EVELEIGH, J., dissenting. I respectfully dissent. I disagree with the majority's conclusion that once the requirements for visitation established in *Roth* v. *Weston*, 259 Conn. 202, 789 A.2d 431 (2002), have been satisfied, visitation must be granted. I also disagree with the majority's conclusion that "whereas the *Roth* factors establish that there is a relationship that is entitled to be fostered, the best interest of the child [standard] guides the court in determining how best to foster that relationship." In my view, the majority opinion effectively eviscerates the best interest standard set forth in General Statutes § 46b-59,[1] and replaces it with the court mandated *Roth* test. *Roth* was designed as a jurisdictional test to save § 46b-59 from constitutional due process concerns. The majority has morphed *Roth* into a substantive sword determinative of the best interest of a child, instead of the jurisdictional shield against due process concerns for which it was intended. I would conclude that, after finding that the plaintiff, Michael DiGiovanna, had met his burden of proof under *Roth*, the trial court properly applied the best interest of the child standard and properly determined, under the facts of this case, that visitation with the plaintiff would not be in the best interest of the minor child, the son of the defendant, Donna St. George. Accordingly, I would affirm the judgment of the trial court.

"The well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law."[2] (Citations omitted; internal quotation marks omitted.) *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 366–67, 999 A.2d 721 (2010).

The majority concludes that, in light of the principles enunciated in *Roth*, the trial court's conclusion "not only conflicts with *Roth*, but is improper for other reasons." I disagree. To the contrary, I would conclude that the trial court properly employed the *Roth* test. The trial court properly did not conclude, however, as the majority does, that the *Roth* test superseded the best interest analysis contemplated by § 46b-59.

I begin with the language of the statute. Section 46b-59 provides in relevant part: "The Superior Court may grant the right of visitation with respect to any minor child or children to any person, upon an application of such person. Such order shall be according to the court's best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable . . . . In making, modifying or terminating such an order, *the court shall be guided by the best interest of the child*, giving consideration to the wishes of such child if he is of sufficient age and capable of forming an intelligent opinion. . . ." (Emphasis added.)

In 2002, this court considered a constitutional challenge to § 46b-59 in *Roth* v. *Weston*, supra, 259 Conn. 202. Specifically, in response to claims that the statute violated due process and the fundamental rights of a parent to rear one's child and to family privacy, this court developed a test to ensure that those rights would be protected. First, in order to establish standing, "any third party . . . seeking visitation must allege and establish a parent-like relationship as a jurisdictional threshold in order both to pass constitutional muster and to be consistent with the legislative intent." Id., 222. This court then continued with what it described as the "second jurisdictional factor in this analysis . . . ." Id. It concluded that in furtherance of this jurisdictional standard, there must be a threshold requirement of a finding of real and substantial harm to the child as a result of the denial of visitation. Id., 226–27. This court further elaborated that the harm alleged "must be a degree of harm analogous to the kind of harm contemplated by [General Statutes] §§ 46b-120 and 46b-129, namely, that the child is neglected, uncared-for or dependent." (Internal quotation marks omitted.) Id., 235. Further, it held that such a finding must be established by clear and convincing evidence. Id., 232.

In *Roth*, this court also recognized that, implicit in § 46b-59, was a rebuttable presumption that visitation that is opposed by a fit parent is not in a child's best interest. Id., 222–23. Further, this court opined that "[t]he constitutional issue, however, is not whether children should have the benefit of relationships with persons other than their parents or whether a judge considers that a parent is acting capriciously. In light of the compelling interest at stake, the best interests of the child are secondary to the parents' rights." Id., 223. "Because parenting remains a protected fundamental right, the due process clause leaves little room for states to override a parent's decision even when that parent's decision is arbitrary and neither serves nor is motivated by the best interests of the child." Id. Thus, in *Roth*, this court concluded that the trial court had improperly applied the analytical framework set forth in the opinion and improperly granted visitation rights

to the plaintiffs, the maternal grandmother and maternal aunt, in violation of the due process rights of the defendant, the father of the minor children, under both the state and federal constitutions. Id., 204, 237–40.

In the present case, the trial court found that the plaintiff had met his burden of proof under *Roth*. The trial court then proceeded to conduct a best interest analysis pursuant to the mandate of § 46b-59. In conducting its best interest analysis, the trial court utilized the fair preponderance of the evidence standard, in accordance with *Fish* v. *Fish*, 285 Conn. 24, 71, 939 A.2d 1040 (2008), which involved a third party custody case. After considering all of the evidence in the present case, the trial court held that it was in the best interest of the child not to have visitation with the plaintiff.

The majority "conclude[s] that the trial court improperly determined that the best interest of the child standard can overcome the *Roth* standard for ordering visitation." Thus, according to the majority, once the second prong of *Roth* is resolved in favor of the plaintiff, the inquiry is over and visitation must be granted to the plaintiff. Herein lies my fundamental disagreement with the majority. The *Roth* test was established by this court for the purpose of constitutionally saving § 46b-59. It was not intended to replace the statute. It must be interpreted so that it coexists with that statute. "In construing statutory language, [n]o part of a legislative enactment is to be treated as insignificant or unnecessary, and there is a presumption of purpose behind every sentence, clause or phrase . . . and no word in a statute is to be treated as superfluous." (Internal quotation marks omitted.) *Foley* v. *State Elections Enforcement Commission*, 297 Conn. 764, 792, 2 A.3d 823 (2010) (*Gruendel*, *J.*, concurring); see also *Brown & Brown*, *Inc.* v. *Blumenthal*, 297 Conn. 710, 726, 1 A.3d 21 (2010) ("[w]e cannot countenance a reading of a statute that would render it superfluous"). I would conclude that the trial court's approach properly interpreted and applied this court's holding in *Roth* in a manner that did not render the language of § 46b-59 superfluous.

To the contrary, the majority's opinion takes a jurisdictional test and transforms it into a substantive rule, thus destroying the best interest of the child test contained in the wording of the statute. Indeed, if the *Roth* test is all that is required to establish third party visitation, § 46b-59 becomes unnecessary. Certainly, the wording of *Roth* did not contemplate such a result. The court in *Roth* held that "[o]nly if that enhanced burden of persuasion has been met may the court enter an order of visitation." *Roth* v. *Weston*, supra, 259 Conn. 235. The use of the word "may" is instructive since it implies that there was still an element of discretion in the trial court after the test was fully satisfied.

The majority readily recognizes the fact that there should be some acknowledgment of a best interest stan-

dard: "[W]e do not intend to suggest that the best interest of the child is irrelevant after the applicant meets his or her burden of proof under *Roth*. To the contrary, whereas the *Roth* factors establish that there is a relationship that is entitled to be fostered, the best interest of the child guides the court in determining how best to foster that relationship." This language again dictates, however, that once the *Roth* factors are proven, the best interest test should only be employed as a tool to help foster the visitation. Indeed, the majority explicitly limits the use of the best interest standard to "counseling, as well as restrictions on the time, place, manner and extent of visitation." I disagree and conclude that the majority's limitation on the best interest standard is contrary to the plain language of § 46b-59. Section 46b-59 provides in relevant part: "In making . . . such an order [of visitation] . . . the court shall be guided by the best interest of the child . . . ." The legislature did not intend, therefore, that the best interest test be a secondary consideration used in fine-tuning the visitation schedule. To the contrary, the plain language of the statute reveals the legislature's intent that the best interest of the child be the primary consideration in determining whether there should be any visitation. Specifically, the legislature used the mandatory phrase: "the court *shall* be guided by the best interest of the child . . . ." (Emphasis added.) General Statutes § 46b-59. The majority opinion has, however, effectively changed the wording of the statute to read that once visitation has been established under *Roth*, "the best interest of the child [standard] guides the court in determining how best to foster that relationship. Those considerations may indicate, as we previously have discussed, counseling, as well as restrictions on the time, place, manner and extent of visitation." Thus, instead of being guided by the child's best interest in order to determine whether there should be any visitation, a court is now required to use the best interest test only as a secondary guideline to determine the nature of that visitation. In my view, this interpretation is contrary to the clear wording of the statute.

Instead, I would conclude that the *Roth* test should remain as it was intended—a jurisdictional test. Once that jurisdictional test is met, the party seeking visitation is given the opportunity to prove by a fair preponderance of the evidence that visitation is in the best interest of the child. Certainly, by virtue of its finding under *Roth*, a court would necessarily find that there is harm to the child if there is no visitation. That harm must be balanced, however, with the harm the child may experience if there is visitation, among other factors.

This balancing approach is what is missing in the *Roth* analysis because it is a jurisdictional test. Indeed, in *Roth*, this court held that for jurisdictional purposes it was improper for the trial court to have focused its analysis on whether there would be significant harm

to the children if visitation were granted. *Roth* v. *Weston*, supra, 259 Conn. 238. Specifically, this court concluded that, for jurisdictional purposes, the analysis should be "whether there would be significant harm to the children were visitation denied." Id. This statement lies at the heart of my objection to today's decision. In a best interest analysis, it would be incumbent upon the trial court to consider, among many other factors, the best interest of the child if there was visitation, and compare that result to the best interest of the child if there was not visitation. Yet, it is this very analysis that is not allowed in the *Roth* jurisdictional test. The majority then transforms a finding made pursuant to the *Roth* standard, without the benefit of the crucial best interest analysis, into a finding on the best interest standard. Indeed, the majority concludes that "the applicant's establishment of the requisite relationship and harm if that relationship is not preserved necessarily exceeds what would have satisfied the best interest of the child standard." Such a result cannot withstand scrutiny. Indeed, the majority's conclusion lies on a foundation of limestone, without the addition of the clay, gypsum, and water needed to help form the concrete.

First, the majority's conclusion ignores the fact that the standard of proof for the best interest test is a fair preponderance of the evidence. Instead, by substituting the *Roth* findings for the best interest standard, it has exchanged a finding based upon clear and convincing evidence for a best interest finding based upon a fair preponderance of the evidence. Such a heavy burden of proof was rejected in *Fish* v. *Fish*, supra, 285 Conn. 71. As this court explained in *Fish*, the legislature explicitly rejected the clear and convincing standard for a best interest analysis in third party custody cases. Id., 67–68. Yet, the majority opinion ignores the wording of both § 46b-59 and General Statutes § 46b-56. The majority also ignores the fact that the legislature has specifically considered the enhanced burden of proof of clear and convincing evidence in these cases, and rejected such a requirement. The majority's intrusion into the legislative fiat in this area is palpable.

It is interesting to note that in *Roth* this court held that "[the] degree of harm requires more than a determination that visitation would be in the child's best interest. It must be a degree of harm analogous to the kind of harm contemplated by §§ 46b-120 and 46b-129, namely, that the child is neglected, uncared-for or dependent." (Internal quotation marks omitted.) *Roth* v. *Weston*, supra, 259 Conn. 235. The standard of proof necessary for establishing neglect is a fair preponderance of the evidence. *In re Juvenile Appeal (84–AB)*, 192 Conn. 254, 268, 471 A.2d 1380 (1984). Nevertheless, this court held in *Roth* that, although the degree of harm must be analogous to the kind of harm contemplated by §§ 46b-120 and 46b-129, the harm must be established by clear and convincing evidence. *Roth* v. *Weston*, supra, 235.

Thus, we have a conflict between the requisite proof in *Roth* and the requisite proof in a best interest analysis. I would conclude that in order to make the best interest standard function in § 46b-59, it is necessary that the two standards be kept separate and distinct. Otherwise, the best interest standard has been reduced to one of the many factors a court could consider in fashioning the visitation order. There is simply no authority in § 46b-59 that justifies such a result.

To the contrary, I would conclude that there are two separate findings that must be made. In effect, a party meeting the *Roth* requirements has established standing. The party must then satisfy the best interest test. The central problem with equating *Roth* factors with best interest findings is that *Roth* excludes most of the factors that a trial judge would ordinarily consider in a best interest analysis. The *Roth* test focuses solely on the harm to the child if there is no visitation. It does not contemplate the numerous factors contained in § 46b-56 (c).

Section 46b-56 (c) provides: "In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of the following factors: (1) The temperament and developmental needs of the child; (2) the capacity and the disposition of the parents to understand and meet the needs of the child; (3) any relevant and material information obtained from the child, including the informed preferences of the child; (4) the wishes of the child's parents as to custody; (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (8) the ability of each parent to be actively involved in the life of the child; (9) the child's adjustment to his or her home, school and community environments; (10) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendete lite in order to alleviate stress in the household; (11) the stability of the child's existing or proposed residences, or both; (12) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (13) the child's cultural background;

(14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child; (15) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (16) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b. The court is not required to assign any weight to any of the factors that it considers."[3]

As the plain language of the statute explains, in making any visitation order the court shall consider the best interest of the child, and in determining the best interest the court can consider any of these factors. The decision of the majority, however, would exclude most of these factors, except perhaps those sections relating to abuse and neglect, in favor of the *Roth* test. While I agree that an examination of these factors is not mandatory, the majority's opinion removes the possibility for a court to consider several factors in determining whether visitation is appropriate, and instead focuses the inquiry solely on whether the child will be harmed in a manner akin to neglect if visitation were denied. What is the aid of the *Roth* test if a court were to find, by clear and convincing evidence, that a child would suffer harm akin to neglect if visitation were denied, but also found, by clear and convincing evidence, that the child would suffer abuse if visitation were granted? Under *Roth*, such a finding by a trial court would be improper because the trial court cannot consider the effect on the child if visitation is granted. Under the majority's opinion a trial court could not consider the effect on the child of the actions of an abuser in a best interest analysis, if the *Roth* elements were proven, because visitation would already be established. Pursuant to the majority opinion, the best interest standard could only be used to fashion the nature of visitation in terms of counseling, time, place and manner of visitation. Even if a trial court were to find that abuse is likely to occur if visitation is granted, visitation must be granted if *Roth* is proven, with restrictions, such as supervised visitation. I strongly disagree that visitation must be granted in such a situation. Indeed, I would conclude that requiring a child to participate in visitation, even in a supervised setting, with an individual who the court finds is likely to abuse the child, would constitute further abuse. Accordingly, I would conclude that a court should be able to consider as many of the best interest factors enumerated in § 46b-56 (c) as it may choose, or any other factors it may deem relevant, and then make a determination as to whether visitation is in the best interest of the child.

Furthermore, the approach adopted by the majority also ignores the wishes of the child. During the best interest analysis the trial court may consider the wishes of the child, if the child is of sufficient age and capable

of forming an intelligent opinion. See General Statutes § 46b-59. This stage is also missing in the *Roth* analysis, and serves as another reason that a finding under *Roth* cannot serve as the basis for the court's final decision regarding visitation. How could a finding under *Roth* be determinative of visitation prior to hearing from a child who was mature enough to voice his or her desires in the matter? The majority may argue that a trial judge could consider the child's wishes in a *Roth* analysis. Although I agree that a court may consider the child's wishes during a *Roth* analysis, a court would be bound to apply the clear and convincing standard of proof to such evidence. See *Roth* v. *Weston*, supra, 259 Conn. 232. Our case law dictates that consideration of a child's wishes must be made using the fair preponderance of the evidence standard.

The majority also concludes that the trial court in the present case improperly applied the law when it made the following statement: "I wish the court had the power to order parents to behave in a way that is not psychologically injurious to their children. However, I cannot control what goes on in the privacy of one's home." Specifically, the majority concludes that this statement suggests that the trial court concluded that it had no authority to compel the defendant to undertake steps that would allow her to comply with the visitation order and that "[s]uch a conclusion would be improper as a matter of law." I would agree with the majority's legal conclusion on this issue, if I agreed with the majority that the trial court's statement reflected a conclusion that it had no authority to compel the defendant to undertake steps that would allow her to comply with the visitation order. Instead, I read the trial court's statement as a general opinion that courts cannot control all forms of human behavior, especially in the privacy of a person's home. I believe it to be a monumental leap in logic to conclude that this statement has anything to do with the court's view of its power to attach conditions onto any visitation order. The statement is simply too amorphous to attach any legal significance to it. It is also noteworthy that this statement was not challenged by the plaintiff when the court delivered its initial oral decision. Further, the issue was never briefed by the plaintiff. Indeed, the plaintiff raised this claim for the first time at oral argument before this court. There is nothing in the record, other than this vague generality regarding the power of a court to control people in the privacy of their home, for this court to conclude that the trial court did not believe that it had the power to attach conditions to any visitation orders. Accordingly, I would not conclude that the trial court misapplied the law. "It is well established that an 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. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the precise matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Citations omitted; internal quotation marks omitted.) *Remillard* v. *Remillard*, 297 Conn. 345, 351–52, 999 A.2d 713 (2010).

Further, the majority also concludes that it was improper for the trial court to not expressly consider § 46b-56 (i)[4] and all of the tools available to it to effectuate visitation. This conclusion is based on the majority's supposition that, having found that the *Roth* standards were proven, visitation was mandated, and that the best interest test could only be used to fashion the exact nature of that visitation. It is more than somewhat ironic to me that the majority finds fault with the trial court's failure to consider § 46b-56 (i) in its consideration of visitation, yet the majority completely ignores § 46b-56 (c) in its determination of visitation. In view of the fact that I disagree with the legal premise that visitation was required once the court determined that the plaintiff satisfied the *Roth* criteria, I further disagree with the conclusion that it was necessary for the trial court to elucidate every conceivable statute it considered and rejected. Indeed, it is equally possible that the trial court believed that there was no need to examine any conditions of visitation pursuant to § 46b-56 (i) because of its conclusion that, in this situation, there should not be any visitation. This is especially likely in light of the conclusion of Kenneth S. Robson, the court-ordered child and adolescent psychiatrist. Robson concluded: "[T]he relationship between [the plaintiff] and [the defendant] cannot and should not be worked on in this evaluator's opinion. There is enough evidence that it is broken and cannot be fixed." Moreover, we will never know whether the trial court considered § 46b-56 (i) because the plaintiff never requested that the trial court articulate the basis for its decision and whether it considered § 46b-56 (i). Indeed, in the absence of an articulation, we need not speculate as to the failure to mention § 46b-56 (i). "In the absence of [an adequate] record [for appellate review], we presume that the trial court, in rendering its judgment . . . undertook the proper analysis of the law and the facts." *S & S Tobacco & Candy Co.* v. *Greater New York Mutual Ins. Co.*, 224 Conn. 313, 321–22, 617 A.2d 1388 (1992). Accordingly, I disagree with the majority that the trial court improperly applied the law.

The majority opinion further notes that "[t]he trial court's order, in effect, sanctioned the defendant's infliction of harm akin to abuse or neglect and allowed

her to prevail in a case in which she had lost on the merits." This statement further emphasizes the importance that the majority now places on *Roth*. In the majority's view, the defendant had "lost on the merits" when the plaintiff satisfied the *Roth* requirements. In my view, the defendant had not "lost on the merits," since the plaintiff still needed to establish that visitation was in the best interest of the child. Although I agree with the majority that the trial court's decision could be viewed as an imprimatur of the defendant's behavior, I am mindful that the ultimate consideration is the best interest of the child.

Furthermore, in considering this issue, it is important to consider additional undisputed facts. The plaintiff and the defendant never resided together during any part of their relationship. The relationship initially ended in 1993, when the plaintiff called off the wedding that had been planned by the parties. At the end of 1995, the plaintiff and the defendant resumed their relationship. The relationship again ended in 1998. Between 1998 and September, 2002, the plaintiff continued to spend time with the child with the encouragement and consent of the defendant. According to the defendant, between 1998 and 2002, the parties began to have disagreements about the defendant's children that regularly disrupted her family life. She perceived the plaintiff to be undermining her parental authority and denigrating her parenting skills. On September 9, 2002, the plaintiff wrote a letter to the defendant's psychiatrist expressing concern about interactions the plaintiff had observed between the defendant and the child. At this time, she essentially terminated contact between the plaintiff and the child, except for one hour visits on Halloween and Christmas Eve of that year. After January, 2003, the defendant severed all ties with the plaintiff.

With respect to the plaintiff's request for visitation, I note these additional facts because the defendant's belief that her parenting relationship with her children was being undermined by the plaintiff could have given rise to her vituperation. Eight months after the cessation of visitation, the plaintiff filed the application for visitation at issue in this case. The trial court found that the harm that the child would suffer if there was no visitation did not rise to a level requiring involvement by the department of children and families. The trial court opined that with "the termination of the relationship, the child would suffer harm akin to [neglect]. It doesn't mean that the child is actually neglected, uncared for, or dependent, but the severing of the parent-like relationship would be similar to that type of harm. I did make that finding. However, the overriding obligation of the court is to see [that] the child's best interest is protected." I share the concern of the majority that an approbation of the trial court's decision could send the wrong message to anyone wishing to oppose

third party visitation, and could perhaps encourage those who oppose third party visitation to act badly toward their children in the hope of defeating visitation. I would conclude, however, that this case must be confined to its unique facts. It may well be that in other third party visitation cases a court may wish to order counseling or structure a strict visitation schedule in order to facilitate visitation. Such a consideration, however, should be made for the purpose of determining whether there should be any visitation, not merely as a tool used to fashion a visitation order after visitation is a fait accompli on the basis of a *Roth* finding. This case is certainly unique based upon the prior history of the parties. On the basis of the evidence in the record, I conclude that the trial court properly considered the defendant's actions toward the child after visitation and relied on them in deciding not to grant visitation. Furthermore, there is nothing in the record to suggest that the defendant's actions were an intentional attempt performed in order to defeat the visitation request. To the contrary, the trial court found as follows: "I don't believe [the defendant] has the emotional control or the capacity not to psychologically harm her child if the [trial court] approves that this relationship continue. . . . I don't believe that [the defendant] has a capacity to put [the child's] needs in front of her own. She is currently so angry and so out of control regarding her feelings about [the plaintiff] that I believe those feelings would be taken out against [the child]." On the basis of this finding, it is clear that the trial court found that the defendant's actions were not intentional, but rather an emotional reaction to the conduct of the plaintiff, which the defendant was unable to control. Indeed, it is a bit disconcerting to suggest that parties would intentionally act in a manner detrimental to their children in order to defeat visitation. Given the vagaries of life, however, I do not discount the possibility of such a course of human conduct.

The facts of this case are also unique because of the plaintiff's attempt to interfere with the defendant's counseling. It is hardly surprising that the reduction of visitation, and ultimate termination thereof, coincided with the plaintiff's interference with the defendant's psychiatrist. Further, Robson believed that the relationship between the plaintiff and the defendant "should not be worked on . . . ."

On the basis of the foregoing, I would conclude that the trial court properly considered § 46b-59 in making its order. Indeed, in *Roth*, this court concluded that "[w]e therefore delineate a scheme consistent with the aforestated principles that will allow [§ 46b-59] to continue to function within the bounds of the constitution." *Roth* v. *Weston*, supra, 259 Conn. 233. The majority's opinion, specifically its conclusion that the best interest test is to be used as an aid to help fashion visitation, rather than as the primary consideration in determining

visitation, obfuscates the statute, instead of allowing it to continue to function as intended by the legislature. Instead, I would conclude that the trial court properly applied the balancing test in this case. Accordingly, I would conclude that this court's review should be directed toward the question of whether the trial court abused its discretion.

"As has been repeatedly stated by this court, judicial review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the [trial] court correctly applied the law and could reasonably have concluded as it did. . . . Our function in reviewing such discretionary decisions is to determine whether the decision of the trial court was clearly erroneous in view of the evidence and pleadings in the whole record. . . . [W]e allow every reasonable presumption in favor of the correctness of [the trial court's] action." (Citations omitted; internal quotation marks omitted.) *Unkelbach* v. *McNary*, 244 Conn. 350, 366, 710 A.2d 717 (1998). "Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Internal quotation marks omitted.) *Misthopoulos* v. *Misthopoulos*, supra, 297 Conn. 372. In this case, the record is abundantly clear that the trial court had more than a sufficient basis to justify its decision. We must also review the trial court's ruling with a view toward the statutorily mandated best interest of the child. We are looking to what is in the child's best interest. The issue of visitation is not a punishment to the defendant for some perceived bad behavior, or a reward to the plaintiff for perceived good behavior.

The record is replete with sufficient evidence to support the trial court's decision that visitation would not be in the best interest of the child. For instance, the child's sister[5] testified that there was a lot less tension in the household since the child stopped seeing the plaintiff, and that the child seemed like he was doing a lot better and he was not having behavior problems. Robson testified that "[t]he disruptions that would occur with a constant state of turmoil were [the plaintiff] and the child to resume contact would seem to me more harmful than the peace that has been described . . . ." Robson also opined that the defendant is "a competent mother" who is "not unfit." Anne M. Phillips, a court-appointed psychologist, testified that "there is likely significant peril to [the child] in terms of the cost to his relationship with [the defendant] for him to have contact with [the plaintiff]." Attorney Gerard Adelman, the guardian ad litem for the child, also agreed with the trial court's conclusion that visitation was not in the best interest of the child. Thus, there is sufficient evidence in the record to support the court's decision.

"[A]lthough the trial court may rely on expert testimony, it ultimately must make its own independent determination as to the best interest of the child." *In re Davonta V.*, 285 Conn. 483, 489, 940 A.2d 733 (2008); see *In re Jeisean M.*, 270 Conn. 382, 398, 852 A.2d 643 (2004). In undertaking appellate review, this court "must defer to both the trial court's weighing of the expert testimony presented and the trial court's independent factual determination as to what was in [the child's] best interest." *In re Davonta V.*, supra, 489. "An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *State* v. *Garcia*, 299 Conn. 39, 52–53, 7 A.3d 355 (2010). In the present case, the trial court had the benefit of viewing the witnesses and evaluating their credibility, and the record is replete with evidence to support its finding that visitation was not in the best interest of the child.

The majority opinion indicates that once the *Roth* test is satisfied based on a showing of clear and convincing evidence that the effect of a denial of visitation will be akin to neglect or abuse of the child, it is therefore impossible to hold otherwise, based upon a best interest, fair preponderance of the evidence standard. In my view, if indeed that is the case, *Roth* has now become the paragon for bench legislation. My response to this proposition is twofold: First, in order to make sense of § 46b-59, it is necessary to overrule *Roth* regarding the use of clear and convincing evidence as the necessary standard of proof. I would propose the standard of a fair preponderance of the evidence in order to allow *Roth* to coexist both with the visitation statute and our existing case law. Why does *Roth* require the clear and convincing standard of proof for visitation when that is the same high standard that is required for cases involving the termination of parental rights? See *Santosky* v. *Kramer*, 455 U.S. 745, 769–70, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (clear and convincing standard of proof applicable to termination of parental rights). It presents a challenge to find the logic in this requirement. It is necessary that we overrule the standard of proof aspect of *Roth* in order to foster a consistent body of law. The *Roth* standard of proof does not fit with the best interest standard of § 46b-59, in which proof is measured by a fair preponderance of the evidence. If we established a fair preponderance standard in the *Roth* test, as I believe we should, it would complete the mantra enunciated in *Roth* to the effect that § 46b-59 should "continue to function with the bounds of the constitution." *Roth* v. *Weston*, supra, 259 Conn. 233. This sentiment is especially true since in *Roth* this court held that, "in the visitation context, the height-

ened standard of clear and convincing evidence *is not constitutionally mandated*." (Emphasis added.) Id., 231. I conclude that it is neither logically sound nor judicially prudent to allow a court mandated standard to override most of the best interest considerations set forth in § 46b-56 (c). Second, if we do not overrule *Roth* in this regard, we have two conflicting standards of proof. In order to recognize the effect of the statute, it is, therefore, necessary that we recognize *Roth* for what it is—a jurisdictional test that does not consider all of the elements necessary in a true best interest analysis.

I would conclude that there is ample evidence in the record to support the trial court's decision. In light of the existing law, in the absence of our overruling the *Roth* standard of proof, the trial court properly considered the elements of both the *Roth* test and § 46b-59. I would, therefore, defer to the trial court's independent determination as to the best interest of the child. Furthermore, I would conclude that the trial court followed both *Roth* and the statutory mandates of § 46b-59 in arriving at its independent determination as to the best interest of the child. Keeping in mind that a court must be careful not to trespass upon the province of the legislature in its efforts to save a statute from constitutional infirmities, I would conclude that the majority's opinion, regarding the proper role of the best interest standard in third party visitation cases, is contrary to the clear language of the visitation statute. Accordingly, I would affirm the judgment of the trial court.

[1] General Statutes § 46b-59 provides: "The Superior Court may grant the right of visitation with respect to any minor child or children to any person, upon an application of such person. Such order shall be according to the court's best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable, provided the grant of such visitation rights shall not be contingent upon any order of financial support by the court. In making, modifying or terminating such an order, the court shall be guided by the best interest of the child, giving consideration to the wishes of such child if he is of sufficient age and capable of forming an intelligent opinion. Visitation rights granted in accordance with this section shall not be deemed to have created parental rights in the person or persons to whom such visitation rights are granted. The grant of such visitation rights shall not prevent any court of competent jurisdiction from thereafter acting upon the custody of such child, the parental rights with respect to such child or the adoption of such child and any such court may include in its decree an order terminating such visitation rights."

[2] I agree with the majority that we must treat as uncontested the trial court's findings that the plaintiff had satisfied his burden under *Roth*. I also note that although the majority states that "*except as otherwise noted*, this appeal turns on the question of whether the trial court correctly applied the law, an issue over which we exercise plenary review," the majority makes no further reference to the applicable standard of review throughout its opinion. (Emphasis added.)

[3] I note that § 46b-56 was the subject of certain amendments since the time of the trial court's order in the present case; see Public Acts 2005, No. 05-258, § 3; including the addition of § 46b-56 (c). Because any reconsideration of the visitation issue on remand will be governed by the current revision, I refer herein to the current revision of § 46b-56 and its subsections.

[4] General Statutes § 46b-56 (i) provides: "As part of a decision concerning custody or visitation, the court may order either parent or both of the parents and any child of such parents to participate in counseling and drug or alcohol screening, provided such participation is in the best interests of the child."

[5] I note that although the plaintiff also had sought visitation with the child's sister in his application for visitation, she had reached the age of

eighteen while the application was pending and, accordingly, the plaintiff withdrew his request for visitation with her.