without the ability of her providing a defense. The Husband then brought this breach of contract action alleging that she liquidated to annuities prior to the divorce totaling in excess of \$1,150,000. After a hearing, the trial court found that the action was barred by the statute of limitations. In addition, the court found that there was insufficient evidence to support the Husband’s claim that there was a failure to disclose assets by either party.

Holding - The Appellate Court dismissed the appeal as moot because the Husband only appealed the determination that the statute of limitations had tolled, not that there was insufficient evidence to support his claim, and. “When an appellate challenges a trial court’s adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot.”

Dismissal of Motion for Failure to Prosecute

Fleischer v. Fleischer, 192 Conn. App. 540 (2019)(Prescott, Bright and Eveleigh; trial court – Axelrod) – The parties’ marriage was dissolved in 1984. The decree provided that the Husband would pay alimony until the death of either party or the Wife’s remarriage. In addition, the decree provided that the parties would exchange W-2’s annually. In December 2012, the Husband filed a motion to modify his alimony claiming that his income has decreased since the dissolution and the Wife’s income has increased. In addition, he filed a motion for contempt regarding the failure of the Wife to provide her W-2’s. In November 2014, the Husband filed a motion in limine seeking to preclude the Wife from introducing certain evidence. In February 2015, the Husband’s counsel, Alan Palmer, was diagnosed with Parkinson’s, which he disclosed in an affidavit in opposition to the Wife’s motion to dismiss. The parties subsequently entered into a stipulation providing a date by which the Wife was to file objections to the Husband’s motion in limine, which she never did. There was no activity on the file for 1-1/2 years and then the court held a status conference in January 2017 and the court set the motions down for a hearing in April 2017.

On the date of the hearing in April 2017, both parties appeared in court, ready to proceed with the hearing. The Wife’s counsel, at the outset of the hearing, argued that the motions should be dismissed pursuant to Practice Book §§ 14-3 and 25-34 for failure to diligently prosecute. The Wife’s counsel argued that if the motions were to proceed that the Husband waive his right to claim retroactivity. The Husband’s counsel argued that the motions have proceeded and the delay was due to his medical condition. The court then inquired as to whether the Husband would waive retroactivity to which he indicated he

would not. The court then dismissed the action for failure to prosecute. Wife's counsel requested a recess to speak to Husband's counsel about waiving retroactivity. Husband's counsel argued that there was no motion to dismiss filed and that he was not given due process. The court stated that if the Husband's counsel did not waive retroactivity it was going to dismiss the motions. Ultimately the court vacated its dismissal, allowing the parties to file memorandum of law and hold a hearing. At the conclusion of that second hearing, the court dismissed the motions for failure to diligently prosecute under P.B. § 14-3, but denied the dismissal under P.B. § 25-34.

Holding – The trial court abused its discretion in dismissing the motions under P.B. § 14-3.

Rationale – The court defined discretion as “It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to sub serve and not to impede or defeat the ends of substantial justice.” The purpose of P.B. §§ 14-3 and 25-34 is to allow for the orderly administration of the docket and not allow motions to languish. However, the provision of the Practice Book acts as a sanction, which must be in proportion to the facts of the case. In *Millbrook Homeowners Assn., Inc. v. Hamilton Standard*, 257 Conn. 1 (2001), the Supreme Court established a 4 part test to evaluate the proportionality of a sanction: (1) the nature and frequency of the misconduct; (2) notice of the possibility of a sanction; (3) the availability of lesser sanctions, and; (4) the client's participation in or knowledge of the misconduct.

- (1) Nature and frequency of misconduct – this typically will deal with repeated refusals to comply court orders. While it may be sufficient for one violation, it must be very egregious to result in the sanction of dismissal. Here there was one 1-1/2 year delay due to Attorney Palmers illness.
- (2) Notice of the possible sanction – although the Practice Book rules generally put counsel on notice of the possible sanction for failing to diligently pursue, there must be some prior notice of this sanction before it is imposed. Here, the first time the sanction was raised is when both parties were present in court and ready to proceed on a hearing on the motions.
- (3) The availability of a lesser sanction – the court made no findings in the memorandum of decision dismissing the motion of lesser sanctions. It could have included the ultimate finding that retroactivity in whole or in part would not be granted, or to permit the Wife a long time to repay any amounts owed to the Husband by virtue of the retroactivity.
- (4) The client's participation in or knowledge of the misconduct – the client here had nothing to do with Attorney Palmer's health issues.

Additionally, the Appellate Court was concerned about the trial court's semi ultimatum of dismissing the action versus waiving rights to retroactivity. “A trial court cannot force a party to engage in horse trading and then punish them when they decline to do so.”

Enforcement of a Ketubah

Tilsen v. Benson, 69 Conn. L. Rptr 241 (Klau, 2019) - The Husband seeks to enforce a Ketubah, which is a Jewish marriage contract, claiming that it is a valid prenuptial agreement. The primary basis for the Husband's argument is that the provision in the parties Ketubah providing for the application of Torah law is essentially a choice of law provision, similar to any civil contract.

Holding - The court denied the Husband's motion to enforce the Ketubah seeking enforcement of the Torah law provision as it would require the court to choose between competing rabbinical interpretations of Jewish law, which the court cannot do without violating the First Amendment.

Rationale - Under the neutral principles of law approach, the First Amendment allows a court to resolve disputes involving religious institutions, parties or documents if the court can do so by applying traditional secular legal principles and without deciding or delving into controverted matters of religious law, doctrine, practice or faith. Basically, the court is not permitted to take sides in inherently religious disputes. These principles have applied to a Mahr (and obligation under an Islamic marriage contract for the Husband to pay a sum certain money to the Wife during the marriage), a Get (a divorce under Jewish law whereby the Husband presents the wife with the Get) and Beit Din (the rabbinical Council for parties to appear before) cases.

Here, the Husband's argument of seeking to have the court enforce the Ketubah under a choice of law provision is a direct religious function and not a neutral principle of law approach. This would require the court to choose between competing interpretations of Jewish law.

Frivolous Action – Sanctions; Restraining Order

M.B. v. S.A., 194 Conn. App. 721 (2020) (DiPentima, Lavine and Bishop; trial judge – Tindill) - The plaintiff filed a restraining order under Conn. Gen. Stat. § 46b-15 against the defendant, alleging a continuous pattern of stalking and harassment. Originally, the plaintiff filed this restraining order in the Stamford judicial district, which granted the restraining order. The defendant filed a motion to vacate and transfer the granting of the restraining order, which was ultimately granted and the matter was transferred to New Haven and the restraining order vacated. The plaintiff then refiled the same application for relief from abuse in New Haven. At the time of the hearing before Judge Tindill. The applicant/plaintiff testified that his goal was to have the defendant arrested as he believed that was the only way to stop her. The trial court denied the restraining order and issued sanctions pursuant to Practice Book §1 – 25 and awarded the defendant counsel fees.

Holding - The trial court did not abuse its discretion in denying the restraining order. The trial court did not abuse its discretion in issuing sanctions against the plaintiff and awarding the defendant counsel fees.

Rationale - The Appellate Court will not retry facts as the trial court has the degree discretion to find facts and determine credibility. The evidence that the plaintiff claimed the court did not consider, the court clearly did consider.

Despite giving the plaintiff a chance to respond as to why the court should not award sanctions, he was unable to come up with a reason. The court, in issuing sanctions, considered his action throughout the course of the litigation and did not find his argument that he filed the new restraining order, because he believes that that is what the motion to vacate and transfer required him to do, persuasive.

Motion to Open – Effect of Contempt on Employment

Hall v. Hall, Conn. (2020)(Kahn, Robinson, Palmer, McDonald, D’Auria, Mullins, and Ecker; trial court - Tindill) - During the pendency of the dissolution action, the parties entered into a stipulation that funds being held in escrow, in excess of \$500,000, be deposited into a joint bank account of the parties which would require dual signatures before any withdrawals. The parties established a bank account to which the monies were deposited, but the bank account permitted online banking and transfers of the funds. On two separate occasions, the Husband unilaterally withdrew funds. The first was on April 28, 2015 when he withdrew in excess of \$237,000. The second time was on September 22, 2015 when he withdrew the remaining balance of in excess of \$70,000. He claimed that the first withdrawal was done because the Wife had previously struggled with addiction and squandered funds. He was concerned that she would go on another bender and do exactly that. The Wife filed a motion for contempt, which the trial court granted. The Husband’s motion for reconsideration was denied.

Shortly thereafter, the parties entered into a separation agreement which provided that they would file a joint motion to open and vacate the contempt findings, believing that such a finding could interfere with the parties’ future employment. The parties filed the joint motion which was denied by the court without a written decision. The Husband, who had appealed the underlying contempt finding, amended the appeal to include the denial of the motion to open and vacate. The Appellate Court ordered the trial court to articulate its findings with respect to the denial of the motion. In part, the trial court, in its articulation, stated that there were three violations by the Husband: setting up the bank account which was not in accordance with the stipulation and the two unilateral withdrawals. At the time of the appeal, the Husband attempted to argue that he withdrew the sums based upon the advice of his counsel. While he testified that he had consulted with counsel prior to withdrawing funds, he did not present to the trial court an assertion that he relied on the advice of counsel. In addition, there was no proof provided that the judgment of contempt would have a deleterious impact on his career.

Holding - The trial court did not abuse its discretion in finding the Husband in contempt. The trial court did not abuse its discretion in denying the motion to open and vacate.

Rationale - The first time that the Husband made a claim that he relied on advice of counsel, was in the motion for reconsideration. However, in that motion, he failed to

submit sufficient evidence to substantiate and warrant a reconsideration of the ruling by the trial court with respect to contempt. Despite the fact that the account was set up, knowing that it did not comport with the court order to require dual signatures for any withdrawal, there was never a modification made of that order requested by the Husband. The Husband learned in August 2015 that the Wife had relapsed, but did not withdraw the balance of the funds until a month later. In response to a question by his own attorney, he stated that he waited so that he could speak with his counsel about this situation. He had also indicated that after some conversations with his counsel, on two occasions he elected not to withdraw funds from the account. He also believed that he should not be held in contempt because he was consulting with his counsel throughout the entire process. There simply was not enough within the motion for reconsideration that pointed to a claim that the actions he took were all in reliance on advice of counsel. The Husband provided email exchanges between he and his counsel which were not clear in advising him to take the funds.

The mere fact that the parties agreed to vacate the finding of contempt does not mean that the court is required to approve the agreement. There was no evidence before the court that there was a negative impact on his employment as a result of the contempt motion. He certainly would not be the only litigant in front of the court subject to the contempt powers.

Motion to Open – Fraud

Longbottom v. Longbottom, 197 Conn. App. 64 (2020)(Harper, Prescott, and Bright; trial court – Nastri) - The marriage of the parties was dissolved in 2012. At the time of the dissolution, the parties agreed that the court would retain jurisdiction with respect to an educational support order. The Husband filed a post judgment motion to modify the educational support order. The court instructed the parties to exchange tax returns and other financial documents to see if there were issues either side had with respect to the others documents. The Wife brought to the court's attention a concern that the Husband's financial affidavit did not list the proceeds from the sale of certain stock options received by the Husband. In fact, those stock options were listed on his financial affidavit as an asset and were contained within the income set forth on the 2016 W-2. The trial court allocated the college educational expenses 45% to the Wife and 55% to the Husband. The Wife filed a motion on the basis of disclosure and a motion to modify the educational support order. The trial court denied the Wife's motion.

Holding - The trial court did not abuse its discretion in denying the motion to open in the motion to modify.

Rationale - Because she received information from the with respect to the stock options, she did not meet her burden and establish probable cause that there was fraudulent non-disclosure. Since the Wife did not meet her burden to establish probable cause of fraudulent nondisclosure, likewise there is no basis upon which to modify the underlying order as a result of the nondisclosure.

Preservation of Issue for Appeal

DeChellis v. DeChellis, 190 Conn. App. 853, cert. denied, 333 Conn. 913 (2019)(Elgo, Moll and Bear: trial court – Tindill) - The parties' marriage was dissolved in 2009. Subsequently, the parties engaged in extensive post judgment litigation and in 2012 elected to arbitrate certain disputes. One of the issues submitted was the question of attorney's fees. On September 8, 2015, the arbitrator sent an email to the parties' counsel that they must apportion their time in the affidavits for counsel fees to each specific motion for which they are seeking an order. When Truax submitted one affidavit of counsel fees, counsel for the Husband objected based upon the arbitrator's order. There was then a disagreement as to whether that order had been modified. On the basis of that, the arbitrator gave Truax two weeks to do affidavits complying with the September 8 order. Subsequently, Truax submitted 72 affidavits of attorney's fees. The Husband argues on appeal that the arbitrator should not have allowed Truax to submit additional affidavits. There was no claim that the award of fees regarding Truax' efforts to comply with the arbitrator's order failed to conform with the submission.

With respect to Cohen's fees, there was an agreement on the record that his fees could be heard as part of the original motion for fees filed by Truax. The Husband claimed that Cohen was not owed the amount sought. He never made the argument that it did not conform with the submission.

The Wife filed a motion to confirm the arbitration award and the Husband filed a motion to vacate the arbitration award. As part of the Husband's motion to vacate, he argued that the arbitrator engaged in evidentiary misconduct in awarding fees. In the appeal, he is now claiming that the award of fees should be vacated because they did not conform to the submission.

Holding – The Husband did not preserve his claim on appeal with respect to counsel fees.

Rationale - The Husband's claim on appeal was not raised distinctly or functionally before the court. All he stated was that they were improperly awarded. There was never any claim the Husband made claiming that the award of fees to compile the 72 affidavits did not comply with the made to the court in the motion to vacate and therefore it is not appropriate for appeal. It was also not appropriate to review the award of Cohen's fees under the plain error doctrine as there was no showing of a plain and obvious error or the resulting manifest injustice, especially when he agreed that the arbitrator could decide his fees.

The arbitrator issued attorney's fees relating to the Wife's post judgment motion to reargue, correct, clarify and/or articulate the judgment, in an amount in excess of \$301,000. He claimed that this violated the separation agreement provision providing for each party to be responsible for their own counsel fees. Before the arbitrator, the Husband argued, not that an award of fees for this issue would be contrary to the dissolution judgment, but rather that the Wife had not shown that she lacked sufficient

assets to pay her own fees. In addition, he argued that the arbitrator based the award of fees on current assets instead of looking at the dissolution assets. These claims were never argued before the court.

Substitution of Executor – Motion to Open

Foisie v. Foisie, Conn. (2020)(D’Auria, Mullins, Kahn, Eckert, and Vertifeuille; trial court – Carbonneau) – The marriage of the parties was dissolved in 2011 when the court approved their separation agreement. In 2015, the Wife filed a motion to open claiming fraud or mutual mistake and, in particular, that the Husband had several million dollars in a Swiss bank account which he never disclosed. The motion was labeled a motion to open the judgment of dissolution, but the request sought was for the court to reexamine the financial resolution in light of the claimed fraudulent non-disclosure of assets. The parties agreed to the motion to open to permit discovery on the issues raised in the motion to open, without the necessity of an *Oneglia* hearing. The Husband did not comply with the requests for production and with the court orders that he comply with production. Before the motion to open was heard the Husband died. The Wife sought to substitute his executors which motion was denied by the trial court. The trial court reasoned that the motion to open filed by the Wife would reinstate the marriage, that the Husband’s death dissolved the marriage, and substituting the executor would serve no purpose as the court could not redissolve an already dissolved marriage.

Holding – The trial court erred in failing to substitute the executor for the Husband as the motion to open did not seek to reinstate the marriage, but instead sought to reallocate the finances as a result of the Husband’s alleged fraud.

Rationale – Unless one of the three exceptions in C.G.S. § 52-599 applies, the court is to substitute the executor in place of the deceased. The only exception that would possibly apply is that the death of the party would render the cause of action defeated or useless. Since the court is not being asked to redissolve the marriage, but rather to address the fraudulent non-disclosure and to redistribute assets valued as of the date of the dissolution of the parties’ marriage, there is no reason not to substitute the executor.

Property Division

Effectuation of Judgment

Almeida v. Almeida, 190 Conn. App. 760 (2019) (Elgo, Keller and Bishop; trial court – Ficeto) - The parties' marriage was dissolved in 2015. At the time of the dissolution, the court found that the husband acquired 4 properties. There is a property in Hartford which he claimed to only be a 50% owner. He claims he has a business partner who owns 50% through a business entity, Talyah Home Improvement LLC, which he testified he had an interest in as well. He indicated that he was able to buy properties with no loans or mortgages because his sister brought him \$100,000 from Brazil and he used that money as the seed money to flip houses. The trial court did not find him credible, especially with respect to the finances, and ordered him to vacate and quit claim to the Wife all interest in the Hartford property. He signed a quit claim deed on December 4, 2015. The parties also entered into an agreement in which the Husband agreed to do a substitution of agent and in turn change of a member with respect to the LLC to allow the Wife to collect the rents going forward. In 2017, the Wife filed a motion for contempt and argued in part that she learned that there is another person on the deed of the property. She further claimed that the Husband never stated that he was only a one-half owner of the property. The court entered an order upon agreement of the parties that the Wife would withdraw the motion for contempt and proceed on a motion for clarification. In the clarification, the court indicated that it was the intent of the court that the Wife acquire 100% of the property and be the sole owner and ordered the Husband to quit claim all interest to her. The Husband appealed claiming that it was an improper modification of the dissolution judgment.

Holding - The trial court erred when it ordered the Husband to quit claim all interest to the Wife of the Hartford property as that modified the judgment. The case was remanded with direction to deny the motion for clarification.

Rationale - Ultimately, the clarification added a new element to the property division, requiring the Husband to transfer 100% ownership to the Hartford property, which he could not do. Contrary to the Wife's claims, the Husband testified that he only had a 50% ownership interest and that's what his financial affidavit reflected.

Casablanca v. Casablanca, 190 Conn. App. 606, cert. denied, 333 Conn 913 (2019) (Alvord, Keller, and Beach; trial court – Nastri) - The parties were married in 2005 and the marriage was dissolved in 2016. The separation agreement provided that the Husband would transfer to the Wife by way of a QDRO 50% of the value of the marital portion of his benefit of the city of Hartford municipal retirement funds minus the amount of the Wife's Social Security benefit. This benefit was to be paid as a separate interest over the Wife's life. The Wife refused to sign the QDRO that was prepared. Thereafter, she filed the first of many motions to open the judgment. The motion to open at issue is one filed in 2017 by the Wife claiming mutual or unilateral mistake. The Wife believed that she was to receive 50% of the marital portion of the monthly pension benefit until she became eligible to receive Social Security benefits, approximately 30 years in the

future, at which time her benefit would be reduced. However, under the proposed QDRO, her share was immediately reduced by the amount of Social Security she was anticipated to be receiving at age 67, \$1,479 a month, resulting in a monthly payment to her of \$242.75. At the time of the hearing, the Husband filed a motion in limine to preclude the Wife from presenting any parole evidence. The trial court partially granted the motion in limine indicating that extrinsic evidence cannot be used to vary the contractual terms of a fully integrated written agreement. After a hearing, the court found that there was no mutuality of mistake, no mutual mistake or unilateral mistake and that it is not unconscionable or inequitable to enforce the contract, ordering the Wife to sign the QDRO. At a re-argument, the court indicated it considered whether the provision with respect to the retirement assets was ambiguous, concluding that it was not.

Holding - The provision with respect to the retirement asset was ambiguous and therefore the court should have permitted the use of parole evidence. The case was remanded for a new hearing to determine the intent of the agreement.

Rationale - The operative motion for the court to force the Wife to sign the QDRO was the Husband's motion to compel her to do the same. The Husband attempted to argue that the Wife had no basis to argue anything against the motion inasmuch as they never filed a written objection to the same. While the Wife's counsel attempted to determine from the Wife why she did not sign the QDRO, the trial court would not allow that questioning the contract and therefore seek parole evidence, contrary to the ruling on the motion in limine, which was the law of the case.

Extrinsic evidence is permitted to explain an ambiguity appearing in the instrument. If the language of the contract is ambiguous, there is a factual determination of the parties' intent. A contract is unambiguous when the language is clear and conveys a definite and precise intent. However, a court will not torture words to find an ambiguity where none exists under ordinary meaning and interpretation of the words. There is an ambiguity in that the Wife's Social Security statement provides for three different retirement amounts, at age 62, 67 and 70. In addition, the language could be interpreted as requiring a discount based upon the retirement amount at full retirement or when she elects to receive Social Security benefits. The court also had third interpretation requiring a lump sum payment contribution to be converted to a present income stream as well to determine the deduction. Both of these are reasonable interpretations.

Morton v. Syriac, 196 Conn. App. 183, cert. denied 335 Conn. 915 (2020)(Devlin, Alvord, and Elgo; trial court – Cole-Chu) - This action is a civil action for permanent injunction. The parties were previously married. The defendant-Husband had received property which his family had owned for some time. The Husband's father had received 34.4 acres of land which bordered the Old Connecticut Path (OCP), an old highway that ceased being a highway and a public easement in 1922. When the Husband's father received the 34.4 acres, part of that encompassed the westerly portion of the OCP. Despite this, the deed into the Husband's father, attempted to grant a use to the entire OCP. When the Husband's father transferred the property to the Husband, he attempted to do the

same thing with respect to the OCP. The Husband transferred to his brother a 1-acre piece of land, together with a right-of-way over the West branch of the OCP. His brother then reconveyed the property back to him, together with the easement over the West branch of the OCP. Under the separation agreement, the land owned by the parties was divided into two parcels and the Husband had to quit claim his ownership in 95 Rocky Hill Road to the Wife and he would retain 97 Rocky Hill Road. In addition, the separation agreement provided that he would allow the Wife and her agents access to her property through his property until he, at his sole expense installed a driveway similar to what he presently has.

In the deed to the Wife, it conveyed an easement to permit her to use the OCP. With respect to her property, without a right-of-way to the east, or to the west over the OCP, her property is landlocked. The Husband holds title to a stretch of the OCP that goes in a westerly direction. The Wife has a claim to a portion of the path leading easterly, but there are others that possess other claims to that strip that are adverse to hers. The Husband has obstructed her access across his land by using hay baling equipment, boulders, wire fencing and a black metal gate.

The Wife sought relief from the Family Court and obtained a post judgment order instructing the Husband to cease obstructing the easement. As a result of that order, he claims to have provided her with a similar driveway along the East branch so that she no longer should access the West branch.

Ultimately, the trial court found that the Husband did not possess marketable title to the East branch of the OCP, has not yet provided her with a similar driveway and therefore has not complied with the separation agreement. Furthermore, the trial court issued a permanent injunction from impeding her access over the westerly easement.

On appeal, the Husband challenges the ability of the court to enter the injunction as well as made a claim that the court modified the separation agreement.

Holding - The trial court did not abuse its discretion in granting a permanent injunction against the Husband. Additionally, the court did not modify, but rather effectuated the terms of the judgment.

Rationale – An order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the parties timely compliance there with. The Husband has not complied with the terms of the separation agreement because he is not provided her with a similar driveway.

Property Constituting the Marital Estate

Al-Fikey v. Obaiah, 196 Conn. App. 13 (2020)(Devlin, Moll and Beach; trial court – Tindill) - The parties were married in 1997 in Egypt. They have two daughters who are currently adults. Prior to the marriage, the Husband acquired a parcel of land in Egypt which would have been their home if they moved to Egypt. The parties moved to Cos Cob in 2003, acquiring the marital residence on East Putnam Avenue. In 2007, the Husband entered into a financial relationship with another to acquire property in New York at

Mohegan Lake. Ultimately, the third party was unable to obtain a mortgage and they entered into an agreement that the Husband would at some future date return title of that property to the third party; despite that agreement, as of the date of dissolution, the Husband still had title to this property. The parties separated in 2009 when the Husband moved out of the home. In 2011, the Husband acquired numerous properties, some of which were through funds received from his mother to either purchase in his name or on her behalf. There were eight properties acquired in Bridgeport, one of which the Husband was residing in at the time of the dissolution.

Until 2012, the Husband was employed as an information technology consultant earning \$117,000 per year. He was laid off from this employment in 2012. Since that time, he's been working in customer service earning significantly less than when he was an information technology consultant.

This action commenced in 2013 and trial commenced on May 1, 2015, with a memorandum of decision entering on October 31, 2017 after 26 days of trial. The trial court found all of the properties were part of the marital estate. In addition, the marital residence was foreclosed prior to the dissolution judgment and the trial court blamed the Husband for that occurring. In the court's judgment, it awarded the New York property at Mohegan Lake to the Wife, the Husband retained the eight properties in Bridgeport, and the parties retained whatever interest they had in Egyptian real estate.

Holding - The trial court did not abuse its discretion in finding that the Husband had an earning capacity. The trial court did not abuse its discretion in making the distributions regarding the real property. The trial court was not clearly erroneous in finding the Husband at fault for the breakdown of the marriage.

Rationale - The trial court finding that the Husband had abruptly left the marital home and failed to return in the four years between leaving and the dissolution action commencing was sufficient in finding him at fault for the breakdown of the marriage.

The trial court did not find the Husband's testimony credible with respect to his income and employment. The Husband tried to contend that his qualifications are outmoded for working in the information technology consultancy realm. There was no testimony other than that from the Husband to suggest his qualifications were outmoded. Additionally, he has done nothing in order to try to improve his chances for getting additional employment in this field.

The trial court's decision with respect to the property distribution was certainly within its broad discretion. The record was complicated as to the Husband's ownership. Awarding separate residences to each party was within the court's discretion and reasonable.

Restraining Orders

Kathryne S. v. Swetz, 191 Conn. App. 850 (2019)(Alvord, Bright and Bear; trial court – Bozzuto) - The petitioner filed an application for relief from abuse, at a time when she was residing with her life partner and his son who was the defendant. The petitioner stated that the defendant screamed in her ear, verbally attacked her covering her in spit, followed her throughout the house, use derogatory language, barged into her room to take photographs of her and her nightwear and he was arrested for assaulting her in 2015. At the time of the hearing, the petitioner offered a flash drive with an audio recording which she had taken to the Police Department. The court advised the Defendant with respect to his Fifth Amendment right and he invoked his Fifth Amendment with respect to the recording. The court indicated that obviously there were things on the tape he did not want the court to hear. It was not admitted into evidence. The defendant argued that there were no accusations with respect to imminent physical harm in either her restraining order or the testimony before court. The trial court issued a no contact order for one year.

Holding - The trial court did not abuse its discretion in granting the restraining order.

Rationale - The trial court found that there was a continuous threat of present physical pain or injury, not stalking or a pattern of stalking. Courts have previously found that even one incident of physical injury and a present continuous threat will satisfy the statutory requirements for issuing a restraining order. Contrary to the Defendant's assertions, there need not be multiple incidences of physical abuse before court can issue a restraining order, which would defeat the purpose of the statute. In addition, the court did not draw an adverse inference with respect to the defendant asserting his Fifth Amendment privilege, but merely commented that there was something that he did not want the court to hear. Even if the court did draw an adverse inference, it was harmless error as there was enough in the record for the court to grant the restraining order. In addition, the court had indicated that the evidence just tipped the scales for purposes of giving her the restraining order. The defendant argued that the court did not apply the proper standard. The standard is the preponderance of the evidence, which some judges colloquially referred to as the just tipping the scales.