

Chapter 8 CUSTODY AND VISITATION

SYNOPSIS

PART I: SCOPE AND OVERVIEW

§ 8.01 Scope

§ 8.02 Objective and Strategy

PART II: ESTABLISHING JURISDICTION AND ANALYZING STATUTORY PROVISIONS FOR CHILD CUSTODY AND VISITATION

§ 8.03 CHECKLIST: Establishing Jurisdiction and Analyzing Statutory Provisions for Child Custody and Visitation

§ 8.04 Establishing Jurisdiction Under the Uniform Child Custody Jurisdiction and Enforcement Act

§ 8.05 Analyzing the Best Interests of the Child Standard

§ 8.06 Analyzing the Statutory Factors and Considerations When Determining the Best Interests of the Child

[1] Analyzing the Statutory Factors—In General

[2] Assessing the Child's Developmental Needs and Temperament

[3] Assessing the Ability of a Parent to Understand and Meet the Needs of the Child

[4] Assessing Relevant Information Received from a Child

[5] Assessing the Parent's Desire as to Custody

[6] Assessing the Child's Relationship with Family Members

[7] Assessing the Ability of Each Parent to Foster a Relationship Between the Child and the Other Parent

[8] Assessing a Parent's Coercive and Manipulative Behavior

[a] Interpreting Statutory Considerations

[b] Assessing Parental Alienation Claims

[9] Assessing a Parent's Ability to be Involved in the Child's Life

[10] Assessing the Child's Adjustment to School, Home and Community

[11] Determining How Long the Child Has Been in the Environment and the Need to Maintain It

[12] Assessing the Stability of the Child's Residence

[13] Assessing the Mental and Physical Health of the Parents and Child

[14] Assessing the Child's Cultural Background

[15] Assessing Domestic Violence's Effect on a Child

[16] Assessing Abuse of the Child or Siblings

[17] Determining if the Parenting Education Course Has Been Completed

[18] Considering the Physical and Emotional Safety of the Child

PART III: DETERMINING WHO MAY SEEK CUSTODY AND VISITATION

§ 8.07 CHECKLIST: Determining Who May Seek Custody and Visitation

§ 8.08 Analyzing Parentage

[1] Analyzing the Rebuttable Presumption of Parentage for a Child Born During the Marriage

[2] Establishing the Presumption of Parentage

[3] Asserting Parentage Under Artificial Insemination with Donor Sperm or Eggs (A.I.D.) Statutes

[a] Assessing the Validity of Surrogacy Agreements Prior to 2011

[b] Entering into Pre-Birth Orders

[c] Enforcing Surrogacy Agreements After 2011

[d] Enforcing Surrogacy Agreements after 2022

[4] Asserting Parentage Through Co-Parent and Stepparent Adoption

§ 8.09 Analyzing the Rebuttable Presumption of Parental Custody

[1] Reviewing General Considerations

[2] Establishing Orders for Children Where Parentage is not Legally Established

§ 8.10 Assessing the Rights of Third Parties to Seek Custody and Visitation

[1] Assessing General Considerations for Third-Party Custody and Visitation Actions

[2] Assessing Third-Party Visitation Actions Under *Troxel v. Granville*

[3] Assessing Third-Party Visitation Under the Revisions to Conn. Gen. Stat. § 46b-59

- [4] Assessing Third-Party Custody Claims Under *Fish v. Fish*
- § 8.11 Commencing an Action or Intervening
- § 8.12 Contesting Third-Party Custody and Visitation Claims
- PART IV: EMPLOYING CHILDREN’S REPRESENTATIVES AND EXPERTS
- § 8.13 CHECKLIST: Employing Children’s Representatives and Experts
- § 8.14 Appointing a Child’s Representative, *Pendente Lite*
- [1] Analyzing the 2014 Legislation—General Considerations
- [2] Appointing an Attorney for the Minor Child or a Guardian *ad Litem*
- [3] Establishing the Initial Court Order Defining the Scope of Appointment
- [4] Assessing the Differences Between an Attorney for the Minor Child and Guardian *ad Litem*
- § 8.15 Appointing an Attorney for the Minor Child, *Pendente Lite*
- [1] Analyzing the Role of an Attorney for the Minor Child
- [2] Assessing Concerns over Dual Capacity Roles
- § 8.16 Appointing a Guardian *ad Litem* for the Minor Child, *Pendente Lite*
- [1] Appointing a Guardian *ad Litem*
- [2] Assessing the Role of the Guardian *ad Litem*
- [3] Seeking to Institute Civil Actions Against the Guardian *ad Litem*
- § 8.17 Asserting Different Positions by the Attorney for the Minor Child and Guardian *ad Litem*
- § 8.18 Asserting Privileges on Behalf of the Minor Child
- § 8.19 Delegating Judicial Authority to an Attorney for the Minor Child or Guardian *ad Litem* is Prohibited
- § 8.20 Determining the Duration of the Appointment of the Attorney for the Minor Child and Guardian *ad Litem*
- § 8.21 Seeking to Remove an Attorney for the Minor Child or Guardian *ad Litem*
- § 8.22 Seeking Professional Evaluations
- [1] Seeking Professional Evaluations—In General
- [2] Conducting Evaluations Through the Family Relations Division
- [3] Obtaining Psychological or Psychiatric Evaluations
- [4] Contacting the Evaluator
- [5] Obtaining and Disseminating Written Evaluation Reports
- [6] Accepting the Recommendations of the Evaluator
- [7] Timing of the Receipt of the Report and Trial
- [8] Challenging Expert Psychological Testimony
- PART V: ASSESSING CONSIDERATIONS IN CUSTODY OR VISITATION ACTIONS
- § 8.23 CHECKLIST: Assessing Considerations in Custody or Visitation Actions
- § 8.24 Applying the Automatic Orders
- [1] Applying the Automatic Orders—General Considerations
- [2] Removing the Child Permanently from Connecticut
- [3] Vacating the Family Residence
- [4] Facilitating Contact Between the Parents and Child
- [5] Maintaining Medical Insurance
- [6] Participating in the Parenting Education Program
- § 8.25 Filing Emergency Ex Parte Custody Actions
- § 8.26 Filing Custody and Visitation Motions *Pendente Lite*—General Considerations
- § 8.27 Filing a Motion for Custody and Visitation *Pendente Lite*
- § 8.28 Preparing Parental Responsibility Plans
- § 8.29 Pleading and Assessing Joint or Sole Legal Custody Issues
- [1] Pleading and Assessing Joint or Sole Legal Custody Issues—In General
- [2] Assessing Decision-Making Considerations
- [3] Preparing for a Hearing on Legal Custody Issues
- § 8.30 Assessing Physical Custody Issues
- [1] Distinguishing Between Shared Parenting and Primary Residence
- [2] Assessing the Parental Behavior in Making Parenting Plans
- [3] Addressing Safety Concerns in Parenting Plans
- [4] Setting Forth a Detailed Parenting Plan
- [5] Determining Parenting Plans When a Parent is Deployed
- § 8.31 Modifying *Pendente Lite* Orders

§ 8.32 Assessing Relocation *Pendente Lite* and at the Time of Judgment
 § 8.33 Prohibiting Prospective Modifications of Custody and Visitation
 § 8.34 Providing for Non-Disparagement of the Parents
 § 8.35 Providing for Counseling Post Judgment
 § 8.36 Appealing *Pendente Lite* Orders
 § 8.37 Evaluating Custody Orders Pending Appeal—Automatic Stay Provisions
 PART VI: FILING CUSTODY OR VISITATION ACTIONS POST JUDGMENT
 § 8.38 CHECKLIST: Filing Custody or Visitation Actions Post Judgment
 § 8.39 Filing Custody or Visitation Actions Post Judgment—In General
 § 8.40 Finding a Material Change in Circumstances for Custody Determinations
 § 8.41 Seeking a Modification
 [1] Seeking a Modification Based Upon the Best Interests of the Child for Visitation Determinations
 [2] Obtaining a Temporary Modification Where a Parent is Deployed
 § 8.42 Assessing Changed Behavior of a Parent in a Modification
 § 8.43 Restricting the Ability of a Parent Filing a Motion for Modification
 § 8.44 Making Orders Regarding Relocation Post Judgment
 PART VII: ASSESSING EVIDENTIARY CONSIDERATIONS IN CUSTODY OR VISITATION ACTIONS
 § 8.45 CHECKLIST: Assessing Evidentiary Consideration in Custody or Visitation Actions
 § 8.46 Assessing the Scope of the Guardian *ad Litem*'s Testimony
 § 8.47 Analyzing Hearsay
 [1] Considering a Child's Statement to a Non-Parent
 [2] Considering a Child's Statement to a Parent
 § 8.48 Determining Appropriate Discovery Sanctions

PART I: SCOPE AND OVERVIEW

CUSTODY AND VISITATION

§ 8.01 Scope

This chapter covers:

- The statutory factors to determine the custody and visitation orders commensurate with the child's best interests.
- Assessing and defending claims for third-party custody and visitation actions.
- The automatic orders applicable to custody cases.
- Considerations when filing motions for custody and visitation *pendente lite*.
- The appointment and duties of the attorney for the minor child and the guardian *ad litem*.
- Seeking evaluations.
- Assessing legal and physical custody issues.
- Relocation *pendente lite* and at the time of the dissolution.

- Modification of custody.
- Evidentiary issues particular to custody cases.

§ 8.02 Objective and Strategy

This chapter is designed to provide an overview of the law regarding child custody and visitation in Connecticut. The chapter will review and discuss the statutory authority governing court actions involving custody and visitation. The chapter begins with an examination of the foundations of Connecticut family law jurisprudence for custody and visitation and the best interests of the child standard. Third-party custody and visitation claims are examined. Considerations during the *pendente lite* phase of the case are discussed, including prosecuting and defending motions for temporary custody and visitation, and the appointment of a guardian *ad litem* or an attorney for the minor child. The rebuttable presumption of joint custody is discussed in this chapter. Relocation issues and the associated burden of proof are examined. This chapter continues with the standards and considerations in filing modifications for custody and visitation. Finally, this chapter concludes with evidentiary considerations that are unique in custody and visitation litigation.

PART II: ESTABLISHING JURISDICTION AND ANALYZING STATUTORY PROVISIONS FOR CHILD CUSTODY AND VISITATION

CUSTODY AND VISITATION

§ 8.03 CHECKLIST: Establishing Jurisdiction and Analyzing Statutory Provisions for Child Custody and Visitation

8.03.1 Establishing Jurisdiction and Analyzing Statutory Provisions for Child Custody and Visitation

- Establishing jurisdiction under the UCCJEA:
 - For a valid order to enter, the court must have jurisdiction over the child.
 - A court with jurisdiction over the child may make or modify orders regarding custody and visitation. **Authority:** Conn. Gen. Stat. §§ 46b-56(a) and 46b-115k *et seq.*; *Doe v. Doe*, 244 Conn. 403 (1998). **Discussion:** See § 8.04, *below*. See also Chapter 2, §§ 2.38–2.50, *above*.
- Analyzing the best interests of the child standard:
 - The ultimate consideration for entering orders for custody and visitation is the best interests of the child standard. **Authority:** Conn. Gen. Stat. § 46b-56(b); *In re Tayquon H.*, 76 Conn. App. 693 (2003). **Discussion:** See § 8.05, *below*.
- Analyzing the statutory factors when determining the child's best interests:
 - The statutory factors are not to be given specific weight and no factor is more important than another.
 - There are sixteen statutory factors to be considered:

- The child's developmental needs and temperament.
- The ability of the parents to meet the needs of the child.
- Relevant information that is received from the child.
- The court may allow a parent to alter parenting time or, under certain circumstances a child to determine parenting time, but it is an improper delegation of judicial authority to have a parent determine visitation.
- The parents' desire as to custody.
- The child's relationship with family members.
- The ability of each parent to foster a relationship between the child and the other parent.
- The parents' coercive and manipulative behavior regarding the child, including parental alienation.
- The parents' ability to be involved in the child's life.
- The child's adjustment to school, home and community.
- How long the child has been in the environment and the need to maintain it.
- The stability of the child's residence.
- The mental and physical health of the parents and child.
- The child's cultural background.
- Domestic violence's effect on the child.
- Abuse of the child or siblings.
- Physical and Emotional Safety of the Child.
- Whether the parents have completed the parenting education course. **Authority:** Conn. Gen. Stat. § 46b-56(c); *Knock v. Knock*, 224 Conn. 776 (1993), *R.H. v. M.H.*, 219 Conn. App. 716 (2023), *Nietupski v. Castillo*, 196 Conn. App. 31, cert. denied, 335 Conn. 916 (2020), *Zilkha v. Zilkha*, 180 Conn. App. 143 (2018), *Hibbard v. Hibbard*, 139 Conn. App. 10 (2012), *Azia v. DiLascia*, 64 Conn. App. 540 (2001), *Grabowski v. Grabowski-Clark*, No. FA1040532335, 2013 Conn. Super. LEXIS 151 (Super. Ct. Jan. 23, 2013), and *Walsh v. Walsh*, FBTF 094027973, 2011 Conn. Super. LEXIS 3336 (Super. Ct. Dec. 23, 2011). **Discussion:** See § 8.06, *below*.

§ 8.04 Establishing Jurisdiction Under the Uniform Child Custody Jurisdiction and Enforcement Act

A valid order for custody or parenting time must be predicated upon the jurisdiction of the court over the child. The jurisdictional requirements are set forth in the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter "UCCJEA"). Conn. Gen. Stat. § 46b-115k *et seq.* For a more thorough discussion of jurisdiction under the UCCJEA, see Chapter 2, §§ 2.38–2.50, *above*.

Provided a trial court has jurisdiction over the child, it has the authority to make or modify orders regarding custody and visitation. Conn. Gen. Stat. § 46b-56(a). The court may exercise this authority in any controversy that comes before it, whether a dissolution action, custody or visitation application, or any other procedural vehicle that brings child custody issues before the court. *Doe v. Doe*, 244 Conn. 403, 424–425 (1998).

§ 8.05 Analyzing the Best Interests of the Child Standard

The ultimate consideration in making orders pertaining to custody and visitation of a child

is that they shall serve the best interests of the child. [Conn. Gen. Stat. § 46b-56\(b\)](#). “Although the term ‘best interest’ is elusive to precise definition ... ‘[t]he best interests of the child has been generally defined as a measure of a child’s well-being, which includes his physical (and material) needs, his emotional (and psychological) needs, his intellectual and his moral needs.’ ” *In re Tayquon H.*, 76 Conn. App. 693, 704 (2003).

The goal in making orders shall have as an overriding principal the best interests of the child, which allows the child to have consistent and active parental involvement consistent with that parent’s abilities and interests. Orders regarding custody and parenting may include:

1. An agreement of the parties to a parenting plan.
2. An award of joint custody or sole custody, both in terms of residential custody and decision-making.
3. Any other custodial arrangement that would be in the child’s best interests.

[Conn. Gen. Stat. § 46b-56\(b\)](#).

#Comment Begins

Strategic Point: A parenting plan is not a “one size fits all.” Rather, it should be tailored to the specific needs and requirements of the child and family. What may have been appropriate for one family, may not work for another.

#Comment Ends

§ 8.06 Analyzing the Statutory Factors and Considerations When Determining the Best Interests of the Child

[1] Analyzing the Statutory Factors—In General

While the ultimate standard in making an order pertaining to custody and visitation is the best interests of the child, the legislature has set forth 17 factors to be assessed. The court is not required to assign weight to any of these factors, but may assess and weigh them in the court’s discretion. [Conn. Gen. Stat. § 46b-56\(c\)](#) and *Hibbard v. Hibbard*, 139 Conn. App. 10 (2012). The court is, however, to articulate the basis of its decision. [Conn. Gen. Stat. § 46b-56\(c\)](#).

#Comment Begins

Strategic Point: Whenever confronted with a custody or visitation case, the list of 16 factors should be used as a template to determine the pros and cons of the case and particular parenting plans. It will also provide a good checklist to ensure that all of the appropriate evidence is provided to the court.

#Comment Ends

[2] Assessing the Child’s Developmental Needs and Temperament

The first factor is to assess the child’s developmental needs and temperament. [Conn. Gen. Stat. § 46b-56\(c\)](#). In determining the best interests of a child, the court must necessarily determine

how those best interests can be met in light of the unique behavioral, educational, and/or developmental needs of that particular child. One consideration may be a child's special needs. This factor permits a court to treat children of varying ages differently. Clearly a parenting plan for a twelve-year-old will not be appropriate for an infant.

#Comment Begins

Strategic Point: Knowing a child's needs is paramount in determining a parenting plan which will provide the least amount of disruption to the child. It will also enable an assessment of the parents' ability to meet any special needs of the child.

#Comment Ends

[3] Assessing the Ability of a Parent to Understand and Meet the Needs of the Child

Just as the court must necessarily determine how the best interests of a child can be met in light of the child's issues or talents, so too must a court assess how a child's best interests can be understood and met by a parent. *Conn. Gen. Stat. § 46b-56(c)*. In a custody dispute, a parent's inability to comprehend or address a child's needs is a significant factor. A parent who fails to recognize a child's developmental needs or acts in a manner that might exacerbate the child's needs will be less likely to prevail in a custody action. *Faria v. Faria*, 38 Conn. Supp. 37 (1982).

A parent's work schedule may also prove to be a material consideration. A parent with a flexible work schedule may permit a more expanded parenting schedule than that of a parent who is unable to be home to care for a child. *Perry v. Perry*, 2009 Conn. Super. LEXIS 1283 (2009).

Other considerations may be for children of special needs. Prior work done with the special needs child in terms of advocating and understanding the child's issues and thus, the ability to advocate for the child in the future will be strongly considered by the court. *Nietupski v. Castillo*, 196 Conn. App. 31, cert. denied, 335 Conn. 916 (2020).

[4] Assessing Relevant Information Received from a Child

Relevant information from a child includes a child's informed preferences. *Conn. Gen. Stat. § 46b-56(c)*. Whether from a guardian *ad litem*, the attorney for a minor child, through a custody evaluation, or some other means of evidence, a child's informed preferences do carry meaning and weight with judges. The fact that a child's preference is to be considered, does not mean custody must be decided in accordance with those preferences. *Knock v. Knock*, 224 Conn. 776 (1993) and *Azia v. DiLascia*, 64 Conn. App. 540 (2001). Certainly, the informed preference of a seventeen-year-old will likely carry more weight than that of a five-year-old child.

Older teenage children who lacked a relationship with their father were properly permitted to determine when they would see him. Such an order was not deemed an improper delegation to a third party, but rather a denial of parenting time, except as determined by the children. *Zilkha v. Zilkha*, 180 Conn. App. 143 (2018). The ability of a parent to modify the parenting schedule is not an improper delegation of judicial authority, while a parent being able to dictate visitation is an improper delegation of judicial authority. *R.H. v. M.H.*, 219 Conn. App. 716 (2023). Thus, the unilateral ability to suspend or modify visitation is not permitted.

#Comment Begins

Strategic Point: Many parents erroneously believe that a child's preference will determine what

the court order will be. Additionally, parents believe there is an age, such as fourteen, when the child may make decisions as to where he or she wants to live. That is not the case, and parents need to be educated from the beginning of the case that children do not make the decisions.

#Comment Ends#Comment Begins

Warning: *Zilkha* should be read narrowly and not broadly as it is an outlier of a case. There was a significant history dating back to the commencement of the dissolution proceedings in 2003 that led the court to the decision it made. In addition, the father's relationship with the children was lacking for a significant period of time, which was a large factor in the court's decision.

#Comment Ends

[5] Assessing the Parent's Desire as to Custody

Just as a child's informed preference will be considered, so will a parent's wish as to custody and visitation. [Conn. Gen. Stat. § 46b-56\(c\)](#). A parent's desire for a particular schedule, or reasons for seeking sole or joint legal custody, can be very illuminating. The motivations of the parents may be explored to determine if they are truly representative of the best interests of the child or are the result of the parent's selfish motivation, such as getting back at the other parent.

#Comment Begins

Strategic Point: The parents' ability to communicate fully during a contested custody case is typically compromised. They enter the proceedings with a healthy dose of paranoia and distrust of the other parent, often ascribing to the other parent erroneous motives for positions being taken. If representing the child, it is important to explore these motivations and clear up misunderstandings that will often help to lessen the tensions and acrimony in such cases.

#Comment Ends

[6] Assessing the Child's Relationship with Family Members

The child's relationship with each parent, sibling, or others with whom he or she significantly interacts, both currently and in the past, is a factor to be considered. [Conn. Gen. Stat. § 46b-56\(c\)](#). The considerations range from the level of bonding between the child and parents to safety concerns such as domestic violence or addiction issues. When assessing this factor in a post judgment modification proceeding, step-parent and step-sibling interactions should be considered. Additionally, the reasons why a child may have a particular relationship with one parent should be viewed. Some parents try to buy a child, while others simply have a more naturally bonded relationship with the child.

#Comment Begins

Strategic Point: When assessing a child's relationship with family members, it is wise to keep in mind the developmental stage of the child. For instance, a fourteen-year-old girl who says she "hates" her mother is typically developmentally appropriate. On the other hand, if this same fourteen-year-old states that her mother is her "best friend," it may be concerning from a developmental standpoint.

#Comment Ends

[7] Assessing the Ability of Each Parent to Foster a Relationship Between the Child and the Other Parent

Each parent's ability to facilitate a relationship between the child and the other parent is a crucial consideration when assessing both an appropriate parenting plan and legal custody issues. [Conn. Gen. Stat. § 46b-56\(c\)](#). In a healthy environment, both parents will facilitate a relationship between the child and the other parent. Where that does not happen, it is significant in terms of determining legal custody issues and the visitation schedule, and may even result in an order of sole custody. *Hibbard v. Hibbard*, 139 Conn. App. 10 (2012).

#Comment Begins

Strategic Point: When assessing facilitation, a parent's actions, not his or her testimony at trial, will show this. A parent's facilitation of the relationship between the child and the other parent may be demonstrated by: communications with the other parent regarding the child's activities and schedules; attempts to voluntarily provide makeup time when the other parent unavoidably could not exercise parenting time; doing drop offs and pickups which are not required under any agreement; ensuring the child is in contact with the other parent daily; and providing information about the child's health and education.

#Comment Ends

[8] Assessing a Parent's Coercive and Manipulative Behavior

[a] Interpreting Statutory Considerations

A parent's coercive or manipulative behavior involving the child in a dispute or placing the child in the middle of the custody litigation is another consideration. [Conn. Gen. Stat. § 46b-56\(c\)](#). The courts are sensitive to the issue of having a child triangulated by one parent against the other. This will often occur when the parent has inappropriate adult conversations with the child. *Eisenlohr v. Eisenlohr*, 135 Conn. App. 337 (2012). Credible evidence of a parent enlisting a child, whether by coercion, deception, or manipulation, to "take sides" may result in a modification of custody. *Eisenlohr*, 135 Conn. App. at 345.

#Comment Begins

Strategic Point: A parent seeking to enlist a child is typically doing so for his or her own selfish purposes and not for the best interests of the child. It can be argued that a parent who was truly looking out for a child's best interests would shield the child from the parental dispute.

#Comment Ends

[b] Assessing Parental Alienation Claims

Many parents who feel the other parent is interfering or unduly restricting his or her parenting time will allege parental alienation. This term is provocative and explosive, oftentimes used erroneously. When the concept originated, it was framed as parental alienation syndrome by Dr. Richard Gardner. However, courts and mental health professionals have dismissed the concept of a syndrome.

"However, the concept of alienation is a complex one. The cartoonish stereotype of an evil, conniving parent who actively and consciously brainwashes the child to separate them from the innocent parent is rare and overly simplistic. When there is a 'preferred' and a 'rejected'"

parent, those involved tend to focus on each other and their conflict. This narrow focus overlooks the actions, thoughts, feelings and opinions of some very important participants—the children.” *Grabowski v. Grabowski-Clark*, No. FA104053233S, 2013 Conn. Super. LEXIS 151, page 1 (Super. Ct. Jan. 23, 2013).

One judge in Connecticut utilized the definition of parental alienation as found in Wikipedia. “Most psychologists today would probably accept the definition found in Wikipedia as being generally accurate ... ‘parental alienation is social dynamic, generally occurring due to divorce or separation when a child expresses unjustified hatred, or unreasonably strong dislike of one parent, making access by the rejected parent difficult or impossible. These feelings may be influenced by negative comments by the other parent and by the characteristics, such as lack of empathy and warmth, of the rejected parent. The term does not apply in cases of actual child abuse, when the child rejects the abusing parent to protect themselves.’ ” *Walsh v. Walsh*, No. FBTFA094027973, 2011 Conn. Super. LEXIS 3336, page 2 (Super. Ct. Dec. 23, 2011).

When assessing whether there is alienation, the practitioner should focus on a couple of issues. First, prior to the dissolution, what was the relationship between the child and the rejected parent? If there was no relationship or there were prior issues, that will mitigate against a finding of parental alienation. However, if there was a strong loving bond between the parent and child and the absence of some intervening event, other than the divorce, the subsequent rejection of a parent by a child may likely be a result of alienation. Second, the child’s reason for rejecting a parent should be assessed. Does the child have a valid reason to reject the parent or is the child providing a vague narrative or even parenting the favored parent? Children who are vague or use developmentally inappropriate language to describe their feelings or experiences may likely be influenced by the favored parent.

When faced with alienation, early intervention is key before a child become so entrenched that no intervention will work.

[9] Assessing a Parent’s Ability to be Involved in the Child’s Life

A parent’s ability to be involved in the child’s life is a significant consideration, especially when preparing a visitation schedule. [Conn. Gen. Stat. § 46b-56\(c\)](#). One factor impacting a parent’s ability to be involved in the child’s life is his or her work schedule. It is extremely important to determine a parent’s availability to parent a child due to work or other commitments. Likewise, if a child is involved in activities in which one parent refuses to allow the child to participate, the parenting schedule may need to be altered to lessen the impact on the child.

#Comment Begins

Strategic Point: When assessing this criterion in light of a parenting plan, the practitioner will need to think outside of the box. For example, if a parent is required to work a schedule that for all practical purposes prohibits meaningful parenting time during the work week, that parent may receive a majority of the weekend parenting time. Similarly, if one parent is in a profession with no set schedule, such as a nurse or those who work for the police or fire departments, the schedule may not be on set days each week, but a rotation depending upon that parent’s work schedule.

#Comment Ends

[10] Assessing the Child's Adjustment to School, Home and Community

How well a child is adjusted to his or her current environment can play an important factor in determining where that child will live in the future. [Conn. Gen. Stat. § 46b-56\(c\)](#). If a child is particularly involved in the community or entering or in high school, a court may be less willing to make orders which would require the child to move out of that environment.

#Comment Begins

Strategic Point: Part of assessing the child's adjustment involves analyzing how well a child can handle change or if he or she needs a change. A child could be very involved in school and extracurricular activities so that taking him or her out of the school would be devastating. On the other hand, a child may be an outsider in school who could benefit from a change.

#Comment Ends

[11] Determining How Long the Child Has Been in the Environment and the Need to Maintain It

The desirability of maintaining continuity of environment for the child as well as the time in which the child has been in this environment, is a corollary of the prior factor. [Conn. Gen. Stat. § 46b-56\(c\)](#). The court will need to understand if a child has grown up in, or adjusted to, a stable and satisfactory environment. This factor also provides that a parent removing himself or herself from the house to alleviate tension or stress in the household, may be favorably considered in determining custody or visitation. Moving the child from an otherwise "stable" residence to protect the child or the parent moving due to emotional and/or physical abuse may be favorably viewed, in part because it places the child's needs above the [parent's](#) parents.

#Comment Begins

Strategic Point: For tactical reasons, many parents are advised not to move out of the marital residence. However, these tactical reasons must be viewed in light of the needs of the child. If the stress and tension in the house is so palpable, the only solution, absent the ability to prevail on a motion for exclusive possession, is for one of the parents to leave the house.

#Comment Ends#Comment Begins

Strategic Point: If the situation in the home is stressful for the child and a parent does not voluntarily remove himself or herself, the court may view that action unfavorably. In that circumstance, a parent may be viewed as placing his or her own interests ahead of the child's.

#Comment Ends

[12] Assessing the Stability of the Child's Residence

The stability of where the child may reside is a key factor in rendering custody and parenting decisions. [Conn. Gen. Stat. § 46b-56\(c\)](#). Stability may take many forms depending upon the child and the family situation. It will include the neighborhood, friends, and parental behavior. Instability may result from a child being left home alone frequently, a parent bringing multiple partners into the home, alcohol and addiction issues, and psychological issues with a parent. Instability may also be a product of a parent's inability to control anger issues. [Peters v. Senman, 2011 Conn. Super. LEXIS 732 \(2011\)](#).

#Comment Begins

Strategic Point: Stability is not only an assessment of outside factors, but also the resiliency with which a child is capable of handling these factors.

#Comment Ends

[13] Assessing the Mental and Physical Health of the Parents and Child

The health, both medical and physical, of the parents and child may potentially be an impediment to parenting. [Conn. Gen. Stat. § 46b-56\(c\)](#). From a medical health standpoint, there may be times when a parent is incapable of taking care of a child. Likewise, if a child has a medical condition that requires a certain amount of care, the courts will assess the parent's ability to meet these needs. The psychological functioning of the parents may be an important component, especially when a parent's mental health interferes with his or her ability to parent. It may be important to evaluate a child's psychological health to determine any special needs and to assess the parents' ability to meet these needs.

#Comment Begins

Strategic Point: Many practitioners routinely file motions for psychological examinations. They are not necessary in each and every case. Before filing any such motion, it should be determined exactly what the purpose is for filing the motion. If a party does not seem to have psychological issues that would impair his or her ability to parent, then psychological evaluations may be superfluous. It must also be remembered that everyone has some sort of psychological feature, trait, or diagnosis. However, that does not render him or her incapable of parenting. The real import of psychological testing is to assess how a parent's psychological functioning affects his or her parenting.

#Comment Ends

[14] Assessing the Child's Cultural Background

The cultural background of the child is a factor to be considered in each case. [Conn. Gen. Stat. § 46b-56\(c\)](#). Certain cultures may have different ways of parenting that do not make them right or wrong, only different. Therefore, parenting cannot be viewed through the lens of the culture of the judge or the ~~attorneys'~~attorneys involved, but through the culture of the child.

#Comment Begins

Strategic Point: Anytime the practitioner is faced with a culture about which he or she is unaware, it is important to learn about that culture. That is the only way to have a true and full understanding of the client and family. As a guardian *ad litem*, such inquiry will eliminate a claim of bias.

#Comment Ends

[15] Assessing Domestic Violence's Effect on a Child

Protecting a child from the scourge of domestic violence, including coercive control, whether as the direct victim or being exposed to it in his or her household, is inherent in ensuring the child's best interests. [Conn. Gen. Stat. § 46b-56\(c\)](#). It is permissible to allow an expert to

testify about battered women's syndrome, as it is relevant in a custody determination. *Knock v. Knock*, 224 Conn. 776 (1993).

[16] Assessing Abuse of the Child or Siblings

Whether a child or sibling has been abused is clearly a relevant factor to determine a child's safety with a parent. *Conn. Gen. Stat. § 46b-56(c)*.

[17] Determining if the Parenting Education Course Has Been Completed

Since 1994, the Connecticut courts have mandated that parents participate in and complete a six-hour parenting education course. Should either parent not attend or complete the course, this may be taken into account by a judge making a custody or visitation order. *Conn. Gen. Stat. § 46b-56(c)*.

[18] Considering the Physical and Emotional Safety of the Child

In 2021, the statute was amended to include considerations of the physical and emotional safety of the child. This change was part of the broader change of the statutes to reference coercive control as an element of domestic violence. *Conn. Gen. Stat. § 46b-56(c)*.

#Comment Begins

Warning: Attorneys serving as a guardian ad litem or attorney for the minor child should make themselves conversant in matters of domestic violence, and most especially coercive control. Since it is a requirement for consideration under the statute, failure to appreciate and understand its intricacies will undermine your credibility if serving in these roles.

#Comment Ends

PART III: DETERMINING WHO MAY SEEK CUSTODY AND VISITATION

CUSTODY AND VISITATION

§ 8.07 CHECKLIST: Determining Who May Seek Custody and Visitation

8.07.1 Determining Who May Seek Custody and Visitation

- Analyzing the rebuttable presumption of parentage for a child born during the marriage:
 - The spouse of the person giving birth to a child during or within 300 days of the termination of the marriage is the presumptive parent of the child.
 - A person who resided with the individual giving birth to or adopting a child and holding the child out as the person's own child from that time and for at least two years thereafter is a presumptive parent of the child.
 - For unmarried individuals only, parentage must be established by

signing an acknowledgment of parentage or other court adjudication.

- The presumption of parentage must be challenge within two years of the child's birth unless certain requirements are met.

- Where the only other person claiming parentage is the person who gave birth to the child, the presumptive parent will be adjudicated a parent if no one challenges the presumption or the person is identified as a genetic parent of the child.

- The person giving birth to the child can challenge the presumptive parent who is not an identified genetic parent by showing that the parent giving birth held the child out to be the presumed parents as a result of dress, coercion or threat of harm.

- Only by presenting clear and convincing evidence that another person is the father may this presumption be rebutted. **Authority:** Conn. Gen. Stat. §§ 46b-475 and 46b-489; *Weidenbacher v. Duclos*, 234 Conn. 51 (1995).

Discussion: See § 8.08[1], below, see also Chapter 10, § 10.05, below.

□ Establishing the presumption of parentage

- A child born during a marriage is presumed to be the child of the marriage.

- The parent-child relationship should be reinforced to the signing of an acknowledgment of parentage.

- Surrogacy, pre-birth orders, and acknowledgments of parentage should be used for any intended parents utilizing gestational or genetic surrogacy. **Authority:** Conn. Gen. Stat. §§ 1-1m, 45a-771(a), and 46b-38nn; *Raftopol v. Ramey*, 299 Conn. 681 (2011). *Weidenbacher v. Duclos*, 234 Conn. 51 (1995) and *Barse v. Pasternak*, 2015 Conn. Super. LEXIS 1705 (June 29, 2015).

Discussion: See § 8.08[2], below. See also §§ 13.13[2] and 13.13, below. See also Chapter 10, § 10.06, below.

□ Asserting parentage under artificial insemination statutes:

- Under the statutes for alternative reproduction technologies, a sperm donor acquires no legal relationship with the child.

- Same-sex couples may use spousal consent provisions, with both becoming the legal parents without the need for an adoption.

- Gestational surrogacy is not covered by the alternative reproduction technology statute. **Authority:** Conn. Gen. Stat. § 45a-771 et seq., 45a-771a, 45a-772(a), 45a-772(b), 45a-773, 45a-774, and 45a-775; *Pavan v. Smith*, 137 S. Ct. 2075 (2017), *Raftopol v. Ramey*, 299 Conn. 681 (2011), *Torres v. Seemeyer*, 207 F. Supp. 3d 905 (W.D. Wisconsin 2016), and *Corte v. Ramirez*, 81 Mass. App. Ct. 906 (2012). **Discussion:** See § 8.08[3], below. See also § 13.10, below.

□ Establishing parentage under surrogacy and pre-birth orders:

- Prior to 2011, a surrogacy agreement could not establish parentage; there had to be an adoption.

- Pre-birth orders began in 2002, which:

- Recognized gestational surrogacy agreements as valid, where the intended parents directly or through a donor provided the egg and sperm.
- Declared the intended parents to be the legal parents of the child.
- Required the hospital where the child was born to place the names of the intended parents on the birth certificate.

- In response to objections by the department of public health, once a court order identified the child's parents the department was to issue a replacement birth certificate.

- After 2011, irrespective of a genetic link, the intended parents may be listed on the birth certificate.
- After 2011, gestational surrogacy agreements must be recognized if all who sign the agreement still agree to its terms when a court order to effectuate it is sought.
- Parentage under a gestational surrogacy agreement and court order is not contingent upon the marital status of the parties.
- The due Connecticut Parentage Act sets forth specific criteria and procedures for establishing parentage for intended parents pursuant to gestational and genetic surrogacy agreements. **Authority:** Conn. Gen. Stat. §§ 7-36, 7-36(16), 7-48a; and 46b-521; *Raftopol v. Ramey*, 299 Conn. 681 (2011), *Doe v. Doe*, 244 Conn. 403 (1998), *Griffiths v. Taylor*, 2008 Conn. Super. LEXIS 1534 (2008), *Oleski v. Hynes*, 2008 Conn. Super. LEXIS 1752 (2008), *Vogel v. Kirkbride*, 2002 Conn. Super. LEXIS 4261 (2002), and *Hatzopoulos v. Murray*, 2002 Conn. Super. LEXIS 4263 (2002). **Discussion:** See § 8.08[3] [a]–[d], *below*. See also Chapter 11, § 11.10 and 11.11, *below*.
- Asserting parentage through co-parent and stepparent adoption:
 - Prior to 2000, same-sex couples could not be recognized as the legal parents of their child.
 - In 2000, legislation was enacted permitting co-parent adoptions for same-sex couples.
 - Upon allowing civil unions and then marriage, same-sex couples could then adopt a child through a stepparent adoption.
 - Because of lack of recognition of same-sex relationships in most areas, it is wise to do an adoption so that the parental relationship will be recognized in all states.
 - An acknowledgment of parentage can be used if unmarried couples have resided together since the date of the child's birth or adoption and for two years thereafter. **Authority:** Conn. Gen. Stat. §§ 45a-724(a)(2), 45a-727(a)(3)(D) and 45a-733(a); *In re Adoption of Baby Z.*, 247 Conn. 474 (1999); Probate Court Rules of Procedure § 40.12. **Discussion:** See § 8.08[4], *below*. See also §§ 13.10 to 13.12, *below*. See also Chapter 9, § 9.08, *below*.
- Analyzing the rebuttable presumption of parental custody:
 - There is a rebuttable presumption that children should be in the custody of his or her parent.
 - The presumption may be rebutted by showing that it would be detrimental to the child for the parent to have custody. **Authority:** Conn. Gen. Stat. § 46b-56b; *Troxel v. Granville*, 530 U.S. 57 (2000) and *Warner v. Bicknell*, 126 Conn. App. 588 (2011). **Discussion:** See § 8.09[a], *below*.
- Establishing custody and visitation orders where parentage is not legally established:
 - A parent who is not a legally recognized parent may only assert rights through third-party custody and/or visitation proceedings. **Authority:** *Fish v. Fish*, 285 Conn. 24 (2008) and *Roth v. Weston*, 259 Conn. 202 (2002). **Discussion:** See § 8.09[b], *below*. See also Chapter 8, § 8.10, *below*.
- Assessing general considerations for third-party custody and visitation actions:
 - A parent has a fundamental right to raise his or her child.
 - However, a third party may seek custody and visitation rights, subject to constitutional safeguards. **Authority:** Conn. Gen. Stat. §§ 46b-56(a), 46b-57, and 46b-59; *Roth v. Weston*, 259 Conn. 202 (2002). **Discussion:** See

§ 8.10[1], *below*.

□ Assessing third-party visitation actions:

- To seek visitation, a third party must allege and prove:

- A parent-like relationship with the child.
- That a denial of visitation will cause the child real and significant harm, commensurate with the child being neglected, uncared-for or dependent.

- These factors must be proven by clear and convincing evidence.

○ This test may be applied to decisions rendered prior to the enunciation of the criteria. **Authority:** *Hepburn v. Brill*, 348 Conn. 827 (2024), *Troxel v. Granville*, 530 U.S. 57 (2000), *DiGiovanna v. St. George*, 300 Conn. 59 (2011), *Denardo v. Bergamo*, 272 Conn. 500 (2005), *Roth v. Weston*, 259 Conn. 202 (2002), *Hunter v. Shrestha*, 195 Conn. App. 393 (2020), *Fuller v. Baldino*, 176 Conn. App. 451 (2017), *Warner v. Bicknell*, 126 Conn. App. 588 (2011), *Carrier v. King*, 105 Conn. App. 391 (2008), *Fennelly v. Norton*, 103 Conn. App. 125 (2007), *Clements v. Jones*, 71 Conn. App. 688 (2002), *Boisvert v. Gavis*, 2017 Conn. Super. LEXIS 4210 (Super. Ct. Aug. 11, 2017), *Gruss-Ververis v. DeHaven*, 2012 Conn. Super. LEXIS 1085 (2012), *Pomerleau v. Remillard*, 2009 Conn. Super. LEXIS 3117 (2009), *Watson v. Kasanowski*, 2009 Conn. Super. LEXIS 1218 (2009), *Hickey v. Hickey*, 2008 Conn. Super. LEXIS 2975 (2008), *Ruffino v. Bottass*, 2006 Conn. Super. LEXIS 444 (2006), *Bennett v. Nixon*, 2004 Conn. Super. LEXIS 427 (2004), and *Lavoie v. Macintyre*, 2002 Conn. Super. LEXIS 3825 (2002). **Discussion:** See § 8.10[2], *below*.

□ Assessing third-party visitation under the statute:

- The statutory revisions of the third-party visitation statute sought to codify *Roth v. Weston* and to make it easier for grandparents to seek visitation.

- The statute spells out factors to consider in assessing a parent-like relationship:

- The length and existence of the relationship prior to the action being commenced.

- How long the relationship has been disrupted.

- What parent-like activities the third party has engaged in with the child.

- Evidence that the third party has undermined the parent's authority.

- The absence of a parent from the child's life.

- The death of a parent of the child.

- The separation of the child's parents.

- The third party's fitness.

- The custodial parent's fitness.

- The second prong of the test is exactly the same as *Roth v. Weston*.

- For grandparents, the court is to consider the regular contact and close relationship of the grandparent and child.

- The court shall specify the visitation schedule.

- The child's desires, if he or she is capable of forming an intelligent opinion, will be considered.

- A third party who obtains visitation rights does not have parental rights with respect to the child.

- The court may order any party to pay the attorney fees, including that of the attorney for the minor child, guardian *ad litem* or expert. **Authority:** Conn. Gen. Stat. § 46b-59; *Firstenberg v. Madigan*, 188 Conn. App. 724 (2019).

Discussion: See § 8.10[3], *below*.

□ Assessing third-party custody claims:

○ A third party seeking custody must allege and prove:

• A parent-like relationship with the child.

• That it is damaging, injurious, or harmful for the child to remain in the custody of his or her parents.

○ These factors must be proven by a fair preponderance of the

evidence. **Authority:** Conn. Gen. Stat. § 46b-56b; *Fish v. Fish*, 285 Conn. 24 (2008). **Discussion:** See § 8.10[4], *below*.

□ Commencing an action or intervening:

○ The third party must either commence an action or intervene in an existing action to seek custody or visitation. **Authority:** Conn. Gen. Stat.

§§ 46b-56(a), 46b-57 and 46b-61; P.B. § 25-4, *Romeo v. Romeo*, 195 Conn. App. 378 (2020). **Discussion:** See § 8.11, *below*. **Forms:** JD-FM-161—

Custody/Visitation Application, see Chapter 20, § 20.12, *below*. JD-FM-162—Order to Attend Hearing and Notice to Respondent, see Chapter 20, § 20.13, *below*. JD-FM-185—Motion for Intervention in Family Matters, see Chapter 20, § 20.24, *below*.

□ Contesting third-party custody and visitation claims:

○ The parent may contest the claim by filing a motion to dismiss.

Authority: *Roth v. Weston*, 259 Conn. 202 (2002). **Discussion:** See § 8.12, *below*.

§ 8.08 Analyzing Parentage

[1] Analyzing the Rebuttable Presumption of Parentage for a Child Born During the Marriage

A child born in wedlock is presumed the biological child of person giving birth and her spouse. This presumption can be challenged by the person who gave birth to the child within the first two years of the child's life and shall then be resolved pursuant to the child's best interest. 46b-489. Factors to be considered regarding the best interests of the child with competing claims of parentage are: (1) the child's age; (2) the length of time each person has assumed a parental role for the child; (3) the nature of the relationship between the child and each person; (4) the harm to the child if the relationship between the child and person is not recognized; (5) each person's bases for claiming parentage of the child; (6) other equitable factors due to the disruption of the relationship between the child and each person or likelihood of other harm to the child; and (7) any other relevant factor. Conn. Gen. Stat. § 46b-475. In addition, parentage being challenged on the results of genetic testing shall also consider the following factors regarding best interest: (1) the facts surrounding the discovery that the person may not be the genetic parent of the child; and (2) the length of time the person has known that they may not have been the genetic parent. Conn. Gen. Stat. § 46b-475. In the event a genetic parent's potential parentage was concealed, they can challenge the presumption within one year of discovering the potential genetic parentage. Such a challenge will not result in the disestablishment of the spouses presumed parentage, but may result in their being more than two legal parents. 46b-489. For a more thorough discussion on the presumption of paternity, see Chapter 10, § 10.05, *below*.

[2] Establishing the Presumption of Parentage

The use of the marital presumption to establish parentage derives from the public policy position that "every child born to a woman during wedlock is legitimate." Conn. Gen. Stat.

§ 45a-771(a). Where the two parents are married, however, parentage is established by operation of the presumption, combined with the mother's husband being listed on the child's birth certificate. Where the two biological, intended parents of a child are unmarried, parentage of the mother is established by virtue of the birth, and parentage of the father is established by either an affidavit or a judgment of parentage. When civil unions, and later marriage, became available to same-sex couples in Connecticut, the nonbirth parent in the union was able to take advantage of the same presumption of parentage as the husband of a mother in a heterosexual union, as the same benefits and protections afforded to heterosexual spouses applied to parties to a civil union. [Conn. Gen. Stat. § 46b-38nn](#). For a more thorough discussion on acknowledging parentage, *see* [Chapter 10](#), § 10.06, *above*.

Upon same-sex marriages being accepted in Connecticut, when “the term ‘husband,’ ‘wife,’ ‘groom,’ ‘bride,’ ‘widower’ or ‘widow’ is used, such term shall be deemed to include one party to a marriage between two persons of the same sex.” [Conn. Gen. Stat. § 1-1m](#). In fact, the Department of Public Health utilizes a birth certificate form for same-sex couples recognizing the operation of the presumption where the child is born to a couple who is in a formally recognized relationship (i.e., marriage, civil union, or domestic partnership), which form permits issuance of an original birth certificate with both spouses listed as parents.

#Comment Begins

Timing: For placement of both spouses on the birth certificate, the relevant inquiry is the marital status of the parties at the time the child was *born*, not their marital status at the time the child was *conceived*.

#Comment Ends

Although the birth certificate provides prima facie evidence of parentage, it does not prove or create parentage. [Raftopol v. Ramey](#), 299 Conn. 681, 690 n.17 (2011). It therefore may be subject to attack by either party listed on the birth certificate, though principles of estoppel are likely to apply, or by a third party alleging to be the child's biological parent. [Weidenbacher v. Duclos](#), 234 Conn. 51, 74 (1995). In the one known case in Connecticut to address the issue, the trial court found that the marital presumption did apply to a child issue of a civil union, which later was converted automatically into a marriage, and also found that the non-biological mother in that case had sufficient basis to equitably estop the biological mother from rebutting the marital presumption. [Barse v. Pasternak](#), 2015 Conn. Super. LEXIS 1705 (June 29, 2015), Superior Court, J.D. of Hartford at New Britain, Docket No. HHB FA 12 4030541 (June 29, 2015). Such a conclusion, however, is very fact-specific and may not support a similar finding in all cases. The safest course, therefore, for parents listed on the birth certificate by operation of the marital presumption is to reinforce the parent-child legal relationship by having both parties execute an acknowledgment of parentage under the formalities required by the Connecticut Parentage Act. *See* § 13.13, *below*. Although all unmarried couples may utilize the acknowledgment of parentage to establish legal parentage for either a genetic parent or a presume parents who held the child out as the presume parents own child while residing with the child, for those presume parents were not genetic parents, the safest course would be to reinforce the parent-child relationship with an adoption. For such couples, the acknowledgment is not effective for establishing legal parentage until at least two years after the child's birth or adoption, creating a time-lapse in which an otherwise presumptive parent could lose the presumptive parent status.

Because our statutes regarding birth certificates focus, in the first instance, on the individual physically giving birth to the child, the marital presumption will be used primarily by

lesbian same-sex couples, whereas gay men are more likely to use surrogacy and pre-birth orders to establish parentage where one individual in the couple is the child's biological parent. *See* § 13.13[2], *below*.

[3] Asserting Parentage Under Artificial Insemination with Donor Sperm or Eggs (A.I.D.) Statutes

In 1975, the legislature provided a statutory scheme establishing the parentage of children born by virtue of alternative reproductive technologies, including intrauterine insemination and in vitro fertilization. *Conn. Gen. Stat. § 45a-771 et seq.* The statutes specifically address insemination of the intended mother with sperm from an anonymous or known donor where that insemination occurs with the aid of a doctor. *Conn. Gen. Stat. §§ 45a-771a and 45a-772(a).* The sperm donor acquires no legal relationship with the resulting child; instead, the child's legal parents are the mother and her spouse, so long as the spouse provided written consent for the use of alternative reproductive technologies. *Conn. Gen. Stat. §§ 45a-772(b), 45a-774, and 45a-775.* The written consent and a letter from the physician who obtained the consent, indicating the child was conceived by virtue of alternative reproductive technologies, are to be filed in the couple's local probate court. *Conn. Gen. Stat. § 45a-773.*

Similar to the availability of the marital presumption, same-sex couples are able to utilize the spousal consent provisions of Connecticut's alternative reproductive technologies statutes so as to obtain parentage by operation of law. *See* § 13.11, *above*. Accordingly, a married same-sex couple who were both agreeable that one be artificially inseminated, were both the legal parents of the child without the need for a subsequent adoption. *Corte v. Ramirez*, 81 Mass. App. Ct. 906, 907 (2012). However, it is far from certain that this parentage status will be recognized by other states. While our Supreme Court has made clear, following *Obergefell*, that a state's alternative reproductive technology statutes must be applied to opposite-sex couples and same-sex couples on an equal basis, where states may be able to establish facially neutral reasoning for treating same-sex couples and opposite-sex couples differently for purposes of such statutes, the parental relationship may not be supported. *Pavan v. Smith*, 137 S. Ct. 2075 (2017) and *see Torres v. Seemeyer*, 207 F. Supp. 3d 905 (W.D. Wisconsin 2016) (Department of Health Services' practice of enforcing provisions of artificial insemination statute against same-sex couples but not against opposite-couples violated *Equal Protection Clause*). As with those situations involving the marital presumption, therefore, it is wise for same-sex couples establishing parentage through the alternative reproductive technologies statutes to reinforce that legal relationship with an executing an acknowledgment of parentage.

#Comment Begins

Warning: Although the alternative reproductive technologies statutes provide for instances in which donor eggs are utilized, ultimately these statutes are intended to be used in situations where one of the intended parents physically gives birth to the child. While donor eggs are used in gestational surrogacy situations, gestational surrogacy currently is not part of the statutory scheme covering alternative reproductive technologies. *Raftopol v. Ramey*, 299 Conn. 681, 691 n.18 (2011). Instead, gestational and genetic surrogacy agreements and the establishment of parentage pursuant to those agreements are governed by the Connecticut Parentage Act.

#Comment Ends

[a] Assessing the Validity of Surrogacy Agreements Prior to 2011

Until very recently, the ability of intended parents to enter into surrogacy agreements and

contract parentage relationships through such agreements was unclear. Case law in Connecticut provided that a traditional surrogacy agreement, where the woman carrying the child also has provided the egg from which the embryo is formed, could not establish parentage by itself; rather an adoption or some other court order would be required. *Doe v. Doe*, 244 Conn. 403, 435 (1998). No case law or statute, however, identified whether and to what extent surrogacy agreements were valid or what procedural mechanisms were a necessary accompaniment to the agreement, if it were valid, so that the parentage it intended could be established legally.

[b] Entering into Pre-Birth Orders

Commencing in 2002, superior courts in Connecticut began entering pre-birth orders, which:

1. Recognized gestational surrogacy agreements as valid, where the intended parents provided, either genetically or through a third-party donor, the egg and sperm necessary to form the embryo which resulted in the gestational surrogate's pregnancy.
2. Declared the intended parents to be the legal parents of the child.
3. Required that the hospital at which the child was born place the intended parents' names on the child's birth certificate. *Hatzopoulos v. Murray*, 2002 Conn. Super. LEXIS 4263 (2002) and *Vogel v. Kirkbride*, 2002 Conn. Super. LEXIS 4261 (2002).

Subsequently, the department of public health objected to the establishment of parentage by pre-birth order where the intended parents were not both biologically related to the child, resulting in split authority among the superior courts as to whether the statutory authority existed to enter pre-birth orders. Compare *Griffiths v. Taylor*, 45 Conn. L. Rptr. 725 (2008), with *Oleski v. Hynes*, 2008 Conn. Super. LEXIS 1752 (2008). Statutory law evolved with the case law, ultimately requiring the department of public health to issue a replacement birth certificate following a court order identifying the child's parents. Conn. Gen. Stat. § 7-48a. In 2011, the supreme court clarified that a pre-birth order could enter regardless of the genetic link between the intended parents and the child, such that a non-biological intended parent could be listed on the birth certificate without having to go through an adoption process. *Raftopol v. Ramey*, 299 Conn. 681 (2011).

[c] Enforcing Surrogacy Agreements After 2011

Following the Supreme Court's decision in *Raftopol v. Ramey*, 299 Conn. 681 (2011), the Connecticut Legislature again amended Conn. Gen. Stat. § 7-48a to require that the Department of Public Health immediately create a replacement birth certificate listing the intended parents in a gestational surrogacy agreement as the parents on the birth certificate following the later of: (1) a court order approving the gestational surrogacy agreement; or (2) the filing of the original birth certificate. In addition, the Legislature defined gestational agreement and intended parent(s).

- (16) "Gestational agreement" means a written agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent or intended parents, which woman contributed no genetic material to the child and which agreement (A) names each party to the agreement and indicates each party's respective obligations under the agreement, (B) is signed by each

party to the agreement and the spouse of each such party, if any, and (C) is witnessed by at least two disinterested adults and acknowledged in the manner prescribed by law; and

(17) “Intended parent” means a party to a gestational agreement who agrees, under the gestational agreement, to be the parent of a child born to a woman by means of assisted reproduction, regardless of whether the party has a genetic relationship to the child.

[Conn. Gen. Stat. § 7-36.](#)

The statute clearly provides now for the recognition of a gestational surrogacy agreement and identifies certain contractual requirements, i.e., who must be a signatory and under what circumstances those individuals must sign the contract. The statutory scheme is silent, however, on the issue of whether the agreement is enforceable; rather, it merely identifies the agreement and provides a mechanism for enforcing a court order entered on the basis of such an agreement. The result is that those entering into gestational surrogacy agreements can obtain court orders declaring parentage in accordance with the intent of the agreement so long as each party still is in agreement with the contract’s terms at the time of such an order. [Conn. Gen. Stat. § 7-36\(16\)](#). Should any party challenge the validity of a gestational surrogacy agreement, whether the challenger be the surrogate or an intended parent, it is unknown whether the agreement would be enforceable as against that now-unwilling party. The lack of clarity applies equally to the establishment of parentage and to the payment of any consideration to the surrogate pursuant to the terms of such a contract.

[d] Enforcing Surrogacy Agreements after 2022

With the adoption of the Connecticut Parentage Act, the Legislature gave official approval and recognition to both gestational surrogacy, where someone who is not an intended parent becomes pregnant using gametes that are not that person’s own, as well as genetic surrogacy, where someone who is not an intended parent becomes pregnant using that person’s own gamete under the terms of a genetic surrogacy agreement. [Conn. Gen. Stat. § 46b-521](#). The legislature set forth specific requirements regarding who could enter into a surrogacy agreement and under what circumstances. Orders concerning parentage pursuant to either a gestational or genetic surrogacy agreement are to be filed in probate court, and neither the Department of Public Health nor any hospital need be made a party. It should be noted there is no distinction between intended [parents](#) [parents who](#) were married and intended parents were not married, so long as all intended parents are parties to the surrogacy agreement. However, the spouse of an intended parent must also be an intended parent under the agreement unless the spouses are legally separated.

[4] Asserting Parentage Through Co-Parent and Stepparent Adoption

In 1999, the supreme court held that the stepparent adoption statutes could not be used to allow a child, who was not the biological child of both parties in an unmarried couple, to be adopted by both parties. *In re Adoption of Baby Z*, 247 Conn. 474 (1999). At that time, neither marriage nor civil union was available to same-sex couples, and therefore there was no way for both individuals in the couple to be recognized as the child’s legal parent. For a more thorough discussion on who is eligible to adopt a child, see [Chapter 9, § 9.08, above](#).

In 2000, the legislature responded to *In re Adoption of Baby Z* by providing for co-parent adoptions. [Conn. Gen. Stat. § 45a-727\(a\)\(3\)\(D\)](#). Such adoptions allowed for a parent of a child to

agree that another individual, with whom he or she shared parenting responsibility for the child, could adopt that child. Such adoptions were similar in nature to stepparent adoptions with several exceptions, the most noteworthy being the requirement of a home study in all such adoptions. *See Conn. Gen. Stat. § 45a-733(a)*.

Once same-sex couples were able to enter into civil unions, and later marriage, they were able to adopt children via stepparent adoption rather than through the co-parent adoption route. As per the discussion above regarding the marital presumption and parentage recognition through use of Connecticut's A.I.D. statutes, adoptions are still the best and safest method of assuring recognition of parent-child relationships both in Connecticut and across state lines.
#Comment Begins

Exception: At first blush, a child who is issue of a same-sex couple does not appear “free for adoption” because he or she has two legal parents. Because the child is to be adopted by his or her non-biological parent, however, the probate courts have evinced a willingness to ignore this factor when the parent and “proposed adoptive parent” indicate to the court that the only reason the adoption is being sought is to cement the legal parent-child relationship which otherwise might be ignored by other states. In fact, a recent change to the probate court rules specifically permits an adoption under these circumstances. Section 40.12 of the Probate Court Rules of Procedure provides, in relevant part: “Even if both spouses of a same-sex married couple are considered parents of a minor under the law of this state, a spouse may petition under *C.G.S. section 45a-724(a)(2)* for a step-parent adoption of the minor by the other spouse.”

#Comment Ends

§ 8.09 Analyzing the Rebuttable Presumption of Parental Custody

[1] Reviewing General Considerations

While third parties may seek custody and visitation rights, there is a rebuttable presumption that it is in a child's best interest to be in the custody of a parent. *Conn. Gen. Stat. § 46b-56b*, *Troxel v. Granville*, 530 U.S. 57 (2000), and *Warner v. Bicknell*, 126 Conn. App. 588, 588–589 (2011). This long-standing presumption, however, “may be rebutted by showing that it would be detrimental to the child to permit the parent to have custody.” *Conn. Gen. Stat. § 46b-56b*.

[2] Establishing Orders for Children Where Parentage is not Legally Established

As in all dissolution of marriage cases involving children, the dissolution of same-sex marriage often involves crafting agreements or seeking orders concerning the custody and visitation of children who were born into the marriage, adopted during the marriage, or born prior to the marriage and raised by the couple during the course of the marriage. Because co-parent adoption only became available in Connecticut in 2000 and still is not available in many states, it is not unlikely that the practitioner will be faced with a case involving a child who is not the legal child of one of the parties to the marriage. In such a situation, the practitioner should evaluate. A whether the client can establish parentage as either a presumptive or de facto parent. If neither, then the practitioner should consider whether the client can and should mount a third-party visitation claim. *Fish v. Fish*, 285 Conn. 24 (2008) or should seek visitation pursuant to *Roth v. Weston*, 259 Conn. 202 (2002). If the client is able to meet the criteria of either a presumptive or de facto parent, the practitioner should be alert for any possible claims of duress, coercion or

threat of harm, as these remain the only significant challenges to presumptive and de facto parentage claims. Typically, a parent defending against a third-party custody or visitation challenge will assert that the petitioner does not have standing as they have not met the heightened requirements enunciated in *Fish or Roth*. Although each case is confined to its facts, it is likely that, in most cases, the non legal parent, who has raised a child in a same-sex marriage but without the benefit of an adoption, will be able to survive a standing inquiry under at least one of the tests. For a more thorough discussion on third-party custody and visitation actions, see [Chapter 8, § 8.10, below](#).

The opposing argument to this standing inquiry, at least from a custody standpoint, is that the parties had at their disposal a legal mechanism for conferring parentage—either by co-parent or stepparent adoption or by executing an acknowledgment of parentage—and made a deliberate choice to not take advantage of that mechanism, eliminating any claim that the non-legally recognized parent had the intention of creating a parent-child relationship with the child. This claim is very fact-specific, however, as the parties may be able to claim other reasons for the adoption not to occur given the circumstances around both the child’s birth and the parties’ marriage.

#Comment Begins

Strategic Point: If bringing a third-party custody or visitation claim, the practitioner must be prepared for the claim to be viewed critically given that the parent-child relationship is a prerequisite for standing and this same relationship status can now form the basis of a legal determination of parentage. The practitioner must be prepared to note for the court the reasons the applicant is not seeking parental status or does not meet that status but why the applicant should still be able to mount a third-party claim.

#Comment Ends

§ 8.10 Assessing the Rights of Third Parties to Seek Custody and Visitation

[1] Assessing General Considerations for Third-Party Custody and Visitation Actions

The court may award custody or visitation to any person. [Conn. Gen. Stat. §§ 46b-56\(a\), 46b-57, and 46b-59](#). However, there has always been a tension between the parent’s right to parent their child as they see fit and the best interests of the child in allowing third parties to seek visitation. [Roth v. Weston, 259 Conn. 202 \(2002\)](#). There are safeguards to balance the parents’ right to raise their child free from interference and the statutory ability of a third party to seek custody and visitation. These safeguards are necessary when a third party is seeking to infringe on the parents’ fundamental right to raise their child. [Roth, 259 Conn. at 217–218](#).

[2] Assessing Third-Party Visitation Actions Under *Troxel v. Granville*

The statutes concerning third-party custody and visitation were originally drafted very broadly, permitting anyone to seek custody or visitation without any constitutional safeguards. However, in 2000, the United States Supreme Court addressed a Washington state visitation statute, to determine whether it was constitutional. [Troxel v. Granville, 530 U.S. 57 \(2000\)](#).

The United States Supreme Court made expressly clear that a biological parent enjoys a constitutional right to parent his or her progeny without the intervention of third parties absent

heightened facts to the contrary. *Troxel*, 530 U.S. at 73. “The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.” *Troxel*, 530 U.S. at 72–73. The Washington statute was found to be unconstitutional as applied. *Troxel*, 530 U.S. at 73.

In 2002, Connecticut addressed its third-party visitation statute in light of the heightened standard required by *Troxel* to determine if it withstood constitutional muster. *Roth v. Weston*, 259 Conn. 202 (2002). The Connecticut Supreme Court devised a two-prong test to save the third-party visitation statute from being declared unconstitutional. To establish standing, the third party must show a parent-like relationship with the child. *Roth*, 259 Conn. at 222. Secondly, a petition by a third-party seeking visitation must contain specific, good-faith allegations that the “denial of the visitation will cause real and significant harm to the child.” *Roth*, 259 Conn. at 234. This alleged “harm” may not simply be that the child’s best interests would benefit from the third party’s presence in the child’s life, but must be commensurate with being neglected, uncared-for or dependent as contemplated by the Connecticut statutes regarding abused and neglected children. *Roth*, 259 Conn. at 235, Conn. Gen. Stat. §§ 46b-120 and 46b-129. The moving party must prove the allegations by the heightened standard of clear and convincing evidence. *Roth*, 259 Conn. at 235. The court may not employ a best interests standard in lieu of the *Roth v. Weston* standard. *DiGiovanna v. St. George*, 300 Conn. 59 (2011).

In many third-party visitation cases since *Roth*, the focus has been on what constitutes a parent-like relationship. If the third party has not seen the child for a significant period of time, a parent-like relationship will not be established. *Watson v. Kasanowski*, 2009 Conn. Super. LEXIS 1218 (2009). The relationship of a grandparent and grandchild who have spent time together and bonded may still not rise to the level of a parent-like relationship. *Clements v. Jones*, 71 Conn. App. 688 (2002). A parent-like relationship has been described “as the relationship that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral, and educational needs of the child. *Pomerleau v. Remillard*, 2009 Conn. Super. LEXIS 3117 (2009). A superior court has set forth six facts to be considered when determining a parent-like relationship:

1. The relationship between the third party and child was agreed to and fostered by the parent.
2. The third party and child have lived together.
3. The child’s daily care has been met by the third party.
4. Major decisions regarding the child’s health, education, and welfare have been made by the third party.
5. Financial support for the child was provided by the third party.
6. There is a bonded and established relationship between the child and the third party.

Hickey v. Hickey, 2008 Conn. Super. LEXIS 2975 (2008).

The harm must be specific to the person seeking visitation, not applicable to several

people or the generalized population. Most typically, the court will find the requisite harm due to the effects of severing what has been a very strong parent-like relationship with the child. Harm will be established where a third party, who has acted as a parent to the child, is abruptly cut out of the child's life. *Bennett v. Nixon*, 2004 Conn. Super. LEXIS 427 (2004). Expert evidence may be used to establish the psychological harm to a child. *Boisvert v. Gavis*, 2017 Conn. Super. LEXIS 4210 (Super. Ct. Aug. 11, 2017), *Lavoie v. Macintyre*, 2002 Conn. Super. LEXIS 3825 (2002). The temporary upheaval of a dissolution action will not constitute the requisite harm required to allow third-party visitation. *Gruss-Ververis v. DeHaven*, 2012 Conn. Super. LEXIS 1085 (2012). Likewise, the deprivation of a relationship with one side of the family is insufficient harm to overcome a motion to dismiss. *Hunter v. Shrestha*, 195 Conn. App. 393 (2020).

The complaint or petition filed by a third party seeking visitation must allege the two requirements set forth in *Roth v. Weston*. Failure to do so will result in a dismissal of the action. *Fennelly v. Norton*, 103 Conn. App. 125 (2007). Repeatedly, the court has determined that this is not a lack of subject matter jurisdiction, because the court has jurisdiction to decide third party visitation issues. *Hepburn v. Brill*, 348 Conn. 827 (2024). The complaint will not withstand a motion to dismiss if it contains only conclusory statements that are not buttressed by factual allegations to support the *Roth v. Weston* requirements. *Ruffino v. Bottass*, 2006 Conn. Super. LEXIS 444 (2006). Mere conclusory statements that harm will occur, without more is insufficient to sustain the pleading burdens for third party visitation. *Fuller v. Baldino*, 176 Conn. App. 451 (2017). Additionally, using the court form for seeking third-party visitation, without providing the facts and circumstances to demonstrate a parent-like relationship with the child and the real and significant harm to occur if visitation is denied, will be insufficient to overcome a motion to dismiss. *Carrier v. King*, 105 Conn. App. 391 (2008).

The *Roth v. Weston* criteria may be applied retroactively to previously made third-party visitation determinations or agreements. *Denardo v. Bergamo*, 272 Conn. 500 (2005). Thus, a petition, together with the evidence, which did not demonstrate the parent-like relationship or requisite harm is subject to being dismissed, despite a prior agreement to permit visitation. *Warner v. Bicknell*, 126 Conn. App. 588 (2011).

[3] Assessing Third-Party Visitation Under the Revisions to Conn. Gen. Stat. § 46b-59

The third-party visitation statute was amended in 2013, and now generally codifies the *Roth v. Weston* standard, i.e., the assertion of a parent-like relationship and the assertion that denial of visitation would cause real and significant harm. Conn. Gen. Stat. § 46b-59. The statutory revision left the first prong of a parent-like relationship intact. Conn. Gen. Stat. 46b-59(b). In addition, the statute lists nine factors to assess whether or not there is a parent-like relationship:

1. The length and existence of the relationship between the child and third party prior to the action commencing.
2. How long a disruption there has been in the relationship between the child and third party.
3. What parent-like activities the third party has engaged in with the child.
4. Any evidence of the third party undermining the authority and discretion of the parent.

5. The absence of a parent from the child's life.
6. The death of a parent of the child.
7. The separation of the child's parents.
8. The third party's fitness.
9. The custodial parent's fitness.

Conn. Gen. Stat. § 46b-59(c). These factors are not exclusive. However, these factors should be referenced in a motion for third-party visitation at the very least to bolster such claim. *Firstenberg v. Madigan*, 188 Conn. App. 724 (2019).

#Comment Begins

Strategic Point: As the statute points out, the factors to assess a parent-like relationship are not exclusive. Accordingly, the factors listed in cases prior to the revision of this statute should also be considered when assessing a parent-like relationship.

#Comment Ends

With respect to the second prong of *Roth v. Weston*, the statutory revisions require that proof of real and significant harm, as defined under the abuse and neglect statutes, must be shown. Conn. Gen. Stat. §§ 46b-59(a)(2) and 46b-59(b).

In addition, the statutory revisions specify grandparents in particular, defining a grandparent or great-grandparent as one related to the child by blood, marriage, or adoption. Conn. Gen. Stat. § 46b-59(a)(1). An additional consideration of a parent-like relationship is the history of regular contact and proof of a close and substantial relationship of the grandparent and child. Conn. Gen. Stat. § 46b-59(d).

In establishing the visitation, the court shall specify the schedule, overnights and any conditions to the visitation, none of which shall be contingent on financial support by the third party. Conn. Gen. Stat. § 46b-59(e). The court is to consider the child's wishes if he or she is "capable of forming an intelligent opinion." Conn. Gen. Stat. § 46b-59(e). The effect of the visitation on the parents and child and the effect on the minor child of any domestic violence are additional factors for the court to consider. Conn. Gen. Stat. § 46b-59(e).

Any third party who has visitation rights does not then have parental rights created with the child. Conn. Gen. Stat. § 46b-56(f). The granting of third-party visitation rights will not be used as a ground to prevent a parent from relocating. Conn. Gen. Stat. § 46b-59(f).

Finally, the statute provides that the court may order payment of fees for a party, the attorney for the minor child, the guardian *ad litem*, or an expert, based upon the financial ability of the party to pay. Conn. Gen. Stat. § 46b-59(g). Presumably this includes payment by the third party of these fees.

[4] Assessing Third-Party Custody Claims Under *Fish v. Fish*

The ruling in *Roth v. Weston* and revisions to [Conn. Gen. Stat. § 46b-59](#) apply to visitation and not custody actions. Unlike the visitation statute, the custody statute creates a rebuttal presumption that parental custody is in the child's best interests. [Conn. Gen. Stat. § 46b-56b](#). It was not until 2008 that the Connecticut Supreme Court assessed the constitutionality of the custody statute. *Fish v. Fish*, 285 Conn. 24, 46 (2008). Similar to *Roth v. Weston*, at issue was how the broadly written statute regarding third parties seeking custody could withstand constitutional scrutiny.

The court established a two-prong test for permitting third-party custody. Since the custody and visitation statutes are overly broad in the same fashion, to have standing a third party seeking custody must allege a parent-like relationship in the same manner as required by *Roth v. Weston*. *Fish*, 285 Conn. at 44.

However, for the second prong, namely assessing the harm to be alleged, the court imposed a less strict standard than is required in visitation actions, because custody implicates the underlying fitness of the parent. *Fish*, 285 Conn. at 47–48. Accordingly, a demonstration that it is “damaging, injurious, or harmful for the child to remain in the parent’s custody” must be made. *Fish*, 285 Conn. at 56. When assessing the harm, it cannot be a temporary harm brought on by the dissolution action, but the harm must be something insidious and demonstrative of a pattern of behavior which is dysfunctional and harmful to the child. *Fish*, 285 Conn. at 81. The burden of proof is by a fair preponderance of the evidence, not clear and convincing evidence. *Fish*, 285 Conn. at 71.

§ 8.11 Commencing an Action or Intervening

To obtain custody or visitation, a third party may commence an independent application or verified petition or intervene in an action brought to court between the parents. [Conn. Gen. Stat. §§ 46b-56\(a\)](#) and [§ 46b-57](#), and P.B. § 25.4. The petition or action must be served on the opposing party.

Commencing June 4, 2018, any custody petition brought by parties living separately requires the applicant to file “accompanying documents” which establish the parental relationship between the parent and the child prior to the first date the matter appears on the docket, *i.e.*, the show cause date. [Conn. Gen. Stat. § 46b-61](#). The “accompanying documents” may include a birth certificate, an acknowledgement of paternity, a court order demonstrating legal responsibility over the child, or evidence the child was born during the marriage.

Since the complaint must adequately set forth the requirements for a third party petition, as a stand alone document, a subsequent affidavit or expert disclosure from a psychologist setting forth the harm if the third party visitation petition is denied, may not be considered by the court. *Romeo v. Romeo*, 195 Conn. App. 378 (2020).

#Comment Begins

Warning: Using the court forms alone will not be adequate to meet the standing requirements under *Roth v. Weston* or *Fish v. Fish*. If the court form is used, it must be supplemented with specific allegations to substantiate the standing and pleading requirements of these actions. Failure to do so will result in a dismissal of the action.

#Comment Ends#Comment Begins

Forms: JD-FM-161—Custody/Visitation Application, *see* Chapter 20, § 20.12, *below*. JD-FM-162—Order to Attend Hearing and Notice to Respondent, *see* Chapter 20, § 20.13, *below*. JD-FM-185—Motion for Intervention in Family Matters, *see* Chapter 20, § 20.24, *below*.

#Comment Ends

§ 8.12 Contesting Third-Party Custody and Visitation Claims

When third parties commence a petition for custody or visitation or seek to intervene in an existing action, the parent contesting the third-party claim must file a motion to dismiss. The motion to dismiss challenges the ability of the third party to bring the claim. The first prong of the third-party visitation and custody tests, proving a parent-like relationship, is one of standing. An action brought without standing deprives the court of subject matter jurisdiction. *Roth v. Weston*, 259 Conn. 202, 219 (2002).

#Comment Begins

Strategic Point: If bringing a third-party custody or visitation claim, the evidence required to withstand a motion to dismiss must be in hand when the action is filed. If a motion to dismiss is filed, there will be little, if any, opportunity to seek discovery to prove the allegations of the petition.

#Comment Ends

PART IV: EMPLOYING CHILDREN’S REPRESENTATIVES AND EXPERTS

CUSTODY AND VISITATION

§ 8.13 CHECKLIST: Employing Children’s Representatives and Experts

8.13.1 Employing Children’s Representatives and Experts

- Appointing a child’s representative, *pendente lite*:
 - The amendments to the family law statutes now refer to both an attorney for the minor child and guardian *ad litem*.
 - Effective January 1, 2017, a standing committee is being formed to, among other things, oversee qualifications and training of children’s representatives.
 - A child’s representative may only be appointed after efforts are made to resolve custody.
 - A child’s representative must complete the training program offered by the judicial branch prior to being appointed.
 - In appointing a child’s representative, the court shall consider:
 - The parties’ financial circumstances
 - The extent of language barriers
 - Transportation barriers

- Disabilities

- Within 21 days of appointing a child's representative, the scope of duties, cessation date of appointment, fees, and timing of court reviews of the work undertaken shall be determined.

- The guardian *ad litem* speaks to the best interests of the child, while the attorney for the child advocates for the child to every extent possible as an unimpaired adult. **Authority:** Conn. Gen. Stat. §§ 46b-12(a), 46b-12(b), 46b-12(c), 46b-12(d), 46b-54, 46b-54(a), 46b-54(b), 46b-54(c), 46b-54(f), and 46b-56(c); *Yontef v. Yontef*, 185 Conn. 275 (1981), *In re Tayquon H.*, 76 Conn. App. 693 (2003), P.B. §§ 3–9, 25-61A(a), 25-61A(b), 25–62(c), and 25–62A(c). **Discussion:** See § 8.14, *below*. **Forms:** JD-FM-225—Affidavit of Expenses of Counsel or Guardian *ad Litem* for Minor Child, see Chapter 20, § 20.33, *below*. JD-FM-232—Periodic Review Worksheet—Fees Charged by Counsel or Guardian *ad Litem*, see Chapter 20, § 20.35, *below*.

- Appointing an attorney for the minor child, *pendente lite*:

- Any matter regarding the child requires the presence and participation of the attorney for the child.

- If the proceedings have been bifurcated, the attorney for the child may be excused from the financial proceedings.

- The attorney for the child is to act in accordance with the rules of professional conduct:

- The relationship between the attorney for the minor child and the child is confidential.

- The attorney should keep the child reasonably informed about the proceedings.

- The attorney is to abide by the child's decisions concerning the objectives of representation and to balance the duties of advisor and advocate and to consider the child's best interest.

- Where there is a conflict between what the child desires and what is in his or her best interests, the attorney for the child may seek the appointment of a guardian *ad litem*. **Authority:** Conn. Gen. Stat. §§ 46b-54(e), 46b-54(c), 46b-56(c), and 46b-56(c)(3); *Carrubba v. Moskowitz*, 274 Conn. 533 (2005), *Oliver v. Oliver*, 85 Conn. App. 57 (2004), *Sheiman v. Sheiman*, 72 Conn. App. 193 (2002), *Ireland v. Ireland*, 45 Conn. App. 423 (1997), *Jaser v. Jaser*, 37 Conn. App. 194 (1995), and *Taff v. Bettcher*, 35 Conn. App. 421 (1994); ROPC §§ 1.2, 1.4, 1.6, and 2.1. **Discussion:** See § 8.15, *below*. **Forms:** Code of Conduct for Counsel for the Minor Child and Guardian *ad Litem*, see Chapter 20, § 20.42, *below*.

- Appointing a guardian *ad litem* for the minor child, *pendente lite*:

- The guardian *ad litem* may, but need not be, an attorney.

- The guardian *ad litem* is to gather facts and determine what is in the child's best interests, which is conveyed when the guardian *ad litem* is a witness.

- Although typically a guardian *ad litem* may not file pleadings, he or she may request a status conference.

- Provided a Guardian *ad Litem* is acting with the scope of his or her duties, he or she is entitled to absolute immunity from separate civil law suits instituted by a parent. **Authority:** Conn. Gen. Stat. § 46b-54(a); *Zhou v. Zhang*, 334 Conn. 601 (2020). *Schult v. Schult*, 241 Conn. 767 (1997), *Dubinsky v. Reich*, 187 Conn. App. 255 (2019), *Zilkha v. Zilkha*, 180 Conn. App. 143 (2018), *Fish v. Fish*, 90 Conn. App. 744 (2005), and *In re Tayquon H.*, 76 Conn.

App. 693 (2003); P.B. § 25-62. **Discussion:** See § 8.16, *below*. **Forms:** JD-FM-219—Guardian *ad Litem* Request for Status Conference, see Chapter 20, § 20.29, *below*. Code of Conduct for Counsel for the Minor Child and Guardian *ad Litem*, see Chapter 20, § 20.42, *below*.

□ Asserting different positions by the attorney for the minor child and guardian *ad litem*:

○ The attorney for the child and guardian *ad litem* may assert different positions if the child's best interests are served by doing so. **Authority:** *Schult v. Schult*, 241 Conn. 767 (1997). **Discussion:** See § 8.17, *below*.

□ Asserting privileges on behalf of the minor child:

○ Once there is a court action and a representative for the child has been appointed, the child's representative holds the privilege for the minor child.

○ If there is a guardian *ad litem*, he or she holds the privilege.

○ If there is no guardian *ad litem*, the attorney for the minor child holds the privilege. **Authority:** Conn. Gen. Stat. § 46b-54(e), P.A. 14-3 and 14-207, *Gil v. Gil*, 94 Conn. App. 306 (2006), *Sheiman v. Sheiman*, 72 Conn. App. 193 (2002), and *Taff v. Bettcher*, 35 Conn. App. 421 (1994). **Discussion:** See § 8.18, *below*.

□ Delegating judicial authority to an attorney for the minor child or guardian *ad litem* is prohibited:

○ A child's representative cannot be given the authority to make decisions in the event the parties are unable to agree.

○ A child's representative can mediate or try to help the parties reach consensus. **Authority:** *Lehane v. Murray*, 215 Conn. App. 305 (2022), *Thunelius v. Posacki*, 193 Conn. App. 666 (2019), *Nashid v. Andrawis*, 83 Conn. App. 115 (2004) and *Weinstein v. Weinstein*, 18 Conn. App. 622 (1989).

Discussion: See § 8.19, *below*.

□ Determining the duration of the appointment of the attorney for the minor child and guardian *ad litem*:

○ Appearance of counsel is automatically withdrawn 180 days after a final judgment.

○ There is no automatic withdrawal for guardian *ad litem*. **Authority:** *Heiman v. Heiman*, 2011 Conn. Super. LEXIS 33 (2011) and P.B. § 3-9(c).

Discussion: See § 8.20, *below*.

□ Seeking to remove an attorney for the minor child or guardian *ad litem*:

○ Prior to October 2014, a litigant must demonstrate prejudice in prosecuting his or her case by the child's representative in order to be able to seek the removal of the attorney for the minor child or guardian *ad litem*.

○ A child's representative may be removed for violating the code of conduct or failing to comply with the appointment order. **Authority:** Conn. Gen. Stat. § 46b-12c; *Strobel v. Strobel*, 64 Conn. App. 614 (2001), *Lord v. Lord*, 44 Conn. App. 370 (1997), and *Wilkinson v. Weigand*, 1997 Conn. Super. LEXIS 2086 (1997). **Discussion:** See § 8.21, *below*. **Forms:** Code of Conduct for Counsel for the Minor Child and Guardian *ad Litem*, see Chapter 20, § 20.42, *below*.

□ Seeking professional evaluations:

○ The court may order evaluations for anything that may be helpful or relevant to resolving the issues in the case.

○ An evaluation may only be ordered in a pending controversy.

○ A case typically will not proceed unless the report has been filed in

time for it to be reviewed.

- Evaluations may be conducted by the family relations division.
 - This evaluation may be issue-focused, which is not a full evaluation, but rather deals with discreet issues.
 - The evaluation may be a full custody evaluation.
- The court may order a psychiatric evaluation.
 - This evaluation may be appropriate where medication is an issue.
 - A psychiatrist does not perform psychological testing.
- The court may order a psychological evaluation.
 - This evaluation may be appropriate where there are suspected mental health issues.
 - A psychologist will perform psychological evaluations.
- The evaluator will be notified by the guardian *ad litem* or the court of the appointment to do an evaluation.
- Counsel shall not initiate contact with the evaluator until the report is filed.
- The report is to be filed in court and distributed by the court to counsel of record and the guardian *ad litem*.
- The court is not bound to accept the recommendations of the evaluator.
- The evaluation may be deemed stale after six months.
- The methodology employed by psychological experts in arriving at their opinions must be valid and may be subject to challenge. **Authority:** Conn. Gen. Stat. §§ 46b-3, 46b-6, 46b-6a, and 46b-7; P.B. § 25-60A; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Barros v. Barros*, 309 Conn. 499 (2013), *State v. Porter*, 241 Conn. 57 (1997), *Yontef v. Yontef*, 185 Conn. 275 (1981), *Merkel v. Hill*, 189 Conn. App. 779 (2019), *Lopes v. Ferrari*, 188 Conn. App. 387 (2019), *Lineberry v. Estevam*, 151 Conn. App. 264 (2014), *Payton v. Payton*, 103 Conn. App. 825 (2007), *Ruggiero v. Ruggiero*, 76 Conn. App. 338 (2003), *Janik v. Janik*, 61 Conn. App. 175 (2000), *Savage v. Savage*, 25 Conn. App. 693 (1991), *Duve v. Duve*, 25 Conn. App. 262 (1991), *O'Neill v. O'Neill*, 13 Conn. App. 300 (1988), *Cotton v. Cotton*, 11 Conn. App. 189 (1987), *Pascal v. Pascal*, 2 Conn. App. 472 (1984), and *Mastrangelo v. Mastrangelo*, 2012 Conn. Super. LEXIS 3101 (2012); P.B. §§ 25-60(a), 25-60(b), 25-60(c), 25-60A(a), and 25-60A(c). **Discussion:** See § 8.22, below.

§ 8.14 Appointing a Child's Representative, *Pendente Lite*

[1] Analyzing the 2014 Legislation—General Considerations

In 2013, a task force consisting of attorneys, mental health professionals, legislators, and laypeople was formed to address perceived inadequacies in the system for appointing and regulating attorneys for the minor child and guardians *ad litem*. The task force made a report as expected and which led to legislation being passed that has extensively overhauled the rules and requirements for children's representatives. The resulting legislation is embodied in Public Act 14-3. Additionally, the revised statutes now refer to both an attorney for the minor child and a guardian *ad litem*. Previously, in order to determine the duties of a guardian *ad litem*, reference had to be made to the probate court statutes, not the family law statutes. Conn. Gen. Stat. § 46b-54.

#Comment Begins

Strategic Point: A knee-jerk reaction from many in the legal profession has been to label and characterize the legislation as being overbearing and unnecessary. However, much of what is contained within the legislation is based upon recommendations from the task force and is an attempt to lead to better practices. While more reporting requirements are indicated within the legislation, ensuring that a child's representative is attentive and fulfilling their duties can only be beneficial for families undergoing custody actions.

#Comment Ends

Effective January 1, 2017, a standing committee will be formed regarding Guardians *ad litem* and attorneys for minor children. P.B. § 25-61A(a). The nine members of the committee consist of the chief public defender, a mental health professional, the commissioner of the department of public health, a family law attorney, two judges, two members of the public, and a representative from a non-profit legal services organization. P.B. § 25-61A(a). The standing committee has oversight to:

1. Establish additional qualifications for individuals to be appointed;
2. Approve a training curriculum;
3. Establish a process to remove people from the approved list;
4. Annually review the list of those eligible to be appointed;
5. Adopt procedures to carry out its functions.

P.B. § 25-61A(b).

[2] Appointing an Attorney for the Minor Child or a Guardian *ad Litem*

Statutes reference the appointment of a child's representative prior to the 2014 amendments only referred to an attorney for the minor child. The amendments now include both the attorney for the minor child and guardian *ad litem*. A child's representative may only be appointed by the court only after reasonable efforts to resolve the custody disputes have been made. [Conn. Gen. Stat. § 46b-54\(c\)](#). No attorney for the minor child or guardian *ad litem* shall be appointed unless he or she has completed the training offered by the judicial branch for attorneys for the minor child and guardians *ad litem*, and: he is an attorney or mental health professional in good standing, proves that he does not have a criminal records, does not appear on a DCF registry, and meets additional qualifications imposed by the standing committee. P.B. § 25-62A(b). The status of those eligible to serve as a Guardian *ad litem* or attorney for the minor child is to be reviewed every three-years. P.B. §§ 25-62(c) and 25-62A(c). To maintain eligibility each person must: (1) certify completion of 12 hours of relevant training, three of which are in ethics; (2) disclose changes in his criminal history; (3) certify he does not appear on the DCF registry; and (4) meets additional qualifications as set forth by the standing committee. P.B. §§ 25-62(c) and 25-62A(c). The parties may agree on a child's representative and submit that to the court. [Conn. Gen. Stat. § 46b-12\(b\)](#). Where the parties have not agreed, the court must provide 15 names of those who can serve in the capacity of either an attorney for the minor child or a guardian *ad litem*, from which the parties may choose. [Conn. Gen. Stat. § 46b-12\(a\)](#). In arriving at the list of 15, the court must consider the following criteria:

- (1) The parties' financial circumstances.
- (2) The extent to which there are any language barriers.
- (3) Transportation barriers between the parties and the proposed child's representative.
- (4) Any physical, mental, or learning disabilities.
- (5) The proximity of the child's representative to the court and the parties' homes.

Conn. Gen. Stat. § 46b-12(a). Within two weeks, the parties shall either have an agreement or the court will appoint a child's representative from the original list of 15. The two-week period will not apply in the event there is an emergency requiring the immediate appointment of an attorney for the minor child or guardian *ad litem*. **Conn. Gen. Stat. § 46b-12(b).**

#Comment Begins

Strategic Point: It is better for counsel to hand-pick the attorney for the minor child than to have the court make a determination. This will allow the choice of an attorney who may be better suited to the personalities and issues in the case than one chosen by the court, who may have a very limited view of the issues at the time of appointment.

#Comment Ends

[3] Establishing the Initial Court Order Defining the Scope of Appointment

Within 21 days of the appointment of an attorney for the minor child or guardian *ad litem*, the court shall enter order which includes the following:

- (1) The specific nature of the work to be undertaken.
- (2) The date on which the appointment is to end, which the court may extend for good cause.
- (3) A deadline for the child's representative to report to the court as to the work undertaken.
- (4) The fees for the child's representative which includes the amount of the retainer, the hourly fee to be charged, how the initial retainer is to be paid, and any calculation of fees on a sliding scale.
- (5) A proposed schedule of court review of the work of the child's representative, which shall be no less than every three months unless waived by the parties with a written agreement filed with the court.
- (6) No less than 30 days after the final judgment, the child's representative shall submit an affidavit setting forth the name of the case, docket number, hourly fee charge, total

hours billed, and the total amount charged. The preparation of this affidavit may not be charged to the parties by the child's representative.

Conn. Gen. Stat. § 46b-12(c).

It is quite possible that the scope of the work to be undertaken may not fully be known at the time this initial court order is entered. In such a case, an amendment to the court order should be sought prior to broadening the scope of the work undertaken by the child's representative.

Determining the end date of the appointment is typically difficult to do at the outset of a case. It might be best to tie the duration to 180 days after the final judgment in which all appearances are deemed to be withdrawn. P.B. § 3-9(d).

When setting forth the dates to report back to the court as to progress on the case, care should be taken to ensure the cooperation of the parties and the ability to do the scope of work within the time constraints provided. If there is inability to fulfill these deadlines, a child's representative should be mindful of providing the court and the parties with concrete reasons for a delay.

#Comment Begins

Strategic Point: Much of the impetus behind the statutory revisions was a feeling by certain litigants that the children's representatives were overcharging for services rendered. There was a desire at the task force to focus on the amounts charged and possibly limit fees for the children's representative. The statutory inclusion of requiring an affidavit at the end of the case is, in the editor's opinion, solely to provide fodder for these disgruntled litigants. A child's representative should, when the initial court order is entered, have this statutory provision waived. It serves absolutely no purpose except as a way to provide information to certain disgruntled litigants. Attorney's fees for a child's representative, like any other attorney's fees, are subject to a standard of reasonableness which, if a party objects, is determined by a court. Accordingly, the affidavit serves no legitimate purpose for the work done by the child's representative.

#Comment Ends#Comment Begins

Forms: JD-FM-225—Affidavit of Expenses of Counsel or Guardian ad Litem for Minor Child, see [Chapter 20, § 20.33, below](#). JD-FM-232—Periodic Review Worksheet—Fees Charged by Counsel or Guardian ad Litem. See [Chapter 20, § 20.35, below](#).

#Comment Ends

[4] Assessing the Differences Between an Attorney for the Minor Child and Guardian *ad Litem*

In contested custody and visitation cases in Connecticut, a court may appoint a neutral, third party to represent a child. *Yontef v. Yontef*, 185 Conn. 275 (1981). A court may appoint a lawyer to serve as the attorney for the minor child in a custody dispute. Conn. Gen. Stat. § 46b-54(a) and (b). The other child representative that may be appointed by the court is a guardian *ad litem*, who may be an attorney, layperson, or mental health professional. Conn. Gen. Stat. § 46b-54(a) and (b).

The attorney for the minor child, while mindful of the child's best interests, advocates for the child in the same manner as an attorney on behalf of a client. The attorney for the minor child is concerned with the child's legal rights, while the guardian *ad litem* speaks to the child's emotional, psychological, and physical needs. *In re Tayquon H.*, 76 Conn. App. 693 (2003). In contrast, the guardian *ad litem* investigates the facts of the case and is charged with advocating through testimony what he or she believes is in the best interests of the child.

In 2014, the legislature amended the statute with respect to the considerations to be made by a guardian *ad litem* and an attorney for the child. The statutory revision requires the guardian *ad litem* and attorney for the child to consider the best interest of the child in recommending the entry of an order and to consider the same statutory factors as the court is to consider pursuant to Conn. Gen. Stat. § 46b-56(c). Conn. Gen. Stat. § 45b-54(f). Unlike the change in Conn. Gen. Stat. § 46b-56(c), the children's representative is not required to articulate the basis for his or her recommendation. Conn. Gen. Stat. § 46b-54(f).

#Comment Begins

Warning: The changes made by the legislature to Conn. Gen. Stat. § 46b-54(f) do not maintain the traditional roles of an attorney for the child or a guardian *ad litem*. An attorney for the child, while mindful of a best interest analysis, is also an advocate for that child. Such advocacy may run counter to the changes in the legislation. In the rush to push through this legislation, care was not taken in analyzing the role of the attorney for the child in light of the legislative changes.

#Comment Ends

§ 8.15 Appointing an Attorney for the Minor Child, *Pendente Lite*

[1] Analyzing the Role of an Attorney for the Minor Child

All matters regarding the child, be it custody, support, or education require the presence and participation of the attorney for the minor child. Conn. Gen. Stat. § 46b-54(e). This includes filing briefs, questioning witnesses, oral argument, and any other proceedings that take place during a pretrial proceeding, hearing, or trial. *Sheiman v. Sheiman*, 72 Conn. App. 193, 203 (2002). It is improper for the court to proceed on a motion for temporary custody and visitation without the attorney for the minor child. *Taff v. Bettcher*, 35 Conn. App. 421 (1994). However, where the proceedings have been bifurcated, it is permissible to proceed on the financial issues without the attorney for the minor child. *Jaser v. Jaser*, 37 Conn. App. 194 (1995). The 2014 revisions to the statute provide for a cost-effective means for the child's representative to participate in hearings. To every extent possible, the participation in a hearing by a child's representative should occur either at the beginning or the end of the proceedings. Conn. Gen. Stat. § 46b-54(e).

It is crucial to remember that an attorney for the minor child is expected to maintain a role commensurate with the Rules of Professional Conduct, irrespective of the child's age. In representing a child, the attorney for the minor child must keep confidences with his or her client, as the attorney-client privilege is paramount in this relationship. Rules of Professional Conduct (hereinafter "ROPC") § 1.6. However, the child should know that his or her preferences will be divulged to the parents and court. The child should also be made aware that issues of safety raised will be divulged.

The child should be consulted with and kept reasonably informed about the status of the case. ROPC § 1.4. Keeping a child informed of the case status is much different than keeping a

parent informed. Clearly, there is no need for a child to receive copies of pleadings or correspondence in the case. A general understanding of the procedures and what will happen in the case is helpful to the child by taking the mystery out of it.

An attorney is also to abide by the child client's decisions concerning objectives of the representation and balance the obligations of being an advisor with that of an advocate. ROPC §§ 1.2 and 2.1. This distinction will typically be important when a child does not want a relationship with one parent. That child will need to be advised that a court will likely require the child to see the parent.

What does an attorney for the minor child do when faced with a dilemma in the balancing of his or her advocacy with the child's stated preferences? It is a child's *informed* preference that is controlling; not simply a voiced preference. [Conn. Gen. Stat. § 46b-56\(c\)\(3\)](#). If the preference relayed by the child client is an informed one and the attorney for the minor child believes it contrary to the child's best interests, the attorney for the minor child must take steps to resolve this conflict in his or her representation. However, in bringing the dilemma to light, the attorney must be mindful of and protect the child client's privileged communications. This conflict may be handled by filing a motion for the appointment of a guardian *ad litem*. If granted, the attorney for the minor child will be relieved to a significant degree of the need to safeguard the child's best interests as the guardian *ad litem* will be in place to do just that.

The judicial branch developed a professional code of conduct for attorneys for the minor child and guardians *ad litem*. Primarily the code of conduct is aimed at the role and duties of the guardian *ad litem*. The code of conduct seeks to establish the separate roles of an attorney for the child, in the same fashion as much as possible as representing an unimpaired adult, and the guardian *ad litem*. While the vast majority of the code is common sense, there are a few paragraphs of which the practitioner should be aware:

- (1) The child's representative should adhere to the ethical rules of his or her profession. This would include mental health professionals abiding by their code of ethics.
- (2) The duties should be limited to the appointment order. Thus, a child's representative cannot exceed the scope of the duties absent a court order amending the duties.
- (3) Maintain documents including written records of all interviews and investigations for six years from the date his or her services as a child representative is concluded.
- (4) Maintain accurate billing records.

#Comment Begins

Warning: Much of the legislative changes regarding a child's representative was borne of a small faction of disgruntled litigants who believe that there is chronic excess billing. Extra care should be taken when preparing bills to ensure their accuracy, as that is an area where a child's representatives are being scrutinized.

#Comment Ends#Comment Begins

Form: Code of Conduct for Counsel for the Minor Child and Guardian *ad Litem*. See [Chapter 20](#),

§ 20.42, *below*.

#Comment Ends

[2] Assessing Concerns over Dual Capacity Roles

An attorney for the minor child's role is to advocate for his or her child client in a manner as close as possible to that of an attorney's role when representing an unimpaired adult. However, unlike representing an unimpaired adult, the primary concern when representing a child is the best interests of the child, requiring consideration of more than the child's desires.

While the attorney for the minor child has the duty to advocate the wishes, desires, and positions of his or her ward, the attorney for the minor child also has an obligation to safeguard the child's best interests while acting as an advocate. *Carrubba v. Moskowitz*, 274 Conn. 533 (2005). Although *Carrubba* concerned issues of immunity, the analysis of the role of the child was necessary to determine the issue. The result was a realization that the attorney for the minor child has a dual role, one as an advocate for the child and the other looking at the child's best interests. *Carrubba*, 274 Conn. at 544–545.

The disparity in this dual role may appear dependent upon the age of the child. Certainly, the older and more mature the child, the representation is more like that of an attorney for an adult litigant. With younger children, the attorney's role may be more of a best interests advocate. The dual role may also appear when there are allegations of alienation or attempts to influence the child, irrespective of the child's age.

#Comment Begins

Strategic Point: If an attorney has been appointed for a child whose preference is contrary to what would be in his or her best interests, the appointment of a guardian *ad litem* should be sought. This will allow the attorney for the minor child to be free from acting in a conflicted capacity. If a guardian *ad litem* is not appointed, the court will need to know when you are acting as the child's attorney and when you are acting in the child's best interests.

#Comment Ends

The primary duty of the attorney for the minor child is to advocate for the child's wishes. However, an attorney for the minor child is permitted to inform the court that he or she believes the child's preference to be in the child's best interests. Conn. Gen. Stat. § 46b-56(c) and *Oliver v. Oliver*, 85 Conn. App. 57 (2004). The attorney for the minor child may argue evidence and support or oppose motions filed by either parent. *Sheiman v. Sheiman*, 72 Conn. App. 193 (2002). It is improper, however, to call an attorney for the minor child as a witness. *Ireland v. Ireland*, 45 Conn. App. 423 (1997).

#Comment Begins

Warning: Recent legislative revisions now require counsel for the minor child to consider a child's best interest when advocating for that child.

#Comment Ends

§ 8.16 Appointing a Guardian *ad Litem* for the Minor Child, *Pendente Lite*

[1] Appointing a Guardian *ad Litem*

The trial court can appoint a guardian *ad litem* to act on behalf of a child. [Conn. Gen. Stat. § 46b-54\(a\)](#) and P.B. § 25-62. The guardian *ad litem* need not be an attorney, but must have completed the training program offered by the judicial branch for attorneys for the minor child and guardians *ad litem*. P.B. § 25-62. Provided it is in the child's best interests, the court may appoint a guardian *ad litem* for the child and order the appointment continue through the child's high school years. [Fish v. Fish](#), 90 Conn. App. 744 (2005).

#Comment Begins

Strategic Point: In determining whether to employ a guardian *ad litem* who is or is not an attorney, the needs of the case should be determined. At times there are significant mental health issues presented in a case, making the appointment of a mental health professional as guardian *ad litem* more appropriate.

#Comment Ends

[2] Assessing the Role of the Guardian *ad Litem*

Because his or her role is one of fact gatherer and witness, the guardian *ad litem* is not expected to file and argue motions, file briefs, or do any other tasks requested of a lawyer. The guardian *ad litem* does not have a privileged relationship with the child or an obligation to abide by the child's decisions and desires. [Schult v. Schult](#), 241 Conn. 767, 779 (1997). There is no balancing between the role of advisor and advocate, as the guardian *ad litem*'s role is strictly to ascertain what is in the child's best interests and to be prepared to testify as to the facts found and conclusions drawn. [In re Tayquon H.](#), 76 Conn. App. 693, 705–708 (2003).

In the role of fact gatherer, the guardian *ad litem* must interview and stay current with the child whose best interests are being determined. [In re Tayquon H.](#), 76 Conn. App. at 705. However, the court could consider the guardian *ad litem*'s testimony, even though she had minimal contact with the children, as there was nothing to suggest that she had no investigated the children's best interest. [Zhou v. Zhang](#), 334 Conn. 601 (2020). Also, the guardian *ad litem* will seek to interview and obtain documentation from the child's parents, third-party professionals, and third parties with whom the child has significant contact. [In re Tayquon H.](#), 76 Conn. App. at 705. These third parties include daycare providers, teachers, guidance counselors, pediatricians, therapists, health care providers, DCF investigators/caseworkers, police personnel, and various family members.

The mere fact that the guardian *ad litem* adopts a position shared by the children does not equate to blind acceptance of the child's position when the guardian believes such position to be in the best interests of the child. [Zilkha v. Zilkha](#), 180 Conn. App. 143 (2018).

#Comment Begins

Strategic Point: An assertion by a parent that the guardian *ad litem* is “blindly advocating” a child's preference will not sway a court to that position. Rather, it is the determination of whether such a position is in the child's best interests and is an informed preference.

#Comment Ends

While typically a guardian *ad litem* may not file pleadings, the guardian *ad litem* may file a form seeking a status conference with the court. Such status conference may be sought if there is an urgent matter regarding the children, a matter requiring the court's attention, concerning fees, or the matter is on appeal and the guardian *ad litem* needs counsel.

#Comment Begins

Forms: JD-FM-219—Guardian *ad Litem* Request for Status Conference, *see* [Chapter 20, § 20.29, below](#). Code of Conduct for Counsel for the Minor Child and Guardian *ad Litem*, *see* [Chapter 20 § 20.42, below](#).

#Comment Ends

[3] Seeking to Institute Civil Actions Against the Guardian *ad Litem*

Inevitably, in the most difficult cases, one party or the other believes the guardian *ad litem* did not do his or her job because their particular point of view was not endorsed. Provided a Guardian *ad Litem* is acting within the scope of the duties to serve in such role, he or she is entitled to absolute immunity for any civil suit brought against him or her in that capacity. *Dubinsky v. Reich*, 187 Conn. App. 255 (2019).

§ 8.17 Asserting Different Positions by the Attorney for the Minor Child and Guardian *ad Litem*

It is not uncommon for cases to have both an attorney for the minor child and a guardian *ad litem* appointed for a minor child. Because the guardian *ad litem* speaks to the child's best interests, it is possible this will result in a position different from that taken by the attorney for the minor child. When this occurs, an attorney for the minor child may advocate a position that is contrary to the position recommended by the guardian *ad litem*. *Schult v. Schult*, 241 Conn. 767 (1997). This divergence of advocacy is permissible if it aids the court in its determination of the child's best interests. *Schult*, 241 Conn. at 780–781.

§ 8.18 Asserting Privileges on Behalf of the Minor Child

In litigated custody cases, one parent may seek to introduce the testimony or evidence from a child's treating health professional. In the absence of court action, the parents of a child hold the privilege as to whether to disclose communications and records between a child and his or her doctor. Once there is a court action and representation is appointed for the minor child, the child's representative holds the privilege instead of the parents. *Gil v. Gil*, 94 Conn. App. 306, 323 (2006), *Sheiman v. Sheiman*, 72 Conn. App. 193 (2002), and *Taff v. Bettcher*, 35 Conn. App. 421, 427–428 (1994). If there is a guardian *ad litem* appointed, he or she holds and asserts the privilege, even if there is an attorney for the minor child. The attorney for the minor child will hold the privilege if there is no guardian *ad litem* appointed. *Sheiman*, 72 Conn. App. at 203.

In 2014, statutory revisions were enacted regarding the testimony or reporting to the court by a guardian *ad litem* or attorney for the minor child as to medical conclusions or diagnoses. An attorney for the child or guardian *ad litem* may be heard regarding a child's medical diagnosis or physician's conclusions if: (1) they have the report which states the diagnosis or conclusions; or (2) one or both parties have refused to cooperate in obtaining the records. Conn. Gen. Stat. § 46b-54(e). Additionally, if it is determined to be in the best interests of the child, the mental health professional may be heard on issues such as custody, care, support, education, and visitation. Conn. Gen. Stat. § 46b-54(e).

#Comment Begins

Warning: In the 2014 legislative session, two public acts were passed concerning [Conn. Gen. Stat. § 46b-54\(c\)](#). The first was P.A. 14-3, which permitted the child's representative to inform the court regarding a medical diagnosis or condition only if one or both parents did not cooperate in allowing the records to be released. That change was repealed and replaced with the language outlined above in P.A. 14-207.

#Comment Ends#Comment Begins

Warning: It appears that the intent of the revisions to the statute regarding mental health professionals for the children is designed to water down the influence of the child's representatives and not truly looking out for the best interests of the child. Very often, the child's therapist will not testify in court in order to preserve the therapeutic relationship. This change to the statute seemingly puts the interest of the parents in obtaining testimony ahead of the best interests of the children. However, it will be up to a court to determine whether hearing from the mental health professional is in the best interests of the child.

#Comment Ends#Comment Begins

Warning: The revision to the statute seems to create some conflict between what the law has been with respect to holding the privilege and providing the court with evidence pertinent to the child and the ability to protect the child. It could likely be the case in which the parents have cooperated with the child's representative to allow him or her to speak with a mental health care provider for the child but then deems it not to be in the child's best interests to hear testimony from that mental health professional. In that case, under the language of the revised statute, the court cannot hear anything regarding the diagnosis or conclusions of the mental health professional from either child's representative. That leaves a key piece of information missing from the court's determination of what is in the best interest of the child. In addition, it ignores existing case law in which a guardian *ad litem* is permitted to testify as to matters that are hearsay if he or she relied on that informing his or her opinion.

#Comment Ends#Comment Begins

Warning: By allowing a mental health professional to opine on the custody, care, support, education, and visitation for the minor child, that mental health professional is being elevated to a status that he or she may not be competent to address. Many times, a mental health professional treating a child is seeing a microcosm of the family situation. Without assessing the entire family, it is difficult to believe that such a mental health professional would be able to opine as to what should happen with respect to custody and visitation, except as it may pertain to the desires and needs of the child.

#Comment Ends

§ 8.19 Delegating Judicial Authority to an Attorney for the Minor Child or Guardian *ad Litem* is Prohibited

~~Despite the fact that~~Even though child advocates often find themselves mediating or arbitrating issues between conflicted parents in an attempt to resolve or reduce conflicts, such decision-making authority may not be sanctioned in court orders, if it represents a final non-

reviewable decision. *Nashid v. Andrawis*, 83 Conn. App. 115 (2004). The prohibition is against the child's representative making the decision absent agreement of the parents. *Weinstein v. Weinstein*, 18 Conn. App. 622 (1989). However, there is nothing preventing the attorney for the minor child or the guardian *ad litem* from mediating between the parties to attempt to resolve the dispute, unless he or she is specifically excluded in the enumerated duties from mediating between the parties. A guardian *ad litem* who is tasked with holding passports, accessing the online e-mails between the parties, receiving copies of the child's phone bills, investigating, mediating and making recommendations is not an improper delegation of judicial authority. *Thunelius v. Posacki*, 193 Conn. App. 666 (2019). In many cases, giving the guardian *ad litem* or another neutral person the ability of acting in this fashion is designed to keep the parties out of court. A parent given the ability to modify the parenting schedule was not an improper delegation of judicial authority since the right to visitation was not affected. *Lehane v. Murray*, 215 Conn. App. 305 (2022).

#Comment Begins

Strategic Point: In *Lehane*, the court had the benefit of seeing many emails between the parties which demonstrated that the husband was reasonable while the wife was hostile and combative. Based upon the husband's words and actions, it was believed that he would promote the relationship between the child and the mother, which is likely why the court gave him the ability to modify the parenting schedule. The case should be used cautiously as precedent.

#Comment Ends#Comment Begins

Warning: The prohibition against delegating judicial authority applies equally to any other non-parent third-party decision maker, including a therapist, medical professional, or teacher.

#Comment Ends

§ 8.20 Determining the Duration of the Appointment of the Attorney for the Minor Child and Guardian *ad Litem*

In all cases, the appearance of counsel is automatically withdrawn 180 days after a final judgment. P.B. § 3-9(c). However, a guardian *ad litem* is not counsel, so the question arises as to when, if at all, his or her appearance expires. One court has indicated that the guardian *ad litem*'s services should terminate upon the conclusion of the proceedings, subject to reappointment in the future. *Heiman v. Heiman*, 2011 Conn. Super. LEXIS 33 (2011).

#Comment Begins

Strategic Point: If acting as a guardian *ad litem* and contacted by a parent after the conclusion of the proceedings, it may be wise to specifically seek reappointment instead of assuming the role. Additionally, there are times when a fresh set of eyes on a case will be beneficial.

#Comment Ends

§ 8.21 Seeking to Remove an Attorney for the Minor Child or Guardian *ad Litem*

As of October 1, 2014, new standards have been implemented by which a parent may seek the removal of a child's representative. Previously, ~~in order to~~ obtain standing, a party had to show that his or her case was prejudiced by the child's representative. The new legislation provides automatic standing for a parent. Conn. Gen. Stat. § 46b-12c. A child's representative

may be removed for failing to follow the Code of Conduct for Counsel for the Minor Child and Guardian *ad Litem* or for failing to comply with the court's appointment order. The matter may be referred to family relations for an attempted resolution and barring that, the court will have a hearing. Conn. Gen. Stat. § 46b-12c. ~~The new legislation does not indicate whether it applies to appointments made prior to October 1, 2014 or only to those after October 1, 2014.~~

Prior to October 1, 2014, an attorney for the minor child and a guardian *ad litem* were court-appointed representatives for the child. Without a showing of prejudice to his or her case or a bias that affected the outcome of the proceedings, a parent did not have standing to seek removal of the child's representative. *Keenan v. Casillo*, 149 Conn. App. 642 (2014) and *Lord v. Lord*, 44 Conn. App. 370 (1997). The prejudice must impede the moving party in prosecuting his or her action. *Strobel v. Strobel*, 64 Conn. App. 614 (2001) and *Wilkinson v. Weigand*, 1997 Conn. Super. LEXIS 2086 (1997).

#Comment Begins

Strategic Point: When representing a party who does not like the child's representatives, it is unwise to file a motion to seek his or her removal. The standard is extremely high and the motion will only be granted in rare instances. The filing of this motion will signal to a court that your client is the problem.

#Comment Ends#Comment Begins

Forms: Code of Conduct for Counsel for the Minor Child and Guardian *ad Litem*. See Chapter 20, § 20.42, *below*.

#Comment Ends

§ 8.22 Seeking Professional Evaluations

[1] Seeking Professional Evaluations—In General

The courts have authority to issue orders to have evaluations performed. Conn. Gen. Stat. § 46b-6. The evaluation may be with respect to any circumstance of the matter that may be helpful or material or relevant to a proper disposition of the case. Conn. Gen. Stat. § 46b-6. Such investigation may include gathering facts of the pertinent history and environment of the child as well as a professional examination of the physical or mental health of the parties. Conn. Gen. Stat. §§ 46b-3 and 46b-6. Among the possible investigations is the appointment of a psychologist or psychiatrist to conduct an evaluation. *Janik v. Janik*, 61 Conn. App. 175, 178 (2000). However, these statutory provisions may not be used to order a child into treatment. *Pascal v. Pascal*, 2 Conn. App. 472 (1984).

An evaluation may only be ordered if there is a then-pending case or controversy; a court cannot order an evaluation to prospectively understand what might occur to affect a child's best interests. *Savage v. Savage*, 25 Conn. App. 693 (1991). There must be a reason for ordering an evaluation and the mere concern that a party is on prescription medication will not form that basis. *Lopes v. Ferrari*, 188 Conn. App. 387 (2019). In the event the court orders an evaluation, but the parties resolve their case prior to the completion of the reports and enter into a stipulation resolving the underlying motions, the court is then without power to order the completion of the evaluation. *Ruggiero v. Ruggiero*, 76 Conn. App. 338 (2003).

Typically, any evaluation will involve direct contact between the litigants and the

evaluator. Counsel for the parents is usually excluded from the evaluation, which is not considered to be a due process violation of a right to counsel. *Barros v. Barros*, 309 Conn. 499 (2013).

The communications made ~~in the course of~~during the evaluation are not privileged. The report is to be filed in court and mailed to counsel of record and self-represented parties. Conn. Gen. Stat. § 46b-7.

A case is not to proceed until such time as the report is filed and the parties have reasonable opportunity to examine the report. Conn. Gen. Stat. § 46b-7. At conflict with the statute is the practice book provision that unless a court orders a hearing to take place prior to the filing of the report, the case will not proceed to trial unless the report has been filed in time for a reasonable opportunity for it to be reviewed. P.B. § 25-60(a). A prior version of this practice book section stated that any hearing prior to the filing of the report would be subject to modification, but this section was deleted. A court that has a hearing, the subject matter of which has been addressed in an evaluation the report of which has not yet been filed, does so in violation of Conn. Gen. Stat. § 46b-7. *Lineberry v. Estevam*, 151 Conn. App. 264 (2014). The report will be admissible if the author is available for cross-examination. P.B. § 25-60(c). The communications made in the course of the evaluation are not privileged.

One issue which arises when such reports enter is a question of when it becomes stale. A family relations report rendered nearly one year before a hearing and in which the family relations officer could not state was in the child's best interests was stale and could not form the evidentiary basis for a modification. *Merkel v. Hill*, 189 Conn. App. 779 (2019).

#Comment Begins

Warning: *Merkel* represents all that is wrong with the family law courts. Matters do not get heard as quickly as they should which results in reports becoming stale as a matter of course. The Appellate Court, in a rare plea, commended to the trial court an expeditious hearing on this matter to avoid the same issues again.

#Comment Ends

[2] Conducting Evaluations Through the Family Relations Division

The family courts in Connecticut have the benefit of the court support services division's (hereinafter "CSSD") family services department. CSSD is staffed by counselors trained in family dynamics, relationships, and alternative dispute resolution techniques. For child custody and visitation matters, CSSD can be called upon to provide alternative dispute resolution services that include pre-trial settlement negotiations, court-ordered mediation, a conflict resolution conference, or conciliation counseling.

For those child custody and visitation cases that cannot or will not settle, the Department is often called upon to perform evaluations to assist the court. Conn. Gen. Stat. § 46b-6. The evaluative services provided by CSSD include issue-focused evaluations and comprehensive evaluations.

An issue-focused evaluation performed by CSSD is a means for dealing with a narrow aspect of a custody or visitation matter without having to investigate those areas that have been resolved or are not the cause of concern for the litigants. The goal of the issue-focused evaluation is to examine a defined parenting dispute and gather information regarding this narrow issue to

help resolve the issue. If the matter is not resolved by agreement, CSSD will issue a recommendation for the benefit of the parties and the court. Issue-focused evaluations, by their nature, are limited in scope, involvement, and duration.

The comprehensive evaluations from CSSD generally take several months to complete as they are in-depth assessments of the family unit and the family dynamics. The comprehensive evaluation report will list the contacts made by the CSSD counselor, the facts discovered during the investigation, and the ultimate recommendations.

[3] Obtaining Psychological or Psychiatric Evaluations

CSSD is not staffed with psychologists or psychiatrists. In certain cases, especially where mental health issues are present, the parties may retain and pay a qualified, licensed health care provider to conduct an evaluation. [Conn. Gen. Stat. § 46b-3](#) and P.B. § 25-60A. There must be a finding that the parties have the financial resources to pay for the evaluation. [Conn. Gen. Stat. § 46b-6a](#). Court orders for an evaluation shall include the name and professional credentials of the professional, the estimated cost of the evaluation and allocation of the same between the parties, the professional credentials of the provider, the estimated completion date, and the estimate cost to testify in court. [Conn. Gen. Stat. § 46b-6a](#) and P.B. § 25-60A. The report shall be filed with the clerk no later than 30 days from the completion of the report. [Conn. Gen. Stat. § 46b-6a](#) and P.B. § 25-60A.

While there is significant overlap between the two evaluations, a psychiatric evaluation will not include psychological testing, whereas a psychological evaluation will include psychological testing. Accordingly, a psychiatric evaluation may not be appropriate where psychological testing is necessary. Psychological testing may not be needed in each case. A psychiatrist is a medical doctor who may prescribe medication, and in the event there are issues regarding psychotropic medication, a psychiatric evaluation may be preferable.

#Comment Begins

Strategic Point: Many practitioners routinely file motions for psychological evaluations, without really determining if they are necessary. Before filing any such motion, determine what type of evaluation is needed to provide the court with the information necessary to resolve the case.

#Comment Ends

[4] Contacting the Evaluator

The evaluator will be notified of his or her appointment by the guardian *ad litem*, or if there is no guardian *ad litem*, by court personnel. P.B. § 25-60A(a). Counsel representing the parties shall not initiate contact with the evaluator until the report is filed. P.B. § 25-60A(c).

[5] Obtaining and Disseminating Written Evaluation Reports

Evaluations in a custody or visitation action are to be encapsulated into a written report. [Conn. Gen. Stat. § 46b-6](#). The written reports are to be impounded by the court and then distributed by the court to the attorneys and guardian *ad litem*. P.B. § 25-60(b). The case is not to be determined until the parties have received the report and have had time to examine the report prior to trial. [Conn. Gen. Stat. § 46b-7](#) and P.B. § 25-60(a). This requirement, however, is not absolute. The court may allow the case to proceed without the report at its discretion. [Cotton v. Cotton](#), 11 Conn. App. 189 (1987) and P.B. § 25-60(c). However, if the court proceeds with the trial or hearing without the evaluation, the orders should be subject to modification once the

report is filed. *Duve v. Duve*, 25 Conn. App. 262 (1991). The court need not state that the order is expressly modifiable, but it will be modifiable upon filing the report. *Payton v. Payton*, 103 Conn. App. 825, 832 (2007). Where the litigants have been made aware of a family relations recommendation, even though a report is not completed, and the family relations officer is available for cross examination, the trial may proceed without the written report. *Payton*, 103 Conn. App. at 832–833 and *Duve*, 25 Conn. App. at 267–268.

#Comment Begins

Strategic Point: It is only in rare circumstances that the court will proceed without the court-ordered report. Accordingly, every effort should be made to ensure that the evaluation is completed in a timely manner.

#Comment Ends

[6] Accepting the Recommendations of the Evaluator

While evaluations are requested by the court, and are of tremendous value to the court, the practitioner and litigant should understand that a trial court is not bound to follow the recommendations provided by the evaluation. *Yontef v. Yontef*, 185 Conn. 275, 281 (1981). The evaluation is one piece of data to be considered in assessing a child's best interests.

[7] Timing of the Receipt of the Report and Trial

The court must assess the child's present best interests when making custody and visitation orders. *O'Neill v. O'Neill*, 13 Conn. App. 300 (1988). There will typically be a delay between the receipt of an evaluation and the trial. If the report is outdated, it is improper for the court to rely on the report in assessing the present best interests of the child. *O'Neill v. O'Neill*, 13 Conn. App. at 303–304.

#Comment Begins

Warning: Courts will typically use a six-month benchmark to determine whether a custody evaluation is stale. The court is likely to schedule the case for trial once the report is completed. Accordingly, discovery on all other matters should be completed to prevent any delay in trial.

#Comment Ends

[8] Challenging Expert Psychological Testimony

The methodology used by an expert in arriving at his or her opinion is rarely challenged. However, such psychological methodology must be valid for the testimony to be admissible. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and *State v. Porter*, 241 Conn. 57 (1997). For a methodology or theory to be valid, it must be based on scientific knowledge as determined by four factors:

- (1) Has the theory or methodology been tested?
- (2) Has the theory or methodology been subjected to peer review and publication?
- (3) What is the rate of error for the theory or methodology?
- (4) Is the theory or methodology generally accepted in the scientific community?

Daubert, 509 U.S. at 592–594 and *Porter*, 241 Conn. at 84–87.

This standard has been used to prohibit testimony regarding parent alienation syndrome, while allowing testimony of strategies of alienation. *Mastrangelo v. Mastrangelo*, 2012 Conn. Super. LEXIS 3101 (Dec. 20, 2012).

PART V: ASSESSING CONSIDERATIONS IN CUSTODY OR VISITATION ACTIONS

CUSTODY AND VISITATION

§ 8.23 CHECKLIST: Assessing Considerations in Custody or Visitation Actions

8.23.1 Assessing Considerations in Custody or Visitation Actions

- Applying the automatic orders:
 - The automatic orders are meant to maintain the status quo.
 - The automatic orders are binding on the plaintiff when the complaint or petition is signed, and on the defendant when he or she is served.
 - The automatic orders for custody matters are:
 - Neither parent may permanently remove the child from Connecticut.
 - A parent vacating the family residence shall provide the other party or his or her attorney with the address and where mail may be sent within 48 hours of vacating the home, absent a contrary court order.
 - Each parent shall facilitate communication between the child and the other parent, absent a contrary court order.
 - The parents shall maintain and keep the child on the medical insurance.
 - The parents shall participate in the parenting education program.
- Authority:** Conn. Gen. Stat. § 46b-83(b); P.B. §§ 25-5, 25-5(a)(1), 25-5(a)(2), 25-5(a)(3), 25-5(a)(4), and 25-5(a)(5). **Discussion:** See § 8.24, below.
- Filing emergency ex parte custody actions:
 - An emergency ex parte motion may be filed only when there is an immediate and present risk of physical danger or psychological harm to the child.
 - The application must be accompanied with an affidavit detailing the conditions requiring the ex parte order, that the order is in the child's best interest, and efforts made to notify the respondent and if no efforts were made the reasons therefore.
 - The court may grant temporary orders but must have a hearing within 14 days.
 - No orders will extend beyond 14 days without written agreement by the parties or court order. **Authority:** Conn. Gen. Stat. § 46b-56f; *Garvey v. Valencis*, 177 Conn. App. 578 (2017). **Discussion:** See § 8.25, below.
- Filing custody and visitation motions *pendente lite*, general considerations:

- The court may enter custody or visitation orders based upon the best interests of the child.
- The court may also order third-party professionals to assist in the resolution of the dispute. **Authority:** *Conn. Gen. Stat. § 46b-6; Hall v. Hall, 186 Conn. 118 (1982); P.B. §§ 25-60A and 25-61.* **Discussion:** See § 8.26, below. **Forms:** JD-FM-279—Affidavit in Support of Request to Enter Final Custody/Visitation Judgment, see Chapter 20, § 20.88, below; JD-FM-280—Affidavit in Support of Request for Approval of Final Agreement on Motion(s), see Chapter 20, § 20.89, below; JD-FM-282—Request for Approval of Final Agreement without Court Appearance, see Chapter 20, § 20.91, below, and JD-FM-284—Custody Agreement and Parenting Plan, see Chapter 20, § 20.92, below.
- Filing a motion for custody and visitation *pendente lite*:
 - Temporary orders are not binding on the court when rendering final orders.
 - The motion for temporary custody and visitation may be simple motions requesting an appropriate custody and visitation order, or it may detail incidents to support a parent's position. **Authority:** *Collins v. Collins, 117 Conn. App. 380 (2009).* **Discussion:** See § 8.27, below. **Forms:** JD-FM-176—Motions for Orders Before Judgment (*P.L.*) in Family Cases, see Chapter 20, § 20.20, below.
- Preparing parental responsibility plans:
 - The parental responsibility plans should include:
 - The child's schedule.
 - The way in which decision-making will be addressed.
 - How future disputes will be resolved.
 - How violations of the orders will be handled.
 - How to address the child's changing needs.
 - How to minimize the child's exposure to parental conflicts.
 - How agreements will be promoted between the parents.
 - The parental responsibility plan must be filed on the case management date. **Authority:** *Conn. Gen. Stat. § 46b-56a(d)* and P.B. § 25-50. **Discussion:** See § 8.28, below.
- Pleading and assessing joint or sole legal custody issues:
 - Legal custody is decision-making on behalf of the child.
 - There is a presumption that the parents should have joint legal custody.
 - If neither party requests joint legal custody, it may not be awarded by the court.
 - Joint legal custody requires the parents to confer with each other.
 - Sole legal custody vests one parent with decision-making power.
 - The court may order joint legal custody, but provide one parent with final decision making over certain issues. **Authority:** *Conn. Gen. Stat. §§ 46b-6, 46b-56(b), 46b-56(c), 46b-56a, 46b-56a(b), and 46b-56(g); Timm v. Timm, 195 Conn. 202 (1985), Strohmeyer v. Strohmeyer, 183 Conn. 353 (1981), Lopes v. Ferrari, 188 Conn. App. 387 (2019), Baronio v. Stubbs, 178 Conn. App. 769 (2012), Lugo v. Lugo, 176 Conn. App. 149 (2017), Altraide v. Altraide, 153 Conn. App. 327 (2014), Clark v. Clark, 150 Conn. App. 551 (2014), Keenan v. Casillo, 149 Conn. App. 642 (2014), Desai v. Desai, 119 Conn. App. 224 (2010), Kidwell v. Calderon, 98 Conn. App. 754 (2006), Carroll v. Carroll, 55 Conn. App. 18 (1999), Tabackman v. Tabackman, 25 Conn. App. 366 (1991), and Emerick v.*

Emerick, 5 Conn. App. 649 (1985). **Discussion:** See § 8.29, *below*.

□ Assessing physical custody issues:

- Physical custody addresses is when the child will be with each parent.
- A designation of the child's primary residence will dictate where the child attends school.
- Orders may be fashioned to protect the child from the harmful effects of parental behavior.
- Orders may enter requiring supervision or testing for substance abuse if the circumstances warrant.
- Parenting plans can vary from being very detailed to very general, depending upon the circumstances.

○ Courts may enter custody orders when a parent is deployed in the military service and such motions are given priority. **Authority:** Conn. Gen. Stat. §§ 10-184, 46b-56e(b) and 46b-56e(f); *Gorman v. Gorman*, 2008 Conn. Super. LEXIS 186 (2008). **Discussion:** See § 8.30, *below*.

□ Modifying *pendente lite* orders:

- *Pendente lite* orders and any modification thereof are based upon the best interests of the child.
- In rare circumstances, the court may modify an order in connection with another motion, if it deems the modification necessary and in the child's best interests. **Authority:** *Hall v. Hall*, 186 Conn. 118 (1982) and *Meehan v. Meehan*, 40 Conn. App. 107 (1996). **Discussion:** See § 8.31, *below*.

□ Assessing relocation *pendente lite*

- *Pendente lite* relocations are predicated upon the best interests of the child.
- However, the parent seeking to relocate should be prepared to go through the post-judgment statutory requirements for relocation to buttress the relocation case. **Authority:** *Weinstein v. Weinstein*, 275 Conn. 671 (2005), *Havis-Carbone v. Carbone*, 155 Conn. App. 848 (2015), *Lederle v. Spivey*, 151 Conn. App. 813 (2014), *Lederle v. Spivey*, 113 Conn. App. 177 (2009), *Racsko v. Racsko*, 91 Conn. App. 315 (2005), and *Ford v. Ford*, 68 Conn. App. 173 (2002). **Discussion:** See § 8.32, *below*. See also § 8.44, *below*.

□ Prohibiting prospective modifications of custody and visitation:

- An order may not include a prospective modification of custody or visitation, unless it is considered a tiered custody order.
- All custody determinations must be based upon the present best interests of the child. **Authority:** *Coleman v. Bembridge*, 207 Conn. App. 28 (2001), *Stahl v. Bayliss*, 98 Conn. App. 63 (2006), *Emerick v. Emerick*, 5 Conn. App. 649 (1985), and *Guss v. Guss*, 1 Conn. App. 356 (1984). **Discussion:** See § 8.33, *below*.

□ Providing for non-disparagement of parents:

- Neither parent should disparage the other parent or in any way injure the child's opinion of the other parent. **Authority:** *Nazareth v. Nazareth*, 2007 Conn. Super. LEXIS 1827 (2007). **Discussion:** See § 8.34, *below*.

□ Providing for counseling post judgment:

- A court may order a parent to go to counseling if it is deemed to be in the best interests of the child.
- A parent may select his own mental health provider.
- Parents with joint legal custody may jointly select a child's court ordered mental health provider, and absent agreement the court shall

make the decision.

- The court may order a parent to be screened for drugs or alcohol.

Authority: Conn. Gen. Stat. §§ 46b-6a and 46b-56(i); and *Foster v. Foster*, 84 Conn. App. 311 (2004). **Discussion:** See § 8.35, *below*.

□ Appealing *pendente lite* orders:

- Temporary custody and visitation orders are considered final judgments for purposes of appeal.

○ When such orders are appealed, the order remains in effect unless a motion for stay is filed and granted. **Authority:** *Madigan v. Madigan*, 224 Conn. 749 (1993), *Sweeney v. Sweeney*, 75 Conn. App. 279 (2003), and *Pascal v. Pascal*, 2 Conn. App. 472 (1984); P.B. §§ 61-11(c) and 61-12. **Discussion:** See § 8.36, *below*.

§ 8.24 Applying the Automatic Orders

[1] Applying the Automatic Orders—General Considerations

The automatic orders were enacted to maintain the status quo during the pendency of the dissolution and custody or visitation actions. There are ~~several of these~~ several automatic orders which apply to minor children. Practice Book (hereinafter “P.B.”) § 25-5. The automatic orders are enforceable against the plaintiff upon the complaint or petition being signed and against the defendant upon receipt of service. P.B. § 25-5.

[2] Removing the Child Permanently from Connecticut

Neither parent is permitted to remove the child permanently from Connecticut without the written permission of the other parent or order of the court. P.B. § 25-5(a)(1). This automatic order concerns a relocation of the child’s residence, not temporary absences from the state.

#Comment Begins

Strategic Point: Many parties erroneously believe that this automatic order allows a parent to veto the other parent’s vacation plans with the minor child. Clients should be made aware of the exact parameters of this automatic order and that it applies only to permanent removal of the child from Connecticut.

#Comment Ends

[3] Vacating the Family Residence

A party who moves out of the marital home is to notify the other party or his or her attorney of the new residence and address where mail may be received within 48 hours, unless there is a contrary court order. P.B. § 25-5(a)(2). Such a contrary court order would include a restraining or protective order. If a parent voluntarily leaves the former family home to serve the best interests of the minor child, the court may favorably consider this when making a child custody or visitation order. Conn. Gen. Stat. § 46b-83(b).

[4] Facilitating Contact Between the Parents and Child

Consistent with family practices, each parent is to assist the child in maintaining contact with the other parent, either by phone, in person, or in writing, unless a contrary order has been issued. P.B. § 25-5(a)(3). Such a contrary order would include a restraining or protective order. A parent who impedes a child’s contact with the other parent, absent truly compelling

circumstances, will not be viewed as acting in a child's best interest.

#Comment Begins

Strategic Point: Parents are well advised to keep their anger and upset in check and especially not allow it to interfere with the child. A parent who uses the child to “get back” at his or her spouse will be undermining efforts for a favorable resolution on custody and visitation by not facilitating the relationship between the parent and child.

#Comment Ends

[5] Maintaining Medical Insurance

The parents shall maintain the existing medical insurance and will not remove a child from the policy. P.B. § 24-5(a)(4).

[6] Participating in the Parenting Education Program

The parties are to participate in the parenting education program within the first 60 days of the action commencing. P.B. § 25-5(a)(5). The parenting education program is a six-hour course about the effects of divorce and custody actions on children.

§ 8.25 Filing Emergency Ex Parte Custody Actions

A person seeking custody of a child may file an ex parte motion for custody only if there is “an immediate and present risk of physical danger or psychological harm to the child.” [Conn. Gen. Stat. § 46b-56f\(a\)](#). Accordingly, the court has established steep hurdles to overcome by a petitioner in filing such a motion.

The ex parte application must include a sworn affidavit stating: (1) what conditions are present to require an ex parte order on an emergency basis, (2) that such an order is in the best interest of the child, and (3) any actions taken to inform the respondent of the ex parte motion, and if not, why not. [Conn. Gen. Stat. § 46b-56f\(b\)](#).

The court shall have a hearing on the ex parte motion. However, the court may, upon finding the existence of an “immediate and present risk of physical danger or psychological harm,” make temporary emergency orders. [Conn. Gen. Stat. § 46b-56f\(c\)](#). Such emergency order may include awarding temporary custody or visitation and enjoining the respondent from “(1) removing the child from the state; (2) interfering with the applicant’s custody of the child; (3) interfering with the child’s educational program,” or (4) any other action deemed in the best interest of the child. [Conn. Gen. Stat. § 46b-56f\(c\)](#). If ex parte relief is granted, there shall be a hearing within 14 days and such orders will not continue past 14 days except by agreement of the parties or orders by the court for good cause shown. [Conn. Gen. Stat. § 46b-56f\(c\)](#). The statute is silent as to when a hearing will be scheduled if the ex parte relief is denied.

While requiring that a hearing be scheduled no later than 14 days after an ex parte order enters, there is no requirement that such hearing conclude within that 14-day period. Accordingly, a hearing that spans over the course of 112 days due to the behavior of the respondent’s counsel and scheduling issues was not a violation of the respondent’s constitutional rights. [Garvey v. Valencis, 177 Conn. App. 578 \(2017\)](#).

#Comment Begins

Strategic Point: When defending against an ex parte order which has entered, counsel for the

respondent should seek an expeditious resolution of the motion. In *Garvey*, the mother was essentially denied contact with the minor child for four months. When rendering custody orders, the court must consider the child's current best interests. Such determination can be severely impacted when the child and a parent have had limited or no contact during an extended period of time.

#Comment Ends

~~Emergency ex parte custody motions are considered Priority 1 matters and, while the COVID-19 restrictions remain in place concerning in person hearings, these are heard in person, if granted.~~

#Comment Begins

~~—Warning: Much of the real experience amongst practitioners during COVID-19 is that emergency ex parte motions are routinely being denied. The court is then in the position of not being required to hold in court hearings and can rather schedule the matter at some future date for a remote hearing. Such practice is often devastating to families who really do require immediate court intervention.~~

#Comment Ends

§ 8.26 Filing Custody and Visitation Motions *Pendente Lite*—General Considerations

The trial courts have vast discretion to enter temporary or interim orders of custody and visitation to meet the best interests of the minor child. *Hall v. Hall*, 186 Conn. 118 (1982).

In addition to entering interim custody and parenting orders, the trial courts may issue orders to have third-party professionals assess the family. Conn. Gen. Stat. § 46b-6 and P.B. §§ 25-60A and 25-61. During this *pendente lite* phase, the court may issue orders to aid in the resolution of custody or visitation disputes, including the appointment of an attorney for the child, the appointment of a guardian *ad litem* for the child, and the ordering of psychiatric, psychological, or family services evaluations.

~~As a result of COVID-19, custody hearings, unless filed as an emergency ex parte order and granted, will be heard remotely. These motions will be assigned for a hearing on a Case Date, at which time any other outstanding pending matters may also be heard.~~

#Comment Begins

~~—Strategic Point: As with all remote hearings, advance preparation is key to the ability to maximize the hearing time given to your matter by the court. To every extent possible, exhibits should be agreed upon in advance and provided to the court in hard copy.~~

#Comment Ends

Should the parties be able to arrive at an agreement, ~~during the COVID-19 restrictions in accessing the courthouse,~~ the parties may file the agreement, the appropriate affidavit in support of request to enter the custody/visitation agreement (either final or pendente lite), and the request for approval of final agreement without court appearance. The court will then review the agreement and enter orders approving the same.

#Comment Begins

Strategic Point: The affidavits signed by the parties requesting the approval of the agreement is intended to substitute for the canvass conducted of the party by counsel and the court. In the

event there are issues and rationale surrounding the agreement which normally would be addressed by the in-court canvass, and which are not included in the court form affidavit, counsel should supplement the court form affidavit to advise the court of those considerations.

#Comment Ends#Comment Begins

Forms: JD-FM-279—Affidavit in Support of Request to Enter Final Custody/Visitation Judgment, *see* [Chapter 20, § 20.88, below](#); JD-FM-280—Affidavit in Support of Request for Approval of Final Agreement on Motion(s), *see* [Chapter 20, § 20.89, below](#), JD-FM-282—Request for Approval of Final Agreement without Court Appearance, *see* [Chapter 20, § 20.91, below](#), and JD-FM-284—Custody Agreement and Parenting Plan, *see* [Chapter 20, § 20.92, below](#).

#Comment Ends

§ 8.27 Filing a Motion for Custody and Visitation *Pendente Lite*

A custody or visitation case during the *pendente lite* phase is, most often, in a state of information gathering while trying to measure and quantify the best interests of the child. Usually, a fuller understanding of the facts and the underlying issues becomes clearer as the case progresses. However, triage-like orders may need to enter at or near the commencement of the action, even though not all facts are known. These initial orders of custody and parenting are not binding on the court at the time of the final judgment and very well may be modified either during the *pendente lite* phase or at the time of judgment. *Collins v. Collins*, 117 Conn. App. 380 (2009).

#Comment Begins

Strategic Point: The *pendente lite* orders, while not binding on final orders, may influence the final orders. There is a difficulty in modifying *pendente lite* orders absent exceptional circumstances, since the standard is the best interests of the child. A court will want a demonstration that the present parenting plan does not meet the child's needs. Accordingly, don't rush into a parenting plan without a reasonable command of the facts and circumstances of the case because such parenting plan may have lingering effects in the final resolution.

#Comment Ends

Filing a motion for custody or visitation *pendente lite* can be as simple as a request that the court enter custody or visitation orders which are consistent with the best interests of the minor child. If there are certain egregious incidents which should be raised to the court in support of the motion, that may be done in the motion.

#Comment Begins

Strategic Point: Where there are egregious incidents, use of the court form will not be practical. The court form may be used and supplemented, but there is simply not enough room in the form to set forth the facts.

#Comment Ends#Comment Begins

Forms: JD-FM-176—Motion for Orders Before Judgment (*P.L.*) in Family Cases, *see* [Chapter 20, § 20.20, below](#).

#Comment Ends

§ 8.28 Preparing Parental Responsibility Plans

In any proceeding involving a dispute with respect to the custody, care, education, and upbringing of a child, the parties are to draft and file with the court a proposed parental responsibility plan. [Conn. Gen. Stat. § 46b-56a\(d\)](#). The proposed parental responsibility plan is to include, at a minimum:

1. A schedule of the physical residence of the child.
2. Provisions to address decision-making authority for one or both parents.
3. Provisions for the resolution of future disputes between the parents.
4. Provisions to deal with anticipated non-compliance with responsibilities noted in the plan.
5. Provisions for addressing the child's changing needs as time goes by.
6. Provisions for minimizing the child's exposure to parental conflict, promoting agreements between the parents, and protecting the best interests of the child.

[Conn. Gen. Stat. § 46b-56a\(d\)](#).

The parental responsibility plan is to be filed by the case management date, approximately 90 days after the commencement of the action. P.B. § 25-50. If the parties do not agree on a parental responsibility plan, the parties and counsel must appear in court on the case management date. The purpose of requiring the parties to appear in court is to enable the courts to identify cases that need assistance and/or services to help move them toward resolution.

§ 8.29 Pleading and Assessing Joint or Sole Legal Custody Issues

[1] Pleading and Assessing Joint or Sole Legal Custody Issues—In General

When filing a complaint or motion seeking custody, the requested relief should include whether a party is seeking sole or joint legal custody. Notwithstanding what a party pleads, if he or she later changes positions, the other side has notice of such a change, and has time to address such a change, the court may hear such a request despite failure to specifically plead the relief requested. [Lugo v. Lugo, 176 Conn. App. 149 \(2017\)](#).

#Comment Begins

Warning: Despite the ruling in *Lugo*, which is very fact specific, counsel should be cautious with playing fast and loose with actual pleading and what is sought at trial. The court in *Lugo* could just as easily denied the request for sole legal custody because it was not properly pled.

#Comment Ends

While parenting time is one aspect of child-focused litigation, another area of discord centers upon the fight over decision-making for child-related issues or legal custody. Litigation over decision-making, however, most often focuses on orders of joint legal custody versus sole

legal custody. “The difference between a sole custodian and a joint legal custodian is that the sole custodian has the ultimate authority to make all decisions regarding a child’s welfare, such as education, religious instruction and medical care whereas a joint legal custodian shares the responsibility for those decisions.” *Emerick v. Emerick*, 5 Conn. App. 649, 657 n.9 (1985). Where a party has sought final decision making, that cannot be equated to sole legal custody. *Lopes v. Ferrari*, 188 Conn. App. 387 (2019).

While the case is pending, if the court determines that the child should undergo healthcare treatment, the parent or legal guardian shall be permitted to make the choice of provider. In the event the parents cannot agree, the court will choose a provider taking into account the health insurance coverage and financial resources of the parents. A parent who has sole custody may make the determination as to the provider. Conn. Gen. Stat. § 46b-6

[2] Assessing Decision-Making Considerations

There is a presumption that parents have joint legal custody of their child. Conn. Gen. Stat. § 46b-56a. If the court does not award joint legal custody, it must state the reasons in its decision. Conn. Gen. Stat. § 46b-56a(b). If neither party requests joint custody, the court cannot award joint custody, but must vest sole custody in one parent. *Tabackman v. Tabackman*, 25 Conn. App. 366 (1991). If a party has requested joint legal custody, the court may enter orders for joint legal custody. *Keenan v. Casillo*, 149 Conn. App. 642 (2014). Where one parent requests joint legal custody and the other party, despite his or her pleadings, acknowledges to the court a consent to joint legal custody, which the court then determines is in the child’s best interests, properly orders joint legal custody. *Baronio v. Stubbs*, 178 Conn. App. 769 (2017). A parent requesting joint custody in his or her proposed orders may be awarded sole custody if there is evidence to support a finding that joint custody is not in the child’s best interests. *Timm v. Timm*, 195 Conn. 202 (1985). There may be circumstances, such as where a parent has a substance abuse problem, when it is proper to award sole custody to the other parent. *Kidwell v. Calderon*, 98 Conn. App. 754 (2006).

Joint legal custody will obligate the parents to confer with each other and timely inform each other of decisions to be made regarding the child’s educational needs, religious upbringing, and health care.

Sole legal custody provides authority to one parent to make the decisions and removes the legal obligation to have that parent confer with the other parent. For sole legal custody, however, courts can and do, at times, mandate the parent having sole legal custody to at least timely inform the other parent of the decisions being made. If one parent is awarded sole legal custody, the other parent shall have access to all information regarding the child, including medical and academic records, unless good cause has been demonstrated as to why the parent should not receive this information. *Clark v. Clark*, 150 Conn. App. 551 (2014) and Conn. Gen. Stat. § 46b-56(g). A common occurrence supporting joint legal custody with one parent is that one parent might marginalize the other if he or she has sole legal custody. *Keenan v. Casillo*, 149 Conn. App. 642 (2014). Sole legal custody is appropriate where a parent exercised his parenting time erratically and indicated a desire to move to Nigeria. *Altraide v. Altraide*, 153 Conn. App. 327 (2014).

As a practical matter, a court may enter a hybrid-type order whereby an order enters of joint legal custody but with final decision-making authority to one parent. *Desai v. Desai*, 119 Conn. App. 224 (2010) and *Carroll v. Carroll*, 55 Conn. App. 18 (1999). In this scenario, the parents must confer with each other and timely inform the other of decisions to be made

regarding the child's needs. However, instead of having the obligation for the parents to communicate and come to agreement on a decision, one parent will have the responsibility, after conferring in good faith with the other parent, to make the decision. *Desai*, 119 Conn. App. at 230 and *Tabackman v. Tabackman*, 25 Conn. App. 366, 368–369 (1991).

#Comment Begins

Strategic Point: A litigant seeking sole legal custody should be familiar with the statutory considerations enumerated in Conn. Gen. Stat. § 46b-56(c). A parent cannot rightfully expect to receive sole legal custody and ignore the other parent. The court's focus will be on the child's best interests, recognizing that these interests are served when decisions can be made quickly and with the least amount of acrimony.

#Comment Ends#Comment Begins

Strategic Point: When assessing whether to award sole or joint legal custody, the allegations of the parties should be supported by his or her actions. A parent claiming that the child is unsafe, is in danger, or will be exposed to inappropriate things should have taken steps to protect the child if he or she wants a court to take such allegation seriously.

#Comment Ends

[3] Preparing for a Hearing on Legal Custody Issues

If a custody matter is litigated, an order of joint legal custody may be ordered after a contested hearing only if one of the parties requested it in their complaint or cross-complaint. *Strohmeyer v. Strohmeyer*, 183 Conn. 353 (1981) and *Tabackman v. Tabackman*, 25 Conn. App. 366, 369 (1991).

#Comment Begins

Strategic Point: Prior to commencing trial, the pleadings should be reviewed to ensure consistency between what has been pled and what is sought at trial. If seeking an order of joint legal custody where both parties have requested sole legal custody, a formal amendment of the pleadings is necessary.

#Comment Ends

Even if one or both of the parties request an order of joint legal custody, however, such an order is not automatically awarded. The request, as with most every aspect of custody and visitation determinations, is seen through the lens of a child's best interests. Conn. Gen. Stat. § 46b-56(b) and *Timm v. Timm*, 195 Conn. 202 (1985).

#Comment Begins

Strategic Point: Where there are more than two parents, counsel should be clear as to how “stalemates will be resolved. There will be an initial reaction that determination should be on a “majority rules” basis, but that mechanism gives little consideration to the various relationships at play. Especially where two or more of the parents still reside together, one parent may be easily swayed by another into joining up against the third parent. Use of a mediation or parent coordinator who has a background working with families with multiple parents or parent -like figures can be extremely helpful in these situations.”

#Comment Ends

§ 8.30 Assessing Physical Custody Issues

[1] Distinguishing Between Shared Parenting and Primary Residence

Parenting plans are primarily designed to provide certainty as to where the child will be residing on a given day. Depending on the circumstances of the family and the needs of the child, the child may spend a majority of time with one parent or may have the time split more equally between parents.

Primary residential status is given to the parent who spends a majority of time with the child. The designation of “primary residence” is important for school placement purposes, as public school districts cannot enroll children who primarily reside outside of the school district. [Conn. Gen. Stat. § 10-184](#).

#Comment Begins

Warning: Care should be taken if a child is attending a school that is not in the school district of the primary parent. Should the school determine the child does not reside in the district, the parents may be ordered to pay tuition for the child.

#Comment Ends

A shared parenting schedule is when the child spends substantially equal time with each parent. In these shared parenting plans, it is still crucial to clearly designate school placement. If both parents reside in the same school district, it remains important to anticipate a future move and to determine the expectations regarding the child’s school placement going forward. If the parents reside in different school districts, it is necessary to delineate which home would be the “primary residence” for school placement purposes.

[2] Assessing the Parental Behavior in Making Parenting Plans

The physical custody of a child depends upon a number of factors, including the suitability of the parent’s environment. A parent who does not expose a child to his or her inappropriate behavior will have parenting time with the child despite such behavior. [Gorman v. Gorman, 2008 Conn. Super. LEXIS 186 \(2008\)](#). However, the court may fashion orders which protect the child from any potential harmful effects of such behavior. [Gorman, 2008 Conn. Super. LEXIS at 186](#).

[3] Addressing Safety Concerns in Parenting Plans

When safety issues are present, it is necessary to craft orders that address these issues to protect the child. Safety issues may include substance abuse problems or mental health issues. In such instances, orders may enter requiring periodic testing for substance use, supervision for the visits, or restricted access to the children. The remedies must be related to the specific safety issue.

[4] Setting Forth a Detailed Parenting Plan

Some parents may be comfortable with a loosely structured parenting plan, while others require detailed times and places for exchanges of the child. Part of this will be determined by the

cooperation between the parents. Parents who are unable to communicate and lack trust with each other will typically be better served with a very detailed parenting plan. Conversely, parents who are cooperative may be able to have a flexible parenting plan that they may adjust as necessary. Holidays and vacations should be included within the parenting plan.

[5] Determining Parenting Plans When a Parent is Deployed

A parent who will be imminently deployed or mobilized, *pendent lite*, whether or not there are any orders, may seek an expedited hearing for temporary parental rights and responsibilities, including contact with the child. [Conn. Gen. Stat. § 46b-56e\(f\)](#). The hearing and orders shall consider access to the child by the deployed parent and disclosure of information. [Conn. Gen. Stat. § 46b-56e\(f\)](#). The initial pleading that seeks relief under this statute must state the deployment or mobilization information. [Conn. Gen. Stat. § 46b-56e\(f\)](#).

#Comment Begins

Strategic Point: When such a motion is filed, in order for it to receive the priority designated by the statute, the pleading should be brought to the attention of the scheduling clerk in addition to regular filing. The clerk's office cannot be relied upon to read the motion to determine that an expedited hearing is statutorily required.

#Comment Ends

In the event a parent is deployed or mobilized, a court is not permitted to enter final custody orders until 90 days after the deployment or mobilization ends. [Conn. Gen. Stat. § 46b-56e\(b\)](#).

§ 8.31 Modifying *Pendente Lite* Orders

As *pendente lite* custody and visitation orders are based solely on the best interests of the child, courts have “discretion to modify custody according to the best interests of the child without first finding a material change of circumstances since the previous award.” [Hall v. Hall](#), 186 Conn. 118, 123 (1982).

#Comment Begins

Strategic Point: While *pendente lite* custody and visitation orders are subject to the best interest standard, a court will typically inquire as to what, if any, change in circumstances will justify the modification of such orders. Thus, while a change in circumstances is not required for a modification, counsel should be prepared to demonstrate to the court the facts which have changed in order to justify the requested modification.

#Comment Ends

There may be occasions during the case when issues regarding the children are raised in a motion other than one seeking to modify the order. It may be proper for the court to modify the order, without a proper motion for modification, if the circumstances so dictate or if it is necessary in the best interests of the child. [Meehan v. Meehan](#), 40 Conn. App. 107 (1996).

#Comment Begins

Warning: If a modification is warranted, a proper motion should be filed. A motion for contempt or other motion should not be filed with the hope or expectation that the court may modify the order.

#Comment Ends

§ 8.32 Assessing Relocation *Pendente Lite* and at the Time of Judgment

In no other type of case in the family courts may the importance of *pendente lite* orders for custody and visitation be more pronounced than in relocation cases. Relocation cases are often time-sensitive, due to employment or the school year commencing, and each raises its own set of case-specific issues, allegations, and conflicting claims. It is not uncommon that these issues come before the court in a *pendente lite* posture and need to be fully litigated on an interim basis. The importance of such *pendente lite* litigation cannot be understated, as the results of these *pendente lite* orders, whether allowing a child to be relocated out of state or preventing such relocation of a child, often dictate the ultimate outcome of the case.

The standard for *pendente lite* custody and visitation matters is strictly an examination of what would meet the best interests of the child. The best interests standard is the analysis applied to both *pendente lite* relocation matters and relocations at the time of judgment. *Lederle v. Spivey*, 113 Conn. App. 177 (2009). A strict best interests analysis is needed as “[a]t the time of the dissolution decree [or prior to Judgment], the parties are on equal ground. Until a judgment dissolving the marriage is rendered, there is no permanent or final determination of the issue of custody in place.” *Ford v. Ford*, 68 Conn. App. 173, 181 (2002). Any *pendente lite* order for relocation must be made after a hearing without a prior predetermination or pronouncement from the court as to its intentions in ruling on the motion. *Havis-Carbone v. Carbone*, 155 Conn. App. 848 (2015).

#Comment Begins

Strategic Point: These “temporary” orders are often determinative of the ultimate custody decision to be incorporated into the divorce judgment. Given this, the practitioner may wish to ensure that, to the extent possible, all evaluations are performed and all discovery is completed prior to the commencement of the *pendente lite* hearing.

#Comment Ends#Comment Begins

Strategic Point: Despite being able to raise relocation *pendente lite*, few if any courts will allow such a relocation as any court-ordered evaluation will not be completed and the court will not have complete information.

#Comment Ends

Although the best interest standard controls, to the extent that it is possible to raise post-judgment relocation factors during the *pendente lite* litigation, this should be done. For a more thorough discussion of the post judgment relocation factors, see § 8.44, below.

While the best interest standard is controlling, the court will assess the reasons for the relocation. A parent’s desire to get away from the other spouse will be unsuccessful as justification for a relocation if it is not in the child’s best interests to be away from the non-relocating parent with whom he or she has bonded. *Racsko v. Racsko*, 91 Conn. App. 315 (2005).

#Comment Begins

Warning: While the court will use the best interests of the child standard in relocations at the time of the dissolution, it is likely that the court will also review the criteria in the relocation statute. Accordingly, counsel should be prepared to demonstrate those criteria to the court as well as the best interests standard.

#Comment Ends

The continuing duty to disclose, under *Weinstein v. Weinstein*, 275 Conn. 671 (2005), does not apply to a custody action. *Lederle v. Spivey*, 151 Conn. App. 813 (2014). Accordingly, the party who was permitted to relocate, which ruling was being appealed, did not have a duty to disclose a change in her job status, which was one of the bases for approving the relocation, after the trial court rendered its decision. *Lederle*, 151 Conn. App. at 819.

§ 8.33 Prohibiting Prospective Modifications of Custody and Visitation

When entering orders at the time of judgment, whether by agreement or after a contested hearing, provisions regarding prospective modifications will not stand. *Emerick v. Emerick*, 5 Conn. App. 649 (1985). A judgment may not provide that upon the happening of a particular event in the future, custody will automatically transfer from one parent to the other. *Guss v. Guss*, 1 Conn. App. 356 (1984). All custody determinations are to be based upon the present best interests of the child. Where there is an automatic prospective modification based upon the occurrence of a future event, the present best interests of the child are not evaluated at the time the change is to occur. Likewise, if the court approves a parenting plan prior to the dissolution judgment and financial orders, that parenting plan must be reaffirmed at the time of the dissolution as still being in the best interests of the child. *Stahl v. Bayliss*, 98 Conn. App. 63 (2006).

However, a court which makes orders regarding a parenting plan from age 2 until age 5, when the child will start school, and setting forth a different parenting plan at age 5, does not impermissibly prospectively modify a court order, rather it is providing a tiered custodial plan. *Coleman v. Bembridge*, 207 Conn. App. 28 (2001). The court differentiated *Emerick* and *Guss*, both of which dealt with issues of sole custody, while this order was one of joint custody. The tiered parenting plan did not modify physical custody in the eyes of the Appellate Court.

#Comment Begins

Warning: The legal reasoning of the *Coleman* decision is not solid. Clear precedent has stated that there can be no prospective modifications as custody determinations must be based upon the child's current best interests. The best interest standard is not limited to issues of joint versus sole custody. In this instance, the parenting plan for the child between ages 2 and 5 was a relatively equal parenting plan, and age 5 it reverted to his mother with the father having 1 week per month. While there may be a certain logic to the ~~court~~court's order, it does not detract from the fact that the order is clearly a future modification.

#Comment Ends

§ 8.34 Providing for Non-Disparagement of the Parents

A typical clause in a separation agreement is that neither parent will do or say anything to disparage or injure the child's opinion of the other parent. The posting online of pictures of the minor child along with information about a highly contested custody case, can be deemed a violation of this type of court order. *Nazareth v. Nazareth*, 2007 Conn. Super. LEXIS 1827

(2007).

#Comment Begins

Strategic Point: The non-disparagement clause is typically a boiler-plate provision in an agreement. However, it should not be overlooked as a possible means to bring a motion for contempt for particularly egregious behavior by a parent.

#Comment Ends

§ 8.35 Providing for Counseling Post Judgment

If it is determined to be in the best interests of the child, it may be ordered that a parent or child go to counseling or be subject to screening for drugs and alcohol post judgment. *Conn. Gen. Stat. § 46b-56(i)*. Such an order is not indicative of any court ordered rights of a parent to determine his or her own healthcare or how to raise his or her child. *Foster v. Foster*, 84 Conn. App. 311 (2004).

A parent ordered by the court to undergo mental health treatment shall be permitted to select the provider. *Conn. Gen. Stat. § 46b-6a*. The parents, except where one party was awarded sole legal custody, has two weeks from an order that a child undergo treatment to jointly select a provider, and in the absence of an agreement, the court shall make the decision. *Conn. Gen. Stat. § 46b-6a*.

§ 8.36 Appealing *Pendente Lite* Orders

Because of the practical importance and reality of entering orders that affect and/or set direction for a child's life, *pendente lite* orders for custody and visitation are final judgments for purposes of appeal. *Madigan v. Madigan*, 224 Conn. 749 (1993). The rationale for viewing it as a final judgment is that time with a child is irreplaceable and may have a huge impact on the final orders. *Madigan*, 224 Conn. at 754–755. Allowing the appeal of these *pendente lite* orders recognizes the common sense standard that “[i]t is the effect rather than the nature of the order or judgment which is critical in determining whether a matter is appealable.” *Pascal v. Pascal*, 2 Conn. App. 472, 476 (1984) and *Sweeney v. Sweeney*, 75 Conn. App. 279, 284 (2003).

§ 8.37 Evaluating Custody Orders Pending Appeal—Automatic Stay Provisions

Orders of custody or visitation are not subject to the automatic stay. P.B. § 61-11(b). As such, custody and visitation orders that are appealed remain in full force and effect, unless a motion for stay is filed and granted. A motion to terminate the automatic stay may be granted after consideration of the following factors:

1. The needs and interests of the parents and child.
2. The prejudice to the parties and child if a stay is not entered.
3. The rights of the party taking the appeal.
4. The effect of the automatic orders.
5. Any other equitable consideration.

PART VI: FILING CUSTODY OR VISITATION ACTIONS POST JUDGMENT

CUSTODY AND VISITATION

§ 8.38 CHECKLIST: Filing Custody or Visitation Actions Post Judgment

8.38.1 Filing Custody or Visitation Actions Post Judgment

- Filing custody or visitation actions post judgment:
 - There must be a material change in circumstances or a finding that the original order is not in the child's best interests to modify it post judgment.
 - The motion must state that it is a post judgment motion, detail the court order for which modification is being sought, and set forth the legal and factual basis for the modification. **Authority:** P.B. § 25-26.
- Discussion:** See § 8.39, below. **Forms:** JD-FM-162—Order to Attend Hearing and Notice to Respondent, see Chapter 20, § 20.13, below. JD-FM-174—Motion for Modification, see Chapter 20, § 20.19, below.
- Finding a material change in circumstances for custody determinations:
 - In order to modify a custody order, the moving party must allege and prove and the court must find a material change in circumstances.
 - For a request to return a child after a relocation has been granted, it must be demonstrated that the relocation is no longer in the child's best interest.
 - Consistent violation of the visitation order may support a modification of legal custody. **Authority:** *Clougherty v. Clougherty*, 162 Conn. App. 857, cert. denied, 320 Conn. 932 (2016), *Hibbard v. Hibbard*, 139 Conn. App. 10 (2012), *Eisenlohr v. Eisenlohr*, 135 Conn. App. 337 (2012), *Sheiman v. Sheiman*, 72 Conn. App. 193 (2002), *Lane v. Lane*, 64 Conn. App. 255 (2001), and *Senior v. Senior*, 4 Conn. App. 94 (1985). **Discussion:** See § 8.40, below.
- Seeking a modification:
 - A post-judgment motion for modification must be based upon the best interests of the child.
 - The modification of visitation must be supported by competent evidence.
 - A temporary modification may be ordered where a parent is deployed or mobilized. **Authority:** Conn. Gen. Stat. §§ 46b-56e(c), 46b-56e(d), 46b-56e(e), and 46b-56e(g); *Simons v. Simons*, 172 Conn. 341 (1977), *Peters v. Senman*, 193 Conn. App. 766 (2019), *Feinberg v. Feinberg*, 114 Conn. App. 589 (2009), *Daddio v. O'Bara*, 97 Conn. App. 286 (2006), *Logan v. Logan*, 96 Conn. App. 842 (2006), *McGinty v. McGinty*, 66 Conn. App. 35 (2001), and *Szczerkowski v. Karmelowicz*, 60 Conn. App. 429 (2000). **Discussion:** See § 8.41, below.
- Assessing changed behavior of a parent in a modification:

- After a parent's behavior has caused a change in a custody order, a subsequent positive change in that parent's behavior may not result in a modification back to the original custody order.
- The court may require one party to file for leave in order to file a motion for modification.
- A court may consider behavior prior to the last court order if it is relevant to the current modification. **Authority:** *Moreira v. Thurber*, 162 Conn. App. 261 (2016), *Harris v. Hamilton*, 141 Conn. App. 208 (2013), *Hibbard v. Hibbard*, 139 Conn. App. 10 (2012), *Brubeck v. Burns-Brubeck*, 42 Conn. App. 583 (1996); P.B. § 25-26(g). **Discussion:** See § 8.42, *below*.
- Restricting the ability of a parent filing a motion for modification:
 - A court, only in the most egregious circumstances, may provide conditions to be met prior to a party filing a motion for modification. **Authority:** *Stancuna v. Stancuna*, 135 Conn. App. 349 (2012), *Eisenlohr v. Eisenlohr*, 135 Conn. App. 337 (2012), and *Martocchio v. Savoir*, 130 Conn. App. 626 (2011). **Discussion:** See § 8.43, *below*.
- Making orders regarding relocation post judgment:
 - The party seeking to relocate must show:
 - There is a reasonable purpose for the relocation.
 - The place to which the relocating parent wants to move is reasonable in light of the purpose of the relocation.
 - The relocation is in the child's best interests.
 - There are statutory factors to determine the child's best interests in a relocation:
 - Why each parent supports or opposes the relocation.
 - The quality of the child's relationship with each parent.
 - How the relocation will affect the contact between the child and the parent who is not relocating.
 - How the relocation will enhance the economic, emotional, and educational needs of the parent and child.
 - Whether suitable visitation may be fashioned to preserve the relationship between the child and the non-relocating parent.
 - The court is not required to assess whether it would be in the child's best interests to remain in Connecticut if the custodial parent chooses to relocate without the child. **Authority:** Conn. Gen. Stat. §§ 46b-56d, 46b-56d(b), and 46b-56d(c); *Ireland v. Ireland*, 246 Conn. 413 (1998), *Ingram v. Ingram*, 211 Conn. App. 484 (2022), *Regan v. Regan*, 143 Conn. App. 113 (2013), *Tow v. Tow*, 142 Conn. App. 45 (2013), *Taylor v. Taylor*, 119 Conn. App. 817 (2010), *Bottinelli v. Bottinelli*, 2003 Conn. Super. LEXIS 3525 (2003), and *Butler v. Butler*, 2007 Conn. Super. LEXIS 1032 (2007). **Discussion:** See § 8.44, *below*.

§ 8.39 Filing Custody or Visitation Actions Post Judgment—In General

Once a matter has proceeded to judgment, the orders regarding custody and visitation remain modifiable. However, modification of a final judgment of child custody or visitation is not available absent a showing of a change in circumstances or a showing that the original order is no longer in the child's best interests. A motion for modification must state that it is a post judgment motion, detail the specific language and date of the court order for which modification is sought, and set forth the factual and legal basis for the modification. P.B. § 25-26. This motion is, in

effect, the commencement of a new action.

#Comment Begins

Forms: JD-FM-162—Order to Attend Hearing and Notice to Respondent, *see* Chapter 20, § 20.13, *below*. JD-FM-174—Motion for Modification, *see* Chapter 20, § 20.19, *below*.

#Comment Ends

§ 8.40 Finding a Material Change in Circumstances for Custody Determinations

In order to change a custody order, the moving party must allege and demonstrate a material change in circumstances from the last, final order of custody. *Sheiman v. Sheiman*, 72 Conn. App. 193 (2002) and *Senior v. Senior*, 4 Conn. App. 94, 96 (1985). The court should state that there has been a material change in circumstances when modifying the order. Even if the court does not state that there is a material change, a modification will be upheld provided the evidence demonstrates such a change. *Hibbard v. Hibbard*, 139 Conn. App. 10 (2012). An attempted modification of an order permitting relocation should demonstrate a material change in circumstances and that the change in circumstances would alter the court's finding that the relocation was in the child's best interests. *Clougherty v. Clougherty*, 162 Conn. App. 857, *cert denied*, 320 Conn. 932 (2016).

#Comment Begins

Strategic Point: A reading of *Clougherty* will demonstrate how not to approach a modification of physical custody. The husband in that case attempted to prove that he was all good and that the wife was all bad. He took a scorched earth policy against the wife, presumably due to his dissatisfaction with the relocation order. He had her threatened by a former FBI agent and also had the former agent contact creditors of her business. Angry litigants must be reminded that part of a court's statutory consideration in any custody order is the willingness of the custodial parent to support the relationship between the child and the non-custodial parent.

#Comment Ends

Modifications of legal custody will typically occur when one parent violates an order regarding legal custody. *Lane v. Lane*, 64 Conn. App. 255 (2001). A parent's consistent violation of the visitation order or attempts to influence the child may result in a modification that would vest sole legal custody in the other parent. *Eisenlohr v. Eisenlohr*, 135 Conn. App. 337 (2012).

If a moving party satisfies the hurdle of demonstrating a significant change in circumstances, the issue reverts to a best interests standard for determining the modified order.

§ 8.41 Seeking a Modification

[1] Seeking a Modification Based Upon the Best Interests of the Child for Visitation Determinations

Unlike post-judgment modifications of custody orders, a litigant seeking to modify a final order of visitation need not demonstrate a material change in circumstances. Rather, the only standard relevant to a post judgment matter concerning visitation is the best interest standard. *McGinty v. McGinty*, 66 Conn. App. 35, 40 (2001) and *Szczerkowski v. Karmelowicz*, 60 Conn.

App. 429, 432 (2000).

Any modification of visitation must be supported by the evidence. *Logan v. Logan*, 96 Conn. App. 842 (2006). Such evidence may include the testimony of the parties, the family relations officer, a psychologist or the guardian *ad litem*. *Daddio v. O'Bara*, 97 Conn. App. 286 (2006). While the court is to consider current evidence, a court may properly consider the history between the parties in determining best interests. *Feinberg v. Feinberg*, 114 Conn. App. 589 (2009).

A court has further specified the circumstances for seeking a modification. First, it can be based up a material change of circumstances altering the court's finding with respect to the child's best interest. Alternatively, it may be based upon a finding that the order modified was not based upon the best interests of the child. *Peters v. Senman*, 193 Conn. App. 766 (2019). The problem with the second part of this language is a seeming invitation to "Monday morning quarterback" a parenting plan and claim that it was not in the child's best interest at the time it was made. That is virtually impossible and invites one court to review, absent appeal, another court's judgment. In addition, this language can be traced back to *Simons v. Simons*, 172 Conn. 341 (1977), where the actual quote references a material change in circumstances such that continuation of the old order is being put into question. Thus, quote this language correctly from *Simons*.

[2] Obtaining a Temporary Modification Where a Parent is Deployed

Where a parent will be deployed or mobilized, either parent may seek temporary custody and a change in parenting time during the period of deployment or mobilization. Such a modification will occur only if:

- (a) The mobilization has an effect on that parent's ability to exercise his or her parenting time as contained in the final order; and
- (b) It is in the child's best interests that such modification occur.

Conn. Gen. Stat. § 46b-56e(c).

Any order modifying the parenting plan must provide for the following:

- (a) When the deployed parent is on leave and requests to see the child, the other parent will make the child available. Any such request cannot be inconsistent with the original orders and shall not require the child to miss school unless both parents agree.
- (b) Telephone, e-mail and other contact between the deployed parent and child must be facilitated.
- (c) The deployed parent will provide the other parent with his or her leave schedule. If the leave schedule changes, it shall not be used as a means to prevent the child from having contact with the deployed parent.

Conn. Gen. Stat. § 46b-56e(d).

#Comment Begins

Strategic Point: Although these three areas are listed as those which must be covered, it does not prevent the court from including any other additional orders consistent with the child's best interest.

#Comment Ends

In addition to specifying the contact between the deployed parent and child, any court order must state that it is based upon the deployment or mobilization of the parent. [Conn. Gen. Stat. § 46b-56e\(e\)](#). Unless there is a court order to the contrary, the non-deployed parent must provide to the deployed parent and court changes to his or her address and telephone number 30 days prior to such change occurring. [Conn. Gen. Stat. § 46b-56e\(e\)](#).

Ninety days after a parent returns from his or her deployment, the court may modify the custody or parenting orders. [Conn. Gen. Stat. § 46b-56e\(g\)](#). The burden of proof in any such modification is on the non-deployed parent to demonstrate why reinstatement of the order in effect prior to deployment is not in the child's best interest. [Conn. Gen. Stat. § 46b-56e\(g\)](#). In modifying such an order, it cannot be based solely upon the deployed parent's absence. [Conn. Gen. Stat. § 46b-56e\(g\)](#). Since the modification of the order is in effect during the period of time that a parent is deployed, the original parenting plan is reinstated when the deployment is completed. [Conn. Gen. Stat. § 46b-56e\(c\)](#).

#Comment Begins

Strategic Point: The statute outlining custody and visitation for a deployed parent, while not specifically stating that the original plan resumes at the end of the deployment, certainly implies it by using the language that the modified plan is in effect during the deployment. It may be prudent to provide in the modification order that the original order resumes at the end of the deployment.

#Comment Ends

§ 8.42 Assessing Changed Behavior of a Parent in a Modification

There are times when custody is modified as a result of the behavior of a parent or because of substance abuse issues. A subsequent positive change in behavior or sobriety may not be enough to justify modifying custody or visitation. On occasion, the child may have adapted to the new arrangement so that it is in his or her best interests to preserve the new status quo, despite the positive change in the non-custodial parent. [Brubeck v. Burns-Brubeck, 42 Conn. App. 583 \(1996\)](#).

While generally a modification is based upon a change since the last court order, a court may consider past behavior if it is relevant to the current modification proceedings. [Harris v. Hamilton, 141 Conn. App. 208 \(2013\)](#), and [Hibbard v. Hibbard, 139 Conn. App. 10 \(2012\)](#).

#Comment Begins

Strategic Point: One instance where it may be beneficial to show the history of behavior is where there is alienating behavior by one parent.

#Comment Ends

§ 8.43 Restricting the Ability of a Parent Filing a Motion for Modification

The court has the power to require a party to file a request for leave from the court for permission to file a motion for modification. P.B. § 25-26(g). Such a request must append the proposed motion for modification. P.B. § 25-26(g). The facts contained within the motion must be sworn to either by the moving party or a person having knowledge of the facts. P.B. § 25-26(g). If there is no objection within 10 days of ~~the serving~~serving the motion, then the court may decide the request for leave with or without a hearing. P.B. § 25-26(g). If an objection is filed, the matter will place the motion on the next calendar or another date, in the discretion of the court. P.B. § 25-26(g). Such a hearing, where an objection has been filed, is mandatory and the court may not rule on the motion for leave until the hearing is held. *Morera v. Thurber*, 162 Conn. App. 261 (2016).

In extreme circumstances, the court may restrict a parent in filing a post judgment motion for custody and visitation or require the parent ~~meet to~~meet certain conditions prior to filing a motion to modify. A parent engaging in behavior which is detrimental to the minor child and which results in custody changing to the other parent may be prohibited from filing a motion for modification unless certain conditions are met. *Eisenlohr v. Eisenlohr*, 135 Conn. App. 337 (2012). Such conditions could include the completion of a psychological evaluation which a litigant previously refused to complete. *Martocchio v. Savoir*, 130 Conn. App. 626 (2011). A party who has a history of mental illness may be required to authorize the release of his or her medical records prior to seeking an order of unsupervised visitation. *Stancuna v. Stancuna*, 135 Conn. App. 349 (2012).

#Comment Begins

Strategic Point: Any restriction on the ability to file a motion for modification will only be ordered in rare and egregious circumstances. The competing interest is a party's due process right to access the court system. The egregious behavior will be balanced against the due process rights.

#Comment Ends

§ 8.44 Making Orders Regarding Relocation Post Judgment

In order to relocate with the minor child post judgment, the moving party must demonstrate:

1. There is a reasonable purpose for the relocation.
2. The relocating parent is proposing a new residence that is reasonable in light of the stated purposes of the relocation.
3. It is in the best interests of the minor child that the relocation occur.

Conn. Gen. Stat. § 46b-56d.

This statute was enacted in response to case law which listed the three criteria outlined in the statute, but set forth a shifting burden of proof between the proponent and opponent of the

relocation. *Ireland v. Ireland*, 246 Conn. 413 (1998). The prior burden of proof required the relocating parent to demonstrate the first two considerations. Thereafter, the opponent of the relocation was required to show why the relocation would not be in the best interests of the minor child. *Ireland*, 246 Conn. at 682–683.

It is difficult to sustain a relocation as being reasonable when the initial reason for the relocation is not valid at the time of the final hearing. A parent initially seeking to relocate to France where her fiancé lived, but whose engagement is later broken off, will not be deemed to have a legitimate purpose to relocate to France by trying to claim that the child will benefit culturally and will be able to heal from the stress of the divorce. *Tow v. Tow*, 142 Conn. App. 45 (2013).

The third statutory requirement, i.e., that it is in the best interest of the minor child that the relocation occur, does not require a court to assess whether it is in the child’s best interest to relocate with the custodial parent or remain in Connecticut despite the custodial parent’s relocation. *Regan v. Regan*, 143 Conn. App. 113 (2013).

#Comment Begins

Strategic Point: The *Regan* decision raises the “damned if you do, damned if you don’t” relocation question. Quite often, whether rightly or wrongly, the custodial parent is asked whether he or she will move even if the child is not permitted to do so. If the custodial parent answers in the affirmative, he or she is deemed uncaring, selfish, and not child oriented. But if the answer is in the negative, it provides the court with an easy answer to the relocation request. If such questions are permitted, why should a court not look at with whom it is better for the child to be living, the custodial or noncustodial parent?

#Comment Ends

Unlike the factors enumerated in § 46b-56(c), General Statute § 46b-56d provides more issue-specific factors for the determination of the best interests of a child in a post judgment relocation matter, which include:

1. Why each parent supports or opposes the relocation.
2. The quality of the child’s relationships with each parent.
3. How the relocation will affect the child’s contact with the parent who is not relocating in terms of quantity and quality.
4. How the relocation will enhance the relocating parent and child from an economic, emotional, and educational perspective.
5. Whether suitable visitation may be fashioned to preserve the child’s relationship with the parent who is not relocating.

Conn. Gen. Stat. § 46b-56d(b).

Courts have allowed relocations when it will provide a financial and career benefit to a

parent that will ultimately benefit the child. *Bottinelli v. Bottinelli*, 2003 Conn. Super. LEXIS 3525 (2003). Career considerations, combined with providing ~~child-care~~ childcare for children from a subsequent relationship, may satisfy the statutory criteria to permit a relocation. *Taylor v. Taylor*, 119 Conn. App. 817 (2010). The desire to move so as not to be engaged in litigation is not a legitimate justification for a move. *Butler v. Butler*, 2007 Conn. Super. LEXIS 1032 (2007). Relocation to the town in which the mother's fiancé is a firefighter, was deemed a legitimate purpose. *Ingram v. Ingram*, 211 Conn. App. 484 (2022).

PART VII: ASSESSING EVIDENTIARY CONSIDERATIONS IN CUSTODY OR VISITATION ACTIONS

CUSTODY AND VISITATION

§ 8.45 CHECKLIST: Assessing Evidentiary Consideration in Custody or Visitation Actions

8.45.1 Assessing Evidentiary Consideration in Custody or Visitation Actions

- Assessing the scope of the guardian *ad litem*'s testimony:
 - While not all guardians *ad litem* are classified as expert witnesses, they will typically be permitted to opine on the best interests of the child.
 - The guardian *ad litem* cannot parrot what he or she is told by third parties, but rather must rely on what he or she is told in formulating an opinion. **Authority:** *Clougherty v. Clougherty*, 131 Conn. App. 270 (2011) and *Johnson v. Johnson*, 111 Conn. App. 413 (2008); COE § 7.4. **Discussion:** See § 8.46, below.
- Analyzing hearsay:
 - The child's opinion is typically something the court will want to know.
 - Hearsay may be admissible if it meets one of the exceptions to the hearsay rule, such as state of mind.
 - Third parties, such as the guardian *ad litem*, family relations officer, or mental health professional, may be able to inform the court of the child's preferences based upon the child's best interests. **Authority:** *Medeiros v. Medeiros*, 175 Conn. App. 174 (2017), *Cotton v. Cotton*, 11 Conn. App. 189 (1987) and *Gennarini v. Gennarini*, 2 Conn. App. 132 (1984). **Discussion:** See § 8.47, below.
- Determining appropriate discovery sanctions:
 - A parent who fails to produce discovery may be precluded from producing evidence on the issue for which he or she failed to produce discovery. **Authority:** *Dessaint v. Dessaint*, 2009 Conn. Super. LEXIS 224 (2009) and P.B. § 13-14. **Discussion:** See § 8.48, below.

§ 8.46 Assessing the Scope of the Guardian *ad Litem*'s Testimony

One issue that typically arises is the manner in which the guardian *ad litem* may testify, particularly concerning testimony which fits the classic definition of hearsay or contains opinions. Since the role of the guardian *ad litem* is to inform the court of what he or she believes is in the child's best interests, by nature such testimony is opinion and therefore the guardian *ad litem*

would need to be deemed an expert witness. Code of Evidence (hereinafter “COE”) § 7.4. However, very few guardians *ad litem* are qualified as expert witnesses at trial. When a guardian *ad litem* is testifying based upon hearsay, the hearsay must form the basis of the opinion to which he or she is testifying. *Johnson v. Johnson*, 111 Conn. App. 413 (2008). A guardian *ad litem*’s testimony may not be used as a way to avoid having a witness appear in court and testify.

Aside from testifying based on opinion, it is perfectly proper for a guardian *ad litem* to testify based upon his or her observations. *Clougherty v. Clougherty*, 131 Conn. App. 270 (2011).

§ 8.47 Analyzing Hearsay

[1] Considering a Child’s Statement to a Non-Parent

Arguments regarding hearsay will be typically raised where: (1) one or both parties wish to have the child’s preferences heard by the court; (2) a parent wishes to testify as to what their child has supposedly said; and (3) a guardian *ad litem* or other custody evaluator wishes to relay information obtained during an investigation.

Parents who are fighting over custody or parenting time will often assert that their child’s wishes mirror, or at least buttress, their own claims. However, since our courts are reluctant to bring a child into court to testify, such evidence can possibly be brought to the court’s attention by what the child has said to others. It is proper for the child’s interests to be made known through the court and this may be done through the guardian *ad litem*, family relations reports, and other means. *Gennarini v. Gennarini*, 2 Conn. App. 132 (1984). This testimony, while it may border on hearsay, will be admissible as to the child’s state of mind, which is relevant in determining the child’s temperament, disposition, and reaction to certain events. *Gennarini*, 2 Conn. App. at 139–140.

[2] Considering a Child’s Statement to a Parent

Invariably in contested custody or visitation actions, one or both parents during their testimony will tell the trial court what they believe their child’s preferences to be. In certain circumstances it may be permissible to receive this testimony, but the court is not required to give it special weight. *Cotton v. Cotton*, 11 Conn. App. 189 (1987). The manner to have such statements admitted into evidence is through the state of mind exception to the hearsay rule. *Medeiros v. Medeiros*, 175 Conn. App. 174 (2017).

§ 8.48 Determining Appropriate Discovery Sanctions

The court has the authority to issue sanctions when a party fails to comply with discovery. P.B. § 13-14. However, any remedy provided should be tailored to the particular case. When a party has been ordered to provide certain medical records, but refuses to do so, it would be improper to preclude that party from producing any evidence, but it may be appropriate that he or she be precluded from offering evidence regarding the medical records which were not produced. *Dessaint v. Dessaint*, 2009 Conn. Super. LEXIS 224 (2009).