MICHAEL DIGIOVANNA *v.* DONNA ST. GEORGE
(SC 17624)

Rogers, C. J., and Norcott, Katz, Palmer, McLachlan and Eveleigh, Js.

*Argued October 18, 2010—officially released January 5, 2011**

Lori Welch-Rubin, for the appellant (plaintiff).

Susan King Shaw, for the appellee (defendant).

Opinion

KATZ, J. In *Roth* v. *Weston*, 259 Conn. 202, 789 A.2d 431 (2002), this court held that the legislature could, consistent with due process, authorize a nonparent to obtain visitation with a minor child over a fit parent's objection if the nonparent alleges and proves by clear and convincing evidence that he or she has a parent-like relationship with the child and that the child would suffer harm akin to abuse and neglect if that relationship is not permitted to continue. The present case calls on this court to consider whether a trial court may deny a nonparent's application for visitation when the applicant has met this stringent burden of proof if that court concludes that visitation nonetheless is not in the best interest of the child. Specifically, the plaintiff, Michael DiGiovanna, appeals from the trial court's judgment denying his application for visitation with the minor child of the defendant, Donna St. George, on the ground that, although the plaintiff had met his burden of proof under *Roth*, visitation ultimately would not be in the child's best interest because the defendant would react to that situation by inflicting greater psychological harm on the child than that which would result from the denial of visitation.[1] We conclude that such a conclusion was improper. Accordingly, we reverse the judgment.

The record reveals the following undisputed facts and procedural history. The plaintiff and the defendant began to date in 1987, at which time the defendant had a sixteen month old daughter, Alexandria. Although the parties had planned to marry in October, 1993, shortly before that date, their wedding was called off and the relationship was terminated. In 1994, the defendant met Thomas Kreis, and the two were married in 1995. Following the marriage, Kreis, who was employed at the University of Geneva, resided in Switzerland, while the defendant remained in Connecticut. In 1995, the plaintiff and the defendant resumed their relationship, at which time the defendant was pregnant by Kreis. In 1996, when the defendant gave birth to her son, Eric, the plaintiff was at her side. The plaintiff and the defendant did not reside together, but they maintained their relationship and the relationship between the plaintiff and the defendant's children for the next two years. Kreis periodically came to Connecticut to see the defendant and the children.

In 1998, when Eric was two years old, Kreis died in a plane crash. The defendant, who subsequently was treated for post-traumatic stress disorder and depression, ended her relationship with the plaintiff around this time. She nonetheless permitted Eric and Alexandria to maintain their relationship with the plaintiff over the next four years. In 2001, the defendant began a relationship with another man, who later moved into the defendant's house and with whom the defendant had her third child. In September, 2002, the plaintiff

wrote to the defendant's psychiatrist expressing concerns that the defendant had been abusive to Eric. Shortly thereafter, the defendant cut off contact between the plaintiff and Eric, but permitted the plaintiff to maintain his relationship with Alexandria. The defendant terminated that contact in 2003, after she learned that the plaintiff intended to seek court-ordered visitation with Eric and obtained legal advice that she should not treat the children differently.

In August, 2003, the plaintiff filed an application, pursuant to General Statutes § 46b-59,[2] for visitation with Eric and Alexandria, then ages seven and seventeen, respectively. He alleged that, with the encouragement of the defendant, he had functioned as a father to her children and that terminating this relationship would cause serious and irreparable harm to them. He further alleged that the defendant was psychologically unstable and that he had provided the only stability in the children's lives. While the application was pending, Alexandria turned eighteen years of age, and the plaintiff thereafter withdrew his request for court-ordered visitation with her.

To assist the court in determining whether the plaintiff had met the standard for obtaining visitation with Eric as set forth in *Roth*, the trial court ordered Kenneth Robson, a child and adolescent psychologist, to evaluate the parties and Eric. The parties thereafter stipulated to have Robson's evaluation address: the nature of the relationship between the plaintiff and Eric; the harm, if any, to Eric from the termination, continued cessation and potential reinstatement of the relationship; practical ways to mitigate any harm from the termination of the relationship; and the fitness of the defendant as a mother.

Following the close of evidence, the court concluded that Robson's testimony had raised serious questions about the mental health of both the defendant and the plaintiff to which the court needed answers before it could render a decision. The court therefore ordered the evidence to be reopened "in the best interest" of Eric and appointed Anne M. Phillips, a clinical psychologist, to conduct a further evaluation. Specifically, the court ordered Phillips to address the following questions:

"a. Is the plaintiff's relationship with the child a vehicle for the plaintiff to continue his relationship with the defendant?

"b. Are the plaintiff's feelings toward the child appropriate as between a child and an adult or has the plaintiff substituted the child for an adult relationship?

"c. How will the defendant react to continued contact between the plaintiff and the child? How will the defendant react to continuing contact with the plaintiff (if ordered by the court) in front of the minor child?"

With respect to the first and second questions, Phillips' report concluded that the plaintiff's relationship with Eric was neither a substitute for his relationship with the defendant nor inappropriate. With respect to the third set of questions, the report provides: "[The defendant] evidences marked deficits in her capacity for emotional and behavioral control. Her assertions that she will make no attempt to constrain her opposition and, indeed, will intensify her opposition, in the face of continued contact, is entirely credible. [The defendant] evidences neither the intention nor the capacity to constrain her behavior to external guidelines with issues of intense importance to her. She is likely to react with an intensification of opposition should such access occur. [The defendant] currently evidences limited awareness, or inclination, to limit her negative remarks about and to her two older children regarding issues both related to [the plaintiff] and separate from him. There is no evidence [that] the [defendant] would react positively in front of her son with respect to his having renewed access to [the plaintiff]."[3]

On January 26, 2005, the trial court issued an oral decision stating the following findings and conclusions as the basis for its decision denying the plaintiff's application for visitation. "The court is going to make a finding that the plaintiff has proven by clear and convincing evidence that he had a parent-like relationship between Eric and himself. He acted as a father figure to Eric with [the] encouragement and consent of the defendant. [The plaintiff] was present for the child's birth and his participation in Eric's life was probably far beyond what most divorced fathers would do. He saw the child on a regular basis, shared vacations with him, had him overnight at his house once or more times per week.

"The court is also going to make a finding that [the defendant's] denial of visitation has and will cause Eric actual and significant damage. [The plaintiff] has been a stabilizing presence in what has been a somewhat chaotic life of Eric. [Eric] has two half-siblings. His father died when he was two years old. His mother, according to both [experts'] reports, has suffered from psychological impairments. [The plaintiff] has been a safe harbor and a place where the child could go for comfort and safety.

"The court finds absolutely no credence in the defendant's allegations that there was anything improper about the relationship between [the plaintiff] and either of the children at issue. [The plaintiff] may not be the biological parent of these children, but like an adoptive parent, the court believes he truly loves these children as if they were his own.

"The third prong of *Roth* requires the court to determine whether the harm that the child will suffer is akin

to that [which] might be characterized as neglected, uncared for, or dependent. The court is making a finding that depriving Eric of the stabilizing relationship would put him in the position like that of a child who is neglected, uncared for, or dependent. Therefore, I'm making a finding that the plaintiff has satisfied all prongs of the *Roth* test.

"However, the reason I asked for the psychological evaluation is, despite the fact that the plaintiff has met every element of *Roth*, the court was very concerned about the impact on Eric of the defendant's behavior. During the course of these proceedings, the court was able to observe the demeanor of the defendant, heard her testimony, and was able to draw its own conclusions. Those conclusions were corroborated by . . . Phillips' testimony.

"The bottom line in this case is, despite the fact that every element of *Roth* has been satisfied by the plaintiff, I believe it is not in Eric's best interest to continue a relationship with [the plaintiff]. I'm sorry I have to say that, but I believe that [the defendant] will take it out on Eric. I don't believe she has the emotional control or the capacity not to psychologically harm her child if the court approves that this relationship continue. 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.

"Based on the two psychological reports, I don't believe that [the defendant] has the capacity to put Eric's needs in front of her own.[4] She is currently so angry and out of control regarding her feelings about [the plaintiff] that I believe those feelings would be taken out against Eric. . . . I simply cannot put a seven or eight year old child in a position where every time he has a visit, he is going to come home to hostility and anger and perhaps mistreatment."

In response, the plaintiff argued that the court's finding of harm akin to abuse or neglect, by clear and convincing evidence, required it either to issue the visitation order or to put into effect some kind of supervision or protective regime by the department of children and families (department). The court rejected this suggestion. It reasoned that there is a distinction between the requisite finding under *Roth*—harm "akin to" the neglected, uncared for, dependent standard under General Statutes § 46b-120 or General Statutes § 46b-129—and a finding that this standard "actually" had been met. The court concluded that "the overriding obligation of the court is to see [that] the child's best interest is protected. Even going through all of the *Roth* standards and finding that they were all proven by clear and convincing evidence, the court cannot see fit to award any visitation because the real damage will come as a result of that visitation. I think [the defendant] does not have

the capacity to control her feelings and emotion. When the child comes and goes from that visitation, he will take the brunt of her uncontrollable emotion and anger as opposed to [the plaintiff]. If there is no visitation, I don't believe that the child is going to be emotionally abused by [the defendant]. I do have some concerns based on . . . Phillips' report, but they don't rise to the level of needing [the department's] involvement. I see it as a potential." The trial court thereafter rendered judgment in accordance with its decision denying the plaintiff's application, and this appeal followed.

The plaintiff contends that, because he had met the *Roth* standard, the trial court improperly denied visitation on the basis of the defendant's presumed harmful response to such an order. He contends that the court had authority to order the defendant to undergo counseling to address such reactions. The plaintiff further contends that the trial court's application of § 46b-59 was unconstitutional in the present case because he established the requirements that this court had engrafted onto that statute in *Roth* to satisfy the demands of due process. In connection with this argument, the plaintiff contends that this court should: (1) recognize that Eric has an independent right to associate with the plaintiff under the state and federal constitutions; (2) recognize the primacy of a child's liberty interest over his or her parent's interest when, to the substantial detriment of the child, the parent terminates a relationship that the parent has encouraged between the child and a third party; and (3) reconsider the *Roth* factors and recognize de facto parenting.

We conclude that the trial court improperly determined that the best interest of the child standard can overcome the *Roth* standard for ordering visitation. We further conclude that the trial court improperly failed to consider and to invoke its authority to issue orders to compel the defendant's compliance with any such visitation order. Therefore, the trial court improperly denied the plaintiff's application. Accordingly, we need not consider the plaintiff's claims relating to the adoption of new constitutional or common-law standards.

Before turning to the merits of the plaintiff's appeal, we note that the defendant has contended in her brief to this court that the trial court improperly found that the plaintiff had established the existence of a parent-like relationship and the requisite harm under *Roth* to impose an order of visitation with a nonparent. See *Roth* v. *Weston*, supra, 259 Conn. 234–35. The defendant does not challenge either finding as clearly erroneous. Rather, she contends that the trial court applied an improper standard in reliance on these findings and seeks plenary review. To the extent that the defendant claims that the trial court should have credited certain evidence over other evidence that the court did credit, it is well settled that such matters are exclusively within

the province of the trial court. See *Slack* v. *Greene*, 294 Conn. 418, 430–31, 984 A.2d 734 (2009); *W.* v. *W.*, 256 Conn. 657, 660, 779 A.2d 716 (2001). To the extent, however, that the defendant claims that, before determining that the *Roth* standard had been met, the trial court was required to consider the harm to Eric that would be caused by granting the petition and to find that the defendant was unfit, we agree that these issues are not dependent on a challenge to the trial court's factual findings. Although the defendant should have presented these claims to the court as alternate grounds for affirmance in a preliminary statement of issues pursuant to Practice Book § 63-4 (a) (1), we nonetheless consider them because the plaintiff adequately has responded to them in his reply brief and therefore is not prejudiced by this procedural defect. See *Gerardi* v. *Bridgeport*, 294 Conn. 461, 466, 985 A.2d 328 (2010). Therefore, we treat as uncontested the trial court's findings that the plaintiff alleged and proved the *Roth* factors by clear and convincing evidence. Accordingly, 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. *Maturo* v. *Maturo*, 296 Conn. 80, 88, 995 A.2d 1 (2010).

This court's decision in *Roth* v. *Weston*, supra, 259 Conn. 202, provides the lens through which we view the trial court's decision in the present case. In *Roth*, we confronted a facial constitutional challenge to the broad terms under which the legislature had permitted visitation to be granted under § 46b-59 over a fit parent's objection. Id., 205. The statute provided that the court could permit "any person" to obtain visitation if it is in "the best interest of the child . . . ." General Statutes § 46b-59. This court acknowledged that parents have a constitutionally protected right to make decisions relating to the care and upbringing of their children and a concomitant right to control their children's associations. *Roth* v. *Weston*, supra, 216–17. We further acknowledged "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.) Id., 216. We recognized, however, that there are circumstances in which interests arise that outweigh the parents' fundamental right to make decisions relating to their child. For instance, it was well settled that the state has the right to intervene to protect a child from an unfit parent, as demonstrated by abuse or neglect. Id., 224. We noted that "[a] more difficult issue is whether the child's own complementary interest in preserving relationships that serve his or her welfare and protection can also constitute a compelling interest

that warrants intruding upon the fundamental rights of parents to rear their children. . . . Specifically, we consider whether something less than an allegation and proof in support of abuse, neglect or abandonment will suffice to permit an intrusion." (Citations omitted.) Id., 225.

In resolving that issue in *Roth*, we stated: "We can envision circumstances in which a nonparent and a child have developed such substantial emotional ties that the denial of visitation could cause serious and immediate harm to that child. For instance, when a person has acted in a parental-type capacity for an extended period of time, becoming an integral part of the child's regular routine, that child could suffer serious harm should contact with that person be denied or so limited as to seriously disrupt that relationship. Thus, proof of a close and substantial relationship and proof of real and significant harm should visitation be denied are, in effect, two sides of the same coin. Without having established substantial, emotional ties to the child, a petitioning party could never prove that serious harm would result to the child should visitation be denied. This is as opposed to the situation in which visitation with a third party would be in the best [interest] of the child or would be very beneficial. The level of harm that would result from denial of visitation in such a situation is not of the magnitude that constitutionally could justify overruling a fit parent's visitation decision. Indeed, the only level of emotional harm that could justify court intervention is one that is akin to the level of harm that would allow the state to assume custody under . . . §§ 46b-120 and 46b-129—namely, that the child is 'neglected, uncared-for or dependent' as those terms have been defined." Id., 225–26. Thus, in *Roth*, we substituted the parent-like relationship and substantial harm elements for the statutory elements of "any person" and " best interest of the child," respectively, as a judicial gloss to § 46b-59 to remedy the constitutionally infirm language.[5] Id., 234–35.

Our reasoning in *Roth* demonstrates several principles that are relevant to the present case. First, the court constitutionally may compel a parent to preserve a relationship between a child and a third party, even in the face of strong parental opposition, when the cessation of that relationship would cause substantial harm to the child. Second, 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. Third, although we crafted the standard in *Roth* specifically to address circumstances in which court intervention is required to compel an unwilling parent to allow visitation, fully mindful of the hostility that may exist between parties to such cases, we did not state or give any basis to infer that the parent's opposition, or the effect thereof, should have any bearing on whether the

applicant may obtain visitation. Fourth, because the requisite harm for obtaining visitation over a fit parent's objection is akin to, but falls short of, the neglected, uncared-for or dependent standard for intervention by the department, parents unsuccessfully may oppose visitation without necessarily being unfit or in need of such intervention.

In sum, our decision in *Roth* determined that, once the trial court concludes that the applicant has established the requisite elements of the parent-like relationship and substantial harm akin to abuse or neglect if visitation were denied, the court necessarily has determined that visitation with that applicant is appropriate and should be ordered. What we did not address in that case, and what the present case gives us an opportunity to clarify, is that the best interest of the child determines *how* that order of visitation should be implemented.

In the present case, the trial court found that the plaintiff had met his burden of proof under *Roth*. The trial court nonetheless denied his application because, even though it would cause harm akin to abuse or neglect to deprive Eric of his relationship with the plaintiff, the defendant would inflict even greater harm on Eric if the court were to allow visitation. In other words, the trial court concluded that it would be in Eric's best interest to deny visitation to the plaintiff. In light of the aforementioned principles, this conclusion not only conflicts with *Roth*, but is improper for other reasons.

The defendant was the party causing substantial harm to her child, either by depriving Eric of his relationship with the plaintiff or by demonstrating that she would inflict even greater harm on Eric should she be ordered to permit that relationship to continue. The 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. The trial court stated: "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." These statements suggest that the trial court concluded that it had no authority to compel the defendant to undertake steps that could allow her to comply with the visitation order. Such a conclusion would be improper as a matter of law.

The trial court did not expressly consider its authority under what is now General Statutes § 46b-56 (i).[6] That statute would have allowed the court to order the defendant to undergo counseling to aid her in coming to terms with the court's decision. See *Foster* v. *Foster*, 84 Conn. App. 311, 323, 853 A.2d 588 (2004) (concluding that court had statutory authority to order plaintiff to undergo postjudgment counseling in custody case); see also *Roth* v. *Weston*, supra, 259 Conn. 209 (noting that, in response to defendant father's hostility to children

having any visitation with maternal grandmother and aunt, trial court had ordered all parties to participate in separate counseling sessions with court-appointed psychologist until such time as psychologist determined that counseling no longer was necessary).[7] That statute also would have provided authority for the court, in its discretion, to order counseling for Eric both to ameliorate and to monitor the defendant's actions.

The court also did not expressly consider other tools in its arsenal to effectuate visitation. As in other cases in which courts have been faced with parties intensely opposed to visitation, the trial court could have prescribed specific conditions under which visitation would take place to address legitimate concerns of either party.[8] Although it involved a visitation dispute between a grandmother guardian and a child's cousin, we find instructive the trial court's decision in *In re Kenneth W.*, Superior Court, judicial district of Fairfield, Docket No. CV03-040 43 11 S (April 11, 2005) (39 Conn. L. Rptr. 113). In that case, the trial court had noted, "[w]hile the animosity between the grandmother and the child's cousin could be detrimental to the child, termination of the cousin's rights of visitation is neither the only nor the appropriate remedy." Id., 114. The trial court ordered the following measures to be undertaken while visitation continued: "Both the [g]randmother and [the] child's cousin are to cooperate in appropriate counseling sessions geared toward the cessation of the animosity between the parties or, at the least, minimizing the possibility that such animosity will have a negative impact upon the child"; id.; "[n]either party is to make any disparaging or negative comment about the other party within the hearing of the child"; id.; "[n]either party is to discuss the court's proceedings regarding custody, guardianship or visitation within the hearing of the child"; id.; and "[there] shall be no verbal exchanges between the parties during those times that the child is either picked up or dropped off at the grandmother's home." Id.

Finally, we note that the trial court in the present case did not expressly consider that, should the defendant fail to comply with such orders, it could have used its contempt powers to coerce her compliance.[9] Indeed, to the extent that, despite such actions, a parent would continue to inflict harm on her child that exceeds that which is "akin to" the neglected, uncared-for and dependent standard, a court properly could deem that parent to no longer be presumptively fit. As such, the court may consider whether to order intervention by the department.

Alternatively, we are mindful that there is some language in the trial court's decision to suggest the possibility that the court may not have concluded that it *lacked* authority to compel the defendant's compliance, but, rather, that it would have been *futile* to employ these

tools. Specifically, the court twice stated its view that the defendant lacked the "capacity" not to psychologically harm her child if the court ordered visitation. Such a factual finding as to futility would not only be unsupported by the evidence; see *Simms* v. *Simms*, 283 Conn. 494, 502, 927 A.2d 894 (2007) ("[t]he 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" [internal quotation marks omitted]); but also would not, as a matter of law, justify denying visitation.

First, neither Phillips nor Robson was asked to consider to what extent, if any, counseling or other actions by the court could ameliorate the defendant's presumed harmful response should visitation be granted. Robson was asked to form an opinion as to whether the harm from the *cessation* of the relationship between the plaintiff and Eric could be ameliorated, but was not asked a similar question relating to the *resumption* of the relationship. Although Phillips had stated that the defendant lacked the "capacity" to constrain her behavior, that opinion was in response to the general question of how the defendant would react in front of Eric to an order continuing contact with the plaintiff.

Second, even if these experts had expressed an opinion that none of the tools available to the court would have any impact on the defendant's harmful conduct, it still would have been improper, as a matter of law, for the court to deny visitation to the plaintiff. The plaintiff had met his burden of proof. If there was evidence that the defendant would inflict harm on Eric that clearly exceeded the harm that would be caused by denying visitation with the plaintiff, intervention by the department might be justified.

Finally and significantly, there are policy considerations that weigh heavily against adopting the trial court's approach. That approach would create a powerful incentive in every visitation contest for a parent to threaten to create a hostile environment if visitation is ordered and to communicate an unwillingness to act otherwise. In essence, we would allow a recalcitrant parent to thwart the legislature's intent expressed in the visitation statute, and in so doing, allow a parent's threat, whether real or contrived, to severely harm his or her child. Such a loophole would wholly undermine the careful balance struck by this court in *Roth* between the preservation of a parent's "interest in the care, custody and control of his or her children"; *Roth* v. *Weston*, supra, 259 Conn. 218; and the critical protection of children from "real and substantial emotional harm . . . [that] presents a compelling state interest . . . ." Id., 226. We cannot sanction such a result.

It is important to underscore, however, that we 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. Those considerations may indicate, as we previously have discussed, counseling, as well as restrictions on the time, place, manner and extent of visitation.

Therefore, we conclude that, because the trial court found that the plaintiff had met the *Roth* standard, it improperly denied the plaintiff's application for visitation. Significantly, however, seven years have lapsed since the plaintiff initiated this action.[10] Upon remand, the trial court is free to consider that fact when crafting a visitation order consistent with Eric's best interest. Cf. *In re Shanaira C.*, 297 Conn. 737, 763, 1 A.3d 5 (2010) (concluding that, in light of three and one-half years lapse since trial court rendered custody order that was reversed on appeal, trial court should consider child's best interest at time of new dispositional hearing).

The judgment is reversed and the case is remanded with direction to render judgment in favor of the plaintiff and to conduct a new dispositional hearing.

In this opinion ROGERS, C. J., and NORCOTT and McLACHLAN, Js., concurred.

* January 5, 2011, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The plaintiff appealed from the trial court's judgment to the Appellate Court, and we thereafter transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] 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."

[3] Phillips also testified: "My conclusion was that [the defendant] would maintain and probably escalate her opposition to contact between [the plaintiff] and her son. She was quite vehement that she would leave the country rather than allow such contact to happen. . . . I found it credible that she would intensely oppose any contact. Whether or not she would leave the country, I don't know. . . . [The defendant] seems neither capable nor motivated to change her opposition to Eric's relationship with [the plaintiff]. She is already somewhat discontrolled in her interpersonal relationships and there is likely significant peril to Eric in terms of the cost to his relationship with [the defendant] for him to have contact with [the plaintiff]."

[4] With respect to this issue, Robson's report stated: "[Eric] is pinioned between [the defendant] and [the plaintiff] in a situation that does not lend itself to repair; that is, the 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."

[5] The *Roth* standard for visitation necessarily differs from the one applied when a third party seeks to intervene in a custody proceeding brought pursuant to General Statutes § 46b-56. A third party seeking custody over a parent's objection must demonstrate "that he or she has a relationship with the child akin to that of a parent, that parental custody clearly would be detrimental to the child *and*, *upon a finding of detriment*, *that third party custody would be in the child's best interest*." (Emphasis added.) *Fish* v. *Fish*, 285 Conn. 24, 89, 939 A.2d 1040 (2008). We retained the best interest element as part of the custody analysis because the detriment element in such cases considers only the effect of continuing the existing relationship between the parent and the child, not the result of forging a more substantial relationship between the third party and the child. See id., 47 ("The harm alleged in a visitation petition results from the child's lack of access to the petitioner rather than from the parent-child relationship, which is deemed to be beneficial. . . . In contrast, the harm alleged in a third party custody petition arises from the fundamental nature of the parent-child relationship, which may be emotionally, psychologically or physically damaging to the child." [Citation omitted.]). The best interest element in custody cases therefore is necessary to consider whether the third party is an appropriate person with whom to vest custody, whereas the harm element in visitation cases essentially resolves that question.

[6] 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."

We note that, since the time of the trial court's order in the present case, January, 2005, § 46b-56 was amended by, inter alia, the addition of new subsections and the redesignation of other existing ones. See Public Acts 2005, No. 05-258, § 3 (among other changes, redesignating former subsection [g] as subsection [i]). Because any reconsideration of the visitation issue on remand will be governed by the current revision of § 46b-56, we refer to the codification therein.

[7] We note that some other jurisdictions employ the same counseling tool. See, e.g., *Babin* v. *Babin*, 854 So. 2d 403, 411 (La. App.) (noting that trial court had ordered grandparent and parent to undergo counseling in case where parent objected to visitation), cert. denied, 854 So. 2d 338 (La. 2003), cert. denied sub nom. *Babin* v. *Darce*, 540 U.S. 1182, 124 S. Ct. 1421, 158 L. Ed. 2d 86 (2004); *Herrick* v. *Wain*, 154 Md. App. 222, 229, 838 A.2d 1263 (2003) (noting that trial court had ordered grandparent and father to undergo counseling, under reasoning that "[w]ith counseling, the two adults who are most important in these children's lives may be able to subordinate their own needs and feelings to those of the children"), overruled in part on other grounds by *Koshko* v. *Haining*, 398 Md. 404, 921 A.2d 171 (2007); *Soohoo* v. *Johnson*, 731 N.W.2d 815, 826 (Minn. 2007) (concluding that trial court had abused its discretion in requiring mother to undergo counseling "in the absence of a factual finding that such counseling is in the best interests of the children as opposed to [the parent]").

[8] For example, the defendant had expressed concerns that the plaintiff had attempted to buy the children's affections by excessively spending money on them and buying them toys and gifts. The trial court could have limited the circumstances under which the plaintiff could buy things for Eric.

[9] We note that courts in other jurisdictions have held parents in contempt in nonparent visitation cases. See, e.g., *McMillin* v. *McMillin*, 6 So. 3d 414, 420–21 (La. App. 2009) (affirming judgment of contempt for mother's failure to comply with grandparent visitation order); *Erwin* v. *Erwin*, Ohio Court of Appeals, Docket No. 9-08-15, 2009-Ohio-407 (February 2, 2009) (same).

[10] The extended period of time that lapsed between the trial court's oral decision and our resolution of this matter resulted from the following delays. In its January, 2005 oral decision, the trial court stated that it intended to issue a written decision for purposes of potential appellate review, but would render a decision orally because of the importance of putting the matter to rest. On November 21, 2005, having not received a written decision, the plaintiff filed a motion seeking to have the trial court either issue a written decision or issue its oral decision as its final decision and establish an effective date of final decision so the parties could exercise their appellate rights. Thereafter, the court signed the transcript of its oral decision as its final decision and rendered judgment on November 22, 2005. More than two and one-half years later, on June 9, 2008, the plaintiff filed a motion seeking permission to file a late appellate brief, which the appellate clerk's office

granted. The defendant thereafter filed eight separate motions seeking extensions of time to file her appellate brief, which the clerk's office also granted. After the defendant filed her brief on April 27, 2009, the plaintiff obtained three extensions of time to file his reply brief, which finally was filed on July 9, 2009.

In response to an inquiry at oral argument by a member of this court regarding the seven year delay between the plaintiff's initiation of this action and the date of the oral argument on this appeal, the plaintiff's counsel asserted that this delay stemmed in part from the fact that the parties unsuccessfully had been pursuing a settlement. It is this court's opinion that this delay was unconscionable and undoubtedly contrary to the best interest of the child, a matter that should have been the paramount priority of the parties, their counsel and the court. Although there is plenty of blame to share, we underscore that it is the sacrosanct obligation of both the courts and the parties to these types of disputes to take all necessary steps to resolve such matters promptly.