****

The "officially released" date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the "officially released" date appearing in the opinion. In no event will any such motions be accepted before the "officially released" date.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest print version is to be considered authoritative.

The syllabus and procedural history accompanying the opinion as it appears on the Commission on Official Legal Publications Electronic Bulletin Board Service and in the Connecticut Law Journal and bound volumes of official reports are copyrighted by the Secretary of the State, State of Connecticut, and may not be reproduced and distributed without the express written permission of the Commission on Official Legal Publications, Judicial Branch, State of Connecticut.

****

SCHALLER, J., dissenting. I respectfully disagree that the respondent mother was unable to benefit from reunification efforts and that terminating her parental rights is in the child's best interest.[1] The trial court's memorandum of decision with respect to the dispositional phase is grounded in the respondent's past conduct, relating more properly to the rehabilitation phase. The memorandum of decision lacks support for termination, as to either the grounds for termination as specified by General Statutes § 17a-112 (j) or as to the child's best interest. The respondent's past conduct is relevant only to define what the respondent was required to do pursuant to the specific steps ordered by the court, *Hon. Frederica S. Brenneman*, judge trial referee, at the time the child was found to be neglected. Although the respondent initially failed to respond to the services offered by the department of children and families (department) pursuant to those steps, after the petition to terminate her parental rights as to the child was served on her, the respondent recognized the need to fulfill the steps and took positive action, often independent of the department, to overcome her substance abuse. The uncontradicted evidence indicates that since the respondent entered an inpatient treatment facility in September, 2007, she has not abused illegal substances. At the conclusion of the trial, the respondent was living in the community, caring for a newborn child and keeping regular visits with the child who is the subject of the termination petition. The record provides no evidentiary basis for concluding that the respondent was unable to benefit from the services she received and that it is not foreseeable within a reasonable time, given her sobriety, that she can fulfill the remaining steps, stable housing and legal income, and assume a responsible position in the child's life. See General Statutes § 17a-112. Moreover, there is no nonspeculative evidence that demonstrates why it is in the child's best interest to terminate the respondent's parental rights now, rather than at some reasonably foreseeable time in the future, *if at all*.

General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by *clear and convincing* evidence that (1) the [d]epartment . . . has made reasonable efforts . . . to reunify the child with the parent . . . unless . . . the parent is *unable or unwilling* to benefit from reunification efforts . . . ." (Emphasis added.) "The clear and convincing standard is met by evidence that induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Internal quota-

tion marks omitted.) *State* v. *Davis*, 229 Conn. 285, 294 n.9, 641 A.2d 370 (1994). An appellate court's review of the factual findings of the trial court is limited to determining whether the facts found are clearly erroneous. See Practice Book § 60-5; *Vernon* v. *Goff*, 107 Conn. App. 552, 557, 945 A.2d 1017, cert. denied, 289 Conn. 920, 958 A.2d 154 (2008). "A finding is clearly erroneous when either there is no evidence in the record to support it, or the reviewing court is left with the definite and firm conviction that a mistake has been made." *In re Samantha C.*, 268 Conn. 614, 627, 847 A.2d 883 (2004). On the basis of my review of the court's memorandum of decision and the evidence presented, I am convinced that the court's finding that the respondent is unable to benefit from reunification efforts is clearly erroneous.

An examination of the court's memorandum of decision with respect to disposition reveals inadequate findings in support of termination of the respondent's parental rights.[2] The court began by reciting briefly the respondent's history of participation in drug treatment programs and the department's services. The court then recited inconclusive facts concerning the child's adoption status and the child's age, then twenty-three months. Although the court praised the respondent's "newly obtained sobriety," it speculated that "[w]hether [the respondent] can sustain sobriety in the community is unknown." The court next repeated in conclusory form her lack of suitable housing, employment and income and her apparently suitable record of maintaining contact with the child.

Without any factual findings to support the conclusion that the respondent was unable to benefit from reunification efforts or whether termination was in the child's best interest, the court merely asserted its conclusory determination that the child's best interest would be served by termination. The court indicated that it "must consider the seven factors outlined in § 17a-112 (k)" but failed to explain how it did so. The court also failed to indicate whether any of its findings were made by clear and convincing evidence.

As I have stated elsewhere, "when . . . the factual findings implicate a [respondent's] constitutional rights and the credibility of witnesses is not the primary issue . . . a scrupulous examination of the record [should be undertaken] to ensure that the findings are supported by substantial evidence."[3] (Internal quotation marks omitted.) *In re Melody L.*, 290 Conn. 131, 176–77, 962 A.2d 81 (2009) (*Schaller*, *J.*, concurring). In this case, however, even the clearly erroneous standard of review reveals that the petitioner, the commissioner of children and families, failed to prove by clear and convincing evidence that the respondent was unable to benefit from reunification efforts,[4] and the court failed to support its termination decision with any supporting evidence, much less by clear and convincing evidence. To the

contrary, the record demonstrates unmistakably that once the respondent put her mind to it, she demonstrated that she could, in fact, benefit from inpatient substance abuse treatment. Admittedly, it took some time for the respondent to come to grips with the consequences of her addiction, but once she did, she pursued a determined course to overcome it, without the benefit of services offered by the department. At the conclusion of evidence concerning the respondent, the record is clear that the respondent had refrained from using illegal drugs for approximately five months, was living with her cousin in the community and caring for her newborn child. There also was evidence that while the respondent was receiving inpatient substance abuse services, she was receiving counseling and attending programs designed to address other steps she needed to take. Compare *In re Vincent B.*, 73 Conn. App. 637, 645, 809 A.2d 1119 ("respondent's positive step in participating in a treatment program demonstrated a degree of rehabilitation in itself"), cert. denied, 262 Conn. 934, 815 A.2d 136 (2003).

Moreover, I conclude that to find that it is in the best interest of the child to terminate the respondent's parental rights at this time is based on sheer speculation. At the time of trial, the child had been living with a foster family since his birth. Because the foster family had decided not to adopt him, he was to be transferred to a relative preadoptive family, but the family had not yet met certain licensing requirements. It is mere speculation that the proposed adoptive family will become licensed and eventually adopt the child. The respondent, at the time, was visiting regularly with the child, and, by all accounts, her interaction with him was appropriate. The petitioner presented no specific information about the child, except his date of birth and that he tested positive for cocaine when he was born. The petitioner provided no evidence as to why the respondent could not care for the child at some foreseeable time in the future, other than to speculate that she might not be able to care for two children younger than age two. It is noteworthy that Kelly Rogers, the court-appointed psychologist called by the petitioner, testified that he did not have enough information to advocate for termination.[5]

"Personal rehabilitation as used in the statute refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . [Section 17a-112] requires the trial court to analyze the [respondent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time." (Citation omitted; internal quotation marks omitted.) *In re Marvin M.*, 48 Conn. App. 563, 578, 711 A.2d 757, cert. denied, 245 Conn. 916, 719 A.2d 900 (1998). "The statute does not require [a parent] to prove precisely when she will be able to assume a responsible position in her

child's life. Nor does it require her to prove that she will be able to assume full responsibility for her child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation she has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date she can assume a responsible position in her child's life." (Internal quotation marks omitted.) *In re Eden F.*, 250 Conn. 674, 706, 741 A.2d 873 (1999).

In this case, the respondent continues to make progress. She overcame her drug dependence and is taking care of a newborn child. She visits with the child who is the subject of this petition on a regular basis and has appropriate interaction with him. She and the newborn are living with the respondent's cousin. The respondent transferred the guardianship of her older children to other relatives. One could infer from such evidence that the respondent had a family support network. I conclude, therefore, that the petitioner has failed to prove by clear and convincing evidence that the respondent is unable to benefit from reunification efforts.

In view of my conclusion that the petitioner failed to prove by clear and convincing evidence that the respondent is unable to benefit from reunification efforts, I also must conclude that the department has not made *reasonable* efforts to reunify the respondent with the child. "The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. . . . [R]easonable efforts means doing everything reasonable, not everything possible." (Internal quotation marks omitted.) *In re Tabitha T.*, 51 Conn. App. 595, 600, 722 A.2d 1232 (1999).

As demonstrated by the testimony of Lakesha Smith, the department social worker assigned to the case, the department was aware of the success the respondent achieved during inpatient treatment for substance abuse. The department also knew that the respondent was taking good care of her newborn child and was interacting with the subject child appropriately. In 2006, when the respondent initially failed to visit the child weekly, the department reduced the amount of time the respondent could visit with the child to every other week. Once the department became aware of the respondent's success in drug treatment, it failed to make the reasonable reunification effort of increasing the frequency of visits between the respondent and her child. Furthermore, Smith testified that it was not possible to find subsidized housing for the respondent as long as she was drug dependent. Although the department knew that at the time of trial the respondent was sober, it failed to make further efforts to find subsidized housing for her.[6] Section 17a-112 (j) (1) requires that

the department make reasonable efforts to reunify the child with the parent, unless the parent is unable to benefit from reunification. Given the respondent's progress in overcoming drug addiction and her ability to care for a newborn child and interact appropriately with the subject child, the court's finding that the department had made reasonable efforts to reunify the child with the parent was clearly erroneous. Without clear and convincing evidence that the department had made reasonable efforts to reunify the child with the respondent, the court was without authority to grant the petition to terminate the respondent's parental rights. See General Statutes § 17a-112 (j) (1).

For the foregoing reasons, I respectfully dissent.

[1] Although the respondent made notable progress toward rehabilitation, she did not accomplish all aspects of the required steps by the time of the trial. Although that phase of the proceeding is not beyond dispute, I choose to dissent with respect to the dispositional phase.

[2] Although the respondent father's situation was entirely different from the respondent mother's, the court dealt with both situations together, alternating facts and conclusions pertaining to both parents in the same section of the memorandum of decision.

[3] In this matter, the credibility of witnesses is not at issue and neither party challenges the underlying facts found by the court. The issue is whether those underlying facts support a finding that the respondent was unable to benefit from the substance abuse services she received.

[4] The relevant portion of § 17a-112 (j) (1) is written in the alternative, i.e., that the "parent is unable or unwilling . . . ." In its memorandum of decision, the court did not distinguish between unwilling and unable. I concede that the record supports a finding that the respondent was unwilling to work with the department, but that is not the end of the matter. My analysis focuses on the "unable . . . to benefit" language of the statute. I also observe that § 17-112 (j) (1) places the onus to provide services on the department; it does not require the respondent parent to accept services from the department exclusively. In this instance, the respondent relied on other agencies to help her obtain the treatment she needed. The petitioner has not taken the position that it was improper for the respondent to obtain services by a means other than those the department provided or facilitated.

[5] Rogers testified in part regarding his opinion as to whether the respondent should be given additional time to reunify with the child: "Though the information that you presented is potentially helpful to me, I don't feel that I have enough information about [the respondent's] progress and the program to definitively advocate for termination."

[6] The evidence portion of the trial with respect to the respondent concluded on January 29, 2008. For reasons having to do with the respondent father, the court continued to hear evidence well into the spring of 2008. See *In re Tremaine C.*, 117 Conn. App. 521, A.2d (2009). Although the court continued to hear evidence on the petition to terminate the respondent father's parental rights, the petitioner never filed a motion to open the evidence with respect to the respondent mother to demonstrate that she had not maintained her sobriety.