B05 - Family Law Cases: A Year in Review (2024CLC-B05)

Monday, June 10, 2024

10:15 a.m. to 12:15 p.m.

Connecticut Convention Center

Hartford, CT

CT Bar Institute, Inc.

CT: 2.0 CLE Credits (General)
NY: 2.0 CLE Credits (AOP)

Table of Contents

Approved by the House of Delegates October 19, 2020

LAWYERS' PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

Competency:

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

Responsibility:

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- 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 my adversary of any likely problem;
- I will make every effort to agree with my adversary, 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;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- 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.

Mentoring:

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- 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, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- 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; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer’s conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

Faculty Biographies

Campbell D. Barrett

Campbell chairs the Family Law and Appellate Practice groups, both of which have been named "Department of the Year" by the *Connecticut Law Tribune.* In 2023, he was named one of the Top 10 lawyers in Connecticut by *Super Lawyers*. He represents clients in complex, high-income, high-net worth cases across Connecticut and handles all aspects of family law, including asset division, alimony, child custody, child support, appeals, prenuptial agreements and postnuptial agreements. He has acted as lead counsel on more than sixty appeals to the Connecticut Supreme and Appellate Courts, including many important cases of first impression.

Campbell is a fellow of the American Academy of Matrimonial Lawyers and in 2019 served as the president of the Connecticut Chapter. He has been named a Top 50 Connecticut *Super Lawyer* and a Top 100 New England *Super Lawyer* multiple times. He was also named "Family Lawyer of the Year" by *Best Lawyers* for 2018, 2020, 2022 and 2024. In 2005, he received the Judge Maxwell Heiman Award by the Hartford County Bar Association. He presently serves on both the Connecticut Bar Examining Committee and the Connecticut Child Support Guideline Commission.

He has lectured and written extensively on family and appellate practice, and has been a guest family law expert on National Public Radio. He is the co-author of the book, *Same Sex Marriage: The Legal and Psychological Evolution in* America, which in 2006 was awarded the American Psychological Association's "Most Distinguished Book in Lesbian, Gay, and Bisexual Psychology." He has also authored chapters in family law treatises on the definition of property and prenuptial agreements.

David A. McGrath

David McGrath is the managing partner at Louden Katz McGrath & Bryan. Throughout his entire legal career, David has focused his practice exclusively on family law, where he quickly established a reputation as a skilled and successful divorce lawyer.

- J.D., with Honors, University of Connecticut School of Law.
- Chair, Connecticut Bar Young Lawyers Section (2018-2019).
- Executive Committee, Connecticut Bar Young Lawyers Section (2010-2021).
- Connecticut Bar Family Law Executive Committee (2011-present).
- Named “Rising Star” by Connecticut Bar Family Section (2011).
- Named “Star of the Year” (2012), received “Chair Award” (2016) and “Achievement Award” (2018) from Connecticut Bar Young Lawyers Section.
- Received Hartford County Bar 2018 Judge Maxwell Heiman Memorial Award.
- Recognized in the area of Family Law by Best Lawyers in America (2021-present).
- Named “Rising Star” (2013-2020) and “Super Lawyer” (2021-present) by *Super Lawyers*.

- Received Martindale-Hubbell's AV Preeminent peer rating for highest level of professional excellence (2018-present) and Platinum Client Champion status (2019-present).
- Elected as a Fellow of the Connecticut Bar Foundation James W. Cooper Fellows Program (2019).
- Elected as a Fellow of the American Academy of Matrimonial Lawyers (2021).
- Court-appointed Special Master (Hartford Family Court, New Britain Family Court, Middletown Family Court).
- One of 37 lawyers in Connecticut named "New Leaders in the Law" by *Connecticut Law Tribune* (2016).
- Authored articles for the *Connecticut Law Tribune* on legislative changes impacting family law, notably revisions to rules in arbitration pertaining to children and coercion as a form of domestic abuse (2021).

David resides in West Hartford with his wife and two children.

Louise T. Truax

Attorney Truax has practiced family law throughout her career. She began practicing at Berkowitz & Balbirer in Westport, before founding Lax & Truax, LLC in Fairfield in 1998. She is now a founding partner in the firm of Reich & Truax, PLLC in Southport.

Attorney Truax is a member of the American Academy of Matrimonial Lawyers (AAML), a national organization with the top family lawyers from across the country. As a member of AAML, she is active on numerous committees regarding child custody issues, served as Treasurer and CLE chair for the national organization in 2014, culminating in the receipt of the Fellow of the Year Award.

Attorney Truax frequently lectures both in Connecticut and across the country regarding family law and child custody issues. She is the General Editor and author of three chapters of Connecticut Family Law, a publication of LexisNexis, which is updated annually.

Family Law Cases: A Year in Review
(2024CLC-B05)

2024 Connecticut Legal Conference
Connecticut Convention Center
June 10, 2024
10:15 a.m. – 12:15 p.m.

Agenda

Presenters:
Campbell D. Barrett, Pullman & Comley LLC, Hartford
David A. McGrath, Louden Katz & McGrath LLC, Hartford

Moderator:
Louise T. Truax, Reich & Truax PLLC, Southport

2:30 p.m. - 4:30 p.m.: Review of Appellate and Supreme Court Family Law Decisions released between June 2023 through May 2024

Family Case Law Update for Connecticut Legal Conference 6/10/24

Materials by David McGrath, Esq.
Louden, Katz, McGrath & Bryan, LLC
638 Prospect Avenue
Hartford, CT 06119
Phone: (860) 231-7150
david@lkmbfamilylaw.com
www.lkmbfamilylaw.com/blog

Covering family law Supreme and Appellate Court cases with advance release dates From June 5, 2023 through May 15, 2024

Table of Contents

A.A.M. v. M.Z. 225 Conn. App. 46 (2024) (child turning 18 mooted appeal as to custody and parenting issues)

Officially released April 23, 2024

In Short and only: The issues related on appeal were limited to challenges to the trial court's rulings related to custody and visitation and the relief requested was entirely devoted to access to the child. The child turned eighteen. Despite the fact that the appeal involved issues of contempt, the Appellate Court dismissed the appeal as moot on the basis that no practical relief could be afforded.

A.D. v. L.D. 220 Conn. App. 172 (2023) (constitutional issues & abuse of discretion & custody modification)

Officially released June 27, 2023

In Short: The trial court's suspension of Father's access and criteria for filing a future motion to modify did not violate his federal constitutional rights to family integrity and did not constitute abuse of discretion. The preponderance of the evidence standard is the appropriate evidentiary standard for modification of custody and did not violate Father's right to due process.

The parties were married in 1999 and had six children. They were divorced in 2018 after a twenty-day trial with the court adopting the parties' agreement as to joint legal custody with primary residence to Mother. Father initially had every other weekend and Wednesdays after school with the three younger children, and weekly reunification with the older three children.

The parties then engaged in substantial post-judgment litigation culminating in an eighteen-day trial before Judge Diana. The trial court issued a memorandum of decision in 2020 resolving forty-one outstanding motions, including Mother's motion for sole legal and physical custody of the minor children.

The trial court found that the children had not visited with Father since 2018, after an incident when Father broke his son's phone and slapped two of the children. Since that date, the children had rejected all Father's efforts to exercise access. The interactions and communications between the children and Father demonstrated extreme and crisis levels of disfunction. The result of the communication and attempted interactions included deleterious impacts on the children's health such as panic attacks, missed school and extracurriculars, police and DCF involvement, Father's arrest and a protective order. The trial court found that there had been a material change in circumstances. Reunification therapy had been terminated by the therapist after only two sessions based on the therapist's conclusion that continued therapy was not appropriate under the circumstances.

The trial court found that Father's obsession with proving that Mother had an affair during the marriage had continued and the same obsessive conduct now pertained to Father's belief that Mother had alienated the children, for which the trial court found no credible evidence. Those behaviors, coupled with Father's own actions and communication and his belief that he is blameless contributed to Father's lack of relationship with the children. The trial court found Mother to be credible and Father to be defiant and misguided.

The trial court ordered that Mother have sole legal and physical custody. The trial court suspended Father's access until further order and that he have no contact with the children by any means. The children were provided the option of a dinner visit with Father every Wednesday at a local restaurant. Mother was ordered to ensure that the children meet with a reunification therapist at least twice per year to reassess the possibility of initiating reunification therapy. Father would be permitted to file a motion to modify upon his completion of the Intimate Partner Violence Program ("IPVP"). Father appealed.

Father's first claim on appeal was that the trial court violated his federal constitutional right to family integrity, in that the trial court terminated his custody, visitation and access and effectively terminated his parental rights without means to reinstate them, by awarding Mother control over potential access.

The Appellate Court noted that a parent's interest in the care, custody and control of their children is a fundamental liberty protected by the fourteenth and ninth amendments to the United States Constitution. However, the Appellate Court found that the trial court's orders did not effectively terminate Father's parental rights, but instead suspended access and established a mechanism for reunification. Father's claim that the only potential access he may have was through Mother and that she had alienated him from the children was unsupported by the evidence.

Father's second claim on appeal was that the trial court abused its discretion by rendering a near impossibility that he can ever regain visitation with his children. Father argued that Mother controlled whether the children would meet with the reunification therapist and that he could not complete the IPVP without the participation of Mother and the children. The Appellate Court noted that the reunification therapy was not required before Father could file a motion, only the IPVP. The Appellate Court took judicial notice of the fact that Father had already completed the IPVP at the time of the decision, and had already filed (and argued and lost) subsequent motions to modify, so his claim as to impossibility must fail.

Father's third claim on appeal was that the application of the preponderance of the evidence standard instead of the clear and convincing evidence standard violated his due process rights. The Appellate Court found that the clear and convincing evidence standard is required for termination of parental rights

proceedings and that the preponderance of the evidence standard is the proper standard of proof for modification of custody, spending some time reviewing the history of the application of such standards. With termination of parental rights, the power of the state is brought against the parent(s) and may be brought multiple times to permanently terminate a parent's rights, whereas in a custody dispute two parents are in dispute with each other. The Appellate Court found that Father's due process rights were not violated.

The Judgment was affirmed.

Anderson-Harris v. Harris 221 Conn. App. 222 (2023) (incomplete evaluations at time of trial; no right to articulation)

Officially released August 22, 2023

In Short: This case is a disaster of mental health, repetitive *ex parte* applications and unsubstantiated repeated allegations of sexual abuse and obsession therewith to the detriment of the children. Its precedential value, if any, is that (1) a trial court may cancel evaluations rather than completing them before trial when circumstances call for such, and (2) there is no right to an articulation when the memorandum of decision is thorough. Although this was unchallenged on appeal, it is also a reminder that the trial court may vest custody or parenting (including *pendente lite*) with a third party, when the need to do so is supported by the facts.

The parties were married in 2007 and had twins in 2013. Wife was a stay-at-home mother and Husband worked outside the home. The parties suffered marital strain from miscarriages and substantial financial insecurity to the point of food insecurity and eviction threats. Wife suffered from substantial mental health issues and was diagnosed and treated for bipolar disorder, including inpatient treatment. Wife's mental health trajectory resulted in Husband changing jobs. Wife did not follow treatment recommendations, began to accuse Husband of sexually abusing the children, and began taking the children to the casino so that she could gamble on a regular basis.

Wife filed for divorce in July 2020, and filed the first of many ex parte applications, alleging that Husband was a danger to the children and that sexual abuse occurred, which applications were all denied. Wife began removing the children from school and "disappeared" with the children for one month without notifying Husband, during which time she lived in homeless shelters. The trial court ordered a comprehensive family relations evaluation and later entered an order cancelling such evaluation after repetitive *ex parte* applications interfered with completing the evaluation. A *Guardian Ad Litem* was appointed during the *pendente lite* period. Both DCF and the police were involved with the family, resulting in no safety plan or substantiation nor any criminal charges.

The trial court held a hearing in March 2021 on all outstanding motions during which both parties and the GAL testified, resulting in a disturbing picture including Wife having an inappropriate and harmful obsession with the cleanliness of the children's vaginas and Husband failing to take adequate steps to control the situation. At the conclusion of the hearing the trial court gave the parties the option of temporary custody being vested either with the paternal grandmother or DCF. The trial court placed the children temporarily with the paternal grandmother, terminated the family relations referral, and ordered the parties and children to participate in a psychological evaluation. The parties were unable to afford the evaluation and it was not completed.

Trial was scheduled to begin in July 2021. Wife filed a motion to continue alleging failure to complete the psychological evaluations, which motion was denied. The trial court offered Wife the option of a limited issue-focused family relations evaluation into whether she would be capable of accepting that Defendant was not a sexual predator, as a predicate to an order of joint custody. The trial court then bifurcated the trial into two parts, dissolution of marriage and property division, and then custody and parenting. Wife thereafter continued to make social media allegations regarding sexual abuse by Husband and revoked her authorizations to family relations for purposes of the evaluation. Husband testified that Wife made numerous statements regarding her intention to disappear with the children.

The trial court thereafter issued a memorandum of decision on all aspects of the case dissolving the marriage and awarding sole legal and physical custody of the children to Husband. Wife's access was limited to two video meetings per week at consistent dates and times to be chosen by Husband.

Wife was ordered to pay $119/week child support based on an earning capacity of $18,000-$21,000/year based on historical earnings as a seamstress. Husband was ordered to pay $1.00 per year alimony for five years and was awarded his retirement accounts free and clear of any claim as well as both cars (subject to large debts). Husband was awarded some $2,750 in attorney and expert fees.

Wife appealed, arguing that (1) the trial court improperly rendered judgment of dissolution before court-ordered evaluations were completed, (2) the trial court abused its discretion in its financial orders including child support and alimony, and (3) the retirement of the trial judge rendered an inadequate record for review, necessitating a new trial.

As to Wife's first claim on appeal regarding incomplete evaluations, CGS § 46b-7 and PB § 25-60 and § 25-60A provide that a case shall not be disposed until such reports are completed. Husband argued that no such evaluation was pending as of the Judgment. The Appellate Court determined that Wife's constitutional claim as to due process for such violation was not preserved as Wife did not raise such

claim before the trial court and did not request nor brief *Golding* review. The Appellate Court reviewed Wife's claim that denial of a continuance request constituted abuse of discretion and found that such denial was not arbitrary, Wife had several months to prepare for trial, and at the time of the continuance denial, the issue of custody was to be deferred for a final resolution after evaluation (which evaluation ultimately did not take place because Wife refused to cooperate).

As to Wife's second claim on appeal regarding financial orders, Wife alleged that the record was "impossible to follow with all aspects relating to the division of property and the financial orders" and abuse of discretion. The Appellate Court noted that no single criteria is preferred over others, and that the trial court is not required to recite the statutory criteria or make express findings as to each factor. The Appellate Court analyzed the findings of the trial court to justify its decision and the facts before it and found no abuse of discretion.

As to Wife's third claim that the retirement of the judge rendered the record inadequate, Wife argued that she was prevented from obtaining an articulation from Judge Schofield. The trial court denied Wife's motion for articulation on the basis of retirement. The Appellate Court thereafter denied the request to set aside such order. Wife sought to analogize this case to *Zaniewski* where the trial court issued a memorandum that contained essentially no factual findings. The Appellate Court found that this case was readily distinguishable based on the thorough memorandum of decision setting forth its findings and credibility determinations. The Appellate Court determined that no articulation was necessary, and no new trial was required.

The Judgment was affirmed.

Anketell v. Kulldorff 223 Conn. App. 345 (2023) (post-judgment interest for delayed QDRO transfer)

Officially released January 16, 2024

In Short: An award of post-judgment interest by the trial court, pursuant to C.G.S. § 37-3a, was an appropriate equitable remedy for a prolonged delay in the transfer of retirement assets.

The parties married in 2011 and were divorced after a two-day trial in 2018. The trial court ordered that Husband transfer $175,000 to Wife from retirement accounts of his choice by QDRO, subject to adjustment for gains or losses prior to the Judgment. Husband previously appealed issues unrelated to his retirement, unsuccessfully, which appeal took years to conclude.

In 2022, Wife filed a postjudgment motion to implement the court orders. This was followed by a motion for clarification as to whether the award was to be adjusted for gains and losses until date of transfer and requesting statutory interest if it is not subject to adjustment for gains and losses.

An evidentiary hearing was held in 2022. The trial court clarified that gains and losses were only intended through date of dissolution, but found that Defendant's appeal of the judgment and further delays served to stay the transfer and use of funds for forty-six months. The trial court found that C.G.S. § 37-3a provided an equitable and appropriate remedy and awarded 5% interest (rather than the maximum 10% permissible under statute) for the wrongful detention of the monies. The trial court awarded additional prospective interest in the event of any future delay.

Husband appealed the award of interest, specifically for the time period after the prior appeal had ended. Husband argued that Wife's attorneys were responsible for the delay.

The Appellate Court applied the abuse of discretion standard to the interest award pursuant to C.G.S. § 37-3a. The Appellate Court noted that the statute does not use the word "wrongful" although prior Supreme Court cases have regularly employed the term. In analyzing what evidence, if any, of "wrongfulness" is required, the Appellate Court determined that it is sufficient to prove the underlying legal claim, namely, that money was due but was not paid.

The Appellate Court declined to review materials in Husband's appendix which were not part of the record and found no abuse of discretion by the trial court. Wife had lost the use of the $175,000 for a substantial period of time from its intended transfer date, and that was sufficient to support a wrongful detention for purposes of C.G.S. § 37-3a. There was no evidence in the record to support the claim that Wife had refused to accept the money.

The Appellate Court also rejected Husband's claim as to an award of future interest, in the event of a future unnecessary delay in the QDRO. Such future award would still not be self-executing and would require findings as to the responsibility of any unnecessary delay, and such determination has not yet been made.

The Judgment was affirmed.

Buchenholz. v. Buchenholz. 221 Conn. App. 132 (2023) ("cause for the breakdown" does not equal "intolerable cruelty"; the trial court has discretion regarding alimony)

Officially released August 15, 2023

In Short: (1) a creative (but not particularly compelling) argument to construe testimony and findings about the cause for the breakdown of the marriage as modification of the complaint to "intolerable cruelty" and an ambush violating due process was unsuccessful on appeal; and (2) the trial court is not bound by half the length of the marriage for alimony awards and has substantial discretion to make factual findings, consider the statutory criteria, and enter such orders as it sees fit.

The parties were married in 2006 and had no children. Wife initiated the divorce with a complaint based on irretrievable breakdown. The case was tried over five days over six months in 2021, with testimony of both parties and several exhibits.

The trial court issued a memorandum of decision dissolving the marriage based on irretrievable breakdown. The trial court found Wife's testimony credible as to several incidents of violent sexual intercourse and other sexual assault as well as physical abuse and other malfeasance. The trial court found that Husband was responsible for the breakdown of the marriage. The trial court explicitly amended the complaint to conform to the extensive proof of Husband's fault (but did not mention "intolerable cruelty"). The trial court awarded Wife $425 per week in alimony for nine years. Husband appealed.

Husband's first claim on appeal was that (1) the trial court abused its discretion by purportedly amending Wife's complaint to allege intolerable cruelty, and (2) Husband did not receive adequate notice that testimony would be submitted to support that ground, and thus his due process rights were violated.

The Appellate Court applied plenary review to interpretation of the trial court's judgment (rather than abuse of discretion review to amendment of a pleading). The Appellate Court found nothing to support Husband's claim that the trial court amended the complaint to allege intolerable cruelty. The Appellate Court read the trial court's language as a recognition of the evidence of fault in the context of irretrievable breakdown.

The Appellate Court applied plenary review over Husband's due process claim. The Appellate Court reiterated that nothing in the record supported a claim that the allegation of intolerable cruelty was made, only evidence regarding cause for the breakdown of the marriage (fault). The Appellate Court found that the time for discovery was adequate, no objection was made to Wife's testimony of abuse on

the first day of trial, and no effort was made for continuance or discovery over the six months thereafter during which the trial concluded.

Husband's second claim was that the trial court abused its discretion in awarding alimony of $425/week for nine years, by failing to credit his testimony, leaving him a lower percentage of net income and providing a duration that exceeds half the length of the marriage. The trial court had concluded, *inter alia*, that Husband's testimony regarding his finances was not credible, made factual findings as to the parties' health and incomes, and imputed an earning capacity to both parties. The Appellate Court found no abuse of discretion.

The Judgment was affirmed.

De Almeida-Kennedy v. Kennedy, 224 Conn. App. 19 (2024) (modification of unallocated award; change in residence of child; cohabitation)

Officially released February 27, 2024

In Short: (1) a change in residence of a child between the parties constitutes a substantial change in circumstances, (2) the cohabitation statute applied where the language of the separation agreement did not expressly preclude modification, and (3) there is a clear procedure for modifying unallocated awards of child support and alimony.

The parties had two children and were divorced via separation agreement in 2010. The separation agreement awarded sole legal and physical custody to Wife and supervised access to Husband. The Separation agreement stated that both children were presently special needs children as defined by Connecticut statute and provided that Husband would pay unallocated support of $1,000 per week, until the death of either party, assigning an earning capacity to Husband and precluding downward modification until Wife earned $50,000/year. There was no other language in the separation agreement precluding or limiting modification.

In 2014, the parties modified that award to $900/week by agreement and eliminated the provision restricting downward modification based on Wife's income. The parties agreed to joint legal custody with primary physical custody remaining with Wife.

In 2015 Husband filed a motion to modify his financial obligations which was denied and the decision affirmed in prior appeal.

In 2018, Husband filed the operative motion to modify the unallocated child support and alimony award. The motion alleged, as a legal basis, that the court had not followed the law in making a child support determination since 2010, that he had lost his primary client, that he was under the care of a psychiatrist, and that the separation agreement did not reflect the termination date for alimony contemplated by the parties.

Judge Egan granted Wife's motion to dismiss based on lack of subject matter jurisdiction based on both parties having moved out of the state, Husband appealed the dismissal, and the Appellate Court reversed and remanded for a new trial in a prior appeal.

In May of 2022, Judge Rodriguez held an evidentiary hearing on Husband's motion. Wife did not appear. During the hearing, Husband identified two substantial changes in circumstances, including cohabitation and change in residence of the older child from Wife to Husband.

Husband testified that his understanding of the separation agreement was that alimony was modifiable and, after a nine-year marriage, he did not expect to still be paying alimony thirteen years post-divorce. Husband testified that his elder child had moved in with him in November of 2021. A private investigator hired by Husband testified regarding her qualifications, regarding numerous indicia that Wife was residing with and in the residence of another man, and that Wife had established a business that was registered to an address also owned by that same man. Husband offered the testimony of his 18-year-old child regarding cohabitation, but the trial court discouraged it, stating at one point "I don't need his testimony."

The trial court issued a memorandum of decision denying Husband's motion. The trial court held that Husband failed to prove a substantial change in circumstances, indicated that Husband had unclean hands due to a substantial arrearage, found that he failed to provide satisfactory evidence of cohabitation, found that the private investigator was not credible, noted that the order has consistently been unallocated, and determined that the alimony award was not modifiable based on cohabitation.

Husband appealed, arguing that the trial court abused its discretion in (1) determining that the change in residence of the older child did not constitute a substantial change in circumstances, (2) denying the motion without determining the child support component of the unallocated order, (3) interpreting the

unallocated support obligation as set forth in the separation agreement to be nonmodifiable, and (4) disallowing the testimony of the older child as to the alleged cohabitation of Mother.

The Appellate Court set forth the abuse of discretion and clearly erroneous standards of review that it applied to all issues in this appeal.

As to Husband's first claim on appeal, the Appellate Court held that the trial court's finding that Husband failed to demonstrate a substantial change in circumstances for purposes of child support was clearly erroneous. The Appellate Court emphasized the importance of ensuring that the custodian receives the support payments pursuant to Conn. Gen. Stat. § 46b-84. Husband's testimony that the elder child had moved in with him was entirely uncontroverted and the trial court failed to make any findings based on that undisputed testimony. The Appellate Court brushed aside the trial court's findings of unclean hands in a footnote, indicating that the trial court had decided the motion on the basis of lack of substantial change.

On the first claim alone, Husband was entitled to a new hearing with respect to modification of the child support component of the unallocated order, however, the Appellate Court addressed the second claim on appeal in order to provide guidance on remand. To modify an unallocated award of child support, the trial court must first unbundle the order from the last modification and determine what portion was child support and what portion was alimony. It must then apply the child support guidelines and statutory criteria. In this case, the trial court must work from the 2014 agreement, at which time financial affidavits and a child support guideline worksheet had been filed. That means determining the parties' net weekly income from the 2014 financial affidavits, calculating the presumptive support using the outdated 2005 guidelines in effect at that time, ascertaining the intent of the parties in 2014 as to how the deviated unallocated amount was to be divided, and then applying the current guidelines against current financial circumstances.

The Appellate Court addressed the third and fourth claims on appeal together. The Appellate Court found that the trial court had erroneously interpreted the agreement to preclude modification based on cohabitation. There was no language in the separation agreement precluding modification and the 2014 agreement amended the agreement by removing the restrictions for Wife's income. C.G.S. § 46b-86 provides for modifiability "[u]nless and to the extent that the decree precludes" it. The Appellate Court determined that the trial court "misled" Husband into forgoing his son's testimony as to cohabitation. The Appellate Court also made a very unusual foray into second-guessing credibility determinations, noting that the trial court failed to identify any aspects of the private investigator's testimony that were not credible nor providing any explanation for its wholesale disregard of her testimony. Lastly, the Appellate Court opined harshly on the trial court's reliance on the long history of an unallocated order in this case, finding that it bolstered the conclusion that the trial court applied the wrong standard of law.

The Judgment was reversed and the matter remanded for a new hearing.

F.S. v. J.S., 223 Conn. App. 763 (2024) (award of sole legal and physical custody; mental health diagnosis)

Officially released February 20, 2024

In Short: Wife was awarded sole legal and physical custody, and Husband was awarded only supervised access contingent on his treatment at his own expense. Husband threw the kitchen sink of claims at the Appellate Court. Husband's diagnosis of narcissistic personality disorder was relied upon to an appropriate extent by the trial court in the context of other evidence and the impact of his behavior.

The parties were married and had one child, born in 2011. The parties began divorce proceedings in 2016. The *pendente lite* period was fraught with conflict and litigation, orders were entered precluding the filing of additional motions, a GAL appointment and removal took place, a criminal protective order and violation thereof occurred, a custody and psychological evaluation was conducted, and various permutations of no access, unsupervised and supervised access for Husband were ordered at different times.

The divorce was granted via separation agreement as to financial matters, with the custody matter than referred to the Regional Family Trial Docket and tried before Judge Nguyen-O'Dowd. The trial court issued a memorandum of decision regarding custody and multiple outstanding motions.

The trial court set forth detailed findings with regard to Husband's behavior, parenting skills, difficult relationship with the child, medical diagnosis by two doctors of narcissistic personality disorder and failure to make or maintain progress on treating the same, as well as the healthy relationship between Wife and the child. The trial court found that Husband was a high conflict individual, prone to making threats, seeking control, and suffering from paranoia and conspiracy theories. The trial court detailed several disturbing parenting behaviors and incidents by Husband as well as its view that Husband was essentially incapable of providing healthy parenting or recognizing his shortcomings.

The trial court awarded sole legal and physical custody to Wife. Husband was awarded weekly supervised access with a professional supervisor at his own expense. Such access would commence after Husband provided proof that he had engaged a clinician to address his narcissistic personality disorder with updated proof required on a quarterly basis. Husband appealed.

The Appellate Court set forth the abuse of discretion and clearly erroneous standards of review applicable to this appeal and the requirements of C.G.S. § 46b-56 regarding custody and parenting orders.

Husband's first two claims on appeal asserted that the trial court violated his rights under the Americans with Disabilities Act ("ADA") by refusing to provide him with medical accommodations and retaliating against him for exercising his rights by denying his motions and prematurely resting his case. The Appellate Court found the record ambiguous as to whether Husband had a "disability" for purposes of the ADA, but nevertheless concluded that Husband received reasonable accommodations and procedural due process and that Husband provided no evidence of retaliatory animus. Although Husband had been provided with half day hearings at one point during *pendente lite* proceedings as a result of his claims of "stress" and a doctor's note regarding the same, those accommodations were not non-modifiable, nor made pursuant to any ADA request, and the trial court was well within its discretion to manage its docket appropriately during trial.

Husband claimed on appeal that the trial court improperly relied on his mental health diagnosis as a basis of limiting his right to visitation and awarding custody to Wife. The Appellate Court found that the trial court did not improperly rely on the diagnosis and the trial court appropriately provided reasons based on Husband's behaviors and failure to improve his behavior. It was not improper for the trial court to rely, in part, on Husband's mental health and its effect on the child.

Husband claimed on appeal that the trial court improperly relied on a stale custody evaluation. The evaluation was completed in December 2019 and the trial concluded in March of 2022 due to numerous delays. The Appellate Court found that the trial court had ample evidence before it regarding Husband's present ability to parent, and that the trial court considered and evaluated the report and testimony in light of other current evidence.

Husband claimed on appeal that the trial court improperly required the parties to request leave of the court before filing motions and denied multiple requests. The Appellate Court noted that trial courts have the discretion to refuse to entertain or decide motions in order to prevent harassing or vexatious litigation. The Appellate Court found no abuse of discretion in the orders restricting filing of motions.

Husband claimed on appeal that the trial court improperly awarded sole custody of the child to Wife, claiming that they had always shared custody and that Wife made no showing of a substantial change in circumstances. The Appellate Court found no error. Irrespective of the orders prior to Judgment, the time of Judgment was the appropriate time to make a final determination of custody.

Husband claimed on appeal that the trial court erroneously found that he had narcissistic personality disorder. The Appellate Court found ample evidence in the record, including the testimony of the psychological evaluator, to support the factual finding.

Husband claimed on appeal that the trial court committed evidentiary errors including improperly admitting certain testimony of a social worker and an affidavit of the child's therapist. The trial court permitted testimony of the social worker over Husband's objection, the social worker testified that she relied, in part, on the affidavit of the child's therapist, and the affidavit was marked for identification, but its actual contents were not the subject of testimony and it was not itself admitted. The trial court made no reference to relying on the contents of the affidavit, which were not in evidence. The Appellate Court applied the abuse of discretion standard to the trial court's evidentiary ruling and found no error.

The Judgment was affirmed.

Gainty v. Infantino, 222 Conn. App. 785 (2023) (post-majority support for disabled child per § 46b-84(c))

Officially released December 12, 2023

In Short: The trial court's decision to award post-majority support pursuant to § 46b-84(c), not based on the child support guidelines, and including residential educational facilities, was upheld. Father was a very unsympathetic litigant and did a terrible job preserving his arguments for appeal.

A Judgment of paternity entered in 2001 for the parties' two minor children in concert with an order of $250/week child support. Fifteen years of post-judgment litigation followed over Father's non-payment of support. Father had been found in contempt five times, purges had been established, and four capiases issued for failure to appear.

In 2019, Mother filed a motion for "child support, education support, medical, dependent care" through age twenty one based on a qualifying disability. Mother filed an additional motion seeking modification of support through age twenty-one.

The Trial Court (Hon. Epstein presiding) held a hearing in 2022 at which the Court understood that Father contested the existence of a disability and whether the child had resided with Mother during the time period at issue.

Mother presented expert testimony of a clinical psychologist who had treated the child since 2006 and testified about several mental disabilities which impeded the child's ability to live independently or obtain a full-time job. Mother also presented the expert testimony of a neuropsychologist regarding two evaluations. The evidence of disability was essentially uncontroverted and compelling. Mother testified that she was employed as a special education teacher earning $75k/year. Mother testified about expenses incurred including a residential educational and treatment facility and, briefly, a special education college. Father testified that he was self-employed in landscape construction earning $165k/year.

The trial court then ordered that Father comply with standing discovery requests and that both parties file updated financial affidavits. Mother was ordered to submit proposed orders with specific monetary amounts and Father with whether he agrees or disagrees with each amount. Mother submitted proposed orders of $300/week child support for the three year period in question. Father did not comply with the discovery orders and filed no posttrial documents prior to the decision issuing.

The trial court found that the child was disabled within C.G.S. § 46b-84(c). The trial court found that Father had essentially no involvement with the child for many years and was in arrears on premajority support. The trial court found that the child had attended Franklin Academy in East Haddam and, for a short time, Landmark College in Putney, VT. Both are residential facilities, but the court found that the child had always resided with Mother. The trial court adopted Mother's proposed orders, amounting to $31,200 for post-majority support, and $44,651 for Father's share of certain medical and special schooling expenses.

Father appealed arguing that the trial court (1) improperly ordered him to reimburse 50% of medical and special schooling expenditures, and (2) exceeded its authority in issuing its support order. Mother filed a motion for appellate counsel fees which was granted in the amount of $10,000. Father amended his appeal to allege that the trial court (3) abused its discretion in awarding appellate attorney's fees.

The Appellate Court first addressed Father's claim that the trial court abused its discretion by ordering reimbursement of expenses twice denied by the court, specifically that reimbursement for Landmark College and Franklin Academy was barred by *res judicata* and *collateral estoppel*. Father alleged that a prior court had determined that Landmark College's costs were outside the scope of the statute because the initiation of this case predates the effective date of enactment of § 46b-56c. The Appellate Court determined that this claim was not preserved for appeal. Father failed to raise these arguments at any

point during the proceeding. Further, the prior order denying Landmark College as beyond the scope of the statute pertained to § 46b-56c, not § 46b-84(c).

Father's second claim was that the trial court modified the child support orders without considering the child support guidelines or statutory criteria. § 46b-84(c) specifically states that the child support guidelines do not apply. Father failed to raise the claim that the post-majority order exceeded the premajority order and did not preserve it for appeal. Father further argued that the trial court failed to consider his "other qualified dependents." The Appellate Court noted that Father failed to provide any evidence of the needs of his other children, that he failed to file an updated financial affidavit when ordered to do so, and found nothing clearly erroneous about the order in light of the findings made by the trial court as to Father's finances.

Father's final claim on appeal related to the award of counsel fees to defend the appeal pursuant to § 46b-62. The trial court stated that it considered all the relevant statutory criteria and that such fee award was necessary not to undermine the court's decision. The Appellate Court made short work of Father's arguments, finding no abuse of discretion in light of the trial court's factual and credibility findings.

The Judgment was affirmed.

Graham v. Graham. 222 Conn. App. 560 (2023) (interpretation of stipulation; concierge medical fee; § 52-192a offer to compromise)

Officially released November 28, 2023

In Short:

1. **The trial court properly interpreted a post-judgment stipulation as fixing a buyout of an unallocated order of alimony and child support by replacing the original judgment with regard to termination upon remarriage;**
2. **A concierge physician fee constituted an unreimbursed medical expense, not an "access" fee"; and**
3. **C.G.S. § 52-192a regarding offers to compromise does not apply to dissolution of marriage actions.**

The Grahams were divorced on April 7, 2011 via separation agreement. They had two minor children at time of dissolution. The separation agreement provided that Husband would pay unallocated alimony

and child support based on a formula for a non-modifiable term of nine years and certain unreimbursed expenses.

In 2019 the parties entered into a postjudgment stipulation that (1) terminated Husband's unallocated obligations subject to his making certain fixed and scheduled payments, and (2) obligated Husband to pay 100% of the children's unreimbursed medical expenses. Except as provided in the stipulation, the separation agreement remained in full force and effect.

In 2020 Wife filed a motion for contempt alleging that Husband willfully violated the 2019 stipulation. Husband's attorney had stated that Husband would not be making payments outlined in the 2019 stipulation totaling $504,000 on the basis that Husband's alimony obligation had terminated due to Wife's remarriage. Wife filed a second motion for contempt alleging that Husband violated the stipulation by failing to reimburse a $5,000 physician concierge fee for the eldest daughter. Wife filed an offer of compromise pursuant to C.G.S. § 52-192a and Practice Book § 17-14 offering to resolve her claim against Husband for alimony.

In 2022 the trial court held a hearing on Wife's motions and issued a memorandum of decision granting Wife's two motions for contempt. The trial court found that Husband had owed $504,000, that he wrongfully detained the money and ordered 5% simple interest pursuant to C.G.S. § 37-3a. The trial court further found Husband willfully violated the order in failing to reimburse the $5,000 concierge physician fee. The trial court awarded Wife $35k in counsel fees (including a second separate award of fees from a new motion for counsel fees covering, *inter alia*, posttrial briefs). The trial court dismissed Wife's offer of compromise. Husband appealed and Wife cross appealed.

Husband's first argument on appeal was that the trial court improperly found him in contempt. The Appellate Court noted that the issue of whether the underlying order was sufficiently clear and unambiguous to support a judgment of contempt is subject to *de novo* review, whereas willfulness is governed by the abuse of discretion standard. It further articulated that the intent of the parties for a contract is interpreted "in light of the situation of the parties and the circumstances connected with the transaction…. To be ascertained by a fair and reasonable construction of the written words … accorded its common, natural and ordinary meaning and usage where it can be sensibly applied …" and so forth regarding contract principles. It articulated the standard of clear and convincing evidence and the burden on the moving party.

The trial court had found that the stipulation was reasonably susceptible to only one meaning, that it was to pay the remaining obligation as a lump sum certain to be paid over a specific time period, replacing the portion of the judgment that would terminate for remarriage. The trial court reasoned that the parties omitted language from the stipulation regarding termination, much of the obligation accrued

prior to the stipulation, everyone knew about the remarriage intention when the stipulation was negotiated, if the original terms as to termination were to govern there was no need for the stipulation, and that Husband had the means and willfully chose not to pay.

Husband argued that, because the termination of alimony was "subject to" his making certain payments, the original language regarding termination upon remarriage still governed prior to his making those payments. This contention was belied by the canvass of the parties when entering the stipulation. The Appellate Court found that the stipulation was clear and unambiguous under the circumstances surrounding it and the trial court did not err by finding Husband's failure to pay was willful.

Husband's second argument on appeal was that the trial court erred by ordering him to pay 100% of the concierge physician fee, that it was an access fee, not a medical expense. The trial court had found that the fee was part of access to the doctor's practice. The Appellate Court noted that the term "medical expense" as used in dissolution decrees must be interpreted broadly. The Appellate Court found no abuse of discretion in determining that this expense qualified.

Husband's third and final argument on appeal was that the trial court erred in awarding the second round of counsel fees citing *res judicata* and *collateral estoppel*, which he raised for the first time on appeal and which the Appellate Court determined was inadequately briefed.

Wife's cross appeal claimed that the trial court improperly dismissed her offer of compromise, arguing that the court erred in finding that C.G.S. § 52-192a did not apply to her claim because it was not based on contract or did not seek money damages. The Appellate Court found that while a dissolution action is a civil action, it is not one based on contract or that seeks money damages. Dissolution actions are equitable in nature and the Appellate Court refused to extend the statute to cover contempt claims as "actions" in and of themselves based in contract. The Appellate Court found that C.G.S. § 52-192a does not apply to marital dissolution cases (but reversed and remanded with direction to strike the offer of compromise rather than dismiss).

The Judgment was affirmed other than to correct the form of rejection of the offer to compromise to strike instead of dismiss.

Hepburn v. Brill 348 Conn. 827 (2024) (third party intervention; subject matter jurisdiction versus statutory authority)

Officially released April 16, 2024

In Short: Per the allegations of an aunt's petition and amended petition for third-party visitation under § 46b-59, a child lived with her mother, aunt and grandmother from birth in 2010 to death of her grandmother and suicide of her mother in 2021, the Aunt was her primary caregiver for a prolonged period of time before Father took the child and cut off access, the child was emotionally and physically devastated by being cut off from her Aunt, and Father was neglectful and abusive. Held: (1) The issue on the motion to dismiss was statutory authority, not subject matter jurisdiction, and the trial court had authority to consider the amended petition, (2) under these allegations, it was error for the trial court to dismiss the petition and amended petition without a hearing.

Plaintiff-Appellant-Aunt ("Aunt"), sought to intervene under the third-party visitation statute. Aunt appealed the judgment of the trial court dismissing her amended verified petition for third-party visitation. Aunt alleged on appeal that (1) the trial court improperly treated Defendant-Appellee-Father's ("Father") motion to dismiss as a question of subject matter jurisdiction rather than statutory authority under C.G.S. § 46b-59, and (2) the trial court incorrectly determined that the amended petition failed to include the specific and good faith allegations necessary to demonstrate a parent-like relationship and that denial would cause real and significant harm.

The Appellate Court reviewed the procedural history as well as the factual assertions by Aunt, construed in her favor, as it was addressing a motion to dismiss. As reviewed by the Appellate Court, the child was born in 2010. From birth until 2021 the child lived with her mother ("Mother"), maternal grandmother ("Grandmother"), and Aunt. Father would regularly visit the child's home, but only had about one visit per year outside of the home. In 2015 Grandmother suffered a stroke and Mother became Grandmother's primary caretaker, resulting in Aunt increasingly stepping into a parent role for the child. Aunt was involved in waking the child in the morning, providing meals, getting the child to school, assisting with homework, engaging in recreational activities and taking her medical appointments.

In 2021 Grandmother died, and two days later Mother died by suicide. The child continued to live with Aunt. Father moved to Connecticut and started taking the child on weekends. In November 2021 Father took the child to live with him full time. Aunt sought visitation via Father unsuccessfully, and then filed a petition via probate court unsuccessfully for emergency temporary custody, removal of Father as guardian, and her appointment as permanent guardian. After the emergency petition was denied Aunt withdrew the probate court and filed this third-party visitation action.

Father filed a motion to dismiss for lack of personal jurisdiction. The parties did not have a hearing, but met in chambers, where the court questioned whether the petition alleged sufficient facts to provide subject matter jurisdiction under Conn. Gen. Stat. § 46b-59(b). Father filed a second motion to dismiss, claiming that Aunt lacked standing under § 46b-59(b) for lack of sufficient allegations as to a parent-like

relationship and real and significant harm. Aunt then filed an amended petition alleging additional facts, including claims arising from calls between Aunt and child leading up to the petition, alleging that the child was in dire physical and emotional health and that Father was neglectful and even outright abusive. Father filed an objection to the amended petition, arguing that it would be improper for the court to consider the amended petition while a motion to dismiss for lack of subject matter jurisdiction is pending.

The trial court held a hearing and issued a memorandum of decision granting the motion to dismiss the initial petition and dismissing the amended position. The trial court determined that initial petition did not satisfy the requirements of § 46b-59 and that the amended petition did not satisfy the requirement regarding facts that would demonstrate a parent-like relationship.

The Appellate Court exercised plenary review over all aspects of the appeal, including the issues of subject matter jurisdiction and statutory authority to act. This also applied to the sufficiency of the pleadings, as interpretation of pleadings is subject to plenary review.

The Appellate Court then began by articulating the difference between subject matter jurisdiction and authority to act under a particular statute, as that determined whether it should consider only the initial petition or the amended petition. Subject matter jurisdiction "involves the authority of a court to adjudicate the type of controversy presented … in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." § 46b-1 provides the superior court with "plenary and general subject matter jurisdiction over legal disputes in family relations matters…" The Appellate Court determined that the trial court had subject matter jurisdiction over the petition, and question that remained was whether sufficiently specific and good faith facts had been pled to provide the court with authority to act under § 46b-59.

The Appellate Court overruled the Appellate Court's decision in *Igersheim v. Bezrutczyk*, 197 Conn. App. 412, 420 (2020), finding that, because the trial court had subject matter jurisdiction, and because of the liberal amending provisions of Practice Book § 25-7, it was proper to consider the amended petition.

That brought the Appellate Court to the question of whether the amended petition pled sufficient good faith allegations as to the parent-like relationship and real and significant harm if visitation were denied. The Appellate Court indicated that pleadings are to be broadly and realistically construed.

The Appellate Court cited *Jeanette-Blethen v. Jeanette-Blethen*, 172 Conn. App. 98 (2017) for an example of a parent-like relationship under § 46b-59, and concluded that the amended petition alleged the existence of care of sufficient duration, regularity and magnitude to establish a parent-like relationship.

The Appellate Court noted that the severance of a parent-like relationship alone does not necessarily constitute the necessary realistic harm, the facts here, with the child coping with the death of a parent and other circumstances, reached the necessary threshold. The Appellate Court differentiated the general and conclusory allegations of harm in *Fuller v. Baldino*, 176 Conn. App. 451 (2017) and *Romeo v. Bazow*, 195 Conn. App. 378 (2020) from the specific disruptions and harms alleged to have been suffered by the child in this case.

The Judgment was reversed and remanded for an evidentiary hearing in which Aunt must prove by clear and convincing evidence that she has a parent-like relationship and that denial of visitation would cause real and significant harm pursuant to § 46b-59. All justices concurred in the decision.

Jacques v. Jacques 223 Conn. App. 501 (2024) (bad faith exception to the American rule)

Officially released January 30, 2024

In Short: The trial court relied on a prior court's memorandum of decision and did not make sufficiently specific findings as to colorless claims and bad faith to support an award of counsel fees under the bad faith exception to the American rule. The decision was reversed and remanded for a new hearing on the issue.

The parties were divorced in 2009 by separation agreement. The separation agreement stated, *inter alia*, "[A]ny assets over ten thousand and 00/100 ($10,000.00) dollars in fair market value that the [defendant] owns or has an equitable interest in at the time of the dissolution which are not shown by the [defendant] on her financial affidavit, shall, upon discovery by the other party, become [the plaintiff's] property without any defense interposed by the [defendant] whatsoever as to such claims of the other party."

In 2016, Husband brought a breach of contract action against Wife, alleging that Wife breached the agreement by failing to disclose certain assets. Husband alleged that Wife liquidated two annuities prior to the divorce and that those proceeds, over $1m, were undisclosed assets. Wife countered that those monies were used to purchase land and build Husband's home, so the proceeds were not undisclosed. Wife also asserted five special defenses, including the statute of limitations on contract actions.

After a bench trial, Judge Adelman found in favor of Wife, holding that Husband's action was barred by the six-year statute of limitations per C.G.S. 52-576(a), finding insufficient evidence as to a breach, finding that Wife did not own the annuities at time of Judgment, finding that Husband had knowledge of the funding and construction of the home, and no failure to disclose assets by either party.

In a prior appeal, Husband challenged the conclusion that the statute of limitations barred his action, but that appeal was dismissed as moot because Husband failed to challenge an independent ground for the court's judgment, namely, insufficient evidence.

In 2020, Wife filed a motion for counsel fees pursuant to C.G.S. § 46b-62, the agreement, Practice Book § 1-25, and the court's inherent authority. Wife's motion stated that the actions were in bad faith and entirely without color. In 2021, following a hearing, Judge Epstein granted Wife's motion for counsel fees under the bad faith exception to the American rule and awarded $51,641.

Husband appealed, arguing that the trial court failed to make factual findings with the high degree of specificity required in order to award attorney's fees under the bad faith exception. Husband argued that Judge Epstein relied solely on the text of Judge Adelman's decision which lacked facts or findings sufficient to serve as a basis of the award.

The Appellate Court reviewed the claim under the abuse of discretion standard. The Appellate Court reiterated the requirements of the bad faith exception to the American rule, namely that the challenged actions are entirely without color and in bad faith as well as a high degree of specificity in the factual findings. Bad faith focusses on subjective intent. The Appellate Court concluded that the factual findings of Judge Adelman's decision were insufficient for Judge Epstein to have relied upon regarding Husband acting in bad faith or his claims lacking color. Judge Epstein failed to herself review the record from the prior proceedings and make her own factual findings with the required level of specificity.

The judgment was reversed and remanded for a new hearing on the motion for attorney's fees.

Marcus v. Cassara, 223 Conn. App. 69 (2023) (division of extracurricular costs is separate from the child support guidelines)

Officially released December 26, 2023

In Short: The dicta is the key to the case: the trial court may order division of extracurricular expenses between the parties pursuant to § 46b-56, separate and distinct from the basic child support obligation and guideline analysis, without any finding of deviation. (The holding was that the trial court erred by granting a modification based on a ground not raised in the motion to modify).

The parties were never married and had three children together. In 2008 Father filed a custody application. In 2009, the trial court issued an oral ruling including custody and visitation orders, providing joint legal custody with physical custody and final decision-making authority to Mother and visitation rights to Father. Father was found to have an earning capacity of $200k despite his claims that he was earning only $100k, and Mother an earning capacity of $20k despite her being unemployed. Father was ordered to pay $528/week child support and various expenses in accordance with the guidelines and, in the same apportionment as the guideline expenses, 72% of reasonable extracurricular expenses.

Father filed a motion for modification in 2021, requesting that the court modify the percentage allocation for extracurricular activities, alleging that his earning capacity from the 2009 decision is more than double his actual income, and alleging that Mother was unilaterally signing the children up for activities he could not afford. Father did not allege that such division of extracurricular activities constituted a deviation from the guidelines and should be modified on that basis.

In 2022 the trial court (Hon. Winslow) held a remote hearing on the motion. The trial court indicated that extracurricular activities "are not regular child support, they are a deviation from the child support guidelines and the court is required to find a reason for the deviation …" The trial court issued an oral ruling granting the motion for modification as to the extracurricular activities, finding that the children do not have extraordinary expenses warranting deviation from the guidelines and eliminating the requirement for a contribution. The trial court subsequently issued a memorandum of decision expanding its reasoning, stating that, in the absence of an agreement of the parties, the trial court must find a basis for deviation in order to require contribution to extra-curricular activities, and that it was appropriate to modify based on a lack of basis for such deviation. The trial court found that Mother had been using her decision-making and the existing orders as a means of "revenge." The trial court made no finding as to a change in either party's earning capacity.

Mother appealed, contending that there had been no substantial change in circumstances and that the trial court had based its decision on irrelevant, nonfinancial factors.

The Appellate Court articulated the abuse of discretion standard as well as the fact that plenary review applies to the correct standard of law and the application of child support guidelines. The Appellate Court noted the two bases for modifying a child support order: (1) a substantial change in circumstances, or (2) a showing that a final order deviates from the guidelines without the requisite findings."

The Appellate Court held that the trial court exceeded its authority in modifying the order regarding extracurricular activities because it based its decision on a ground that was not contained in Father's motion for modification. Reliance of the trial court on a ground not raised in a motion to modify constitutes abuse of discretion absent amendment to the motion. Father had not pled and did not raise the issue of the original orders being a deviation from the guidelines, and he himself had requested a modification to a 50-50 division of such costs.

Having already established a basis for remand, the Appellate Court moved in a different direction and set forth its disagreement with the trial court's conclusion that the extracurricular activities order constituted a deviation from the guidelines. It cited *Powers v. Hiranandani*, 197 Conn. Spp. 384 (2020) for the principle that the court may order payment of extracurricular activities pursuant to § 46b-56, rather than § 46b-215b. The Appellate Court found that the original order did not deviate from the guidelines in its $528/week child support award, and ordered division of extracurricular activities completely separately from the guideline award pursuant to § 46b-56. (Side note: so far as I can tell, nobody involved in this argument or decision raised the fact that the original order was, by its very definition, a deviation from the guidelines because the court had assigned each party an earning capacity, which is in and of itself a deviation criteria, but that is of little import if extracurriculars can be divided separately from the guideline considerations.)

The Appellate Court stated that the guidelines address only "basic" child support obligations. "Because the basic child support obligation as set forth in the child support guidelines does not encompass the expenses for extracurricular activities, imposing an order to account for those expenses is not inconsistent with, and does not deviate from, the presumptive amount under those guidelines. See *Maturo* v. *Maturo*, supra, 296 Conn. 107 (differentiating between "the basic child support obligation" and "additional support obligations imposed on the noncustodial parent for education, health care, *recreation*, insurance and other matters"

In my view, this analysis by the Appellate Court is both entirely dicta (the holding that the modification was not based on any ground in Father's motion could have ended the analysis without any further analysis) and, more problematically, effectively creates an entire second basis for financial support for children that is separate from the scope and analysis of the child support obligation. According to this decision, you can have different or additional financial orders beyond the scope of the presumptive guidelines by deviating based on allowable criteria, and you can also simply look to § 46b-56 for division of financial obligations that are not "basic" aspects of supporting a child, such as extracurricular activities (and once the door is opened, who knows what else?). And, of course, you can also have a separate analysis of a presumptive range of support for high income families per the *Maturo/Misthopolous* line of cases. This conundrum already existed, because the Appellate Court pointed to a long litany of decisions

where the Appellate and Supreme Courts have touched on cases which had divisions of extracurricular costs.

The takeaway is, a trial court may order division of extra-curricular expenses (and maybe other costs not written anywhere in a statute?) as it sees fit, without finding a deviation or the parties being above-guideline, by citing to § 46b-56 and entering the order separately from the child support guideline findings. In some ways, this case changes nothing, because trial courts have regularly issued orders dividing extra-curricular costs, as the decision points out. It provides a specific basis to legitimize such awards however, and possibly builds some foundation for other ways to go around the guidelines.

The Judgment was reversed and the case remanded to reconsider the motion to modify in accordance with the opinion.

Judge Clark concurred with the decision but disagreed with the notion of a "separate order" as a basis for the extra-curricular activity award. Under Judge Clark's analysis, the extra-curricular order constituted a deviation, despite the trial court's failure to state as much when entering the original orders, and it subject to modification on that basis if that basis had been pled. Judge Clark's analysis, if it were the majority, would provide a much more straightforward way to handle such divisions in future orders which appears more consistent with the statutes and regulations: namely, division of extracurricular costs could be accomplished by means of a deviation, not by a new form of "separate order" independent of the guideline analysis.

Marshall v. Marshall, 224 Conn. App. 45 (2024)(determination of income & prior year K-1 versus more recent distributions)

Officially released February 27, 2024.

In Short: (1) the trial court did not abuse its discretion by relying on a 2020 K-1 showing $1.3m of income rather than 2021 distributions of $2.3m in assessing Wife's income in February of 2022, and (2) the trial court was not required to assign Wife an earning capacity.

The parties were married in 2000 and had three children, two of whom were minors at time of trial. Wife filed for divorce in 2017.

At time of trial, Wife was 46 and an equity partner at an investment banking firm that she cofounded in 2012. Her income was a percentage of the partnership's yearly net profits in the form of distributions. Testimony indicated an informality and ad-hoc nature to the assessment of each partner's percentage of the net profit. Wife's percent of partnership income and actual K-1 income from 2018-2021 was 21%/$2.4m, 15%/$1.2m, 12%/$1.3m, and 11%/$2.3m respectively. Wife's financial affidavit at time of trial, in February of 2022, relied on her 2020 K-1 as she had not yet received her 2021 K-1.

At time of trial, Husband was 53 and unemployed. He was last employed as a senior managing director at Focuspoint Private Capital. He testified that he lost his job due to poor performance and that he could not find a new job due to a felony conviction in 2013. The trial court assigned Husband an earning capacity of $350k.

Judge Margarita Hartley Moore issued a memorandum of decision in 2022 finding that Husband's unilateral decision not to find employment was the primary cause of the breakdown. The trial court ordered Wife to pay alimony of $1,500 per week for five years. The parties were to share joint legal and physical custody of the minor children. The trial court awarded $1,500 per week in child support, which was significantly above the above-guideline presumptive floor of $708/week, citing the needs of the children.

Husband appealed claiming that the trial court improperly (1) relied on Wife's allegedly manipulated 2020 income in fashioning the child support and alimony awards instead of relying on her 2021 partnership distributions, and alternatively, (2) based those support orders on Wife's reported income rather than on her earning capacity. Husband argued that the trial court relied on Wife's February 2022 financial affidavit which reflected her 2020 actual earned income of $1.3m rather than the evidence of the $2.3m in distributions she received in 2021 as a partner or applying an earning capacity.

The Appellate Court set forth the abuse of discretion and clearly erroneous standard of review. It cited C.G.S. § 46b-84 and case law relating to above-guideline maximum awards of child support.

As to Husband's first claim, the Appellate Court found that the trial court had explicitly considered the distributions received by Wife in 2021, had considered a written threat made by Wife to reduce her income, and had noted that her income had in fact been reduced during the divorce. However, the trial court also considered that additional partners were added and the structure calls for significant fluctuations in income from year to year. The Appellate Court found that the trial court was within its discretion to base its financial orders on Wife's 2020 income because it was unable to determine her 2021 and YTD 2022 income solely based on distributions, without a K-1. Distributions are not the same as income and the partnership decision and K-1 are the final word on the actual income.

As to Husband's second claim, that the trial court erred by not assigning Wife an earning capacity, the Appellate Court made short work in determining that the trial court was not required to do so. Wife had been continuously employed and had income documented on her K-1 on which the trial court could reasonably rely in crafting orders. The Appellate Court found no abuse of discretion.

The trial court was affirmed.

I cannot help but wonder, if Husband had not been such an unsympathetic character or the sympathies had been reversed, if Husband's first claim on appeal might not have prevailed (although he might have had a very different result at the trial level in the first place had that been the case).

Netter v. Netter, 220 Conn. App. 491 (2023) (mootness; contempt)

Officially released July 18, 2023

In Short: this case contains (1) a review of the "capable of repetition, yet evading review" doctrine pertaining to mootness on appeal and (2) a failed attempt to find ambiguity and excuses where none existed as to contempt.

Husband appealed the trial court's decision on two *pendente lite* motions filed by Wife. Husband appealed the trial court's decision (1) permitting Wife to return to the marital residence to retrieve personal property and (2) holding him in contempt for violation of the *pendente lite* parenting plan.

During the pendency of Husband's appeal, the court held a fifty-seven-day trial over seventeen months and issued a memorandum of decision dissolving the parties' marriage.

The Appellate Court determined that the first portion of Husband's appeal was mooted by the final judgment. The final judgment's order as to personal property largely mirrored the *pendente lite* order permitting Wife to retrieve her personal property from the marital residence, except that it permitted Husband to be present. The Appellate Court conducted an analysis of the "capable of repetition, yet evading review" exception and concluded that any likelihood of the issue being repeated was purely speculative.

As to the second issue on appeal, Husband argued that the 2019 summer vacation provision of the *pendente lite* parenting plan did not clearly and unambiguously require him to propose his dates before

April 15, 2019, and even if it did, his failure to do so was not willful. The Appellate Court applied *de novo* review to whether the underlying order was sufficiently clear and unambiguous and the abuse of discretion standard as to willfulness.

The *pendente lite* parenting plan explicitly required that "[t]he parties shall exchange proposed vacation dates in writing no later than April 15, 2019." Husband did not propose his dates until May 27, and then he changed his proposed dates on August 6 to claim the week immediately abutting the children's return to school. The trial court found that there had been a clear and unambiguous court order and that Husband provided no excuse for his violation thereof. Husband's excuses pertained to needing consent or agreement to travel to his chosen location, which were unrelated to the requirement that he provide notice for his choice of dates by April 15. The Appellate Court found no abuse of discretion in the trial court's decision.

The portion of the appeal pertaining to access to the residence was dismissed as moot and the judgment pertaining to contempt was affirmed.

Ochoa v. Behling, 221 Conn. App. 45 (2023) (Appellate Court declines to review issue not raised before trial court)

Officially released August 8, 2023

In Short (and all you need to know): Father failed to raise the issue of the trial court's authority to award a tax exemption to an intervening third party at any time prior to appeal and so the Appellate Court declined to review his claim pursuant to Practice Book § 60-5.

Father appealed the trial court's order permitting the intervening maternal grandmother, who has sole legal and physical custody of the child, to continue to claim a federal income tax dependency exemption for the child.

Father argued on appeal that the trial court erred "in adopting [a] prior court order" permitting the custodial nonparent to take the tax dependency exemption. Father argued on appeal that the trial court lacked the authority to "allocate federal tax liability, as doing so is within the exclusive province of the United States Congress."

The Appellate Court declined to review Father's underlying claims based on Practice Book § 60-5. Father failed to raise the claim that the trial court lacked authority to enter such order at any point before the

trial court. He did not file an objection to the motion requesting that relief, he did not file an objection to the proposed orders which sought the relief, and he did not raise the issue during the hearing.

The Judgment was affirmed.

Ostapowicz v. Wisniewski, 222 Conn. App. 847 (2023) (scope of remand)

Officially released December 19, 2023.

In Short: a decision about the scope of remand, which is governed by plenary review.

The parties were married in 2006. Wife filed for divorce in 2017. The trial court (Judge Caron presiding) issued a memorandum of decision dissolving the marriage in 2019. A prior appeal resulted in a remand to address an apparent conflict between an order assigning payment of a home equity line of credit on which attorney's fees had been incurred and an order that each party pay his/her own attorney's fees.

After a proposed order by the trial court, objection, and a further hearing, the trial court amended its orders only to explain that in its original order it had intended that each party be responsible for his/her own counsel fees *above and beyond* those already paid on the home equity line of credit, and that no practical change would be effectuated. Wife appealed again, arguing that the trial court failed to comply with the Appellate Court's prior orders on remand.

The Appellate Court noted that the scope of remand is a matter of law subject to plenary review. The Appellate Court indicated that the remand was with direction "to resolve the inconsistency." The Appellate Court found that the trial court did resolve the inconsistency, just not in the way Wife wanted it resolved. The Judgment was affirmed.

Pencheva-Hasse v. Hasse, 221 Conn. App. 113 (2023) (dissipation of assets did not result in consequences, underreporting of earnings did not result in earning capacity assignment)

Officially released August 15, 2023

In Short: Minimal appellate precedential value. Husband was found to have dissipated assets but was awarded the lion's share of the marital estate, and was found to have underreported his income but was not assigned an earning capacity nor ordered to pay any alimony. Husband appealed and lost.

The parties were married in 2009 and had one child. Wife commenced the divorce in 2020. The matter was tried before Judge Shluger over four days. A Guardian *Ad Litem* testified in support of a shared parenting plan. The trial court entered a memorandum of decision. The findings of the trial court were as follows:

At the time of marriage, Wife was a twenty-four-year-old Bulgarian citizen on a temporary visa, who thereafter began working at Husband's law firm, initially without a salary, but later for modest payroll. At the time of the divorce Wife was working at Home Depot earning net income of $366 per week.

At the time of the marriage Husband was a fifty-one-year-old attorney who was sole proprietor of a busy criminal and personal injury practice and served as appointed counsel in the federal court system. At time of trial, Husband claimed to earn only $612/week gross income, and despite years of tax returns showing gross receipts of between $410,000 and $537,000, his returns never showed a profit in excess of $36,000 per year. The trial court stated that it "strains the credulity of the court that this experienced and capable trial attorney earns no income …" while spending monies on his child, including for private school. The trial court specifically found that Husband understated his income.

The trial court made further findings regarding substantial real estate holdings that Husband owned prior to the marriage and other assets of Husband, as well as suspicious large withdraws that Husband contemporaneously with the divorce. The trial court found that Husband "failed to adequately explain how he had used, spent or dissipated these funds [and] concluded that [Husband] had violated the automatic orders by withdrawing vast sums of money from his bank accounts …"

Wife argued that the trial court should find an earning capacity for Husband, but the trial court declined to do so (leaving me baffled, particularly with the specific finding that Husband understated his income), citing lack of an expert witness.

The trial court ordered that Wife be provided the marital residence and that Husband essentially keep his assets, determining that these orders provided Wife with $425,000 of assets and Husband with $832,500 plus the $342,000 that it found that Husband withdrew during the pendency of the action in violation of the automatic orders. The trial court awarded no alimony. (Once again, I feel I must be missing something substantial to justify these orders in light of the trial court's factual findings, at least as recited in the Appellate decision).

The trial court ordered a shared parenting plan. It ordered child support based on the actual claimed earnings of the parties and provided Husband a downward deviation based on the shared parenting plan, ordering only $70 per week in child support and an equal division of unreimbursed medical costs and work-related childcare.

Husband then proceeded to appeal his (seemingly undeserved and baffling) total grand-slam victory. Wife did not participate in the appeal (perhaps because she had been awarded no alimony, $70 per week child support, no counsel fees, and a house, and could not afford an appellate attorney on a Home Depot wage while supporting her child).

Husband's first claim on appeal was that the trial court erred in applying the child support guidelines by improperly calculating the parties' incomes and deviating from the guidelines, arguing that the evidence did not support an earning capacity. The Appellate Court noted that the trial court's ordinary discretion is somewhat limited for application of the child support guidelines. The Appellate Court found that the trial court did not rely on an earning capacity (much to Wife's disappointment) and found no error in the trial court's deviation based on a shared parenting plan. The trial court had followed all the requisite steps in entering such an order.

Husband's second claim on appeal was that the trial court abused its discretion by entering order of custody that were not consistent with the best interests of the child. The Appellate Court made short work of this, simply citing the trial court's discretion, noting that the trial court stated it considered all the relevant statutory criteria, and refusing to reweigh the evidence.

Husband's third claim on appeal was that the trial court abused its discretion in the property distribution by not considering Husband's lifelong financial contributions in obtaining assets prior to the marriage and incorrectly finding that he dissipated assets. Husband seemed to miss the fact that the trial court awarded him all of his premarital assets and made findings of a substantial dissipation by him. The Appellate Court noted that Husband was permitted to keep all his solely owned property and the lion's share of the marital estate and found no abuse of discretion.

The Judgment was affirmed. (And I am left as confused as to both the trial court's decision and Husband's choice to take an appeal – however, having not read the underlying trial decision nor observed the trial, my reactions should be taken with a grain of salt.)

Prioleau v. Agosta, 220 Conn. App. 248 (2023) (reargument; custody & abuse of discretion)

Officially released July 4, 2023

In Short: This case is a modest primer on reargument based on overlooked facts.

The parties were never married and had one child. They had informally exercised joint legal custody and a shared parenting plan in which Mother had the child every Monday to Friday and Father every Friday after school to Monday morning. Covid interrupted the schedule and resulted in an alternating weeks schedule. A comprehensive custody evaluation was conducted by family relations and the parties tried the matter before Judge Klau.

The trial court found that the child's academic performance had recently struggled and that both parents were involved in her academics. The trial court awarded the parties joint legal custody with Mother having primary residence and Father having every weekend from Friday to Sunday.

Mother filed a motion "for clarification, articulation, and reargument, postjudgment." She argued that the evidence presented at trial supported the fact that Father did not permit the child to attend social or educational activities on his weekends and that the every weekend order prevented Mother from having quality time with the child due to her work schedule. She sought at least one weekend per month with the child. Father objected, arguing that the proper remedy was modification and that Mother failed to establish that the court overlooked any controlling law or misconstrued any factual evidence.

The trial court issued an order denying any clarification or articulation, but treating the motion as a motion for reconsideration. The trial court found, upon reconsideration, that it was in the best interests of the child that Mother have the third weekend of each month but awarding Father afternoon visitation one day on the fourth week of each month. Father appealed.

Father's First Claim on Appeal was that the trial court lacked jurisdiction to modify the judgment and, in the alternative, that it abused its discretion by doing so. The Appellate Court reviewed the jurisdictional claim under plenary review and the remainder for abuse of discretion.

The Appellate Court held that the trial court had subject matter jurisdiction, the only issue was its authority to reconsider. The Appellate Court cited Practice Book § 11-11 for authority to reargue and found it applicable in this instance. Motions are not strictly construed by their titles. Mother's motion was filed within the requisite time period and was based solely on evidence that was presented at trial.

The requirements of a motion to modify were therefore not applicable. The trial court was not required to hold a new hearing as it based its decision solely on evidence that was already presented and on facts that it had overlooked.

Father's Second Claim on Appeal was that the trial court abused its discretion in reducing the overnights he had with the child. His overnights were reduced from the prior schedule the parties had enjoyed, but there was indicia that this was abuse of discretion.

The Judgment was affirmed.

R.H. v. M.H. 219 Conn. App. 716 (2023) (discretion to delegate authority over access to a custodial parent)

Officially released June 6, 2023

In Short: With one dissenting opinion, this decision shifts the ground underneath what now appears to be fairly unsettled law as to whether, to what extent, and under what circumstances, the family court is permitted to award discretion to one parent to make decisions about the other parent's access with the children.

The parties' marriage was dissolved by separation agreement in March 2019, providing for joint legal and shared physical custody of their ten- and eleven-year-old children. The parties were to work with a co-parenting coordinator, follow a 2-2-3 schedule, and keep the children enrolled in the present school district.

In June 2019 Father filed a post-judgment motion for contempt alleging that Mother ceased working with the co-parenting coordinator, moved to Middletown requiring the children to wake up at 5:30 a.m. to get to school, and unilaterally contacted a state trooper and counselor about one of the children purportedly conducting inappropriate internet searches. Father also filed a post-judgment motion to modify custody and access seeking sole legal and physical custody of the parties' minor children. The parties thereafter agreed to the appointment of a GAL and a custody evaluator and that Mother would be monitored by Soberlink.

In October 2019, Father filed an *ex parte* application for custody pursuant to C.G.S. § 46b-56f(a) based on an affidavit from the GAL indicating that Mother had tested positive for alcohol and failed retesting requirements, which the trial court granted on the papers. The parties entered into an agreement resolving and modifying the *ex parte* order, including further orders as to access and Soberlink. A hearing

was scheduled for April 2021. Numerous additional motions were filed. Father filed an additional *ex parte* application which was denied on the papers but which resulted in an order of final decision-making and certain restrictions on Mother's access to various providers. A six-day hearing was held between April and November of 2021 on all then-pending motions, including Father's underlying motion to modify.

In November 2021, Judge Albis issued a memorandum of decision. The trial court found that Mother generated the vast majority of the parties' issues and problems and that Father had been a steady hand in supporting the children and making appropriate decisions. The trial court found that Mother posed no threat of physical harm but failed to recognize the psychological harm of her actions on the children. The trial court denied Father's motions for contempt but granted his motion for modification and awarded him sole legal custody and primary residence. Mother was ordered to participate in specific mental health treatment.

Mother's access to the children was limited to various forms of supervised access. With one child, Mother was permitted additional access "as the parties may agree upon recommendation of the family therapist." With the other child, in addition to specific orders regarding supervised access, the trial court ordered that:

> [U]nless [Father] reasonably determines, after consultation with [the child's] therapist, that the supervised visits are causing negative behavioral or emotional consequences for [the child], then [Mother] shall thereafter be entitled to reasonable, incrementally increased, unsupervised visitation with [the child] on a schedule approved by [Father] from time to time. If at any time [Father] reasonably determines, after consultation with [the child's] therapist, that the unsupervised visits are causing negative behavioral or emotional consequences for [the child], then [Father] may either suspend [Mother's] visitation or reinstate the requirement of supervision of the visits by a third party of his choice, with [Father] responsible for the cost of supervision, if any ....

The trial court also modified the parties' ability to claim the children as dependency exemptions on their taxes, which was not challenged in this appeal, but bears mentioning in light of the recent decision of *Lehane v. Murray*, 215 Conn. App. 305 (2022) which held that such exemptions were non-modifiable aspects of property division.

Mother appealed arguing that the trial court improperly (1) granted Father's emergency *ex parte* application, (2) delegated judicial authority by giving Father decision-making authority over Mother's access to the children, and (3) infringed on her privacy rights by permitting testimony about her medical information and including information about it in its decision.

Mother's **First Claim on Appeal** was that the trial court erred in granting the *ex parte*. Mother first argued that this was because insufficient evidence was presented to support an immediate present risk of physical danger or psychological harm because the children were not in her care at the time of the application.

The Appellate Court indicated that the proper standard of proof for an order of temporary custody is the normal civil standard of a fair preponderance of the evidence, and that review of factual findings is governed by the clearly erroneous standard of review. The evidence before the trial court supported a finding that Mother had been drinking to excess during her time with the children and when she was responsible for getting them to school. Mother's argument essentially boiled down to the fact that, by the time the *ex parte* was filed, the children were already at school and thus no longer in danger. The Appellate Court held that the evidence supported a danger that was "immediate and present" inasmuch as it was presented to the trial court and that any other construction based on the children being temporarily not in Mother's care would be too narrow and irrational.

Mother's first claim also challenged the *ex parte* on the basis that the court did not hold a hearing on the first *ex parte* application. The parties had submitted multiple agreements continuing those *ex parte* orders in effect while they negotiated an agreement. There was one occasion where the record did not provide clarity as to why a hearing was not held, but that date was followed by an agreement of the parties resolving the *ex parte*. The Appellate Court concluded that there was no violation of due process based on the agreements of the parties.

Taking Mother's appellate arguments out of order to leave the most important for last, Mother's **Third Claim on Appeal** is that the trial court violated her privacy rights under state and federal law by permitting witnesses to testify about her medical history and referencing that history in its memorandum of decision. Appellate Court determined that Mother failed to preserve these claims for appeal and did not address them.

Mother's **Second Claim on Appeal is the heart of this decision**, that the trial court "improperly delegated its judicial authority by giving [Father] the authority to decide the nature and scope of her visitation..." The Appellate Court addressed on the portion of Mother's claim that the trial court permitted Father to "determine the frequency of visitation between the defendant and [child], including the ability to cancel visits and modify visitation if [Father] determines the visits are causing negative behavioral or emotional consequences…"

The Appellate Court stated that "[a] court improperly delegates its judicial authority to [a nonjudicial entity] when that person is given authority to issue orders that affect the parties or the children" and noted that such claims are governed by plenary review.

The Appellate Court reviewed three cases that are instructive. First, very recently, the decision in *Lehane v. Murray*, held that permitting a father to "alter, change or modify" a mother's visitation schedule did not constitute impermissible delegation, because it "does not permit him to reduce, suspend or terminate her access to their son." However, that holding seems based on a very limited interpretation of what a plain reading indicates the order actually permitted. Second, in *Kyle S. v. Jayne K.*, 182 Conn. App. 353 (2018), delegation to permit a therapist to determine the scope of access was held to constitute improper delegation. That seems a much easier decision and not particularly on point, because it delegated the decision to a third party rather than a parent. Third, in *Zilkha v. Zilkha*, 180 Conn. App. 143 (2018), an order "granting teenage children control over their father's access" was upheld. The *Zilkha* decision avoided the delegation problem by awarding the father *no rights* while allowing the children voluntary visits.

In this case, the Appellate Court held that the "portion of the order pertaining to [Mother's] visitation … is an improper delegation of authority because the court effectively delegated to [Father], in consultation with the child's therapist, the authority to suspend or terminate [Mother's] visitation … and its attendant obligation to consider the best interests of [the child] pursuant to § 46b-56 (c) before doing so." The Appellate Court found that the reference to Father's making his decision in consultation with the child's therapist acted to exacerbate the problem rather than salvage the order, because it implied the delegation of consideration of the best interest standard to a third party.

The Appellate Court distinguished this case from *Zilkha* by finding that, here, the trial court's order granted Mother specific rights of visitation and discussed her entitlement to increased access over time. The lesson of this distinction seems to be that if the trial court wishes to vest authority in one party to avoid future conflict and provide flexibility to the more trusted parent, it must award the other parent *no rights* and allow any delegated flexibility to constitute a purely voluntary act.

The Appellate Court distinguished this order from *Lehane*, by finding that *Lehane* permitted the father to modify the *schedule*, rather than the *right* to visitation. That seems a limited and tortured interpretation of what the *Lehane* order actually permitted the father to do on the face of the plain language of the order. It seems clear that if you can "alter" a schedule, you can reduce or terminate it as a form of alteration. Such action reducing or terminating the mother's access under the *Lehane* language would not support a finding contempt of a clear and unambiguous court order.

The Appellate Court cited to numerous out-of-state cases, in particular *Rainey v. Rainey*, 74 Va. App. 359 386 (2022), for the principle that, "from a practical standpoint, there are obvious problems inherent in delegating judicial decision-making functions to a party. First, particularly in child custody and visitation cases, parties are likely to have difficulty communicating and seeing past their inherent biases. Leaving the sole power of increased visitation with such a party invites abuse and inequity."

Judge Bright concurred in part but **dissented** as to the second claim regarding delegation that made up the heart of the decision. Judge Bright argued that the cases on which the majority relied were inapplicable to a visitation order affording a custodian with sole legal custody discretion over the non-custodial parent's access. The issue was therefore abuse of discretion and Judge Bright would have upheld the decision.

Judge Bright's dissent argued that the broad discretion afforded to the trial court under C.G.S. § 46b-56, coupled with its authority to deny all access to one parent, and the need to permit the trial court flexibility, supports his interpretation. Judge Bright's dissent highlights the extent to which the majority decision splits hairs (making a "distinction without a difference") by distinguishing this case from *Zilkha* and in the argument that awarding Mother here some level of "rights" invalidated the decision to provide Father with discretion to limit those rights. Judge Bright also disagreed with the concept that requiring Father to consult with the child's therapist before exercising his own discretion afforded some delegation to the therapist, rather than a restriction on Father. Judge Bright did not argue with the law regarding third-party delegation nor suggest that this should be common practice or never constitute abuse of discretion, his dissent was limited to delegation to a party with sole custody.

One note to bear in mind if Judge Bright's interpretation is later vindicated in future appellate decision: C.G.S. § 46b-56 provides authority for the trial court to award custody "to either parent or to a third party…" which would seem to open this loophole (likely in exceptional circumstances which might narrow this problem substantially) to third-party delegation, if that third party were actually awarded sole legal custody of the children.

In all, for the various faults of the majority decision , it does provide a road-map of guidance for how future trial courts may best avoid running afoul of the delegation issue while still permitting discretion to a party with sole legal custody:

1. Afford the parent who is not granted the discretion *no rights*, as in *Zilkha*, such that the discretion afforded other parent be merely an exercise of the custodial parent's own parenting authority.
2. Only permit the custodial parent the right to *increase* access of the other parent, never to suspend, terminate or reduce.

3. Do not link such discretion to any third-party. Any requirement that a parent consult with, e.g., a child's therapist, should be separate and disconnected from the discretionary provision and crafted as for the benefit of the child.

R.H. v. M.S., 220 Conn. App. 212 (2023) (§46b-15 & stalking; §46b-15 & children)

Officially released June 27, 2023

In Short: The trial court must have some evidence connecting the violative behavior to the children in order to extend protection under CGS § 46b-15 to the children; the definition of stalking is broader than statute and includes common usage and the absence of a benign explanation for the respondent being present over a period of time at the applicant's residence was sufficient in this instance.

The parties were married, had children, and divorced. Plaintiff ex-husband filed an application for relief from abuse pursuant to CGS § 46b-15 against Defendant. Plaintiff did not check the box seeking that it apply to their children. Plaintiff alleged that Defendant had stalked him.

The trial court granted *ex parte* relief and extended the order to the parties' children. The trial court held an evidentiary hearing at which several witnesses testified, but Defendant did not testify or call any witnesses. The trial court extended the restraining order for one year. Defendant appealed, and Plaintiff did not participate in the appeal.

Defendant's first claim on appeal was that the trial court improperly extended the *ex parte* order of protection to the parties' children. The Appellate Court reviewed this claim under the abuse of discretion standard.

Plaintiff did not present any evidence regarding any conduct related to the parties' children nor seek such protection. The trial court was permitted to continue relevant court records, but it erred in relying solely on such records pertaining to the divorce in extending the protection to the children in the absence of any evidence that any conduct related to the restraining order related to the children. The Appellate Court vacated the *ex parte* restraining order to the extent that it extended protection to the children, noting that restraining orders are not moot for purposes of appeal even after expiration.

Defendant's second claim on appeal was that the trial court improperly found that Defendant had stalked the Plaintiff. Evidence had been presented that, *inter alia*, Defendant had surveilled Plaintiff over a period of forty-five minutes from two different locations on his street from her car.

The Appellate Court noted that the definition of stalking in CGS § 46b-1 is broader than that defined in the criminal statute and can include commonly defined usage of the term. The Appellate Court highlighted the fact that Defendant offered no testimony or evidence to provide a benign explanation for her presence on his street. The Appellate Court did not find abuse of discretion.

The issuing of the one-year restraining order was affirmed; the *ex parte* restraining order, to the extent that it extended protection to the parties' children, was vacated.

Simpson. v. Simpson. 222 Conn. App. 466 (2023) (interpretation of contract; UConn Cap & § 46b56c)

Officially released November 28, 2023

In Short: (1) The Appellate Court found that an agreement capping alimony and support payments on $700k of gross earned income was clear and unambiguous on its face, and (2) agreement to send a child to a college where tuition exceeds the UConn Cap is not the same as agreement to exceed the UConn Cap.

Judge Prescott issued the decision with which Judge Clark concurred. Judge Alvord issued a concurrence and dissent.

The parties were divorced by separation agreement and an addendum thereto in 2013, with three provisions relevant to this appeal:

1. Child Support: the separation agreement provided that Wife was earning $135k base income and Husband $299k base income annually, and awarded child support of $420/week. Husband was to pay additional child support, starting in 2016, in the amount of 9% of his gross bonus/profit sharing as long as he was obligated to pay child support for the children, and 6% of such when only one child remained eligible. The gross bonus/profit-sharing was calculated to include total payments Husband received, less any portion that was part of his normal monthly draw and normal quarterly tax payment draw. Husband's obligations were capped such that no child support would be paid on gross earned income in excess of $700k per calendar year, including bonus/profit sharing.

2. Alimony: the separation agreement provided that Husband would pay $3,500/month, reducing to $1,750/month upon sale of the marital home. Husband was to pay additional alimony starting in 2016 in the amount of 20% of his gross bonus/profit sharing. The bonus/profit sharing and the cap were defined for alimony in the same manner as for child support above.
3. The separation agreement provided that if Husband's compensation package materially changed, including base income or bonus/profit sharing structures, the parties would renegotiate the alimony and tax provisions to carry out the intentions of the agreement. The provision further clarified that the intention behind the division of income on the base salary/draw was to equalize the net income of the parties from those sources.

In 2018 Wife filed a motion for order regarding college education costs, a motion for contempt claiming Husband had violated the terms regarding child support and alimony, and a motion to modify child support and alimony alleging a substantial change in Husband's compensation package. Husband filed objections and a motion to decrease child support based on one child aging out of eligibility for support.

The trial court (M. Murphy, J.) held a five-day hearing at which both parties and Husband's accountant testified. The trial court issued a memorandum of decision finding the following facts and rendering the following orders:

1. At time of divorce Husband was an equity partner at Shipman & Goodwin earning a base salary of $298,686. At the time of the hearing Husband was a shareholder with the law firm of Carlton Fields and his income in 2019 was $1m.
2. Husband's gross bonus was $360k in 2015, $458k in 2016, $731k in 2017 and $627k in 2018.
3. Each bonus was earned during the calendar year prior to the January in which it was paid.
4. Husband failed to provide credible evidence as to what portion, if any, of those 2016-2019 bonuses should be allocated to his monthly base draw and so determined that the entire amount of the bonuses would be eligible for the percentage additional child support and alimony.
5. The relevant provisions of the Judgment were ambiguous, Husband was not in contempt, and extrinsic evidence was necessary regarding the parties' intentions.
6. The $700k cap effectively established a bonus cap of $401k, based on the difference between Husband's base salary at time of Judgment and $700k. This interpretation permitted consideration of Husband's income beyond $700k per year to extent that up to $401k per year of bonus exceeded that number, citing the intentionality language of the agreement and the language regarding renegotiation of the agreement.
7. A substantial remedial order for a $332k arrearage was entered with regard to the additional child support and alimony payments.
8. Despite acknowledging the substantial increase in Husband's compensation, the motions for modification were denied.
9. Husband was ordered to pay 90% and Wife 10% of the college costs, which were found not to be capped by statute, and which order was not made retroactive.
10. Husband was ordered to pay $58k of legal fees pursuant to C.G.S. § 46b-62.

The trial court articulated various aspects of its decision.

Husband claimed that the trial court improperly (1) modified its original decision by way of a post appeal articulation, (2) construed provisions of the parties' separation agreement regarding child support and alimony, (3) awarded counsel fees, and (4) exceeded the statutory cap for post-secondary education set forth in C.G.S. § 46b-56c.

Wife cross appealed arguing that the trial court improperly denied her motion for modification of alimony and child support.

The Appellate Court first addressed Husband's claim that the trial court improperly interpreted the separation agreement, specifically arguing that the $700k cap was clear and unambiguous. The Appellate Court applied plenary review to the issue of whether the contract was clear and unambiguous and cited hornbook law regarding interpretation of contracts ("a fair and reasonable construction of the written words … common, natural and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract … will not torture words to import ambiguity … any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms …"). The separation agreement specifically applied the $700k cap to Husband's gross earned income, not his annual bonus. The Appellate Court found this to be clear an unambiguous as a cap on Husband's total gross income for purposes of any percentage payment. The Judgment regarding the contempt motion was reversed only with regard to its remedial orders. Because of this reversal, the Appellate Court declined to resolve the claim regarding articulation.

The Appellate Court next addressed Husband's challenge to the award of counsel fees. The trial court made such award pursuant to C.G.S. § 46b-62. The Appellate Court determined that because the Judgment was reversed as to financial orders, the issue of counsel fees was intertwined with such orders and must be reconsidered on remand.

The Appellate Court then addressed Husband's claim that the trial court improperly exceeded the cap of C.G.S. § 46b-56c. Husband argued that there was no evidence in the record to support the trial court's finding that the parties agreed to exceed the cap. The parties had agreed that the child would attend Clemson, and the cost exceeded the UConn cap. Husband had paid all tuition, room and board for the first two years. The trial court interpreted the agreement to send the child to a school where tuition exceeded the cap as agreement to exceed the cap, despite Wife herself testifying that she wanted the UConn cap followed. The Appellate Court applied the clearly erroneous standard of review and reversed the trial court's decision. Agreement to attend an expensive institution does not amount to agreement to exceed the statutory limits for required payment. The issue of college costs was remanded for a new hearing.

Lastly, the Appellate Court considered Wife's cross appeal. The trial court had articulated that it denied the motion for modification because of the mosaic it created to provide equity to Wife. Thus, the Appellate Court reasoned that this issue must also be reversed and remanded in connection with the reversal of the remedial orders.

In sum, the Judgment was reversed as to the remedial orders and finding that the UConn cap did not apply and remanded for a new hearing on all pending motions on that basis.

Judge Alvord dissented regarding the issue of ambiguity of the separation agreement. She would have remanded for further proceedings to permit extrinsic evidence as to the parties' intent, which she indicated was missing. Judge Alvord stated that Wife set forth a plausible alternative interpretation of the separation agreement given the facts and circumstances of the case, relying on the fact that Husband's base income substantially exceeded the cap on support under the Judgment. In my analysis, the facts Judge Alvord cites are reasons why Wife could prevail in a modification, but they are not a basis for finding ambiguity in the original contract, which appears clear on its face as to the $700k cap.

Strauss v. Strauss, 220 Conn. App. 193 (2023) (Finality of Judgments)

Officially released June 27, 2023

In Short: the trial court does not have authority to vacate a finding of contempt after 120 days (absent mutual mistake, fraud or duress).

The parties were divorced by separation agreement in 2006. Thereafter, Wife filed numerous motions for contempt and the trial court granted several such motions.

In 2014, the trial court made the specific finding of contempt material to this appeal. That finding was made during a hearing at which Husband and Husband's lawyer did not appear or participate. Husband notified the court the morning of that hearing regarding a cardiac event that prevented him from appearing, but the trial court did not become aware of such notice until after it concluded the hearing and found Husband in contempt. Husband did file not appeal at that time nor any motion to reargue. Further proceedings continued to be held regarding the contempt and Husband was temporarily incarcerated.

In 2020, Husband filed a motion to vacate the 2014 contempt order, arguing that the contempt finding and subsequent incarceration violated his constitutional rights. Husband argued that the trial court had authority to vacate because the 2014 contempt orders were "fundamentally flawed" and

"constitutionally infirm …" arguing that the trial court had inherent authority to correct its judgment at any time. After some torturous procedural back-and-forth that was not subject of this appeal, the trial court denied the motion to vacate without a hearing, finding that it lacked authority to open a judgment entered five years previously. Husband appealed.

Husband filed a motion to stay with the trial court, asking the court to either clarify that the automatic stay precludes any act to enforce the 2014 contempt order or to order a stay of such action. The trial court held a hearing and denied the motion to stay, holding that a discretionary stay was not appropriate due to the unlikelihood that Husband would prevail in his appeal.

Husband's first claim on appeal was that the trial court improperly concluded that it lacked authority to vacate the 2014 contempt orders. Husband argued that, although CGS § 52-212a and PB §17-4 require that a motion to vacate be filed within four months of the Judgment, the court retains inherent equitable authority to vacate a motion for contempt in perpetuity. The Appellate Court cited and analyzed the compelling interest in the finality of Judgments and exercised plenary review over the question of law that was raised.

Husband cited appellate case law for the principle that the court retains authority to permit the purging of a civil contempt. The Appellate Court agreed that the trial court retains limited continuing authority to vacate a civil contempt finding if the contemnor purges the contempt, however, (1) Husband did not purge his contempt and was not challenging the contempt finding on the basis that he purged himself, and (2) purge of contempt does not automatically vacate the underlying order.

Husband argued that the trial court retained continuing authority to effectuate its Judgment. The Appellate Court pointed out that there is a difference between effectuating a judgment and modifying or vacating that Judgment, and Husband's request was not to effectuate, but was to vacate. The Appellate Court concluded that the trial court properly denied the motion to vacate.

Husband's second claim on appeal was that the trial court improperly denied his motion to stay the trial court proceedings during the pendency of the appeal. The Appellate Court declined to review this claim as the sole remedy to review an order concerning a stay of execution is by motion for review under PB § 66-6, which must be filed within ten days from the issuance of the notice of the order which is sought to be reviewed. Husband did not file a motion for review and therefore could not challenge the denial of stay on appeal.

The Judgment was affirmed.

Tilsen v. Benson, 347 Conn. 758 (2023) (ketubah & prenuptial agreement; U.S. Const. 1st Amendment)

Officially released September 5, 2023

In Short: (1) A prenuptial agreement that directs the court to enter financial orders based on religious doctrine, rather than expressing the intended financial orders itself, will not be enforced for violation of the establishment clause of the first amendment. (Those seeking to compel a "get"* based on a ketubah may be out of luck in future in Connecticut and would be better served by a secular prenup). (2) The trial court was well within its discretion to find an earning capacity based on fifty-nine-year-old Husband's last contract where he caused its early termination and sought no further employment.

The parties were married in 1989 in Pennsylvania, though they resided in Israel at the time. The wedding ceremony was conducted in accordance with Jewish tradition, including the signing of a traditional Jewish marriage contract written in Hebrew and Aramaic known as a ketubah. This ketubah provided that the parties agreed to "divorce … according to Torah law as is the manner of Jewish people…." The ketubah itself was devoid of financial specifics in the event of divorce.

The parties then moved to the United States for Husband's career opportunities as a conservative rabbi. Husband served as the rabbi of a synagogue in New Haven for twenty-eight years, until his employment contract was not renewed during the pendency of the divorce. Husband renegotiated a 10-year contract which would have run through 2025 (ordinarily subject to financial adjustment for the remaining five years) in exchange for a new 1-year contract, which was then not renewed because of disagreements between Husband and the Synagogue over issues arising from Covid-19. Husband had not thereafter searched for new employment and did not intend to seek further employment, despite being only fifty-nine years old.

Wife had worked as an attorney, a paralegal and a non-profit executive, but had not worked since 2015 despite significant efforts to find employment. She was sixty-one at time of divorce. She had been the primary caregiver to the parties' four adult children and supported Husband's career by hosting dinners, social events and certain services for the synagogue.

Husband brought the divorce action in 2018, seeking, *inter alia*, enforcement of the parties' ketubah as a premarital agreement, which he asserted would equalize most marital property and prohibit alimony. Wife filed an objection to such enforcement. The parties submitted conflicting affidavits from rabbis about the application of Torah law to alimony and property division.

Judge Klau held a hearing and denied the motion to enforce the ketubah, effectively bifurcating the prenuptial portion of the proceedings. The trial court determined that enforcement of the ketubah would require it to choose between competing religious interpretations of Torah law which is precluded under the first amendment and denied Husband's motion on that basis.

The case was then tried before Judge Goodrow over multiple days subject with substantial delay due to Covid-19. The trial court found that both parties were unemployed at time of trial, that Husband's gross annual earning capacity was $202k consistent with his final compensation from the synagogue, and that Wife's gross weekly earning capacity was $480 based on full-time employment at $12/hour. The trial court found that Husband's conduct demonstrated an effort to reduce his financial liability to Wife in the divorce. The trial court ordered, in relevant part, Husband to pay alimony of $5,000/month for fifteen years and provided Wife a safe harbor of $50,000. The trial court ordered Husband to pay 25% of the net distributions, including from sale, from a real estate interests established by his father and uncle.

Husband appealed arguing that the trial court (1) improperly denied his motion to enforce the ketubah, and (2) abused its discretion in fashioning financial orders. The appeal was transferred directly to the Connecticut Supreme Court.

As to **Husband's first claim on appeal**, he argued that enforcement would (A) not violate the establishment clause of the first amendment because it simply required enforcement of a choice of law provision, and (B) failure to enforce would violate his rights under the free exercise clause of the first amendment. The Supreme Court applied plenary review.

Husband argued that Jewish law governing marriage is secular in nature, and thus interpretation thereof was merely a choice of law provision, noting that a prior superior court decision imposed a monetary provision of a ketubah until the Wife was granted a get. In *Avitzur v. Avitzur*, 58 N.Y.2d 108, cert. denied, 464 U.S. 817 (1983), the high court in New York had similarly required a Husband to appear before a religious tribunal to permit a get pursuant to a ketubah, finding that the enforcement was simply to perform a secular obligation to which he had contractually bound himself.

Our Supreme Court found the dissenting opinion in *Avitzur* more persuasive, finding it impossible for a court to disentangle secular from religious considerations in adjudicating this dispute. Our Supreme Court explicitly disagreed with a similar decision in an Illinois Appellate decision, *In re Marriage of Goldman*, 196 Ill. App. 3d 785, appeal denied, 132 Ill. 2d 544 (1990) where the ketubah made no specific reference to dissolution, but the trial court found that the parties intended to govern and the court relied on the testimony of rabbis that the ketubah required a get and that such process was secular as a matter of religious law. Our Supreme Court held that Husband's desired relief would violate the establishment clause under the neutral principles of law doctrine. Because the ketubah was silent as to each spouse's

financial obligations in the event of a divorce, the trial court would be left to determine the intent from Jewish religious law.

Our Supreme Court reviewed Husband's unpreserved claim that failure to enforce would violate his rights under the free exercise clause pursuant to *Golding* review, but found that Husband's effort failed the third prong of *Golding*, based on the absence of a Constitutional violation. The free exercise clause prohibits unequal treatment and subjects to strict scrutiny laws that target the religious based on their status. Our Supreme Court found that Husband was still free to contract in any way he saw fit for a prenuptial agreement provided that such agreement was worded in such manner as could pass the neutral principles of law doctrine.

In summary, regarding the religious issue: (1) The ketubah was silent as to the actual financial terms necessary to provide the enforcement Husband sought, and instead directed the court to figure out the financial terms of the prenuptial agreement based on Jewish law, which is not a foreign secular jurisdiction, but a religion. This was prohibited by the Establishment Clause and not salvaged by Husband's argument about the free exercise of religion. (2) Although this case is not about a get, this opinion casts substantial doubt (if not sounding the death knell) on the ability of a trial court to require any future Husband to permit a get based on a ketubah. Any religiously observant Jewish woman wishing to preserve her right to a get in a future divorce would be well-served to execute a secular prenuptial agreement explicitly requiring participation in a get in the event of a divorce.

As to **Husband's second claim on appeal**, and his secular argument, our Supreme Court reviewed under the abuse of discretion and clearly erroneous standards. Husband challenged clearly erroneous factual findings and abuse of discretion as to the alimony and 25% distributions.

The Supreme Court (relatively easily under the facts cited above) found that the trial court properly exercised its discretion in finding earning capacities. There was ample evidence that Husband's efforts that resulted in termination of his employment were for advantage in the litigation, as were his cessation of efforts to find employment. The president of the synagogue's board testified that Husband sought the reduction in his contract term and efforts to retain him in his position. Similarly, the findings about Wife's lower earning capacity were grounded in factual findings regarding her difficulties in her career and efforts to find employment. The trial court was within its rights to not credit various aspects of Husband's vocational expert's testimony as to Wife's earning capacity.

Husband next argued that distributions from his real estate were "mere expectancies" and argued that the trial court failed to attach a present value to those distributions. The parties had stipulated before trial that the interest was not transferable but that the trial court could make a determination about a portion to which Wife was entitled. The Supreme Court found that the distribution order was consistent

with the present division method of deferred distribution and the parties had agreed that the interest was marital property.

Finally, Husband argued that the alimony award was unduly punitive, failed to consider his lack of income and employability given his age, did not adequately explain or justify the fifteen-year duration, and erroneously was based on gross earning capacity rather than net income. The Supreme Court noted that references to gross income by itself does not warrant reversal when there is ample evidence from which the court could have determined net income. While the finding of earning capacity was expressed in gross income, its award supports the presumption that the trial court considered Husband's net income. The Supreme Court compared the factual findings and award with various other cases and found no abuse of discretion, also noting the modifiability of the award.

The Judgment was affirmed.

*A get is a Jewish religious divorce permitting remarriage under Jewish law.

Walker v. Walker, 222 Conn. App. 192 (2023) (consideration of fault was not abuse of discretion; trial court considered all statutory criteria)

Officially released October 31, 2023

In Short: the trial court did not err in considering all the statutory criteria, including fault, in entering its financial orders, nor was there evidence that the trial court abused its discretion in its consideration and analysis of fault.

The parties married in 1993 and had three children, all of whom were adults by the time of the divorce. The matter was tried before Judge Moukawsher.

The trial court found the following facts: Wife was fifty and Husband sixty years old. The parties resided in a home purchased for Wife by her father, of which Wife owned 74.5% and Husband owned 25.5%. The parties remortgaged the marital home and used the proceeds to purchase Husband's sister's interest in an inherited building and family business, a custom frame shop. A major cause of the breakdown of the marriage was Husband's violence toward Wife and Husband's extramarital affairs. Wife had no job skills outside of her work at Husband's family business and limited work in retail. Husband's annual business income is approximately $100,000.

The trial court awarded the marital home to Wife, which was worth $800,000 and had a mortgage of $440,000. The trial court awarded the custom frame shop and building to Husband, which was worth $600,000, had no mortgage, and had rental income and potential for more. Husband was ordered to pay Wife $235,000, the amount by which the marital home had been encumbered to purchase Husband's sister's interest in the building. (For those who want the quick math, Wife was awarded net value of $595,000 and Husband $365,000 per the trial court's findings). Husband was ordered to pay $1,000 per month alimony for ten years (one third of the length of the marriage, but continuing until Husband turns 70). Both parties were awarded the extent of their respective interests that were received from family or inheritance.

Husband claimed on appeal that the trial court (1) improperly failed to consider all the relevant statutory criteria set forth in § 46b-81, and (2) applied an unreasonable amount of weight to Husband's fault in the breakdown of the marriage in fashioning awards of property division and alimony. (Husband abandoned claims initially raised on appeal regarding double-dipping, third party testimony weight, and restriction of time allocated for trial).

As to Husband's first claim, the trial court expressly stated that it "considered all" of the statutory criteria of § 46b-81. The Appellate Court held that the trial court was therefore presumed to have done so unless contradicted by the record, and nothing contrary appears in the record. The Appellate Court found that the trial court provided a well-reasoned analysis for the disparity in awards which was based on the facts, including origin of the assets, contributions of the parties, and needs of the parties.

Husband argued on his second claim that, due to the fact that the dissolution was based on the ground of irretrievable breakdown rather than intolerable cruelty (which ground was also alleged in the amended complaint) the trial court assigned his fault disproportionate weight. The Appellate Court noted the trial court's findings that Husband was more unfaithful and more violent than Wife, that Husband admitted his violence, and that Husband was deemed less credible. The Appellate Court also noted the trial court's emphasis on the financial circumstances of the parties in fashioning its award. The Appellate Court found it unnecessary to discern precisely how much weight the trial court placed on fault, as it was one factor among all of them and the trial court is afforded wide latitude. Dissolution based on irretrievable breakdown is not inconsistent with analysis of the cause for the breakdown as mandated by statute.

The Judgment was affirmed.

Wethington v. Wethington. 223 Conn. App. 715 (2023) (automatic orders effective upon service; dissipation of assets & discretion in property award)

Officially released February 13, 2024

In Short: The automatic orders are not effective until they are served (although the court properly considered prior dissipation of funds in fashioning division of assets); the trial court did not abuse its discretion in awarding Wife 60% of the marital estate where Husband was primarily responsible for the breakdown of the marriage and dissipated funds.

The parties married in 2010, had one child in 2012, began divorce proceedings in 2019, and had a four-day divorce trial in 2021-2022 before Judge Egan. The trial also addressed six motions for contempt, *pendente lite*.

The trial court found that the primary causes of the breakdown of the marriage was Husband's "excessive" drinking as well as his physical and verbal abuse. The trial court found Husband not to be credible. Wife was awarded 60% of the proceeds from the marital residence and other assets, Husband was found in contempt on the six motions for contempt and ordered to pay $76k out of his share of the proceeds as well as $25k in counsel fees related to those contempt findings.

Husband appealed, claiming that the trial court improperly (1) granted several motions for contempt *pendente lite*, (2) distributed the parties' assets, and (3) denied several postjudgment motions to reargue.

Husband's first claim addressed in the appeal was that he was improperly held in contempt for violation of the automatic orders prior to them becoming effective against him, and the trial court improperly denied his motion to reargue on that point. Husband was served with the notice of automatic orders on November 21, 2019. The trial court's orders addressed, in part, conduct that predated the service of the automatic orders.

The Appellate Court reviewed the legal question regarding the application of the automatic orders and rules of practice under the plenary standard of review. The Appellate Court also set forth the standard for reviewing a ruling on a motion to reargue, which is abuse of discretion. Practice Book § 25-5 provides for service of such automatic orders and renders them effective on the plaintiff upon the signing of the complaint and upon defendant upon service. The Appellate Court found that the trial court improperly found Husband to be governed by the automatic orders prior to service and improperly denied the motion to reargue on that point.

Husband's second claim addressed in the appeal was that the trial court improperly failed to credit him money he had escrowed in accordance with a stipulation, *pendente lite*. The parties had entered into a stipulation providing for certain *pendente lite* payments to Wife, as well as a $46,000 escrow account for Wife's use. Husband contended that the escrow was merely for security for which he should be credited, whereas Wife argued, and the trial court found, that it was an additional obligation. The Appellate Court determined that the stipulation was clear and unambiguous and that the escrowed monies were an additional obligation.

Husband's third claim addressed in the appeal was that his purchase of a Mercedes-Benz E350 during the pendency of the action constituted a customary and usual household expense permitted by the automatic orders, that he needed the second vehicle which he purchased for $14,000 for his use while living in Florida. The Appellate Court reviewed the trial court's finding of contempt on this point for abuse of discretion. The Appellate Court rejected Husband's argument in light of his ownership of another vehicle and lack of credibility as to his needs found by the trial court.

Husband's fourth claim addressed in the appeal was that the trial court improperly distributed the assets pursuant to C.G.S. § 46b-81. The trial court had awarded Wife 60% of the marital assets, plus the sums and fees ordered in connection with the contempt findings. The Appellate Court applied the abuse of discretion standard, and, in light of the trial court's findings of cause for the breakdown of the marriage and dissipation of funds, the trial court was well within its broad discretion in entering its orders.

The Judgment was reversed only with regard to the contempt and reargument specifically as to the conduct that occurred prior to the entry of the automatic orders and remanded with direction to enter orders consistent with the opinion in that respect.

Y.H. v. J.B. 224 Conn. App. 793 (2024)(child support; contempt sanctions)

Officially released April 16, 2024

In Short: (1) The trial court must consider the applicable statute and guidelines regarding an award of child support irrespective of whether either party asks for child support (and child support was requested…), (2) omission of child support was significant enough to trigger a total financial remand under the mosaic doctrine, and (3) a sanction for contempt must be restricted to efforts related to the contempt.

The parties had a child in 2008 and were married in 2010. Wife commenced divorce in 2020. The matter was tried before Judge Moukawsher. The trial court issued a memorandum of decision granting joint legal custody and awarding Husband primary residence of the child. The trial court stated "[n]either party has asked for alimony or child support, so the court will order none." The trial court awarded the parties' business, which it valued at $100k, to Wife. The trial court ordered that Husband have the marital home until the child turned nineteen or graduated high school and that it then be sold and a payment of $90k or 35% of the proceeds, whichever was greater, be paid to Wife.

The trial court also granted Wife's three motions for contempt regarding finances of the business and ordered Husband to pay $40k of Wife's counsel fees, but also stated that it was awarding such pursuant to C.G.S. § 46b-62.

Husband appealed the judgment of dissolution arguing that the trial court abused its discretion in (1) declining to award him alimony and child support, (2) how it divided marital property including home and business, and (3) granting Wife's motion for contempt and awarding her $40k in counsel fees. The Appellate Court set forth the abuse of discretion standard of review.

The Appellate Court first addressed the issue of child support, noting that Husband had repeatedly requested child support, and that, even if Husband had not requested child support, it was improper to fail to award it without first considering the applicable statutes and guidelines. The language of C.G.S. § 46b-84 is mandatory. In light of the trial court's failure to apply the statutes and guidelines, the Appellate Court remanded the case for a new trial on all financial orders based on the mosaic doctrine.

The Appellate Court next addressed Husband's claims of abuse of discretion as to contempt and the award of $40k in counsel fees. The Appellate Court agreed with the trial court that the underlying orders forming the basis for the contempt finding were clear and unambiguous and held that the trial court could reasonably have concluded that Husband had willfully failed to comply with those orders. However, the Appellate Court found that, to the extent that the $40k was a sanction, it constituted abuse of discretion which entitled Husband to a new hearing as to the appropriate sanction for willful violation of the court's orders, and to the extent that it was made pursuant to C.G.S. § 46b-62 it must be remanded for reconsideration in light of the above remand under the mosaic doctrine. Orders under C.G.S. § 46b-87 are restricted to efforts related to the contempt action, and the trial court cited no evidence relating the award to the motions for contempt.

The judgment was reversed only as to financial orders and the award of attorney's fees and remanded for a new trial on financial issues and for the appropriate contempt sanctions.

This is the first time that Judge Moukawsher was reversed on appeal in a family docket case.

Zakko. v. Kasir. 223 Conn. App. 205 (2023) (due process)

Officially released January 9, 2024

In Short: this case has a very complicated history and numerous issues were raised on appeal, but the sole issue addressed by this decision (which rendered all other claims moot) was a simple one: The trial court violated Husband's due process rights when it opened the Judgment of dissolution at an *Oneglia* hearing without permitting Husband to present any evidence or inquire of any witness.

The parties were divorced in 2016 by separation agreement. Prior to the divorce and again at the time of the divorce, Husband disclosed on his financial affidavit a disability insurance policy held with Mass Mutual, for which he did not list a value. After the dissolution, Husband applied for, and received, benefits from the Mass Mutual disability insurance policy that he disclosed. The alimony orders in the separation agreement included specific limitations with regard to modification of alimony based on percentages of Husband's earned income and Veteran's Disability income.

After the Judgment, Wife filed a motion to compel, two motions for contempt and a motion for modification, based on the Mass Mutual disability insurance payments, which motions were denied. Wife then filed a motion to open the Judgment of dissolution on the basis of fraud or mutual mistake. An *Oneglia* hearing was scheduled to determine whether there was probable cause of a fraud sufficient to permit post-judgment discovery.

The parties appeared before Judge Dolan for the *Oneglia* hearing. Wife's counsel called Husband to the stand and began a direct examination. After a brief direct examination, Judge Dolan interjected by asking questions, making statements and factual findings, and then summarily terminated the hearing. Judge Dolan found that Husband had *not* committed fraud but opened the judgment as to financial matters on the basis of mutual mistake and "fundamental fairness." Husband filed a prior appeal regarding the opening of the Judgment, which appeal was dismissed as interlocutory.

The divorce was then tried before Judge Klau over five days in 2021. Wife appealed Judge Klau's decision on various grounds and Husband cross-appealed arguing that his due process rights were violated in the hearing on the motion to open the judgment before Judge Dolan.

The Appellate Court reviewed Husband's cross appellate argument regarding due process under the plenary standard of review. The Appellate Court set for the minimum standards of due process, including the right to be heard in a meaningful time and in a meaningful manner, citing *Merkel v. Hihll*, 189 Conn. App. 779, 786-87 (2019), *Morera v. Thurber*, 187 Conn. App. 795, 799-800 (2019), *Eliers v. Eiles*, 89 Conn. App. 210, 218 (2005) and *Szot v. Szot*, 41 Conn. App. 238, 242 (1996). The Appellate Court found that Husband's due process rights were violated because Husband was not permitted to introduce any evidence or have a reasonable opportunity to be heard regarding the motion. The decision opening the Judgment was reversed, the original 2016 financial orders were reinstated, and the matter was remanded for a hearing on the underlying motion to open.

*Attorney McGrath represented Husband-Cross-Appellant in this appeal.