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IN RE MARIE J.*
(AC 45917)

Alvord, Prescott and Moll, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights with respect to his minor child and denying the respondent mother's motion to transfer guardianship to E, the child's maternal grandmother. The father had been convicted of sexually assaulting the child's older sibling. Thereafter, the child was adjudicated neglected and committed to the custody of the petitioner, the Commissioner of Children and Families. After the trial on the petition to terminate parental rights but before the trial court issued its decision, our Supreme Court reversed the father's criminal conviction in *State* v. *Juan J.* (344 Conn. 1). Subsequently, the trial court issued its memorandum of decision finding, inter alia, that, pursuant to statute (§ 17a-112 (j) (1)), the Department of Children and Families made reasonable efforts to reunify the father with the child, and that, pursuant to § 17a-112 (j) (3) (B) (i), despite the department's having provided the father with specific steps and services to facilitate reunification, he had failed to achieve a sufficient degree of personal rehabilitation. *Held:*

1. The respondent father could not prevail on his claim that the trial court improperly concluded that the petitioner established by clear and convincing evidence the statutory grounds on which the court based the termination of his parental rights because, in light of the reversal of his criminal conviction, the cumulative effect of the court's factual findings, was insufficient:

   a. The trial court properly concluded that that the father failed to rehabilitate in accordance with § 17a-112 (j) (3) (B) (i): the court found that the father had unaddressed mental health concerns and parenting deficits that affected his ability to parent the child and he did not comply with specific steps meant to address these concerns, his visitation with the child even prior to his incarceration was minimal, as he visited her only once in a twenty-two month period and, although he was referred to counseling services, he attended only one session, demonstrating his lack of effort to address his mental health and parenting deficits; thus, although the father's criminal conviction had been reversed, the court clearly based its conclusion that the father failed to rehabilitate on more than just his conviction and incarceration.

   b. The trial court properly determined that there was no ongoing parent-child relationship between the respondent father and his child pursuant to § 17a-112 (j) (3) (D): the court found that the child had no present and positive memories of her father, who had minimal contact with her even prior to his incarceration and the imposition of the standing criminal protective order imposed at his sentencing, the child did not recognize her father, and the court properly found that to allow further time for the establishment of their relationship would be contrary to the child's best interest, noting that she had been in foster care virtually her entire life and needed permanency; moreover, the father could not prevail on his unpreserved claim that the virtual infancy exception applied, as our appellate courts have held that the virtual infancy exception does not apply when a child is four years old at the time of the termination hearing, as was the child in the present case, and the exception does not apply when a child's feelings can be determined by the court, as the court did in this case, when it found that the child had no current and positive feelings toward her father, and, even if the exception were applicable, the court considered the father's conduct, noting his minimal visits with his child and the fact that he failed to use resources offered by the department to establish a relationship with her.

2. The trial court did not abuse its discretion by denying the respondent mother's motion to transfer guardianship to E: the court's conclusion that E was not a suitable and worthy guardian was based on the evidence before it, including testimony from department social workers, that E had an extensive criminal history, a child protection history, and was

not a licensed foster parent; moreover, the trial court noted that the child had no relationship with E because they spent little time together, that the child had bonded with her foster parents and foster siblings, and that her foster parents were affectionate and committed to ensuring that the child had every opportunity to grow and thrive; furthermore, the mere fact that certain evidence in the record could support a conclusion that E was a suitable and worthy guardian did not establish that the court's conclusion to the contrary was an abuse of its discretion.

Argued April 4—officially released June 5, 2023**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, where the respondent mother filed a motion to transfer guardianship; thereafter, the case was tried to the court, *C. Taylor, J.*; judgment denying the motion to transfer guardianship and terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

Caroline E. Lovallo, certified legal intern, with whom was *Joshua D. Michtom*, assistant public defender, for the appellant (respondent father).

Andrew Mark Ammirati, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner).

Opinion

PRESCOTT, J. The respondent father, Juan J., appeals from the judgment of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights with respect to his daughter, Marie.[1] On appeal, the respondent claims that the court (1) improperly concluded that the petitioner established by clear and convincing evidence that (a) the respondent failed to rehabilitate in accordance with General Statutes § 17a-112 (j) (3) (B) (i) and (b) there was no ongoing parent-child relationship pursuant to § 17a-112 (j) (3) (D), and (2) abused its discretion by denying S's motion to transfer guardianship to Marie's maternal grandmother, Elizabeth, pursuant to General Statutes § 46b-129 (j).[2] We affirm the judgment of the trial court.

The record reveals the following facts, which are undisputed in the record or were found by the trial court, and procedural history. Marie was born in August, 2017. S and the respondent have five other children together: P, J, E, V, and C.[3] Marie is the youngest of their six children.

In June, 2016, prior to Marie's birth, P disclosed to an official from New Britain Public Schools that the respondent had sexually abused her. The official reported the disclosure to the Department of Children and Families (department) and the department reported the allegation to the New Britain Police Department. Because of the allegations against the respondent, the department became involved with the family. The department substantiated the allegation of sexual abuse against the respondent on September 7, 2016. On the basis of P's allegations, the respondent was later charged with one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and one count of criminal attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70 (a) (1).[4]

On February 7, 2017, the department filed neglect petitions against S and the respondent on behalf of P, J, E, V, and C. On April 13, 2017, the court adjudicated the five children neglected. After the adjudication of neglect, the court committed P to the custody of the petitioner[5] but allowed J, E, V, and C to remain with S under protective supervision for a period of six months. During this period of protective supervision, the respondent was not allowed in the home with the children unsupervised.

While the order of protective supervision was still in place for the four children, a department social worker visited the home on August 11, 2017. During this home visit, the social worker observed that there was a baby

living in the home whose presence and identity were not previously disclosed to the department. S originally lied to the social worker and told her that the baby—later identified as Marie—was not hers. S later admitted, however, that she was the biological mother of Marie and informed the social worker that the respondent was Marie's father.

After learning that S had concealed Marie's birth from the department, the petitioner invoked a ninety-six hour hold on behalf of Marie and her four siblings who were currently in S's care under the order of protective supervision. On August 25, 2017, the petitioner filed a neglect petition on behalf of Marie. On that same day, the petitioner obtained an order of temporary custody for Marie. The court held a contested hearing on the order of temporary custody on September 11, 2017. On September 12, 2017, the order of temporary custody was vacated and Marie, along with four of her siblings, returned to S's care under an order of protective supervision for a period of six months.

Shortly after the children were returned to S's care under protective supervision, the department learned that S had been evicted from her home but continued to remain there unlawfully with Marie and her four siblings. The department also learned that the respondent had unsupervised contact with the children, which violated the safety plan the department had put in place. At this time, the respondent and S were allowing the children to live in "deplorable" conditions.[6] Due to these safety concerns, the petitioner sought and obtained an order of temporary custody on behalf of Marie and the other four children on October 3, 2017. When the department removed Marie from the home, the respondent was present and threatened the social worker. The respondent told the department social worker who removed Marie from the home that he would find her and that, if she had children, they were "going to get it."

On October 13, 2017, S and the respondent entered written pleas of nolo contendere with respect to Marie's neglect petition. The court adjudicated her neglected and ordered specific steps to facilitate reunification with the respondent. The court then committed her to the care and custody of the petitioner and placed her with her current foster parents. She has lived with them continuously since she was two months old.

On April 25, 2019, after a trial by jury, the respondent was convicted of all of the criminal charges brought against him with respect to P. The respondent was sentenced on July 1, 2019, to thirty-five years of incarceration, execution suspended after twenty-five years, followed by twenty-five years of probation. At the respondent's sentencing, the court imposed a standing criminal protective order on the respondent that prohibited him from having contact with any individual under the age of sixteen.[7] The respondent appealed from his

conviction.

Subsequent to the October 3, 2017 order of temporary custody and prior to the respondent's April 25, 2019 conviction, the respondent visited with Marie once, on or about March 3, 2019.[8] At that time, Marie, who was less than two years old, did not appear to recognize him. Despite the conditions in which the children were living, the respondent also did not engage in counseling because he believed that he did not require parenting education.

On June 30, 2021, the court approved the department's permanency plan for Marie, which called for the termination of the respondent's and S's parental rights and her adoption. The court also discontinued further efforts to reunify Marie with the respondent due to the standing criminal protective order that prohibited him from contacting anyone under sixteen years old.

On July 22, 2021, the petitioner filed a petition to terminate the parental rights of the respondent and S with respect to Marie. The petitioner alleged in the termination petition the adjudicatory grounds that the respondent had failed to achieve a sufficient degree of personal rehabilitation in accordance with § 17a-112 (j) (3) (B) (i) and that he lacked an ongoing parent-child relationship with Marie pursuant to § 17a-112 (j) (3) (D). At a hearing on August 18, 2021, the respondent entered a pro forma denial of the allegations in the petition.

Prior to the start of trial on the petition to terminate parental rights, S filed a motion to transfer guardianship of Marie to Elizabeth, Marie's maternal grandmother. The hearing on the motion to transfer guardianship was consolidated with the trial on the petition to terminate parental rights. The trial commenced on March 7, 2022, continued on March 8, 2022, and concluded on April 21, 2022.[9] The petitioner presented testimony from the department social workers who worked on Marie's case and a forensic psychologist who had evaluated S. S presented testimony from Elizabeth. The respondent did not present a case.

On July 5, 2022, after the trial on the petition to terminate parental rights concluded but before the court issued its decision, our Supreme Court reversed the respondent's criminal conviction on the ground that the trial court improperly admitted uncharged misconduct evidence. The criminal case was remanded for a new trial. See *State* v. *Juan J.*, 344 Conn. 1, 5, 276 A.3d 935 (2022).

The trial court issued its memorandum of decision in the present case on August 16, 2022. The court granted the petition to terminate the respondent's parental rights and denied the motion to transfer guardianship to Elizabeth. In reaching its conclusions, the court first found, pursuant to § 17a-112 (j) (1), that

the department made reasonable efforts to reunify the respondent with Marie. The court then concluded, pursuant to § 17a-112 (j) (3) (B) (i), that Marie had been adjudicated neglected in a prior proceeding and, despite the department providing the respondent with specific steps and services to facilitate reunification, he had failed to achieve a sufficient degree of personal rehabilitation that would encourage the belief that within a reasonable time he could assume a responsible position in Marie's life. In regard to the respondent's failure to rehabilitate, the court found that he had issues with "criminal recidivism, parenting deficits, and a failure to attempt to benefit from counseling and services." Although the court found that he had complied with certain specific steps, it found that he had failed to comply with others.

Specifically, the court found that he failed to keep all appointments set by or with the department; to take part in individual counseling and make progress toward his identified treatment goals; to cooperate with service providers recommended for parenting, individual, or family counseling; to secure and maintain adequate housing and legal income; and to visit Marie as often as the department permitted. The court described the respondent's visitation with Marie as " 'minimal' " and found that he failed to complete counseling, attended only one session, and had no permanent residence. See footnote 8 of this opinion. For these reasons, the court ultimately concluded that, "[g]iven the [respondent's] failure to progress in his parenting abilities, it is reasonable to infer that he will remain besieged by those issues for some extensive time, and that he will not be physically available to serve as a custodial resource for Marie" within a reasonable amount of time.

With respect to the second adjudicatory ground, the court also concluded that there was no ongoing parent-child relationship between the respondent and Marie and that to allow further time for such a relationship to develop would be detrimental to her best interests pursuant to § 17a-112 (j) (3) (D). In regard to the lack of an ongoing parent-child relationship, the court found that the respondent "had minimal contact with Marie . . . even prior to his incarceration and the issuance of the [protective] order. . . . [She] exhibits no bond with or affection toward [him] and does not recognize him as her father. . . . [She] has been in foster placement for virtually her entire life. [His] obvious failure to involve himself in [her] life demonstrates his lack of capacity to develop an appropriate parental relationship with his daughter."

After concluding that the petitioner had proven both statutory grounds for termination by clear and convincing evidence, the court proceeded to the dispositional phase of the proceeding and determined that the termination of the respondent's parental rights and the denial

of S's motion to transfer guardianship to Elizabeth were in Marie's best interests. In the dispositional phase of the proceeding, the court first made written findings regarding each of the seven factors set forth in § 17a-112 (k).[10] The court considered several factors to determine what was in Marie's best interests, including her interests in sustained growth, well-being, and stability. The court first concluded that it was in Marie's best interests to terminate the parental rights of the respondent. In support of this conclusion, the court found that the respondent "ha[d] failed to demonstrate any real initiative to rehabilitate himself so as to be a part of Marie's life, to successfully address his own issues, or to provide an appropriate home and suitable guidance for [her]. . . . [The respondent] received a twenty-five year sentence after being convicted of sexually abusing [P], but this judgment was recently overturned by [our] Supreme Court and remanded for a new trial. The allegations by [P] still remain, however, and are credi[ble] in nature. . . . Marie can no longer wait for permanency, continuity and stability in her life."[11] The court further found that Marie "has a strong relationship and a bond with her foster parents and her extended foster family. She has lived with her foster family for virtually her entire life . . . [she] has no relationship with [the respondent]."

The court also concluded that a transfer of guardianship to Elizabeth was not in Marie's best interests. The court found that "there were no viable relative resources for Marie" and that she did not have a relationship with Elizabeth.[12] The court further found that Elizabeth "has an extensive child protection history and a criminal record. She is not licensable as a foster parent for Marie." On the basis of the foregoing, in addition to its finding that Marie had a strong relationship with her foster family, the court concluded that the denial of the motion to transfer guardianship was in Marie's best interests. This appeal followed. Additional facts will be set forth as necessary.

I

The respondent first claims that the court improperly concluded that the petitioner proved by clear and convincing evidence the statutory grounds upon which the trial court based the termination of his parental rights.[13] The respondent argues that the cumulative effect of the court's factual findings, in light of the reversal of the respondent's criminal conviction, did not establish that (1) the respondent had failed to rehabilitate according to § 17a-112 (j) (3) (B) (i), and (2) there was a lack of an ongoing parent-child relationship between the respondent and Marie pursuant to § 17a-112 (j) (3) (D).[14] We disagree.

We begin with the legal principles relevant to termination of parental rights proceedings and our standard of review. "A hearing on a termination of parental rights

petition consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the court must determine whether the [commissioner] has proven, by clear and convincing evidence, a proper ground for termination of parental rights. . . . In the dispositional phase, once a ground for termination has been proven, the court must determine whether termination is in the best interest of the child." (Internal quotation marks omitted.) *In re Briana G.*, 183 Conn. App. 724, 728, 193 A.3d 1283 (2018).

"Although the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. . . . On review, we must determine whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . To the extent we are required to construe the terms of [§ 17a-112 (j) (3) (D)] or its applicability to the facts of th[e] case, however, our review is plenary.

* * *

"Moreover . . . the fact of incarceration, in and of itself, cannot be the basis for a termination of parental rights. . . . At the same time, a court properly may take into consideration the inevitable effects of incarceration on an individual's ability to assume his or her role as a parent. . . . Extended incarceration severely hinders the department's ability to offer services and the parent's ability to make and demonstrate the changes that would enable reunification of the family. . . . This is particularly the case when a parent has been incarcerated for much or all of his or her child's life and, as a result, the normal parent-child bond that develops from regular contact instead is weak or absent." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Tresin J.*, 334 Conn. 314, 322–25, 222 A.3d 83 (2019).

A

The respondent first claims that the court improperly concluded, in the adjudicatory phase, that the petitioner proved by clear and convincing evidence that he failed to achieve the requisite degree of personal rehabilitation required by § 17a-112 (j) (3) (B) (i). Specifically, the respondent argues that the court improperly based its conclusion that the respondent had failed to rehabilitate on his conviction and incarceration. We are not

persuaded.

The following legal principles are relevant to the respondent's claim. In the adjudicatory phase of a termination of parental rights proceeding, the court must determine whether one of the six statutory grounds that may serve as a basis for the termination of parental rights exists. *In re Briana G.*, supra, 183 Conn. App. 728. "Failure of a parent to achieve sufficient personal rehabilitation is one of six statutory grounds on which a court may terminate parental rights pursuant to § 17a-112. . . . That ground exists when a parent of a child whom the court has found to be neglected fails to achieve such a degree of rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, the parent could assume a responsible position in the life of that child. . . .

"Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . The statute does not require [a parent] to prove precisely when [he] will be able to assume a responsible position in [his] child's life. Nor does it require [him] to prove that [he] will be able to assume full responsibility for [his] child, unaided by available support systems. . . . Rather, [§ 17a-112] requires the trial court to analyze the [parent'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. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [the parent] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he] can assume a responsible position in [his] child's life. . . . [I]n assessing rehabilitation, *the critical issue is not whether the parent has improved* [*his*] *ability to manage* [*his*] *own life*, *but rather whether* [*he*] *has gained the ability to care for the particular needs of the child at issue*." (Emphasis added; internal quotation marks omitted.) Id., 728–29.

"Section 17a-112 (j) (3) (B) allows for the termination of parental rights due to a respondent's failure to achieve personal rehabilitation only after the respondent has been issued specific steps to facilitate rehabilitation. Specific steps provide notice . . . to a parent as to what should be done to facilitate reunification and prevent termination of rights. . . . The specific steps are a benchmark by which the court will measure the respondent's conduct to determine whether termination is appropriate pursuant to § 17a-112 (j) (3) (B). . . . We acknowledge that the court need not base its determination purely on the respondent's compliance with the specific steps." (Citations omitted; internal quotation marks omitted.) *In re Shane M.*, 148 Conn. App. 308, 329, 84 A.3d 1265 (2014), aff'd, 318 Conn. 569, 122 A.3d 1247 (2015). "A parent may complete all of

the specific steps and still be found to have failed to rehabilitate. . . . Conversely, a parent could fall somewhat short in completing the ordered steps, but still be found to have achieved sufficient progress so as to preclude a termination of his or her rights based on a failure to rehabilitate." (Internal quotation marks omitted.) *In re Bianca K.*, 188 Conn. App. 259, 271, 203 A.3d 1280 (2019).

In the present case, the court found that the respondent had mental health concerns and parenting deficits that remained unaddressed and that affected his ability to parent Marie. The respondent did not comply with key specific steps meant to address these parenting concerns. Specifically, the evidence before the court established that, during the period in which he was offered visitation with Marie, the respondent's visitation was minimal. In fact, although the respondent had yet to be incarcerated and was allowed supervised visitation, the respondent visited with Marie only once during the twenty-two month period in which Marie was placed in foster care.[15] The respondent cancelled visits, did not show up to scheduled visits, and declined to reschedule his visits. Although he was referred to counseling services, the respondent attended only one counseling session. According to the respondent, he did not require parenting education. These actions violated the specific steps meant to facilitate reunification with Marie and demonstrated a lack of effort by the respondent to address his mental health and parenting deficits.

Despite these findings, the respondent argues that the court "gauged its failure to rehabilitate finding on the fact that [he] was expected to serve thirty-five years incarcerated." The court, however, clearly based its conclusion that the respondent failed to rehabilitate on more than just his criminal conviction and incarceration. See *In re Katia M.*, 124 Conn. App. 650, 670, 6 A.3d 86 (2010) ("incarceration alone may not be considered a basis for the termination of parental rights"), cert. denied, 299 Conn. 920, 10 A.3d 1051 (2010). At the outset of its memorandum of decision, the court acknowledged that the respondent's criminal conviction was reversed by our Supreme Court. Although the court noted that the respondent had issues with "criminal recidivism," the court also found that the respondent had parenting deficiencies and failed to take part in or benefit from counseling. The court concluded that the respondent failed to rehabilitate not because of his incarceration but, rather, because he failed to comply with key specific steps that were meant to address these parenting deficiencies,[16] specifically noting that he only visited with Marie once in a twenty-two month period and attended only one session of counseling. The court in its memorandum of decision stated: "[G]iven the [respondent's] failure *to progress his parenting abilities*, it is reasonable to infer that he will remain besieged by those issues for some extensive time." (Emphasis

added.)

Furthermore, the court's findings demonstrated that it accounted for the barriers that existed due to the respondent's incarceration, and, thus, its decision to terminate his parental rights was not solely based on his incarceration. The court acknowledged that, during the respondent's sentencing, the court, *Oliver*, *J.*, imposed a standing criminal protective order that prohibited the respondent from contacting anyone under sixteen years of age. The court found, however, that the respondent "failed to consistently visit [with] Marie *prior* to his sentencing. He cancelled visits frequently and failed to appear for visits. His excuse was usually related to employment obligations. [The department] offered other visitation times, but [the respondent] failed to take advantage of these opportunities, again citing work." (Emphasis added.)

Viewed in the manner most favorable to sustaining the judgment, the evidence sufficiently supported the court's conclusion that there was clear and convincing evidence that the respondent failed to achieve a sufficient degree of rehabilitation necessary to encourage a belief that now or within a reasonable time he could assume a responsible position in Marie's life and care for her particular needs. See *In re Briana G.*, supra, 183 Conn. App. 729 ("[i]n assessing rehabilitation, the critical issue is not whether the parent has improved [his] ability to manage [his] own life, but rather whether [he] has gained the ability to care for the particular needs of the child at issue" (internal quotation marks omitted)).

B

The respondent next claims that the court improperly concluded, in the adjudicatory phase, that he lacked an ongoing parent-child relationship according to § 17a-112 (j) (3) (D). We disagree.[17]

We begin with the relevant legal principles. Pursuant to § 17a-112 (j) (3) (D),[18] the lack of an ongoing parent-child relationship is one of the six statutory grounds on which a court may terminate parental rights. "The lack of an ongoing parent-child relationship is a no fault statutory ground for the termination of parental rights. . . . [Our Supreme Court] has explained that the ground of no ongoing parent-child relationship for the termination of parental rights contemplates a situation in which, regardless of fault, a child either has never known his or her parents, so that no relationship has ever developed between them, or has definitively lost that relationship, so that despite its former existence it has now been completely displaced. . . . *The ultimate question is whether the child has some present memories or feelings for the natural parent that are positive in nature.* . . .

"In its interpretation of the language of [the lack

of an ongoing parent-child relationship ground], [our Supreme Court] has been careful to avoid placing insurmountable burden[s] on noncustodial parents. . . . Because of that concern, we have explicitly rejected a literal interpretation of the statute, which defines the relationship as one that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child . . . . [D]ay-to-day absence alone, we clarified, is insufficient to support a finding of no ongoing parent-child relationship. . . . We also have rejected the notion that termination may be predicated on the lack of a *meaningful* relationship, explaining that the statute requires that there be *no* relationship." (Emphasis in original; internal quotations marks omitted.) *In re Tresin J.*, supra, 334 Conn. 326.

"Because [t]he statute's definition of an ongoing parent-child relationship . . . is inherently ambiguous when applied to noncustodial parents who must maintain their relationships with their children through visitation . . . [t]he evidence regarding the nature of the respondent's relationship with [the] child at the time of the termination hearing must be reviewed in the light of the circumstances under which visitation had been permitted." (Citation omitted; internal quotation marks omitted.) *In re Carla C.*, 167 Conn. App. 248, 266, 143 A.3d 677 (2016).

The proper legal test to determine whether the petitioner has proven the lack of an ongoing parent-child relationship is a two step process. "In the first step, a petitioner must prove the lack of an ongoing parent-child relationship by clear and convincing evidence. In other words, the petitioner must prove by clear and convincing evidence that the child has no present memories or feelings for the natural parent that are positive in nature. If the petitioner is unable to prove a lack of an ongoing parent-child relationship by clear and convincing evidence, [this adjudicatory ground] must be denied, and there is no need to proceed to the second step of the inquiry. If, and only if, the petitioner has proven a lack of an ongoing parent-child relationship does the inquiry proceed to the second step, whereby the petitioner must prove by clear and convincing evidence that to allow further time for the establishment or reestablishment of the relationship would be contrary to the best interests of the child. . . .

"There are two exceptions to the general rule that the existence of an ongoing parent-child relationship is determined by looking to the present feelings and memories of the child toward the respondent parent. The first exception . . . applies when the child is an infant, and that exception changes the focus of the first step of the inquiry. . . . [W]hen a child is virtually a newborn infant whose present feelings can hardly be discerned with any reasonable degree of confidence, it

makes no sense to inquire as to the infant's feelings, and the proper inquiry focuses on whether the parent has positive feelings toward the child. . . . Under those circumstances, it is appropriate to consider the conduct of a respondent parent. . . .

"[Our Supreme Court] emphasized in *In re Jacob W.* [330 Conn. 744, 767–68 and n.5, 200 A.3d 1091 (2019)] that it was not the child's age at the time of the respondent's incarceration . . . that controls for purposes of the application of the virtual infancy exception, but [the child's] age . . . at the time of the termination hearing. To determine whether a petitioner has established the lack of an ongoing parent-child relationship, the trial court must be able to discern a child's present feelings toward or memories of a respondent parent. The virtual infancy exception takes account of the particular problem that is presented when a child is too young to be able to articulate those present feelings and memories. . . . It would make no sense to require a trial court to resolve whether a child's feelings could have been determined at some time prior to the termination hearing. The inability of the court to discern or to be presented with evidence regarding a virtual infant's present feelings drives the exception. That finding must be made at the time of the termination hearing." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *In re Tresin J.*, supra, 334 Conn. 326–29.[19]

The court properly concluded that the petitioner proved by clear and convincing evidence that the respondent lacked an ongoing parent-child relationship with Marie. In the present case, the court found that Marie has no present and positive memories of the respondent. The respondent had minimal contact with Marie, even prior to his incarceration and the imposition of the standing criminal protective order. He visited with Marie only once prior to his incarceration.[20] When she last saw him, she did not recognize him. The court found that to allow further time for the establishment of the relationship would be contrary to Marie's best interests. Specifically, the court noted that Marie has been in foster care virtually her entire life and that she needs permanency. The court determined that the respondent's "obvious failure to involve himself in Marie's life," as exhibited by his failure to visit her prior to his incarceration, demonstrated his inability to "develop an appropriate parental relationship with his daughter." Accordingly, there was sufficient evidence to support the court's conclusion.

We next turn to the respondent's argument on appeal that, rather than considering whether Marie had present and positive feelings toward the respondent, the court should have considered his conduct in determining whether there was a lack of an ongoing parent-child relationship because the virtual infancy exception

applied in the present case. In response, the petitioner argues that this claim is unpreserved because the respondent did not argue before the trial court that the virtual infancy exception should apply and, therefore, it did not make any findings regarding the applicability of the exception. Alternatively, the petitioner argues that, even if the argument is preserved, the virtual infancy exception would not apply in the present case because whether a child is a "virtual infant" is determined by considering the child's age at the time of the termination hearing and not at the time of the parent's incarceration. We agree with the petitioner that the respondent's argument is not preserved and that, even if the argument were preserved, the virtual infancy exception does not apply in the circumstances of this case. Finally, we conclude that, even if the virtual infancy exception did apply in the present case and the respondent's conduct was properly considered, sufficient evidence supported the court's conclusion that he lacked an ongoing parent-child relationship with Marie.

The respondent agrees that he has raised the applicability of the virtual infancy exception for the first time on appeal. "[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." (Internal quotation marks omitted.) *Guddo* v. *Guddo*, 185 Conn. App. 283, 286–87, 196 A.3d 1246 (2018). As our Supreme Court has previously stated, the trial court must make a finding at the time of the termination hearing that it is unable to discern the child's present feelings in order for the virtual infancy exception to apply. *In re Tresin J.*, supra, 334 Conn. 329. Because the respondent did not raise the applicability of this exception before the trial court, it did not make a finding as to the applicability of the virtual infancy exception. Instead, the court found that Marie had no present and positive memories of the respondent.

We also agree with the petitioner that, even if the respondent's claim was preserved, the virtual infancy exception is not applicable in the present case. The petitioner correctly argues that it is the child's age at the time of the termination hearing—not at the time of the respondent's incarceration—that is applicable for purposes of the virtual infancy exception. See id. Marie was four years old at the time of the termination hearing. Our appellate courts previously have held that the virtual infancy exception does not apply when a child was four years old at the time of the termination hearing. See, e.g., id., 330; see also *In re Jacob W.*, supra, 330 Conn. 768 n.5. Furthermore, the petitioner presented evidence that Marie did not recognize the respondent and the court found that Marie had no current and positive feelings toward him. In instances such as the present case, in which a child's feelings can be deter-

mined by the court, the virtual infancy exception is not applicable. See, e.g., *In re Jacob W.*, supra, 768 n.5 (virtual infancy exception was not applicable because trial court found that child had " 'little to no memory' " of respondent father).

Finally, even assuming arguendo that the respondent preserved his argument and that the virtual infancy exception applied in the present case, the respondent's conduct by itself also established a lack of an ongoing parent-child relationship. The court found that the respondent had " 'minimal' " visits with Marie during the time in which the department offered him visitation. Although it is true that the respondent successfully sought and obtained a reversal of his conviction, this does not change the fact that the respondent failed to use the resources that the department offered him to establish a relationship with Marie, particularly given his almost complete failure to visit her prior to his conviction. See *In re Tresin J.*, supra, 334 Conn. 330 n.11 ("the parent's perpetuation of the lack of a relationship by failing to use available resources to seek visitation or otherwise maintain contact with the child may establish the lack of an ongoing parent-child relationship" (internal quotation marks omitted)). Accordingly, the respondent's conduct by itself also established the lack of an ongoing parent-child relationship. On the basis of our review of the record, there was sufficient evidence to support the court's conclusion that, even given the reversal of the respondent's conviction, the petitioner proved by clear and convincing evidence that he lacked an ongoing parent child relationship with Marie pursuant to § 17a-112 (j) (3) (D).

II

Finally, the respondent claims that the court, in the dispositional phase, abused its discretion in denying S's motion to transfer guardianship to Elizabeth.[21] We disagree.[22]

We begin with the relevant legal principles. "The adjudication of a motion to transfer guardianship pursuant to [§ 46b-129 (j)][23] requires a two step analysis. [T]he court must first determine whether it would be in the best interest[s] of the child for guardianship to be transferred from the petitioner to the proposed guardian. . . . [Second] [t]he court must then find that the third party is a suitable and worthy guardian. . . . This principle is echoed in Practice Book § 35a-12A (d), which provides that the moving party has the burden of proof that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interests of the child. . . .

"To determine whether a custodial placement is in the best interest of the child, the court uses its broad discretion to choose a place that will foster the child's interest in sustained growth, development, well-being,

and in the continuity and stability of its environment. . . . We have stated that when making the determination of what is in the best interest of the child, [t]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . . [G]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . [Appellate courts] are not in a position to second-guess the opinions of witnesses, professional or otherwise, nor the observations and conclusions of the [trial court] when they are based on reliable evidence." (Citation omitted; footnote altered; internal quotation marks omitted.) *In re Leo L.*, 191 Conn. App. 134, 139–41, 214 A.3d 430 (2019).

"A trial court's factual findings will not be set aside unless they are clearly erroneous. . . . A finding of fact is clearly erroneous when there is *no evidence* in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 138 n.5.[24]

In the present case, the court found that Elizabeth had an extensive criminal history, a child protection history, and was not a licensed foster parent.[25] The court further found that Marie had no relationship with Elizabeth because they spent little time together, that Marie was bonded with her foster parents and foster siblings, and that her foster parents are "affectionate, nurturing, and committed to ensuring that [she] has every opportunity to grow, thrive, and mature . . . ." See *In re Athena C.*, 181 Conn. App. 803, 821, 186 A.3d 1198 ("a trial court may rely on the relationship between a child and the child's foster parents to determine whether a different placement would be in the child's best interest"), cert. denied, 329 Conn. 911, 186 A.3d 14 (2018).

The respondent argues that the court "failed to consider certain evidence adduced at trial" that demonstrated that Elizabeth was a suitable and worthy guardian and that a transfer of guardianship was in Marie's best interests. Specifically, the respondent cites to evidence in the record that Elizabeth appealed the child protection claims against her, took steps toward becom-

ing a licensed foster parent, and is the current foster placement for four of Marie's older siblings. The mere fact that evidence in the record could support the conclusion that Elizabeth was a suitable and worthy guardian does not establish, however, that the court's conclusion to the contrary was an abuse of its discretion. Moreover, the court heard and reviewed the evidence before it, including Elizabeth's testimony, and concluded that "there were no viable relative resources for Marie." See, e.g., *In re Miyuki M.*, 202 Conn. App. 851, 864, 246 A.3d 1113 (2021) ("[a]lthough there was testimony from witnesses who indicated that the [proposed guardian] was suitable and worthy, it is the function of the trial court to determine the reliability and weight of the evidence presented"); *In re Leo L.*, supra, 191 Conn. App. 142 ("it is the trial court's role to weigh the evidence presented and determine relative credibility when it sits as a fact finder"). Given the evidence before the trial court, we will not second-guess its determination that it was not in the best interests of Marie to transfer guardianship to Elizabeth; see, e.g., *In re Miyuki M.*, supra, 865; accordingly, the court did not abuse its discretion in denying the motion.

The judgment is affirmed.

In this opinion the other judges concurred.

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

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, a protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

** June 5, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] In the same proceeding, the court also terminated the parental rights of Marie's mother, S. Because she has not appealed from that judgment, we refer to Juan J. as the respondent and to S by name throughout this opinion.

[2] The respondent also claims that this court should use its supervisory authority to remand the case for a new trial because the trial on the petition to terminate his parental rights was inherently unfair. See footnote 13 of this opinion.

[3] P was born in 2002, J was born in 2003, E was born in 2005, V was born in 2006, and C was born in 2010.

[4] The record is unclear as to when the defendant was charged and arrested.

[5] S's and the respondent's parental rights with respect to P were later terminated.

[6] A department social worker that visited the home reported: "[T]he home was extremely dirty, very deplorable conditions. I remember the bathroom had feces all over the toilet, and the tub had feces in it. The children's bedrooms were in complete disarray . . . ." The respondent was in the home at this time in violation of the safety requirement.

[7] The court found that the standing criminal protective order imposed at the respondent's sentencing prohibited "visitation with children under sixteen years of age." The court's finding has factual support in a social study admitted into evidence as petitioner's exhibit 13, which states: "There is no visitation with [the respondent] due to a protective order which was imposed at [his] sentencing. The order prohibits any visitation with anyone under the age of 16." Neither party challenges this finding as clearly erroneous. We note for the record, however, that the standing criminal protective order

imposed at sentencing does not appear to prohibit the respondent from visitation with anyone under the age of sixteen but, rather, prohibits the respondent, among other things, from having any contact with P. See *Larmel* v. *Metro North Commuter Railroad Co.*, 200 Conn. App. 660, 662 n.2, 240 A.3d 1056 (2020) ("[t]he Appellate Court, like the trial court, may take judicial notice of the files of the Superior Court in the same or other cases" (internal quotation marks omitted)), aff'd, 341 Conn. 332, 267 A.3d 162 (2021). Moreover, at the time of the trial on the termination of the respondent's parental rights, the respondent did not introduce into evidence a copy of the standing criminal protective order or proffer other evidence to rebut the statement in petitioner's exhibit 13 that the standing criminal protective order imposed at sentencing prohibited visitation with anyone under the age of sixteen.

[8] The March 3, 2019 visit is the only visit documented in the record and is commonly referred to as her "last" visit with the respondent. Petitioner's exhibit 13 states that "Marie's last in-person visit with [the respondent] was [March 3, 2019]. During this visit, [she] didn't recognize [him]. Prior to this, there have been multiple cancell[ations] and no shows . . . by [him] for visitation. When asked about the cancellations, [the respondent] reported employment as a barrier to attending visits. As a result, [he] was offered other visitation times, but he indicated that due to his work schedule he was not able to come at another time or another day."

[9] Marie's attorney supported the termination of the respondent's parental rights and the denial of the motion to transfer guardianship. Additionally, on appeal, her attorney adopted the petitioner's brief and supports the affirmance of the trial court's decision.

[10] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

[11] Although it is unclear in the record what evidence the court relied upon in making the determination that the criminal allegations were credible, this finding is supported by the facts that the department substantiated the allegations of sexual abuse and that probable cause existed to arrest the respondent for sexually assaulting P.

[12] The record reveals that Elizabeth "was offered visits with Marie" but that "she has not attended any visits" with her. Marie does not know Elizabeth's relationship to her or Elizabeth's name.

[13] The respondent also argues that this court should use its supervisory authority to remand the case for a new trial because the reversal of his conviction after the conclusion of the trial resulted in an inherently unfair trial. He claims that his trial strategy was based on the premise that he would remain incarcerated for twenty-five years and, therefore, "he effectively conceded his own case" regarding the termination of his parental rights. The respondent argues that, after his conviction was reversed, "the universe of arguments and options available to him to fight to preserve his constitu-

tional right to a relationship with his daughter changed dramatically." Accordingly, the respondent argues that he was entitled to an opportunity to be heard on the effect that the reversal of his conviction had on the petition to terminate his parental rights. We are not persuaded that such extraordinary measures are appropriate in the present case. See *In re Yasiel R.*, 317 Conn. 773, 789, 120 A.3d 1188 (2015) ("[t]he exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole" (internal quotation marks omitted)).

First, the respondent's claim relies, in part, on his argument that the court failed to consider the reversal of his conviction and the effect it had on the petition to terminate his parental rights. As we set forth in part I of this opinion, we are not convinced that the court failed to consider the reversal of the respondent's conviction in its judgment. Furthermore, as the petitioner argues, the respondent could have sought an opportunity to be heard on the effect of the reversal of his conviction by moving to open the evidence after his conviction was reversed but before the court rendered its judgment. See *In re Janazia S.*, 112 Conn. App. 69, 87, 961 A.2d 1036 (2009) ("Whether or not a trial court will permit further evidence to be offered after the close of testimony in the case is a matter resting within its discretion. . . . In the ordinary situation where a trial court feels that, by inadvertence or mistake, there has been a failure to introduce available evidence upon a material issue in the case of such a nature that in its absence there is serious danger of a miscarriage of justice, it may properly permit that evidence to be introduced at any time before the case has been decided." (Internal quotation marks omitted.)). Finally, during oral argument before this court, counsel for the respondent failed to articulate with any degree of specificity how the respondent's trial strategy would have changed or what additional evidence would have been presented if he had been given the opportunity to be heard after his conviction was reversed. On the basis of the foregoing, we are not convinced that the integrity of the trial was compromised, let alone the perceived fairness of the judicial system as a whole.

[14] The petitioner needed to demonstrate by clear and convincing evidence only one of the two alleged grounds for termination. See General Statutes § 17a-112 (j) (3). Accordingly, to demonstrate reversible error, the respondent must establish that the petitioner failed to prove by clear and convincing evidence both of the statutory grounds upon which the court based its termination of the respondent's parental rights, namely, the failure to rehabilitate and the lack of an ongoing parent-child relationship.

[15] Marie was placed in foster care in October, 2017, when she was approximately two months old. Our review of the record indicates that the respondent was permitted to visit with Marie prior to his sentencing and incarceration, which took place on July 1, 2019.

[16] The respondent argues that the court found him to be in compliance with eleven of his specific steps. Successful completion of some of his specific steps, however, does not establish that the court improperly concluded that the respondent failed to achieve a sufficient degree of rehabilitation. See *In re Eric M.*, 217 Conn. App. 809, 830, 290 A.3d 411 ("successful completion of expressly articulated expectations is not sufficient to defeat a . . . claim [by the petitioner] that the parent has not achieved sufficient rehabilitation" (internal quotation marks omitted)), cert. denied, 346 Conn. 921, 291 A.3d 1040 (2023).

[17] Because the court properly concluded that one of the statutory adjudicatory grounds existed, namely, the failure to rehabilitate, we would not ordinarily address the respondent's claim that the court improperly concluded that he lacked an ongoing parent-child relationship as only one adjudicatory ground is required to affirm the court's judgment. See footnote 14 of this opinion. Our state's public policy is to protect children, to provide them with permanency, and to handle child protection cases efficiently; see *In re Amias I.*, 343 Conn. 816, 842, 276 A.3d 955 (2022) (" '[t]ime is of the essence in child custody cases' "). In light of this policy, the unique procedural posture of this case, and to aid in facilitating resolution of any potential future appeal, we choose to address the respondent's claim regarding the second adjudicatory ground that the petitioner proved.

[18] General Statutes § 17a-112 (j) (3) provides in relevant part: "(D) [T]here is no ongoing parent-child relationship, which means the relationship that ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral and educational needs of the child and to

allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child . . . .''

[19] In his preliminary statement of issues that the respondent filed with this court on appeal, he stated that the trial court improperly concluded that there was a lack of an ongoing parent-child relationship because his wrongful conviction was ''tantamount to a third-party interference . . . .'' This claim implicates the second exception to the lack of an ongoing parent-child relationship. ''The second exception . . . applies when the petitioner has engaged in conduct that inevitably has led to the lack of an ongoing parent-child relationship between the respondent parent and the child. This exception precludes the petitioner from relying on the lack of an ongoing parent-child relationship as a basis for termination.'' (Internal quotation marks omitted.) *In re Tresin J.*, supra, 334 Conn. 327–28. The respondent does not adequately brief this argument in his principal appellate brief. See *In re A'vion A.*, 217 Conn. App. 330, 356–57, 288 A.3d 231 (2023). Although he states that the department's actions, in removing Marie from the home and requiring that his visits with her be supervised, ''undeniably strain[ed]'' his relationship with Marie, he does not claim that these actions constitute third-party interference or that they precluded the petitioner from relying on the lack of an ongoing parent-child relationship as a basis for the termination of his parental rights. Therefore, any claim that the petitioner's interference caused the lack of an ongoing parent-child relationship pursuant to the second exception to this statutory ground for termination has been abandoned.

[20] See footnote 8 of this opinion.

[21] Although the motion to transfer guardianship was filed by S and not the respondent, the respondent implicitly adopted her motion at the trial on the petition to terminate parental rights. In particular, the respondent's counsel argued in favor of the court granting the motion to transfer guardianship to Elizabeth in his final argument. The respondent had a specific, personal, and legal interest in the transfer of guardianship because, according to the respondent, the transfer of guardianship to Elizabeth would better maintain Marie's familial connection compared to her placement with her current nonrelative foster parents. Thus, we conclude that the respondent is aggrieved by the denial of the motion. See General Statutes § 52-263.

[22] The petitioner argues that the record is inadequate to review the respondent's claim that the court abused its discretion by denying the motion to transfer guardianship because the court ''did not expressly engage in any suitability and worthiness analysis.'' We do not agree that the court failed to determine whether Elizabeth was a suitable and worthy guardian. The court made several factual findings regarding Elizabeth's suitability and worthiness: the court found that Elizabeth was not a licensable foster parent for Marie, that she had a criminal record, and that she had an extensive child protection history. These findings directly speak to the court's conclusion, even if it was implicit, that Elizabeth was not a suitable and worthy guardian for Marie.

[23] General Statutes § 46b-129 (j) provides in relevant part: ''(2) Upon finding and adjudging that any child or youth is uncared for, neglected or abused the court may (A) commit such child or youth to the Commissioner of Children and Families, and such commitment shall remain in effect until further order of the court, except that such commitment may be revoked or parental rights terminated at any time by the court; (B) vest such child's or youth's legal guardianship in any private or public agency that is permitted by law to care for neglected, uncared for or abused children or youths or with any other person or persons found to be suitable and worthy of such responsibility by the court, including, but not limited to, any relative of such child or youth by blood or marriage; (C) vest such child's or youth's permanent legal guardianship in any person or persons found to be suitable and worthy of such responsibility by the court, including, but not limited to, any relative of such child or youth by blood or marriage in accordance with the requirements set forth in subdivision (5) of this subsection; or (D) place the child or youth in the custody of the parent or guardian with protective supervision by the Commissioner of Children and Families subject to conditions established by the court.

* * *

''(6) Prior to issuing an order for permanent legal guardianship, the court shall provide notice to each parent that the parent may not file a motion to terminate the permanent legal guardianship, or the court shall indicate

on the record why such notice could not be provided, and the court shall find by clear and convincing evidence that the permanent legal guardianship is in the best interests of the child or youth . . . ."

[24] We note that our cases reviewing a trial court's ruling on a motion to transfer guardianship have described the court's inquiry as a two step process. In order to grant the motion to transfer guardianship, the court must determine both that the motion to transfer guardianship is in the child's best interests and that the proposed guardian is suitable and worthy. Although this court has held that the determination of the child's best interests should be reviewed by an abuse of discretion standard, we have not clearly stated the appropriate standard for the "suitable and worthy" determination. To the extent that a trial court's determination of whether the proposed guardian is suitable and worthy is based upon subordinate facts, those facts should be reviewed pursuant to the clearly erroneous standard. Because, as a matter of logic, it would not be in a child's best interests to have his or her guardianship transferred to a person who is not suitable and worthy, a court reviewing either determination, i.e., the "best interests" determination or the "suitable and worthy" determination, should apply an abuse of discretion standard of review.

[25] The respondent does not explicitly challenge any of the court's factual findings as "clearly erroneous" but, rather, states that "this conclusion cannot be reasonably supported by the subordinate facts." The "conclusion" to which the respondent refers appears to be the court's findings that Elizabeth had an extensive child protection history and criminal record and could not be licensable as a foster parent. To the extent that the respondent claims that these findings are clearly erroneous, we are not persuaded. A review of the record indicates that a department social worker testified that Elizabeth had an "extensive" child protection and criminal history. A department social worker also testified that Elizabeth was not a licensed foster parent. Accordingly, evidence in the record supported the court's findings that Elizabeth had an extensive criminal history, a child protection history, and was not a licensed foster parent.