CARLA BARROS *v.* ALFRED BARROS
(SC 18934)

Rogers, C. J., and Norcott, Palmer, Zarella, McDonald and Espinosa, Js.

*Argued May 17—officially released August 6, 2013*

*Joseph Chiarelli*, for the appellant (defendant).

*Anne E. Epstein*, for the appellee (plaintiff).

*Adam P. Mauriello*, with whom, on the brief, was *Martin R. Libbin*, for the Court Support Services Division of the Judicial Branch of the state of Connecticut as amicus curiae.

*Opinion*

ROGERS, C. J. The dispositive issue in this expedited public interest appeal is whether a parent must be permitted to have his counsel present at a child custody evaluation in order to satisfy federal and state due process requirements.[1] Pursuant to General Statutes § 52-265a,[2] the defendant, Alfred Barros, appeals from the trial court's denial of his motion to order the Family Relations Office (family relations) of the Court Support Services Division of the Judicial Branch of the state of Connecticut to allow the defendant to complete the child custody evaluation with the assistance of counsel. On appeal, the defendant contends that the family relations policy of barring counsel from its evaluations in child custody proceedings violates procedural due process under state and federal law. The plaintiff, Carla Barros, contends that the policy comports with due process because counsel is provided an opportunity to examine the evaluation and to cross-examine the court-appointed evaluator prior to any binding custody determination. The Court Support Services Division, appearing as amicus curiae,[3] similarly argues that due process does not require that counsel be permitted to attend the child custody evaluation. We conclude that the trial court properly denied the defendant's motion.[4]

The following facts and procedural history are relevant to our disposition of this appeal. On June 24, 2010, the marriage of the defendant and the plaintiff was dissolved pursuant to a separation agreement executed by the parties. Together, the parties have a minor child. As part of the judgment of dissolution, the parties agreed to a parenting plan governing the care and custody of their minor child. The parties agreed to share joint legal custody and that the minor child would reside primarily with the plaintiff. Less than two years after the parenting plan was adopted, however, the parties became entangled in an ongoing dispute over the custody and parenting arrangement.

On September 14, 2011, the defendant filed a post-judgment motion for modification of the parenting plan. Specifically, the defendant sought increased visitation and parenting time, alleging that as the child matured she wanted to spend more quality time with her father. Each party then proceeded to file a series of motions challenging the other party's fitness to maintain custody of the minor child.[5]

On November 18, 2011, the defendant moved to refer the matter to family relations. Family relations provides myriad services to help parties resolve custody and visitation disputes, including negotiation, conflict resolution conferences, and mediation. When parties are unable to reach an agreement, family relations conducts evaluations in order to recommend a parenting plan that is focused on the best interest of the child. See

State of Connecticut, Judicial Branch, Court Support Services Division, "Family Services FAQs," available at http://www.jud.ct.gov/cssd/familysvcs (last visited July 24, 2013). The trial court, *Gould, J.*, granted the defendant's motion and accordingly, on January 19, 2012, referred the matter to family relations.

After meeting with the parties and counsel on January 19, 2012, family relations recommended a comprehensive evaluation. The trial court approved the parties' written agreement requesting the evaluation and made it an order of the court. Family relations provided the parties an overview of the process and a questionnaire to complete prior to their initial appointment scheduled for February 6, 2012. The initial appointment was to consist of a joint conference with both parents and the assigned family relations counselor, Brendan C. Holt.

On February 6, 2012, the defendant appeared for the initial appointment with family relations accompanied by counsel. Pursuant to the policy of family relations of excluding counsel from its evaluations, Holt would not allow the defendant's counsel to participate in the initial appointment. When the defendant declined to participate without counsel present, family relations reported to the trial court that it could not complete the evaluation. Thereafter, the court explained that if the defendant elected to participate in the voluntary custody evaluation process, which is conducted at no cost to the parties, he was required to do so without counsel. During the hearing, the following colloquy occurred:

"[The Defendant's Attorney]: I'm [the defendant's] lawyer and I want to be there during this proceeding because I'm concerned that statements that he might not be making will be attributed to him and interpreted out of context in the sense that he never intended.

"The Court: All right. So obviously the custody evaluation process that [family relations] conducts is completely voluntary, the court has absolutely no ability to force any party or any litigant to participate against their wishes. And if your client chooses not to participate because the preexisting condition to his participation is going to be that his attorney is not going to be present then he does not have to participate. And so it's a voluntary elective service and he doesn't have to do it. So those are his two options. He either does it without you or he doesn't go in and we don't do it."

When the defendant confirmed that he did not wish to participate without counsel, the trial court ordered the evaluation canceled, and family relations withdrew the evaluation referral.

Thereafter, on February 9, 2012, the defendant moved the trial court to order family relations to allow him to complete the evaluation with his counsel present. In his motion, the defendant contended that the family

relations policy violates his right to counsel and that the trial court's order canceling the evaluation punished him for refusing to waive his rights.

On February 10, 2012, the parties once again appeared before the trial court. The court explained that in order to proceed on the defendant's motion for postjudgment modification of custody, the defendant had the burden of demonstrating a substantial change in circumstances since the time of the joint custody agreement.[6] The defendant's attorney agreed that this showing would require a child custody evaluation under the circumstances alleged in this case.[7] The trial court denied the defendant's motion to complete the family relations evaluation with counsel present.[8] The court continued the case to March 9, 2012, and ordered a full custody evaluation by a private evaluator at the defendant's expense if, by that time, the parties were unable to reach a resolution. This appeal followed.

On appeal, the defendant claims that the trial court's denial of his motion to complete the family relations evaluation with counsel present violated his procedural due process rights. We disagree.

We begin with the standard of review and general principles. Whether the defendant has a constitutional procedural due process right to the assistance of counsel in a custody evaluation is a question of law over which our review is plenary.[9] *State* v. *Long*, 268 Conn. 508, 520–21, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004). "[F]or more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard . . . . Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Instead, due process is a flexible principle that calls for such procedural protections as the particular situation demands." (Internal quotation marks omitted.) *In re DeLeon J.*, 290 Conn. 371, 378, 963 A.2d 53 (2009).

"In reviewing a procedural due process claim, we must first determine whether a protected liberty or property interest is involved. If it is, then we must determine the nature and extent of the process due . . . . A parent's right to make decisions regarding the care, custody, and control of his or her child is a fundamental liberty interest protected by the [f]ourteenth [a]mendment. . . . Before a parent can be deprived of her right to the custody, care, and control of her child, he or she is entitled to due process of law." (Citation omitted; internal quotation marks omitted.) *In re Tayler F.*, 296 Conn. 524, 553–54, 995 A.2d 611 (2010).

Accordingly, it is well settled that a parent has a liberty interest in the custody, care, and control of his child and that parent is entitled to due process of law

before he can be deprived of this liberty interest. Nevertheless "[a] due process violation exists only when a claimant is able to establish that he or she was denied a specific procedural protection to which he or she was entitled." (Internal quotation marks omitted.) Id., 554.[10]

Turning to the defendant's claim, whether the defendant has a due process right to have counsel present at a child custody evaluation is governed by the three-pronged balancing test set forth by the United States Supreme Court in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Under this test, "[t]he three factors to be considered are (1) the private interest that will be affected by the state action, (2) the risk of an erroneous deprivation of such interest, given the existing procedures, and the value of any additional or alternate procedural safeguards, and (3) the government's interest, including the fiscal and administrative burdens attendant to increased or substitute procedural requirements. . . . Due process analysis requires balancing the government's interest in existing procedures against the risk of erroneous deprivation of a private interest inherent in those procedures." (Internal quotation marks omitted.) *In re Lukas K.*, 300 Conn. 463, 469, 14 A.3d 990 (2011).

With respect to the first prong of *Mathews*, the defendant has an interest in the custody of his child and, therefore, in a custody adjudication process that grants him custody if it is in the child's best interest. From a procedural due process standpoint, the defendant's custody interest is legitimate only to the extent that those procedures facilitate an accurate custody determination, that is, a custody determination consistent with the child's best interest. See *Schult* v. *Schult*, 241 Conn. 767, 777, 699 A.2d 134 (1997) ("[t]he guiding principle in determining custody is the best interests of the child"). Presumably, both parents and the child share an interest in a custody determination that is in the child's best interest.[11] The difficulty is that each parent has conflicting interpretations of the child's best interest. "In cases in which both parents seek custody, '[n]either parent has a superior claim to the exercise of [the] right to provide care, custody, and control of the children. . . . Effectively, then, each fit parent's constitutional right neutralizes the other parent's constitutional right, leaving, generally, the best interests of the child as the sole standard to apply to these types of custody decisions. Thus, in evaluating each parent's request for custody, the parents commence as presumptive equals and a trial court undertakes a balancing of each parent's relative merits to serve as the primary custodial parent; the child's best interests [tip] the scale in favor of an award of custody to one parent or the other." (Emphasis omitted; internal quotation marks omitted.) *Fish* v. *Fish*, 285 Conn. 24, 45, 939 A.2d 1040 (2008).

Under the second prong of *Mathews*, we must evaluate the risk of an erroneous deprivation of the defendant's custody rights under the existing procedures and the probable value, if any, of additional procedural safeguards. *Mathews* v. *Eldridge*, supra, 424 U.S. 335. We note at the outset that a deprivation of the defendant's custody rights is erroneous only if granting custody to the defendant would have been in the child's best interest. Therefore, we must determine whether the exclusion of counsel from the child custody evaluation creates a greater risk that the defendant will not be granted custody when that custody is in the child's best interest, and whether allowing counsel to be present would enhance the accuracy of the custody determination.

With respect to this prong of the *Mathews* analysis, the defendant argues that the risk that he will be erroneously deprived of his legitimate custody rights under the existing procedures is substantial. He contends that, without counsel present, family relations counselors will disregard the parents' rights in an effort to induce settlement and to dispose of the cases on the trial court's docket. According to the defendant, the exclusion of counsel severely jeopardizes the accuracy of the custody determination because the trial court "will presumably place great weight on that which the [f]amily [r]elations counselor recommends." In essence, the defendant equates the family relations evaluation with the ultimate decision of the trial court and, in so doing, disregards the procedural safeguards attendant to the court's adjudication of custody. We are not persuaded by the defendant's characterization of the evaluation as a proxy for the court's decision and, ultimately, we conclude that there is no risk of an erroneous custody determination because of the failure to include counsel under the existing procedures.

The risk of an erroneous custody determination under the existing procedures is minimal for two reasons. First, it is undisputed that the parties have an opportunity to meet with counsel prior to the child custody evaluation. Counsel can advise the parties on how to respond to the evaluator's questions, or counsel may advise the parties not to discuss certain topics or information altogether.[12] As part of this process, the parties can fill out the custody questionnaire that will be used at the evaluation meeting with their counsel, as occurred in this case. Additionally, the parties have ample opportunity after the evaluation is completed to rebut the findings contained in the evaluation report submitted to the court. See Practice Book § 25-60.[13] Courts have consistently held that when a court considers a child custody evaluation in making its custody determination, due process requires affording the parties an opportunity to review and challenge the evaluation report. See, e.g., *Ex parte Beckham*, 643 So. 2d

1373, 1374 (Ala. 1994); *Eastman* v. *Eastman*, 6 Kan. App. 2d 137, 139, 626 P.2d 1238 (1981); *Gilmore* v. *Gilmore*, 369 Mass. 598, 604, 341 N. E.2d 655 (1976); *Malone* v. *Malone*, 591 P.2d 296, 298–99 (Okla. 1979); *Hall* v. *Luick*, 314 Pa. Super. 460, 465–66, 461 A.2d 248 (1983). "[O]ne of the cornerstones of our system of justice . . . [is] the right of the parties to be aware of all of the evidence considered by the trier of fact in making an adjudicatory determination and to have the opportunity to challenge and answer that evidence. 'Due process' encompasses that principle and requires that if a court bases its custody decision, even in part, on an independent report, the parties—or their attorneys—must be given the opportunity to examine the report and must be allowed the opportunity to cross-examine the investigator and to produce outside witnesses to establish any inaccuracies the report may contain." *Denningham* v. *Denningham*, 49 Md. App. 328, 337, 431 A.2d 755 (1981).[14] In this case, the existing procedures fully afford the defendant a meaningful opportunity to be heard and to contest any inaccuracies in the evaluator's findings before the trial court makes its determination.[15]

Second, the risk of an erroneous custody determination is further mitigated by the fact that reliance on the evaluation is discretionary with the court, as one source to be considered in its custody determination. See *Ridgeway* v. *Ridgeway*, 180 Conn. 533, 542 n.6, 429 A.2d 801 (1980) ("[w]hile it may be helpful to a judge deciding a custody dispute to obtain the disinterested assessment such a report would provide . . . the court [is not] required to do so"); *Payton* v. *Payton*, 103 Conn. App. 825, 832, 930 A.2d 802 ("[a]lthough a report from [family relations] may have been helpful, there was other evidence from which the court could evaluate each party's ability to serve as the custodial parent"), cert. denied, 284 Conn. 934, 935 A.2d 151 (2007). In fact, the trial court is not "bound to accept the expert opinion of a family relations officer."[16] *Yontef* v. *Yontef*, 185 Conn. 275, 281, 440 A.2d 899 (1981). "The court may seek the advice and heed the recommendation contained in the reports of persons engaged by the court to assist it, but in no event may such a nonjudicial entity bind the judicial authority to enter any order or judgment so advised or recommended." *Cotton* v. *Cotton*, 11 Conn. App. 189, 194–95, 526 A.2d 547 (1987).

The probable value of additional procedures under the second prong of *Mathews* also weighs against the defendant in this case. Even if we were to assume that there is a risk of an erroneous custody determination under the existing procedures, allowing counsel to be present at the evaluation would not enhance the accuracy of the court's determination for two reasons. First, a child custody evaluation is not an adversarial setting in which parents require the benefit of legal counsel. Instead, the evaluation is an information gathering process focused on making a factual determination as to

the child's best interest and recommending a parenting plan consistent with that interest.[17] See General Statutes § 46b-6.[18] Because it is an intrinsically evaluative and information seeking process devoid of legal argument or legal determinations, counsel's involvement is unnecessary. See *State* v. *Steiger*, 218 Conn. 349, 368–70, 590 A.2d 408 (1991). In *Steiger*, we concluded that a psychiatric examination did not implicate the right to counsel "because a defendant was not required during a psychiatric examination to make any decisions requiring 'distinctively legal advice . . . .' " Id., 368. Similarly, the parties here do not require the advice of counsel to guide their responses or for any other purpose during a child custody evaluation.

Second, the appropriateness of counsel's presence in the child custody evaluation is diminished because family relations officers must maintain neutrality and impartiality throughout the evaluation.[19] Family relations evaluators assist the court by providing "a disinterested assessment of the circumstances of a case." *Knock* v. *Knock*, 224 Conn. 776, 780 n.2, 621 A.2d 267 (1993); see also *Savage* v. *Savage*, 25 Conn. App. 693, 699–700, 596 A.2d 23 (1991) ("General Statutes §§ 46b-3 and 46b-6 govern pretrial investigations in a pending family relations matter. . . . By utilizing these statutory provisions, a trial court may obtain a disinterested assessment of the facts of a particular case in order to dispose of it properly." [Footnote omitted.]). Furthermore, because the evaluator is a neutral third party, and not a partial adversary, the role for counsel in this setting is nominal. See *State* v. *Steiger*, supra, 218 Conn. 368 (concluding that counsel is not required in psychiatric examination because "the examining psychiatrist was not equivalent to a professional adversary representing the state"). We are not persuaded that infusing the adversarial process into the child custody evaluation will enhance the accuracy of the court's custody determination. Moreover, we are mindful of the potentially adverse effect that counsel's presence may have on the reliability of the custody evaluation.[20] If an evaluator's capacity to provide a disinterested assessment is compromised, then the court is necessarily deprived of a valuable, competent, and impartial opinion on the child's best interest. See *In re Marriage of Adams & Jack A.*, 209 Cal. App. 4th 1543, 1564–65, 148 Cal. Rptr. 3d 83 (2012) (reversing custody modification order when objectivity of child custody evaluator was compromised by bias). To the extent that counsel's presence could interfere with the evaluator's ability to ascertain the child's best interest by stifling the forthright and candid participation of the parties, the value of allowing counsel to be present may well be negative.

With respect to the third and final prong of *Mathews*, the government has a paramount interest in custody adjudication procedures that facilitate an accurate determination of the child's best interest. The touch-

stone for the court's custody determination is "the best interests of the child . . . ." General Statutes § 46b-56 (c); see also *Schult* v. *Schult*, supra, 241 Conn. 777 ("The guiding principle in determining custody is the best interests of the child. . . . The trial court is vested with broad discretion in determining what is in the child's best interests."); *Gallo* v. *Gallo*, 184 Conn. 36, 43, 440 A.2d 782 (1981) ("the court must ultimately be controlled by the welfare of the particular child"). Because the trial court is mandated by statute to make custody determinations "that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests"; General Statutes § 46b-56 (b); the government has a vital interest in procedures that facilitate an accurate determination of the child's best interest. In view of the record, which reflects significant contention between the parties; see footnote 5 of this opinion; we conclude that the exclusion of counsel from the child custody evaluation furthers the government's paramount interest in this case.

As applied to the facts of this case, the *Mathews* balancing test does not support the defendant's due process claim. Under *Mathews*, we must "balanc[e] the government's interest in the existing procedures against the risk of erroneous deprivation of a private interest inherent in those procedures." *In re Lukas K.*, supra, 300 Conn. 469. In this case, the government's interest in protecting the best interest of the child through the existing procedures is weighty. Where, as here, both parents have emotionally charged and conflicting interpretations of their child's best interest, the value of a disinterested assessment to assist the court in making its custody determination is significant. Excluding counsel from custody evaluations furthers the unobstructed information seeking process on which the evaluator relies in assessing the child's best interest and making its recommendation to the court. By comparison, the risk of an erroneous custody determination because of the exclusion of counsel under the existing procedures is insubstantial. The evaluation is but one source that the court may consider in making its custody determination. Parties may meet with their counsel to prepare for the evaluation and, prior to any decision by the court, the parties have an opportunity to rebut the findings and cross-examine the evaluator. Moreover, the record does not support that there is any probable value in allowing counsel to be present at the evaluation. Not only is it improbable that the presence of counsel would enhance the accuracy of the custody determination, but it may well jeopardize the custody determination insofar as the evaluator is unable to ascertain information integral to an accurate assessment of the child's best interest. See footnote 12 of this opinion. Balanced against the risk of an erroneous custody determination inherent in the existing proce-

dures, it is clear that the government's interest in excluding counsel far outweighs the risk of an erroneous deprivation of a private interest. Ultimately, the existing procedures strike the appropriate balance between safeguarding the parties' right to be heard and maintaining the objective nonadversarial setting on which the evaluator's assessment depends. We hold that the existing procedures are constitutionally sufficient and, accordingly, we affirm the decision of the trial court.

The trial court's decision denying the defendant's motion to complete the family relations proceeding is affirmed and the case is remanded for further proceedings according to law.

In this opinion the other justices concurred.

[1] The fourteenth amendment to the United States constitution, § 1, provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

Article first, § 10, of the Connecticut constitution provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

[2] General Statutes § 52-265a provides in relevant part: "(a) Notwithstanding the provisions of sections 52-264 and 52-265, any party to an action who is aggrieved by an order or decision of the Superior Court in an action which involves a matter of substantial public interest and in which delay may work a substantial injustice, may appeal under this section from the order or decision to the Supreme Court within two weeks from the date of the issuance of the order or decision. The appeal shall state the question of law on which it is based.

"(b) The Chief Justice shall, within one week of receipt of the appeal, rule whether the issue involves a substantial public interest and whether delay may work a substantial injustice.

"(c) Upon certification by the Chief Justice that a substantial public interest is involved and that delay may work a substantial injustice, the trial judge shall immediately transmit a certificate of his decision, together with a proper finding of fact, to the Chief Justice, who shall thereupon call a special session of the Supreme Court for the purpose of an immediate hearing upon the appeal. . . ."

[3] In accordance with Practice Book § 67-7, the Court Support Services Division sought permission to appear as amicus curiae, to file a brief, and to participate at oral argument, which request was granted.

[4] The defendant also raised a second issue in this certified appeal: "Can the Family Court penalize the [defendant] for refusing to waive his right to counsel?" On appeal, the defendant argues that the trial court's decision to stay the custody proceedings pending the outcome of this appeal was "an arbitrary, punitive order directed at the [defendant] for refusing to meet with [family relations] without his attorney being in attendance . . . ."

We do not address the defendant's second issue at length because our rejection of the defendant's claim that he is entitled to counsel at the family relations evaluation is dispositive of whether the trial court can penalize the defendant for "refusing to waive his right to counsel" when the defendant had no such right in the first instance. Accordingly, the trial court's stay order was not a punitive action in response to the defendant's exercise of a constitutional right. In any event, we do not agree that the trial court's stay order was arbitrary or punitive under any circumstances.

Practice Book § 61-12 provides in relevant part: "In the absence of a motion filed under this section, the trial court may order, sua sponte, that proceedings to enforce or carry out the judgment or order be stayed until the time to take an appeal has expired or, if an appeal has been filed, until the final determination of the cause. . . ." It is well settled that "the purpose of a stay is to preserve the status quo pending the outcome of [an appeal] . . . ." *Griffin Hospital* v. *Commission on Hospitals & Health Care*, 196 Conn. 451, 461, 493 A.2d 229 (1985).

Notwithstanding our disposition of the first issue, we disagree with the defendant that the record reveals any punitive action by the trial court.

Instead, we conclude that the trial court was well within its discretion under the rules of practice to stay the proceedings.

To the extent that the defendant referenced certain other allegedly punitive actions by the trial court in his filings on appeal but failed to provide any legal analysis, we deem those claims abandoned. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 124, 956 A.2d 1145 (2008); see also *Smith* v. *Andrews*, 289 Conn. 61, 80, 959 A.2d 597 (2008) (declining to review claim when party merely recited facts without citation to legal authority); *Lucarelli* v. *Freedom of Information Commission*, 136 Conn. App. 405, 412, 46 A.3d 937 (declining to review claim when party expressed general dissatisfaction with court's rulings without any legal analysis), cert. denied, 307 Conn. 907, 53 A.3d 222 (2012).

[5] On October 13, 2011, the plaintiff sought a court order that the defendant not be allowed to transport the minor child in his vehicle. The plaintiff alleged that she was concerned that the defendant had been operating a motor vehicle while under the influence of illegal substances. The plaintiff further requested that the trial court order the defendant to undergo forensic hair follicle testing. These motions were later withdrawn. Finally, the plaintiff moved the trial court to appoint a guardian ad litem for the minor child. On December 7, 2011, the trial court appointed Margot Burkle as guardian ad litem.

The defendant filed a motion seeking sole legal and physical custody of the minor child on November 18, 2011. The defendant also moved for a court order that the plaintiff and certain members of her family undergo preliminary drug, alcohol, and psychological testing and evaluation.

[6] "Before a court may modify a custody order, it must find that there has been a material change in circumstances since the prior order of the court, but the ultimate test is the best interests of the child." (Internal quotation marks omitted.) *Harris* v. *Hamilton*, 141 Conn. App. 208, 219, 61 A.3d 542 (2013). "The burden of proving a change to be in the best interest of the child rests on the party seeking the change." *Kearney* v. *State*, 174 Conn. 244, 249, 386 A.2d 223 (1978). "To obtain modification, the moving party must demonstrate that circumstances have changed since the last court order . . . . Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order." (Internal quotation marks omitted.) *Kelly* v. *Kelly*, 54 Conn. App. 50, 55–56, 732 A.2d 808 (1999).

[7] On February 6, 2012, the defendant moved for a court order requiring the caretakers of the minor child, including both the defendant and the plaintiff, to "undergo psychological drug and alcohol evaluations."

With regard to the necessity of child custody evaluation, the trial court and the defendant's attorney had the following exchange:

"The Court: It's going to require expert, professional input. You have alleged mental health disease. . . .

"[The Defendant's Attorney]: Yes, I agree. That's what we need. They need a psychiatric evaluation of the plaintiff. . . . Well, my client is happy to submit to any examination.

"The Court: What we need, he is.

"[The Defendant's Attorney]: Of course he is.

"The Court: And he's going to retain it privately. So the court orders a full custody evaluation done by a private evaluator. Your client is going to incur the full cost of it."

[8] We note that although there is no official court order denying the defendant's motion to complete the evaluation, the motion was implicitly denied in view of the trial court's February 10, 2012 order continuing the case and referring the matter to a private evaluator.

[9] We note that the defendant has alleged violations of both the state and federal constitutions, but has failed to provide an independent analysis of his state constitutional claim under *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). "We have repeatedly apprised litigants that we will not entertain a state constitutional claim unless the defendant has provided an independent analysis under the particular provisions of the state constitu-

tion at issue. . . . Without a separately briefed and analyzed state constitutional claim, we deem abandoned the defendant's claim." (Internal quotation marks omitted.) *In re Tayler F.*, 296 Conn. 524, 552 n.14, 995 A.2d 611 (2010). Accordingly, we analyze the defendant's due process claim under the federal constitution only.

[10] Consistent with the questions presented in this expedited public interest appeal, and the framing of the issues by the parties and amicus curiae, we assume, without deciding, that a due process evaluation is necessary in this case, on the ground that the child custody evaluation at issue could deprive the defendant of a liberty interest in the custody of his child. In addition, we assume, without deciding, that the voluntary child custody evaluation at issue in this appeal is state action.

[11] Indeed, this court has recognized the presumption that fit parents act in their children's best interests. "Building on a long line of cases acknowledging the fundamental right of parents to raise their children as they see fit, *Troxel* [v. *Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)] teaches that courts must presume that fit parents act in the best interests of their children, and that so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the [s]tate to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." (Internal quotation marks omitted.) *Roth* v. *Weston*, 259 Conn. 202, 216, 789 A.2d 431 (2002).

[12] Although we acknowledge that counsel may advise the parties of their right not to answer certain questions, the mere prospect that a party would hesitate to be forthright with the evaluator regarding information that bears on ascertaining the child's best interest is disconcerting. The record reveals that the defendant bases his procedural due process claim, at least in part, on the need for counsel at the evaluation so that he does not make any potentially incriminating or otherwise damaging statements. As the defendant claimed in his application for certification to this court, he has a "right to be represented by counsel in a proceeding by a court agency investigating [him] including allegations of illegal drug use and driving [while] under the influence of alcohol/drugs. . . . Litigants are unsure of their rights and privileges and are unaware of how and when to raise objections at such proceedings."

However unsavory the allegations involved in this custody dispute may be, the central focus of the custody evaluation is determining the child's best interest. To the extent that a parent wants counsel present in order to frustrate an evaluator's access to information that may place that parent in a bad light, then it necessarily follows that counsel's presence could very well jeopardize the reliability of the evaluation in determining the child's best interest.

[13] Practice Book § 25-60 provides: "(a) Whenever, in any family matter, an evaluation or study has been ordered pursuant to Section 25-60A or Section 25-61, the case shall not be disposed of until the report has been filed as hereinafter provided, and counsel and the parties have had a reasonable opportunity to examine it prior to the time the case is to be heard, unless the judicial authority orders that the case be heard before the report is filed.

"(b) Any report of an evaluation or study pursuant to Section 25-60A or Section 25-61 shall be made in quadruplicate, shall be filed with the clerk, who will impound such reports, and shall be mailed to counsel of record, guardians ad litem and self-represented parties unless otherwise ordered by the judicial authority. Said report shall be available for inspection to counsel of record, guardians ad litem, and the parties to the action, unless otherwise ordered by the judicial authority.

"(c) Any report prepared pursuant to Section 25-61 shall be admissible in evidence provided the author of the report is available for cross-examination."

[14] In *Denningham* v. *Denningham*, supra, 49 Md. App. 337–38, the court ultimately held that denying a father who moved for a custody modification a copy of the custody investigation report and an opportunity to be heard, although an error of a "constitutional dimension," was harmless in view of the father's inability to meet his evidentiary burden of demonstrating a strong reason affecting the children's welfare, such as the mother's inability to care for or to meet their children's needs.

[15] We note also that in the context of a court-ordered psychiatric examination of a criminal defendant, when counsel is similarly excluded from the evaluation itself, our courts have held that the right of cross-examination and the opportunity to consult with counsel prior to the evaluation are

sufficient to protect a defendant's sixth amendment right to counsel. *State* v. *Steiger*, 218 Conn. 349, 368–70, 590 A.2d 408 (1991); *State* v. *Johnson*, 14 Conn. App. 586, 592–93, 543 A.2d 740, cert. denied, 209 Conn. 804, 548 A.2d 440 (1988).

Here, the defendant has both the opportunity to meet with counsel prior to the evaluation and the opportunity to cross-examine the evaluator at a subsequent custody hearing. These procedures fully comport with due process.

[16] As this court previously has stated, "[w]e have never held, and decline now to hold, that a trial court is bound to accept the expert opinion of a family relations officer. As in other areas where expert testimony is offered, a trial court is free to rely on whatever parts of an expert's opinion the court finds probative and helpful. . . . In family cases in particular, it would be anomalous to require a trial court to assign particular weight to a report which is based on statements that the trial court may evaluate differently and on circumstances that may have changed. . . . The best interests of the child, the standard by which custody decisions are measured, does not permit such a predetermined weighing of evidence." (Citations omitted.) *Yontef* v. *Yontef*, 185 Conn. 275, 281–82, 440 A.2d 899 (1981).

[17] Holt, the family relations counselor assigned to the matter in the present case, provided a letter to the parties prior to the evaluation that highlights the information seeking character of the evaluation process: "The evaluation process begins with the completion of the enclosed questionnaire that you should bring to your first appointment. During that appointment, I will address the parenting concerns that will be the focus of this evaluation. Each of you will have an opportunity to speak with me separately during subsequent individual appointments. Appointments will also be made to meet with your children and to conduct home visits.

"To expand my understanding of your family situation, you will be asked to provide the names of both professional and personal references whom I will contact as part of this process. At the conclusion of the evaluation, I will share my assessments and offer recommendations for a parenting plan.

"As you can see, your active participation throughout this process is essential."

[18] General Statutes § 46b-6 provides in relevant part: "In any pending family relations matter the court or any judge may cause an investigation to be made with respect to any circumstance of the matter which may be helpful or material or relevant to a proper disposition of the case. . . ."

[19] The American Psychological Association has addressed the importance of an evaluator's impartiality. "Family law cases involve complex and emotionally charged disputes over highly personal matters, and the parties are often deeply invested in a specific outcome. The volatility of this situation is often exacerbated by a growing realization that there may be no resolution that will completely satisfy every person involved. *In this contentious atmosphere, it is crucial that evaluators remain as free as possible of unwarranted bias or partiality.*" (Emphasis added.) American Psychological Assn., "Guidelines for Child Custody Evaluations in Family Law Proceedings," 65 Am. Psychologist 863, 864 (December, 2010).

[20] The Appellate Court has acknowledged the deleterious effect that counsel's presence may have on the accuracy of the psychiatric evaluation of a criminal defendant: "[T]he presence of a third party, such as counsel or a stenographer, at such an examination tends to destroy the effectiveness of the interview. . . . Even if the defendant's counsel were to sit in absolute silence or remain in an adjoining room, with the defendant aware of his presence, the effectiveness of the psychiatric interview could be materially impaired." (Citation omitted; internal quotation marks omitted.) *State* v. *Johnson*, 14 Conn. App. 586, 591, 543 A.2d 740, cert. denied, 209 Conn. 804, 548 A.2d 440 (1988), quoting *United States* v. *Baird*, 414 F.2d 700, 711 (2d Cir. 1969).

This observation is consistent with empirical research documenting the adverse impact that counsel's presence may have on child custody evaluations. The presence of a third party "may significantly influence the responses of the individual who is being evaluated, and/or the evaluator, potentially invalidating the assessment. . . . There is no research to date indicating that the presence of a third party does not have an adverse impact on the assessment process. The opposite is not true: there is a substantial body of research indicating that the presence of a third party may or does have an adverse impact on an assessment." (Emphasis omitted.) M. Ackerman & A. Kane, Psychological Experts in Divorce Actions (5th Ed. 2011) § 2.17, pp. 182–83. Although the majority of the research involved neuropsy-

chological tests, the authors noted that "the principle in child custody evaluations is exactly the same." Id., p. 183.