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A. D. *v.* L. D.*
(AC 44326)

Elgo, Suarez and Bear, Js.

Syllabus

The defendant father, whose marriage to the plaintiff mother previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's motion to modify custody and visitation and awarding her sole legal and physical custody over the parties' minor children. The trial court found that there had been a material change in circumstances since the dissolution judgment warranting a modification of the child custody orders and that it was in the best interests of the minor children to modify the defendant's access and visitation schedule. *Held*:

1. The defendant could not prevail on his claim that the trial court's modified custody orders violated his federal constitutional right to family integrity: the orders did not effectively terminate his parental rights but, rather, suspended his access to the children and established a mechanism for him to reunify with his minor children, the orders provided the defendant with an opportunity to have dinner with his minor children each week if they elected to participate, permitted the minor children to contact the defendant, required the plaintiff to ensure that the minor children meet with a reunification therapist twice per year to assess the possibility of reunification, required the plaintiff to keep the defendant reasonably informed of her decisions regarding the children, and permitted the defendant to file a motion to modify the orders once he completed an intimate partner violence program, giving the defendant a course of action to reestablish his parenting access and contact with his minor children; moreover, the defendant's assertion that the only permitted potential access he may have to his children was controlled by the plaintiff who he claims had alienated the children from him was unsupported by the evidence in the record.
2. The defendant failed to demonstrate that the trial court abused its discretion by creating a near impossibility that he could ever regain visitation with his children: the modified custody orders did not require the defendant to engage in reunification therapy with his children, which the defendant claimed was nearly impossible to satisfy, before being able to file a motion for modification of the orders, and imposed on the defendant only an obligation to complete an intimate partner violence program before he was able to file a motion for modification; moreover, the defendant has already completed the intimate partner violence program and has filed a motion for modification of the orders.
3. The trial court did not violate the defendant's due process rights by applying the well established fair preponderance of the evidence standard in considering the plaintiff's motion for modification of custody; under *Cookson* v. *Cookson* (201 Conn. 229), our Supreme Court addressed the issue of what standard of proof is required in child custody proceedings to satisfy the requirements of the due process clause of the United States constitution, and concluded that a fair preponderance of the evidence standard was the proper standard of proof when deciding a motion to modify custody required to satisfy due process under both the state and federal constitutions.

Argued October 6, 2022—officially released June 27, 2023

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Hon. James G. Kenefick, Jr.*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Diana, J.*, granted the plaintiff's

motion to modify custody and visitation, and the defendant appealed to this court. *Affirmed.*

Kenneth A. Votre, for the appellant (defendant).

Marianne J. Charles, for the appellee (plaintiff).

Opinion

SUAREZ, J. In this dissolution matter, the defendant, L. D., appeals from the judgment of the trial court granting a postjudgment motion to modify custody and visitation filed by the plaintiff, A. D. On appeal, the defendant claims that the court (1) violated his fundamental right to family integrity as guaranteed under the constitution of the United States, (2) created a near impossibility that he could ever regain visitation with his children, and (3) violated his federal due process rights by applying an incorrect burden of proof to the plaintiff's motion to modify custody. We affirm the judgment of the court.

The following undisputed facts and procedural history are relevant to the resolution of this appeal. The parties were married on August 7, 1999, and there are six children issue of the marriage: G, D, V, S, N, and T.[1] On February 8, 2016, the plaintiff commenced a dissolution of marriage action. Following a highly contested trial held over twenty various days from July, 2017, through February, 2018, the court, *Hon. James G. Kenefick, Jr.*, judge trial referee, issued a memorandum of decision on June 11, 2018, in which it dissolved the marriage of the parties. With respect to custody, the court ordered that the "parties shall share joint legal custody of the six minor children. The [plaintiff] shall have primary physical custody and the [defendant] shall have parenting time pursuant to their parenting plan dated June 20, 2017 . . . their agreement of December 18, 2017 . . . and their stipulation of December 18, 2017 . . . all of which were approved and so ordered by the court."

Article II of the parenting plan governs the regular parenting schedule of the parties. It provides in relevant part that the defendant "shall have parenting time with the three minor children, [S, N, and T], every other weekend from Friday after school until Sunday at 7:00 p.m. . . . and every Wednesday from after school until 8:00 p.m. . . . The [defendant] and the three minor children, [G, D, and V] shall continue in weekly reunification therapy . . . for a period of at least one year." The parenting plan further provides that the schedule may be modified upon mutual written agreement of the parties.[2]

Since the date of judgment, the parties have engaged in ongoing postjudgment litigation. Following an evidentiary hearing spanning eighteen nonconsecutive days, the court, *Diana, J.*, issued a memorandum of decision on October 6, 2020, resolving forty-one outstanding postjudgment motions. Among the motions resolved by the court, and the subject of the present appeal, was a motion filed by the plaintiff on August 5, 2019, seeking to modify the June 11, 2018 custody orders by granting her sole legal and physical custody of

the minor children.[3] In that motion, the plaintiff claimed that, since the date of judgment, there had been a substantial change in circumstances warranting a modification of the child custody orders and that it was in the best interests of the minor children to modify those orders. In support of her motion, the plaintiff alleged that the defendant refused to cooperate and/or communicate with the plaintiff regarding issues relating to the minor children, that the defendant's behavior had become increasingly erratic and volatile, that the minor children had limited contact with the defendant, and that the defendant had maintained a pattern of harassment, made numerous frivolous filings, and continuously sought ex parte motions for modification of custody.

In its October 6, 2020 memorandum of decision, the court found the following facts: "The three older children have not visited with the defendant since November, 2017, and the three younger children have not visited with the defendant since September 3, 2018.[4] On the preceding day, the defendant broke his son's phone and slapped two of the children, leaving a mark on his daughter's face. Since then, the defendant has arrived to pick up the children in an attempt to exercise his visitation without any success, as the children have summarily rejected his pleas. They tell him to leave, that they hate him and will not visit with him, and that he is not their father. The defendant has recorded . . . many of these troubling interactions, including his son kicking his car and taking air out of his tires. . . .

"This unhealthy behavior continues with the communication between the defendant and the children. The defendant sends each of the children a positive and uplifting text message most days, the majority of which never receive a reply. If there is communication from the children to the defendant, it is all extremely negative. The upset in this relationship between the defendant and his children is extremely dysfunctional and at a crisis stage." (Citation omitted; footnote added.)

The court further found that "[t]he children allege that their father abused them. He denies the allegations. They have told him how and why they feel the way they do. He refuses to listen to them. Instead, he informs the children that they have been poisoned and brainwashed by their mother who has alienated them from him.

"At this point, this chaos and upset caused by the defendant trying to force visitation and communication with [the] children who reject him has been going on for approximately two years. The result has harmed the children, who have acted out as a result of this forced relationship by being hysterical, hyperventilating, walking away from the defendant, crying and shaking, refusing his gifts and affection, having panic attacks, missing school, stopping participation in extra-

curricular activities, and calling the police. As such, the [local] police department and the . . . Department of Children and Families ([department]) have been involved, but to no avail. Protective orders were issued on behalf of a few of the children against the defendant after [he] was arrested. Those matters have since concluded, however, a protective order still remains on behalf of the parties' oldest daughter against the defendant. Additionally, on February 24, 2020, the court issued an interim order whereby the defendant was ordered not to go to the children's school(s) or the plaintiff's residence."

Moreover, the court found that "[t]he communication between the parties, as seen in multiple email exhibits, has also materially changed since the [June, 2018] memorandum of decision was issued. . . . Their ability to communicate has severely declined, going from bad to worse. The court finds the communication to be unhealthy and unproductive. The plaintiff is found to regularly inform the defendant of the children's activities. The defendant's responses are hostile, accusatory, and insulting. Numerous matters that seek and request a reply from the defendant go unanswered." (Citation omitted.)

The court found that the defendant and his children participated in reunification therapy as required by the parenting plan. However, the court found that the reunification therapy was terminated by the reunification therapist after only two sessions in the summer of 2019. According to the testimony at the hearing from the reunification therapist, not all families can be reunified. The therapist testified that reunification therapy "was not appropriate to continue as the children were afraid, shaking, crying, and anxious." The court found that repeated efforts to reunify had been made and that continued efforts at reunification would be counterproductive and cause the children more harm and distress than good.

In addition to reunification therapy, the court found that "every other reasonable service has been exhausted in an effort to calm the tension and resolve the ongoing disputes between the parties. Those services include a guardian ad litem, a parent coordinator, [the department's] Intimate Partner Violence Program, Family Services Intensive Case management, the local police department, two binding arbitrations, and various protective orders, one of which is still in effect. All of these services, however, have been insufficient to help this family, in part, because of the defendant's attitude and belief that he is blameless.

"This belief and attitude, in part, stems from the defendant's obsession with trying to prove that the plaintiff was having an affair during the marriage. Judge Kenefick found no credible evidence to support this claim. . . . The defendant has not changed his behav-

ior and continues to make the same claim to the children and to this court. . . . This same obsessive conduct is also found by this court in the defendant's repeated claim that the plaintiff has alienated the children from him. . . . The court finds that no credible evidence was presented to support this claim." (Citations omitted.)

Additionally, the court found that the defendant's lack of relationship with his children was "due to his own actions over the years, not due to the actions of the plaintiff. In fact, the court finds that the plaintiff has tried to encourage the children to visit with the defendant when they refuse. . . . Unfortunately, the defendant's focus has been to prove alienation, not to repair his damaged relationship with the children. This can be seen in the communication between the defendant and the children, which shows how he is unable to understand and meet the needs of the children. . . . [The children] have consistently and clearly informed the defendant, the police, the school, the school resource officer, [the department], the reunification therapists, and the plaintiff that they do not want to have contact with the defendant. The defendant's reaction to hearing from the children that they do not want to have contact with him is to continue to contact them and to focus on their physical appearances as opposed to their emotional well-being." (Citation omitted.)

The court found the plaintiff to be credible and the defendant to be defiant and misguided regarding the plaintiff and the minor children. It described the defendant as "insistently rigid, faultless, [and] unable [to] follow court orders or professional instruction" and found that "[he] lacks any insight into how these same attributes interfere with his ability to have a relationship with [his] children." The court found that the defendant "actively disbelieves the children when they tell him how they think and feel, and therefore he is incapable of meeting their needs." The court ultimately found that there had been a material change in circumstances since the date of judgment regarding custody of the parties' four minor children and that it was in the best interests of the children to modify the defendant's access and visitation schedule.

The court granted the plaintiff's August 5, 2019 motion to modify custody and ordered that the plaintiff "shall have sole legal and physical custody of the parties' minor children." The court suspended the defendant's parenting schedule with the minor children until further order of the court and ordered that the defendant not "initiate contact with the children by any means, including, but not limited to, text, email, phone call, or social media." The court further ordered that the children have the option of a dinner visit with the defendant every Wednesday from 5:30 to 7:30 p.m. at a local restaurant in the town where the children reside. The court ordered the plaintiff to advise the defendant

by Tuesday as to whether any of the children chose to attend the Wednesday dinner visit. The court ordered the plaintiff to "ensure that the minor children meet with a reunification therapist twice a year . . . to reassess the initiation of reunification therapy." The court further ordered that, if "the defendant successfully completes [the department's] Intimate Partner Violence Program, he may file a motion with the court to modify this decision to reestablish parenting access and contact with his minor children." This appeal followed. Additional facts will be set forth as necessary.

We begin by setting forth the following relevant legal principles. "General Statutes § 46b-56 provides trial courts with the statutory authority to modify an order of custody or visitation. General Statutes (Rev. to 2019) § 46b-56 (c) directs the court, when making or modifying any order regarding the custody, care, education, visitation and support of children, to consider the best interests of the child, and in doing so [the court] may consider, but shall not be limited to, one or more of [sixteen enumerated] factors[5] . . . . The court is not required to assign any weight to any of the factors that it considers . . . .

"Our standard of review of a trial court's decision regarding custody, visitation and relocation orders is one of abuse of discretion. . . . [I]n a dissolution proceeding the trial court's decision on the matter of custody is committed to the exercise of its sound discretion and its decision cannot be overridden unless an abuse of that discretion is clear. . . . The controlling principle in a determination respecting custody is that the court shall be guided by the best interests of the child. . . . In determining what is in the best interests of the child, the court is vested with a broad discretion. . . . [T]he authority to exercise the judicial discretion [authorized by § 46b-56] . . . is not conferred [on] this court, but [on] the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one [that] discloses a clear abuse of discretion can warrant our interference. . . .

"The trial court has the opportunity to view the parties [firsthand] and is therefore in the best position to assess the circumstances surrounding a dissolution action, in which such personal factors as the demeanor and attitude of the parties are so significant. . . . [E]very reasonable presumption should be given in favor of the correctness of [the trial court's] action. . . . We are limited in our review to determining whether the trial court abused its broad discretion to award custody based upon the best interests of the child as reasonably supported by the evidence." (Citations omitted; footnote in original; internal quotation marks omit-

ted.) *Dolan* v. *Dolan*, 211 Conn. App. 390, 398–400, 272 A.3d 768, cert. denied, 343 Conn. 924, 275 A.3d 626 (2022).

I

The defendant first claims that the court's modification of the custody orders violated his federal constitutional right to family integrity. He asserts that the court's termination of his custody, visitation, and access to his children effectively terminated his parental rights without any means to ensure reunification or reinstitution of his parental rights, and, therefore, the court's modification orders violated his fundamental right to family integrity. Specifically, he argues that the only permitted potential access he may have to his children is entirely controlled by the plaintiff, who, he maintains, has alienated the children from him. We are not persuaded.

"It is well established that the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court. . . . The rights to conceive and to raise one's children have been deemed essential . . . basic civil rights of man . . . and [r]ights far more precious . . . than property rights . . . . The integrity of the family unit has found protection in the [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment . . . the [e]qual [p]rotection [c]lause of the [f]ourteenth [a]mendment . . . and the [n]inth [a]mendment [to the United States constitution] . . . ." (Citation omitted; internal quotation marks omitted.) *In re Zakai F.*, 336 Conn. 272, 291–92, 255 A.3d 767 (2020). Our Supreme Court has also stated that "[t]he termination of parental rights is defined . . . as the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child[ren] and [their] parent." (Internal quotation marks omitted.) *In re Tresin J.*, 334 Conn. 314, 324–25, 222 A.3d 83 (2019).

In the present case, the October 6, 2020 orders do not effectively terminate the defendant's parental rights. Rather, they suspend the defendant's access to the children and establish a mechanism for the defendant to reunify with his minor children. The October 6, 2020 orders provide the defendant with an opportunity to have dinner with his minor children each week if they elect to participate, and the orders also permit the minor children to contact the defendant. Moreover, the orders require the plaintiff to ensure that the minor children meet with a reunification therapist twice per year to assess the possibility of reunification and to keep the defendant reasonably informed of the plaintiff's decisions regarding the children. Additionally, the October 6, 2020 orders permit the defendant to file a motion to modify the custody and visitation orders once the defendant completes the department's Intimate Partner

Violence Program, giving the defendant a course of action to reestablish his parenting access and contact with his minor children.

The defendant's assertion that the only permitted potential access he may have to his children is controlled by the plaintiff who has alienated the children from him is unsupported by the evidence in the record. In his brief to this court, the defendant asserts that the court entirely ignored his concern that the plaintiff was alienating the children from him after hearing testimony from James Connolly, the court-appointed psychologist who performed the psychological evaluation of the family during the initial dissolution proceedings, who stated that "there is a high likelihood that the [plaintiff] would attempt to interfere with the contact and relationship of her soon to be ex-spouse with her children going forward." In its memorandum of decision, however, the court addressed both Connolly's testimony and the defendant's claim of alienation. The court specifically found that "no credible evidence was presented to support this claim." The court found that the defendant's lack of relationship with the children was "due to his own actions over the years" and not due to the actions of the plaintiff. The court specifically found that the plaintiff has encouraged the children to visit with the defendant after the children refuse to visit with him.

With respect to Connolly, the court found his testimony to be "unpersuasive and unreliable." Contrary to the defendant's assertion, the court noted that Connolly was not ordered by the court to perform an updated evaluation, nor was he provided with the essential and complete information to do so. Instead, the court found that "[t]he defendant and his counsel contacted [Connolly] directly contrary to Practice Book [2020] § 25-60A (b) and (c)[6] . . . [and that] he was only provided with selected information from the defendant and/or his counsel." (Footnote added.) "[A]s a reviewing court, [w]e cannot . . . pass upon the credibility of the witnesses. . . . Rather, [i]t is within the province of the trial court, when sitting as the fact finder, to . . . determine the credibility and effect to be given the evidence." (Internal quotation marks omitted.) *In re Cameron H.*, 219 Conn. App. 149, 162, A.3d , cert. denied, Conn. , A.3d (2023).

In light of the foregoing, we conclude that the defendant has failed to demonstrate that the court's modified custody orders violated his right to family integrity. Accordingly, this claim fails.

II

The defendant next claims that the "court's orders create a near impossibility that [he] can ever regain visitation with his children." He argues that the provisions of the October 6, 2020 orders, which purport to provide a path for reunification with his children, are

nearly impossible to satisfy. Specifically, the defendant asserts that the October 6, 2020 orders requiring him to complete the Intimate Partner Violence Program before he may file a motion to modify the orders, and the order requiring the plaintiff to ensure that the minor children meet with a reunification therapist twice per year, create a near impossibility for him to regain access to the minor children. With regard to the order concerning the Intimate Partner Violence Program, he asserts, without any reference to the record, that the program cannot be completed without the cooperation of the children and, potentially, the plaintiff. He argues that his inability to contact his children, coupled with the children's refusal to interact with him, makes the requirement that he complete the Intimate Partner Violence Program nearly impossible to satisfy. Moreover, the defendant argues that the provision requiring the children to meet with a reunification therapist twice per year is "entirely in control of the plaintiff," who is not likely to ensure the children will attend the visits. Further, he maintains that, even if the children do meet with a reunification therapist, the reunification therapy is unlikely to further the goal of reunification if the children meet with the same therapist that the court previously appointed, who testified that not all families can be reunified.

This claim, which we consider under the abuse of discretion standard as previously set forth in this opinion, fails for two reasons.

First, the October 6, 2020 orders do not require the defendant to engage in reunification therapy with his children before he may file a motion for modification of the custody orders. The October 6, 2020 orders only impose on the defendant an obligation to complete the department's Intimate Partner Violence Program before he may file a motion for modification.

Second, the defendant has completed the Intimate Partner Violence Program and has filed a motion for modification of the October 6, 2020 orders.[7] Our careful review of the trial court's voluminous file, of which we take judicial notice,[8] reflects that on November 30, 2021, the defendant filed with the court a request for leave to file a motion for modification of the October 6, 2020 orders. In the November 30, 2021 request for leave, the defendant represented to the court that he completed the Intimate Partner Violence Program as a reason for leave to file a motion for modification.[9] On February 14, 2022, the defendant filed a second request for leave to file a motion for modification with an attached amended motion for modification of custody orders. In the attached amended motion for modification of custody orders, the defendant again represented that he "successfully completed [the] Intimate Partner Violence Program, as was ordered." On May 2, 2022, the court, *Connors*, *J.*, held a hearing on the defendant's request

for leave to file a motion for modification and, after hearing from the defendant's witness, found that he "has proved to the satisfaction of the court that [he] has completed the [department's] Intimate Partner Violence Program ordered by the court . . . ." On October 5, 2022, the court, *Grossman*, *J.*, conducted a remote hearing on the defendant's motion for modification and denied the motion in a memorandum of decision issued on December 27, 2022. That court found: "The situation between the defendant and his children has declined. The defendant is distressed by his poor relationship with his children but unwilling to acknowledge his role in the circumstances. He has not changed his behavior or gained any insight into how his actions negatively impact his children. The defendant has elevated his desire for vindication and punishment over his desire for a relationship with his children."

For the foregoing reasons, we conclude that the defendant has failed to demonstrate that the court abused its discretion.

III

The defendant's final claim is that the court's application of the preponderance of the evidence standard violates his due process rights.[10] He claims that the October 6, 2020 orders effectively terminated his parental rights and, therefore, the court was required to apply the clear and convincing standard of proof.[11] We are not persuaded.

Our Supreme Court, in *Cookson* v. *Cookson*, 201 Conn. 229, 514 A.2d 323 (1986), previously addressed the issue of what standard of proof is required in child custody proceedings to satisfy the requirements of the due process clause of the United States constitution. In doing so, our Supreme Court considered the three factors enumerated in *Santosky* v. *Kramer*, 455 U.S. 745, 754, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). In *Santosky*, the United States Supreme Court held that, in a hearing on a petition to terminate parental rights, due process requires that the state prove statutory termination criteria by clear and convincing evidence rather than by a fair preponderance of the evidence. Id., 769–70. "The three factors considered in *Santosky* to determine whether a particular standard of proof in a particular proceeding satisfies due process are: (1) the private interests affected by the proceeding; (2) the risk of error created by the chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure." *Cookson* v. *Cookson*, supra, 234–35. After discussing that standard, our Supreme Court concluded that a fair preponderance of the evidence standard was the proper standard of proof, when deciding a motion to modify custody, required to satisfy due process under both the state and federal constitutions. Id., 239–40.

The court reasoned: "This court in *In re Juvenile Appeal (83-CD)*, 189 Conn. 276, 455 A.2d 1313 (1983), dealt with the issue of the proper standard of proof to be applied in a temporary custody hearing. There we examined the reasoning in *Santosky* and concluded that the higher standard of 'clear and convincing evidence,' required by *Santosky*, was not required in a temporary custody hearing because '(1) the nature of the private interests concerned in the two kinds of hearings differs, and (2) the deprivation of rights in a temporary custody adjudication is neither final nor irrevocable.' . . .

"In the present case the nature of the private interests involved likewise differs substantially from those in *Santosky*. In this instance, prior to judicial intervention, neither parent had an exclusive right to the custody of the children; their rights were joint and equal. General Statutes [Rev. to 1985] § 45-43 . . . . This contrasts sharply with the situation in *Santosky* where the parents were pitted against the state and faced the prospect of losing the children permanently to a complete outsider to the family unit. Further, the modification of a custody decree does not involve the same complete severance of the parent-child relationship that results from the termination of parental rights. . . . After the modification of a custody order the noncustodial parent, generally speaking, retains the right to maintain a relationship with the children and to participate, albeit to a more limited extent in their upbringing. See General Statutes [Rev. to 1985] § 46b-56 (e) . . . . Also a custodial determination is not a 'final and irrevocable' and immutably permanent decision as is that effected by a termination proceeding. . . . The court has continuing jurisdiction over a custody decree; see [General Statutes (Rev. to 1985)] § 46b-56 (a) and (b); and the noncustodial parent retains the option to move to modify custody based on a substantial change in circumstances affecting the welfare of the children. . . .

"In sum, while substantial, the private interests involved in a custody dispute between parents and the effect on those interests wrought by a judicial transfer of custody are not such that the constitution requires the use of a 'clear and convincing' standard of proof by the tribunal making the decision.

"We must also consider whether the possibility of an erroneous deprivation of custody by the use of a 'preponderance of the evidence' standard deprived the plaintiff of due process of law. The United States Supreme Court in *Santosky* stated that 'the relevant question is whether a preponderance of the evidence standard fairly allocates the risk of an erroneous [fact-finding] between these two parties.' . . . The court answered that question by determining that due process required a 'clear and convincing' standard in termination proceedings, based largely on what it perceived to be the unequal contest between the state and the par-

ents from whom the state sought custody. It was the court's view that in a proceeding to terminate parental rights the ability of the state to assemble its case almost 'inevitably dwarfs the parents' ability to mount a defense.' . . . Additionally, the court pointed out that in a termination proceeding there is a striking disproportion in the litigation options of the adversaries because the parents do not have a 'double jeopardy' defense against repeated state termination efforts. 'If the [s]tate initially fails to win termination, as New York did here . . . it can always try once again to cut off the parents' rights after gathering more or better evidence. Yet, even when the parents have attained the level of fitness required by the [s]tate, they have no similar means by which they can forestall future termination efforts.' . . .

"The United States Supreme Court found that those factors coupled with the use of a 'fair preponderance of the evidence' standard created a 'significant prospect of erroneous termination' . . . and that the consequent social cost of the complete destruction of the natural family by an erroneous termination of parental rights was too great a risk to assign to a 'preponderance of the evidence' standard, which allocates the risk of error nearly equally between destruction of the family unit and mere maintenance of the status quo of the children in a foster home.

"A custody dispute between parents does not present the same inherent disparity in resources, disproportionate litigation options or the risk of total destruction of the family unit which would constitutionally require the use of the higher standard of proof by 'clear and convincing' evidence.

"In *Santosky*, the final factor that the court addressed was the 'countervailing governmental interest supporting use of the challenged procedure.' . . . In a proceeding to determine custody between parents, since the government is not a party, this factor would translate to whether the competing interests of those affected by the litigation support the use of a 'preponderance of the evidence' standard or require the use of a 'clear and convincing' standard.

"In a custody dispute between parents . . . each parent and the children have interests which conflict in varying degrees but have relatively equal weight on the societal scale. The custodial parent has an interest in retaining custody, the noncustodial parent has an interest in the well-being of the children, and the children have an interest in continuity of care. The overriding concern, however, is that the children be placed in an environment that secures their best interests.

"When the interests of the parents vis-à-vis each other and the children allegedly conflict, that conflict is best resolved by placing the burden on the [moving] parent

to prove by a fair preponderance of the evidence that a [modification] of custody is in the best interests of the children. Where 'important interests affected by a proceeding are in relative equipoise . . . a higher standard of proof would necessarily indicate a preference for protection of one interest over the other.' *In re Juvenile Appeal (83-CD)*, supra, [189 Conn.] 298.

"Although we recognize the importance of continuity of care as a significant factor in the statutory mandate that custody disputes be resolved in accord with the 'best interests of the child,' we do not believe that this consideration requires implementation through departure from the normal standard of proof. . . .

"[A]lthough a 'clear and convincing' standard of proof is constitutionally required for the termination of parental rights . . . the burden of proof by a 'preponderance of the evidence' placed on the moving parent in a proceeding to determine custody comports with due process and serves adequately to protect the various interests involved. . . .

"[A] modification of custody hearing is not a proceeding that requires, constitutionally or otherwise, the judicial implementation of a burden of proof other than the familiar civil standard." (Citations omitted; footnotes omitted.) *Cookson* v. *Cookson*, supra, 201 Conn. 235–41.

In sum, we conclude that the court did not violate the defendant's due process rights by applying the well established fair preponderance of the evidence standard in considering the plaintiff's August 5, 2019 motion for modification of custody.

The judgment is affirmed.

In this opinion the other judges concurred.

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

[1] The record reflects that G was born in 2000; D was born in 2002; V was born in 2003; S was born in 2005; N was born in 2007; and T was born in 2008.

[2] On July 19, 2018, the parties entered into a written agreement in which the defendant's parenting time was expanded to include "Wednesdays at 1 p.m. to Thursday return to school or if there is no school 10 a.m."

[3] In addition to the plaintiff's August 5, 2019 motion for a modification of custody, the court considered seven motions for modification of custody and three ex parte motions for custody filed by the defendant, all of which the court denied; eight motions for contempt filed by the plaintiff, which the court granted; two motions for contempt filed by the plaintiff, which the court denied; fifteen motions for contempt and a motion for order filed by the defendant, all of which the court denied; two motions for sanctions filed by the plaintiff and one motion for sanctions filed by the defendant, all of which the court denied; and a motion for attorney's fees filed by the plaintiff, which the court granted. The defendant appeals only from the granting of the plaintiff's August 5, 2019 motion for modification of custody.

[4] At the time the court issued its memorandum of decision, only four of the children were minors.

[5] "The statutory factors are as follows: '(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 pendente 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.' General Statutes (Rev. to 2019) § 46b-56 (c)." *Dolan* v. *Dolan*, 211 Conn. App. 390, 398–99 n.6, 272 A.3d 768, cert. denied, 343 Conn. 924, 275 A.3d 626 (2022).

[6] Practice Book (2020) § 25-60A governs court-ordered private evaluations and provides in relevant part: "(a) If the court orders a private evaluation of any party or any child in a family proceeding where custody, visitation or parental access is at issue, a state licensed mental health professional shall conduct such evaluation.

"(b) Notice of any orders relating to the evaluation ordered shall be communicated to the evaluator by the guardian ad litem or, where there is no guardian ad litem, by court personnel.

"(c) Until a court-ordered evaluation is filed with the clerk pursuant to Section 25-60 (b), counsel for the parties shall not initiate contact with the evaluator, unless otherwise ordered by the judicial authority. . . ."

[7] The fact that the defendant has completed the Intimate Partner Violence Program does not give rise to any mootness concerns with respect to all or part of this appeal. The defendant relies, in part, on the court's order that he complete the program in an effort to demonstrate that the court placed before him an insurmountable burden to his ability to restore his parental role with his children. The defendant does not challenge the propriety of the order itself or whether he was required to comply with it. Thus, the defendant's completion of the program does not lead us to conclude that an actual controversy did not exist at the time the appeal was taken, that a controversy does not exist that is capable of being adjudicated in this court, or that this court is unable to provide any practical relief to the defendant if it were to agree with the merits of his claim. See *In re Allison G.*, 276 Conn. 146, 165, 883 A.2d 1226 (2005) ("[j]usticiability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant" (internal quotation marks omitted)).

[8] "[I]t is well established that [this court], like the trial court, may take judicial notice of files of the Superior Court in the same or other cases." (Internal quotation marks omitted.) *Thunelius* v. *Posacki*, 193 Conn. App. 666, 669 n.1, 220 A.3d 194 (2019).

[9] We note that the defendant's brief to this court was filed on December 6, 2021, and does not mention his completion of the Intimate Partner Violence Program.

[10] In his brief to this court, the defendant asserts that "[i]t is not clear from the trial court's decision what standard of proof the trial court held the plaintiff to deciding her motion for modification . . . ." In its memorandum of decision, however, the court clearly states that it made "the following findings of fact throughout this decision by a preponderance of the evi-

dence . . . ."

[11] The defendant relies heavily on our Supreme Court's decision in *In re Zakai F.*, supra, 336 Conn. 272, in support of this claim. *In re Zakai F.*, however, is easily distinguishable from the present case. In *In re Zakai F.*, our Supreme Court held that when a parent seeking reinstatement of guardianship rights establishes that the cause that existed for the removal of the parent as guardian no longer exists, that parent is entitled to a presumption that reinstatement is in the best interests of the child. Id., 276. The party opposing reinstatement must rebut this presumption by clear and convincing evidence. Id. The analysis in *In re Zakai F.* is inapplicable to a resolution of custody and visitation issues between parents.