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IN RE JOSEPH W., JR., ET AL.*
(AC 30476)
(AC 30477)

Bishop, Harper and Pellegrino, Js.

Argued January 12—officially released June 8, 2010

(Appeal from Superior Court, judicial district of Middlesex, Child Protection Session at Middletown, Olear, J.)

David B. Rozwaski, for the appellant (respondent mother in AC 30476).

David J. Reich, for the appellant (respondent father AC 30477).

Jane R. Rosenberg, assistant attorney general, with whom, on the brief, was *Richard Blumenthal*, attorney general, for the appellee (petitioner in both cases).

Geraldine M. Menn, for the minor children in both cases.

BISHOP, J. The respondent mother, Karin H., and the respondent father, Joseph W., appeal from the judgments of the trial court terminating their parental rights as to their two children, Joseph, Jr., and Daniel.[1] Because we conclude that the terminations of the rights of both parents were premised on a prior adjudication of neglect that was improperly rendered, we reverse the judgments of the trial court.

The following factual and procedural history is relevant to the respondents' appeals. Joseph, Jr., was born on July 18, 2005, in Scranton, Pennsylvania. The respondents feared that the department of children and families (department) would take Joseph, Jr., from them because the mother's first child had been committed to the custody of the petitioner, the commissioner of children and families. Consequently, on the advice of legal counsel, the respondents traveled to Pennsylvania in an attempt to evade the department. The parents were not successful in their attempt to elude the department. On July 21, 2005, three days after his birth, while still in the hospital, Joseph, Jr., was taken into emergency protective custody by the commonwealth of Pennsylvania, to be transferred to the custody of the petitioner upon the issuance of an order of temporary custody. Also on July 21, 2005, the petitioner took Joseph, Jr., into custody pursuant to an order of temporary custody and filed a neglect petition, on the basis of the doctrine of predictive neglect, premised on allegations regarding the mother's mental health issues[2] and the father's alleged inability to acknowledge the mother's parenting limitations."[3] Joseph, Jr., has remained in the custody of the petitioner throughout the ensuing proceedings leading, ultimately, to this appeal.

Daniel was born on July 20, 2006, in Waterbury. On the same day, while Daniel was still in the hospital, the petitioner took him into custody pursuant to an emergency ninety-six hour administrative hold. See General Statutes § 17a-101g. On July 24, 2006, the petitioner filed a neglect petition and sought an order of temporary custody as to Daniel. The custody order was granted on the same day.[4] The allegations of neglect regarding Daniel were essentially the same as of those made in the neglect petition regarding Joseph, Jr. As in the case of Joseph, Jr., Daniel has remained in the custody of the petitioner throughout the proceedings leading to this appeal.

On August 2, 2007, at the hearing on the neglect petitions regarding both children and at which the father was present, the mother entered a plea of nolo contendere as to the allegations of neglect. After canvassing the mother, the court, *Wilson*, *J.*, adjudicated the children neglected pursuant to General Statutes (Rev. to 2007) § 46b-120 (9) (C) and committed the

children to the custody of the petitioner. Neither respondent appealed from the neglect judgments.

On November 29, 2007, however, the father filed a motion to open the adjudications of neglect and commitment of the children, alleging that he had attempted to object to the mother's plea on August 2, 2007, but that the court would not allow him to speak.[5] On May 16, 2008, the court, *Bear, J.*, held an evidentiary hearing on the father's motion to open the adjudications of neglect during which the father testified as to what happened at the earlier neglect proceeding, and the transcript of that hearing was introduced into evidence. On May 30, 2008, the court issued an order denying the father's motion to open the judgments of neglect but indicating that if the father filed a pleading seeking a trial on the issue of whether the children were neglected, then the petitioner would have the burden of proving, at the termination trial,[6] that the children were neglected despite the prior adjudications of neglect.[7]

On June 16, 2008, the petitioner filed a motion asking the court to reconsider its May 30, 2008 order requiring that she prove by a fair preponderance of the evidence that the children were neglected at the trial on the petitions to terminate the respondents' parental rights. On June 24, 2008, pursuant to the court's May 30, 2008 order, the father filed a motion seeking a neglect trial, a motion to clarify and an objection to the petitioner's motion for reconsideration. The court, *Bear, J.*, held a hearing on these motions on July 9, 2008. On that date, the court granted the father's motion for a neglect trial but denied the father's other requested relief. At the July 9, 2008 hearing, the court, *Bear, J.*, also found that the father had not stood silent at the August 2, 2007, neglect proceeding and that he did not waive his right to be heard on the neglect matter. The court commented that "[i]f [the father] turns out to have been custodial, then only half of what needed to be done was done with the mother's nolo." The court also denied the petitioner's motion[8] but clarified its May 30, 2008 ruling, explaining that the issue to be determined was whether the father "was a noncustodial or custodial parent on the date of the filing of each of the [neglect] petitions, since the father's hearing rights in light of the mother's nolo contendere plea would be different depending on his custodial or noncustodial status."

Thereafter, on August 20, 2008, the father filed a motion to bifurcate the neglect and termination of parental rights proceedings, to which the petitioner objected. On August 21, 2008, the petitioner filed another motion asking the court to reconsider its May 30, 2008 order requiring the petitioner to prove at the termination of parental rights hearing that the children had been neglected.[9] By way of a memorandum of decision dated August 25, 2008, the court, *Bear, J.*, denied

the father's motion for bifurcation, sustained the petitioner's objection to the motion for bifurcation and denied the petitioner's motion for reconsideration.[10]

On September 4, 2008, the court, *Olear*, *J*., commenced the termination hearing, beginning with the issue of whether the father was a custodial parent as of the date that the neglect petitions were filed. The father testified that he was present at the hospital when both Joseph, Jr., and Daniel were born, that he signed acknowledgements of paternity for both children while they were in the hospital and that he was there with them for the duration of their stay in the hospital until they were taken into the custody of the petitioner within a few days of their respective births. The father also testified that it was his understanding that he and the mother would raise Joseph, Jr., and Daniel together. After the father testified, the petitioner called Kathleen Dayner, a social worker with the department, to testify. Dayner testified that both parents were considered custodial before the children were taken into the petitioner's custody "because [the parents] were both together."[11] Following the hearing, the court concluded: "[T]he father today has not produced sufficient evidence to meet his burden of having established that he was a custodial parent as contemplated by the Practice Book and by law, and, furthermore, by Judge Bear's order. So, at this point, I'm not finding the father to have been custodial for purposes of the neglect adjudication being required to be remade."

Thereafter, the court granted a motion filed by the petitioner to correct its petition for termination of the respondents' parental rights and to proceed on the basis of the prior adjudications of neglect. Following an evidentiary hearing, the court, by memorandum of decision dated October 1, 2008, terminated the respondents' parental rights as to both Joseph Jr., and Daniel.[12] These appeals followed.

On appeal, the father claims that the termination of his parental rights was improper because it was premised on a prior finding of neglect in a proceeding in which he was deprived of his right to participate. He claims further that he was entitled to a contested hearing on the neglect petition because he was a custodial parent at the time that the neglect petition was filed. The father also claims that the court improperly found that the department made reasonable efforts to reunify him with his children and that he was unable or unwilling to benefit from services. See General Statutes § 17a-112 (j) (3) (B) (i). The mother claims that the court improperly found that she had failed to achieve a sufficient degree of personal rehabilitation; see General Statutes § 17a-112 (j) (3) (B) (i) and (E); and that it would be in the best interests of the children to terminate her parental rights. Pursuant to the procedural posture of this case, the petitioner did not have to prove at the

termination hearing that the children were neglected but only that the children had been found to be neglected in a prior proceeding.[13] Because the neglect adjudications relate to the children, and not to either of the parents; see *In re T.K.*, 105 Conn. App. 502, 505–506, 939 A.2d 9, cert. denied, 286 Conn. 914, 945 A.2d 976 (2008);[14] if the father is successful in his claim regarding the deprivation of his rights in the neglect proceeding, the finding of neglect, despite the mother's nolo plea, cannot stand. In other words, a court could not, after an evidentiary hearing in which the father has the right to participate, find that the children were not neglected but also, on the basis of the mother's nolo plea, find that they were neglected. Accordingly, because the neglect adjudications were the factual underpinnings for the termination of the rights of both respondents, if we find that there should be a new neglect proceeding, the termination of the parental rights of both respondents must be reversed.

As a preliminary matter, we note that the petitioner contends that the father's claim constitutes an impermissible collateral attack on the court's prior adjudication of neglect.[15] In so claiming, however, the petitioner mischaracterizes the father's appeal. As part of the father's appeal from the termination of his parental rights, he is contesting the court's determination that he was not a custodial parent as of the date the neglect petitions were filed. He makes this challenge because the petitioner relied on the prior neglect determination as an adjudicative basis for termination.[16]

In support of her argument, the petitioner relies on *In re Stephen M.*, 109 Conn. App. 644, 647, 953 A.2d 668 (2008), in which this court held that a party is barred by the doctrine of collateral estoppel from relitigating a previous finding of neglect during a subsequent termination trial.[17] In *In re Stephen M.*, the trial court had disregarded the prior finding of neglect and, accordingly, dismissed the petitions for the termination of the parents' rights. Id. Here, however, the court afforded the father the opportunity to prove, at the termination hearing, that he was a custodial parent at the time that the neglect petitions were filed. Thus, the court effectively opened the judgment of neglect on the basis of the fact that the father may have been a custodial parent at the time and that he had been denied the right to contest the neglect petitions. Accordingly, on the basis of the unique procedural circumstances of this case, the father's claim on appeal does not constitute an impermissible collateral attack on the neglect adjudication.[18]

We now turn to the father's claim that the court improperly concluded that he was not a custodial parent at the time that the neglect petitions were filed. The parties agree that a parent is custodial for the purposes of a neglect adjudication if that parent is responsible

for the physical care and supervision of the child.[19] The father contends that both he and the mother were custodial parents for the purposes of the neglect hearing.[20] He argues that there was no difference between his status and that of the mother because he, like the mother, is the acknowledged parent of both children, he was present at the birth of each child, and he was in the hospital with them until they were each taken into state custody.[21] Thus, he claims that his custodial status cannot reasonably be viewed as any different from the mother's, whose status was unquestioned at the neglect proceedings. We agree.

The father's claim raises a mixed question of law and fact, over which we exercise plenary review. Therefore, "we must decide whether [the court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *In re Haley B.*, 262 Conn. 406, 411, 815 A.2d 113 (2003).

In 2007, Practice Book § 35a-1 (b), subsequently redesignated as Practice Book § 35a-1 (a),[22] provided: "Notwithstanding any prior statements acknowledging responsibility, the judicial authority shall inquire whether the allegations of the petition are presently admitted or denied. This inquiry shall be made of the *custodial parent* in neglect, uncared for or dependent matters; and of all appearing parents in termination matters." (Emphasis added.) To resolve the father's claims on appeal, we must determine the meaning of "custodial parent" as it is used in this section of the rules of practice.[23]

On January 28, 2010, we asked the court, *Olear*, *J.*, to articulate the legal and factual bases for its conclusion that the father was not a custodial parent at the time that the neglect petitions were filed. In response, the court stated that the "[f]ather, while represented by competent counsel, elected to stand silent at the time of the neglect adjudication and, by doing so, acknowledged being a noncustodial parent." The court defined the custodian of a minor child as "the parent or person with whom a minor child resides, at all times or from time to time, and who assumes the responsibility for all or part of the day-to-day care and supervision of the child." The court found that the father was present at the births of the children; that both children were taken into the custody of the petitioner prior to their discharge from the hospital; that the father signed an acknowledgement of paternity for each child; and that, prior to the respective orders for temporary custody, there were no court orders establishing the legal custodian of the children. The court noted the father's failure to introduce any evidence that he and the mother were married, that they resided together or that they intended to reside in the same home with the children upon discharge from the hospital.[24] The court stated

that "[t]here was no evidence that [the] father was going to or had prepared to care for his children in his residence at the time the neglect petition was filed or at any foreseeable time in lieu of or in addition to the children being cared for by [the] mother (an acknowledged custodial parent)[25] in her separate residence." The court concluded that the father failed to "introduce any evidence to refute [the] mother's acknowledgement, by entering her plea of nolo contendere, that she was a custodial parent."[26]

We find the court's articulation legally and factually troubling. We first address the court's statement that the father stood silent at the neglect hearing. This finding is belied by Judge Bear's earlier determination, following a hearing in which the transcript of the neglect proceeding was introduced into evidence. Judge Bear stated that "[t]he father, from the transcript, made it clear that he did want to proceed with his rights such as they are . . . ." Judge Bear found that the "[f]ather did not stand silent. The transcript reflects that whatever the father was supposed to do, that was not his understanding, and he tried to make that clear to the court from the beginning of the canvass. So, whatever may have been thought, the father made it clear he wanted to have his hearing." Judge Bear further found that "the father has and did not waive [his right to participate in the neglect proceeding] and has pursued his right to be heard on the neglect matter."

The statement of the court, *Olear*, *J.*, that the father remained silent at the neglect proceeding is further belied by the court's statement on September 4, 2008, in which it said: "On consideration of the testimony put forward today and on a further reading of Judge Bear's order of August 25, 2008, while the court acknowledges [that] *the father may not have waived his rights at the time of the hearing*, the father today has not produced sufficient evidence to meet his burden of having established that he was a custodial parent . . . ." (Emphasis added.) A fair review of the record in this regard reveals that the father not only did not "stand silent" at the neglect hearing but that he attempted, without success, to assert his right to participate in the neglect hearing and to contest the allegations of neglect.

We next turn to the question of whether the father should have been accorded the right to participate in the neglect proceeding because, as noted, if that proceeding was flawed, the findings of neglect could not subsequently and properly be used by the petitioner as an adjudicative allegation in the termination proceedings. Although the rules of practice do not define the term "custodial" for purposes of adjudicating neglect, we find guidance in our statutes and case law.[27] General Statutes § 45a-606 provides in relevant part: "The father and mother of every minor child are joint guardians of the person of the minor, and the powers, rights and

duties of the father and the mother in regard to the minor shall be equal. . . ." "The right to the custody of a minor child is one of the principal attributes of a guardianship of the person." *Boardman* v. *Boardman*, 135 Conn. 124, 129, 62 A.2d 521 (1948). "Since 1901 the rights of both parents have been equal . . . ." *Dunham* v. *Dunham*, 97 Conn. 440, 442, 117 A. 504 (1922),[28] overruled in part on other grounds by *Freund* v. *Burns*, 131 Conn. 380, 385, 40 A.2d 754 (1944). Parents are joint guardians and have equal and independent rights to their custody. See *Scott* v. *Furrow*, 141 Conn. 113, 119, 104 A.2d 224 (1954). "In a custody dispute, parents stand on equal footing with respect to one another . . . ." *Doe* v. *Doe*, 244 Conn. 403, 476, 710 A.2d 1297 (1998) (*Katz*, *J.*, concurring in part and dissenting in part).

On the basis of the record before the court at the time of the neglect proceeding, we can discern no distinction in the custodial status of either parent. Both parents were at the hospital together for the births of both children, and they spent equal amounts of time with them before they were taken into custody by the petitioner. In its decision, the courts, *Olear*, *J.*, and *Bear*, *J.*, placed a burden on the father to prove that he was a custodial parent even though no court in these proceedings has placed a corresponding burden on the mother. Additionally, we are not aware of any legal authority that stands for the proposition that a parent must prove that he or she is custodial to contest a neglect petition. As noted, decisional and statutory law establishes that there is a presumption that the rights of both parents, in regard to their children, are equal.[29] Mindful of these legal parameters, it is difficult to fathom the basis on which the court, in the neglect proceeding, accepted the nolo plea from the mother while denying the father an opportunity to be heard, particularly when, by the testimony of the case social worker, the petitioner considered both parents to be custodial. Because our law provides that the right to custody of the minor child is equal in both parents,[30] the mother's "acknowledgment" that she was custodial does not render the father noncustodial and should not place on him a burden to prove that he is custodial, a presumption that exists in our jurisprudence.

On the basis of the foregoing, we conclude that the father enjoyed the same custodial status as the mother at the time the neglect petitions were filed and that he was entitled to contest the allegations of neglect. Because the father is entitled to contest the neglect allegations, the termination of the respondents' parental rights must be reversed, as the terminations were premised on improper adjudications of neglect.

The judgments are reversed and the cases are remanded for further proceedings consistent with this opinion.

In this opinion HARPER, J., concurred.

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79-3, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

[1] In AC 30476, the respondent mother appeals from the court's judgment terminating her parental rights as to both children. In AC 30477, the respondent father appeals from the court's judgment terminating his parental rights as to both children.

[2] In support of the allegations of predictive neglect, Kathleen Dayner, a social worker with the department, set forth the following history of the mother's involvement with the department. On October 14, 2002, the mother gave birth to her first child, who is not at issue in these appeals. On the day that child was born, that child was taken into the custody of the petitioner on the basis of a referral from the hospital indicating that the mother's "mental health presentation impaired her ability to safely parent her infant child." On February 7, 2003, the mother was diagnosed with schizotypal personality disorder. This disorder is "characterized by unusual, disjointed and peculiar distortions of thinking, understanding and interpersonal relationships." On this basis, the court-appointed psychiatrist opined that the mother "could not be predicted to be able to reliably care for a child" and that "the prognosis for [the mother] to develop abilities in the future is exceedingly poor." The psychiatrist stated that the mother "has demonstrated no ability to change her functioning on the basis of reasoning, advice, counseling or coaching."

In May, 2005, the mother was seen by a different psychiatric specialist who diagnosed her with paranoid schizophrenia and post-traumatic stress disorder. The mother was prescribed medication, which she failed to take. Dayner alleged that the mother had failed to benefit from the psychiatric and medical services provided by the department, and, consequently, the mother's parental rights as to her first child were terminated.

[3] In the petitioner's summary of facts substantiating the allegations of neglect, Kathleen Dayner, a social worker with the department, noted the father's lack of "insight or acceptance" of the mother's "psychiatric impairment and the implications they have for this child." She also noted: "Dr. [Cynthia] Ronan reported to [the department] on [June 28, 2005] that father . . . 'is as unstable as [the mother]'. Dr. Ronan stated [that the father] refused during a prenatal visit to listen to the child's heartbeat saying 'that's too intimate.' " Dayner also stated that the father "has a criminal history dating back to 1971 with charges that include assault, breach of [the] peace, threatening, breaking and entering and resisting arrest."

[4] The basis for the neglect petition as to Daniel was the same as the basis for the petition filed regarding Joseph, Jr.; see General Statutes (Rev. to 2007) § 46b-120 (9) (C); except that it averred that the father "has not demonstrated an ability to care for the child independent of the mother." In the petitioner's summary of facts substantiating the allegations of neglect, in addition to citing to the father's criminal history, Kathleen Dayner, a social worker with the department, stated: "Since the inception of the case involving [Joseph, Jr., the father] has demonstrated during visitation, a refusal or reluctance to feed the child as advised or to follow [child care] advice given by [the department]. He has also failed to act responsibly resulting in an injury to the child during visitation on [July 19, 2006]."

[5] The father alleged in his motion that "the [c]ourt cautioned [him] to quiet down and [j]udicial [m]arshals prepared to enforce this request."

[6] The petitioner filed petitions to terminate the parental rights of the respondents on December 10, 2007.

[7] Specifically, the court's order stated: "The respondent father's motion to open the judgment of neglect, filed on November 29, 2007, having been heard by this court, it is hereby ordered that the relief sought in such motion, e.g., that the judgment of neglect be opened, is hereby denied, but such respondent father (but not the respondent mother who did not seek similar relief) shall be permitted on or before August 12, 2008, fourteen days before the termination of parental rights trial scheduled to commence on Tuesday, August 26, 2008, to file a pleading with the court, copies certified to counsel, that he continues to seek a trial on the issue(s) of whether Joseph, Jr., and Daniel were neglected as alleged by [the petitioner] in each respective neglect petition, and if such pleading timely is filed by such respondent father, despite the prior adjudications of neglect and dispositions of commitment entered on or about August 2, 2007, upon the nolo contendere pleas

of the mother, at such trial [the petitioner] shall also have the burden to prove by a fair preponderance of the evidence that Joseph, Jr., and Daniel were neglected.

"Such prior commitments of Joseph, Jr., and Daniel to the care, custody and guardianship of [the petitioner] shall remain in effect until further order(s) of this court."

[8] None of the parties appealed from this order.

[9] The petitioner based her motion on this court's decision in *In re Stephen M.*, 109 Conn. App. 644, 953 A.2d 668 (2008), which was released August 12, 2008.

[10] None of the parties appealed from these orders.

[11] Following the testimonial portion of the hearing, the petitioner seems to have argued that the father was not custodial in that he "came in on the scene from a hospital, and the only involvement [the petitioner] had at the time was with the mother in regard to this case." Such an argument, however, merely serves to undermine the thoroughness of the petitioner's actions to remove the children from their parents on the basis of predictive neglect.

[12] The court rendered judgment of termination of parental rights as to the mother pursuant to General Statutes § 17a-112 (j) (3) (B) (i) and (E) and as to the father pursuant to § 17a-112 (j) (3) (B) (i).

[13] On January 8, 2009, the petitioner asked the court to articulate whether "there [was] sufficient evidence presented at the termination of parental rights trial, whereby the trial court could find by a fair preponderance of the evidence that the children were neglected?" The court denied the motion for articulation on the ground that the issue of neglect was not before the court at the termination trial because that issue had been previously adjudicated on August 2, 2007, and the father had not produced sufficient evidence to prove that he was custodial and, therefore, entitled to a contested hearing on neglect.

[14] We note the apparent anomaly that while an adjudication of neglect relates to the status of a child and is, therefore, not premised on the fault of the parents, such a finding can, nevertheless, be used as a basis for terminating a parent's rights.

[15] "The [petitioner's] claim that a trial court may not reconsider the issue of neglect during a termination of parental rights proceeding presents a mixed question of fact and law because it involves the application of factual determinations to the statutory scheme for the protection of the well-being of children. In such circumstances, an appellate court employs the de novo standard of review." *In re Stephen M.*, 109 Conn. App. 644, 658, 953 A.2d 668 (2008).

[16] Although the father arguably should have appealed immediately from the adjudication of neglect, instead, he timely filed a motion to open that judgment pursuant to General Statutes § 52-212a. It is noteworthy that the petitioner neither filed an objection to the father's motion, nor raised the issue at the hearing on the motion that the father should have previously appealed from the neglect adjudication. The petitioner did not make that argument until she filed a motion for reconsideration on June 16, 2008.

[17] "The applicability of the doctrines of collateral estoppel or res judicata presents a question of law that we review de novo." *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 601, 922 A.2d 1073 (2007). "Claim preclusion (res judicata) and issue preclusion (collateral estoppel) have been described as related ideas on a continuum." (Internal quotation marks omitted.) *Bouchard* v. *Sundberg*, 80 Conn. App. 180, 186, 834 A.2d 744 (2003).

"The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality. . . . Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment." (Citations omitted; internal quotation marks omitted.) *Lafayette* v. *General Dynamics Corp.*, 255 Conn. 762, 772, 770 A.2d 1 (2001).

Here, in affording the father an opportunity to prove that he was a custodial parent, the court implicitly determined that the issue of neglect had not previously been fully and fairly adjudicated.

[18] The court then ordered the matters consolidated, which further undermines the petitioner's claim that the father is collaterally attacking the judgment of neglect.

[19] We presume that the rationale behind the rule requiring the judicial authority to address its inquiry regarding neglect to the custodial parent

was tied to the fact that the custodial parent was in the better position to attest to the condition of the children. This case does not fit readily into that framework for two reasons. First, because the basis for the neglect petitions as to both children was predictive, it cannot be presumed that one parent would be more competent to plead to predictive behavior than the other. Second, here, there is no evidence that either parent had a greater custodial relationship with either child in the hospital in the few days that transpired between birth and removal of the children by the department.

[20] "[A] father, no less than a mother, has a constitutionally protected right to the companionship, care, custody, and management of the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection." (Internal quotation marks omitted.) *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 652, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975).

[21] Curiously, the petitioner contends on appeal that neither parent was custodial at the time the neglect petitions were filed because the petitions were not filed until after the children were taken into custody. If that be the case, it is difficult to rationalize the court's acceptance of the mother's nolo plea at the neglect hearing, as we are not aware of the basis for a court properly to accept a nolo plea to a neglect petition from a noncustodial parent. Therefore, if the mother was not a custodial parent when the neglect petitions were filed, it is questionable as to whether her nolo plea was a proper vehicle for adjudicating the children as neglected.

[22] In 2009, Practice Book § 35a-1 (b) was redesignated Practice Book § 35a-1 (a), with certain revisions for clarification, to require that the judicial authority inquire of the parents or guardian whether or not they admit or deny the allegation of the neglect petition regardless of whether the parent is custodial.

[23] "Construction of our rules of practice presents a question of law over which our review is plenary. . . . In construing our rules of practice, we are guided by the principles governing statutory interpretation. . . . Our fundamental objective in interpreting a rule of practice is to ascertain and give effect to the intent of the drafters. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply." (Citations omitted; internal quotation marks omitted.) *Malave* v. *Ortiz*, 114 Conn. App. 414, 417, 970 A.2d 743 (2009).

[24] It is noteworthy that the petitioner, in her affidavit dated July 24, 2006, seeking out of home placement for Daniel, alleged that the mother and the father did, in fact, reside together and that the parents' misrepresentation of their joint residency was one area of the petitioner's concern. That affidavit was filed simultaneously with the neglect petition as to Daniel.

[25] This statement is troubling, as it seems to suggest that a parent may be considered custodial simply on the basis of his or her willingness to enter a nolo plea. It also begs the question as to what the custodial status of each parent would be if the father had agreed to the nolo plea, but the mother had refused. Would the father then have been considered a custodial parent rather than the mother? The petitioner, the court and the dissent seem to so suggest.

[26] Such reasoning wrongly presumes that only one parent can be custodial. It also presumes that the father had a higher burden than the mother to prove that he was a custodial parent. As noted previously, we know of no legal authority for this presumption.

[27] In analyzing the father's claim that he is a custodial parent, we are mindful that we are dealing with a requirement in the rules of practice that cannot substantively affect a party's statutory or constitutional rights. See *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 44, 970 A.2d 656, cert. denied sub nom. *Bridgeport Roman Catholic Diocesan Corp.* v. *New York Times Co.*, U.S. , 130 S. Ct. 500, 175 L. Ed. 2d 348 (2009).

[28] Prior to 1901, "[p]rimarily the parents [were] entitled to the custody of their minor child, and formerly, in case of controversy, the father to the exclusion of the mother." *Dunham* v. *Dunham*, supra, 97 Conn. 442.

[29] The dissent sets forth, with no legal support, several potential items that the father could have raised as proof that he was a custodial parent, such as the purchase of a child safety seat or a crib. Whether or not there is any legal basis for the dissent's proposition, it is noteworthy that there is no evidence in the record that the mother had presented such evidence, or any evidence whatsoever, to establish that she was a custodial parent.

[30] The United States Supreme Court held in *Stanley* v. *Illinois*, 405 U.S. 645, 658, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), that a conclusive presumption that unwed fathers are unfit to have custody of their children violated the

fourteenth amendment. The court held that both the due process clause and the equal protection clause of the fourteenth amendment entitle the father of an illegitimate child to the same hearing as a legal father to determine his fitness before being deprived of custody of his child. Id., 649. In defining the right at stake, the court held that "[t]he rights to conceive and to raise one's children have been deemed 'essential,' . . . 'basic civil rights of man,' . . . ." (Citations omitted.) Id., 651.