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ZARELLA, J., dissenting. The majority concludes that a prior order for specific steps to facilitate the return of a child to a parent is required in a termination proceeding in accordance with clauses (i) and (ii) of General Statutes § 17a-112 (j) (3) (B) but that the failure of the trial court in the present case to order the respondent, the father of the minor children, Elvin G. and Kadahfi G., to take specific steps pursuant to clause (i) was harmless error. I agree with the majority that the specific steps requirement applies to both clauses (i) and (ii) of § 17a-112 (j) (3) (B). I do not agree, however, that it is appropriate to apply harmless error review to § 17a-112 (j) (3) (B). Accordingly, I would conclude that the trial court's failure to order specific steps warrants a reversal of its decision to terminate the respondent's parental rights.

I begin by summarizing § 17a-112 (j) and describing this court's application of harmless error review in civil cases. I then discuss why I believe that harmless error review is inappropriate in the present case. Finally, I share my concerns about the majority's reasoning and its implications for termination of parental rights proceedings.

Section 17a-112 (j) provides in relevant part that a trial court may grant a petition for termination of parental rights "if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent . . . *unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required*, (2) termination is in the best interest of the child, and (3) (A) the child has been abandoned by the parent in the sense that the parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child; (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected or uncared for in a prior proceeding, or (ii) is found to be neglected or uncared for and has been in the custody of the commissioner for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . (D) there is no ongoing parent-child relationship, which means the

relationship that ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child; [or] (E) the parent of a child under the age of seven years who is neglected or uncared for, has failed, *is unable or is unwilling* to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child and such parent's parental rights of another child were previously terminated pursuant to a petition filed by the Commissioner of Children and Families . . . ." (Emphasis added.)

Pursuant to § 17a-112 (j), the trial court must make the required findings to terminate parental rights at a hearing. It is well established that, "[u]nder § 17a-112, a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. . . . In contrast to custody proceedings, in which the best interests of the child are always the paramount consideration and in fact usually dictate the outcome, in termination proceedings the statutory criteria must be met before termination can be accomplished and adoption proceedings begun. . . . Section 17a-112 [(j) (3)] carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent." (Citation omitted; footnote omitted; internal quotation marks omitted.) *In re Eden F.*, 250 Conn. 674, 688–89, 741 A.2d 873 (1999). "If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child." Id., 689. As the majority acknowledges, "[b]ecause a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun."[1] (Internal quotation marks omitted.)

This court has applied harmless error review in both criminal and civil cases involving a fundamental right.[2] In fact, "harmless error review has become the standard that our Connecticut appellate courts normally use to review errors occurring in civil litigation."[3] *Wiseman* v. *Armstrong*, 295 Conn. 94, 109, 989 A.2d 1027 (2010). "There is no rule or practice [however] that requires an appellate court to apply a particular standard of

review in civil cases, even when reviewing for structural error."[4] Id., 109–10.

The error in the present case results from the trial court's failure to adhere to a statutory requirement in § 17a-112 (j). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes."[5] (Footnote omitted; internal quotation marks omitted.) Id., 99–100. "It is well settled that we look to the broader statutory scheme to ensure the coherency of our construction because it is presumed [that] the legislature created a harmonious and consistent body of law." (Internal quotation marks omitted.) Id., 102. In the present case, the only ground for termination at issue is § 17a-112 (j) (3) (B). Thus, in accordance with § 1-2z, I begin my analysis by considering § 17a-112 (j) (3) (B) in relation to other provisions of § 17a-112 (j).

Two other provisions in § 17a-112 (j) provide an exception for when a parent is "unable or unwilling" to benefit from certain services or activities. For example, subdivision (1) of § 17a-112 (j) includes such an exception to the "reasonable efforts" requirement. That is, the Department of Children and Families (department) is exempted from the requirement that it make reasonable efforts to locate the parent and to reunify the child with the parent if "the court finds in [the] proceeding that the parent is *unable or unwilling* to benefit from reunification efforts" or if the trial court "has determined at a hearing . . . or determines at trial . . . that such efforts are not required . . . ." (Emphasis added.) General Statutes § 17a-112 (j) (1).[6] The legislature included similar language in subdivision (3), which provides grounds for termination when, inter alia, "the parent of a child under the age of seven years who is neglected and uncared for, has failed, *is unable or is unwilling* to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child and such parent's parental rights of another child were previously terminated pursuant to a petition filed by the Commissioner of Children and Families . . . ." (Emphasis added.) General Statutes § 17a-112 (j) (3) (E).

The language of § 17a-112 (j) (3) (E) is very similar to the provision at issue in the present case in that both § 17a-112 (j) (3) (B) and § 17a-112 (j) (3) (E) provide grounds for termination of parental rights based on the failure to rehabilitate. The notable differences between the two are: (1) § 17a-112 (j) (3) (B) includes a specific steps requirement, whereas § 17a-112 (j) (3) (E) does not; (2) § 17a-112 (j) (3) (B) does not include any lan-

guage about whether the parent is "unable or unwilling" to be rehabilitated, whereas § 17a-112 (j) (3) (E) does; and (3) § 17a-112 (j) (3) (B) refers to a prior finding of *neglect* for the same child at issue in the termination proceeding, whereas § 17a-112 (j) (3) (E) refers to a prior *termination* of parental rights with respect to "another child . . . ." The statute as a whole therefore provides more procedural protection—in the form of specific steps—to parents who are involved in their first termination proceeding, rather than their second or subsequent proceeding, when faced with a claim of failure to rehabilitate.

Including further procedural protection for parents who have had their children adjudicated neglected, but have not yet had their parental rights terminated, makes sense because the specific steps requirement provides parents with notice of what they can do to avoid reaching a stage at which the termination of parental rights is necessary. "[T]he 'specific steps' provisions of [§ 17a-112 (j)] have two purposes: first, to instruct the parent on the specific conduct in which he or she must engage in order to satisfy the [department] and the trial court that he or she is a fit parent and, second, to ensure that the [department] does what it reasonably can to facilitate, rather than to impede, reunification." *In re Devon B.*, 264 Conn. 572, 589, 825 A.2d 127 (2003) (*Sullivan, C. J.*, dissenting). These objectives are clear from the language of the specific steps form itself, which requires a signature by the respondent under the statement, "I understand that if I do not follow these specific steps it will increase the chance that a petition may be filed to terminate my parental rights permanently so that my child may be placed in adoption." Connecticut Judicial Branch Form JD-JM-106 (Rev. January, 2011) p. 2 (Specific Steps Form), available at http://jud.ct.gov/webforms/forms/JM106.pdf (last visited October 27, 2013). Informing parents of what they can do to become fit parents in the eyes of the court thus provides parents with a meaningful opportunity for rehabilitation and reunification.

Furthermore, the differences between § 17a-112 (j) (3) (B) and § 17a-112 (j) (3) (E) demonstrate that a court should examine a parent's willingness and ability to rehabilitate when that parent previously has had his or her parental rights to another child terminated, but not when there only has been a prior neglect proceeding. Although § 17a-112 (j) does not explicitly mention harmless error review, examining a parent's willingness and ability to rehabilitate has the same effect as harmless error review in this particular context. For example, if a court were to engage in harmless error review with respect to the reasonable efforts requirement, the court would determine whether the department's failure to make reunification efforts "would likely affect the result" of the termination proceeding. (Internal quotation marks omitted.) *Kalams* v. *Giacchetto*, 268 Conn.

244, 249, 842 A.2d 1100 (2004). This analysis would turn on whether the parent was willing and able to benefit from reunification efforts because, if the parent were unwilling or unable, there certainly would be no harm. Essentially, harmless error review in this context is the functional equivalent of the statutory exception already set forth in § 17a-112 (j) (1).

Because the unwilling and unable exception contained in § 17a-112 (j) (1) and harmless error review involve the same analysis and lead to the same result, it would be inconsistent with the statutory language to apply harmless error review to a provision that did not include this exception. Specifically, when the majority applies harmless error review to the trial court's failure to provide specific steps, the analysis focuses on whether the respondent would be able to benefit from these steps—essentially, whether he was willing and able.[7] Because "[i]t is not the function of courts to read into clearly expressed legislation provisions which do not find expression in its words"; (internal quotation marks omitted) *State* v. *Ward*, 306 Conn. 698, 710, 52 A.3d 591 (2012); this court should not read into § 17a-112 (j) (3) (B) an exception for when parents are unwilling or unable. Thus, this court also should refrain from engaging in the identical analysis of harmless error review when it is clear from the statute that the parent's willingness and ability should not be considered.

I therefore conclude that applying a harmless error analysis to § 17a-112 (j) (3) (B) is inappropriate, as the legislature had the ability and opportunity to include this exception by adding the willing and able language but chose not to do so. Even though a parent's inability or unwillingness is relevant for some claims or stages of termination proceedings, a court should not consider it in evaluating whether a parent has failed to rehabilitate under § 17a-112 (j) (3) (B).[8]

The real problem in this case is that both the Commissioner of Children and Families (petitioner) and the majority attempt to fit a square peg in a round hole. The majority seems concerned—and understandably so—about the children and their lack of contact with the respondent due to his prolonged incarceration. Specifically, the majority repeatedly suggests that a parent's prolonged incarceration after the birth of a child and *before* termination proceedings are initiated can, in and of itself, justify the termination of parental rights on the ground that the parent has failed to rehabilitate.[9] Although I am sympathetic to the majority's concern, I believe that we must encourage the department to follow the proper procedural channels for termination. The petitioner brought this claim under § 17a-112 (j) (3) (B) but seemingly realized a mistake shortly before trial and unsuccessfully attempted to amend the petitions for termination of parental rights to include the grounds of abandonment and no ongoing parent-child

relationship. These grounds for termination occur when either "the child has been abandoned by the parent in the sense that the parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child"; General Statutes § 17a-112 (j) (3) (A); or "there is no ongoing parent-child relationship, which means the relationship that ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child . . . ." General Statutes § 17a-112 (j) (3) (D).

Even if the evidence in the present case supported a finding of abandonment or the lack of an ongoing parent-child relationship, however, such a finding alone would not constitute grounds for terminating the respondent's parental rights. See, e.g., *In re Christian P.*, 98 Conn. App. 264, 268, 907 A.2d 1261 (2006) (when petitioner did not allege lack of ongoing parent-child relationship, termination of parental rights on that ground was improper). I would not go so far as to guess the outcome if the termination petitions in the present case had alleged either of those two grounds, but the evidence seems far more relevant to the abandonment and no ongoing parent-child relationship claims than to the failure to rehabilitate.[10] Rehabilitation, by nature, assumes that the parent is currently unfit or previously has engaged in some negative behavior and seeks to provide that parent with a meaningful opportunity to change. See, e.g. *In re Eden F.*, supra, 250 Conn. 706 ("'"[r]ehabilitate" means "to restore [a handicapped or delinquent person] to a useful and constructive place in society through social rehabilitation"'"). Thus, it would make no sense to bring a claim for failure to rehabilitate and then to terminate parental rights solely on the basis of the inevitable results of prior unfitness or negative behavior; such reasoning would defeat the purpose of rehabilitation altogether. Rather, a failure to rehabilitate claim should require consideration of the parent's behavior and efforts *after* he or she has been provided notice of what specific steps could lead to reunification.[11]

The majority's treatment of incarceration as it relates to rehabilitation has further implications that concern me. The specific steps requirement in § 17a-112 (j) (3) (B) is a procedural protection that safeguards a parent's "constitutionally protected right to raise and care for [his or her] own children." *In re Juvenile Appeal (83-DE)*, 190 Conn. 310, 318, 460 A.2d 1277 (1983), citing *Stanley* v. *Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). Specific steps provide "fair warning to a parent of the potential termination of parental rights in subsequent proceedings." (Internal quotation marks omitted.) *In re Devon B.*, supra, 264 Conn. 584. "The

United States Supreme Court has frequently emphasized the constitutional importance of family integrity. 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. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. 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." (Internal quotation marks omitted.) *In re Juvenile Appeal (83-CD)*, 189 Conn. 276, 284, 455 A.2d 1313 (1983). "This right to family integrity includes the most essential and basic aspect of familial privacy—the right of the family to remain together without the coercive interference of the awesome power of the state." (Internal quotation marks omitted.) Id.

"The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the [s]tate. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky* v. *Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). "When the [s]tate initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. If the [s]tate prevails, it will have worked a unique kind of deprivation. . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." (Internal quotation marks omitted.) Id., 759. Therefore, "[w]hen the [s]tate moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." Id., 753–54. "If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs." Id., 753.

The majority purports to apply the well established principle that "the fact of incarceration, in and of itself, cannot be the basis for a termination of parental rights." This principle is especially important in the rehabilitation context, which seeks to allow a parent the opportunity to change and be "restor[ed] . . . to his or her former constructive and useful role as a parent." (Internal quotation marks omitted.) *In re Eden F.*, supra, 250 Conn. 706. If incarceration alone cannot be the basis for the termination of parental rights, I do not understand how the inevitable restraints that result from incarceration can be the sole basis either. For example, the majority simply *assumes* that the trial court prop-

erly could order an incarcerated parent to take specific steps that the parent *could not possibly comply with* while in prison, such as keeping appointments with the department and obtaining employment, and then use the parent's failure to comply with such an order as grounds for terminating his or her parental rights. It seems to me, however, that such an order would be entirely inconsistent with the principle that, "[w]hen the [s]tate moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures"; *Santosky* v. *Kramer*, supra, 455 U.S. 753–54; especially when the trial court could order any number of meaningful specific steps that the respondent could follow while in prison.

For example, a respondent could "[k]eep all appointments set by or with [the department]" via telephone, "[t]ake part in counseling," "[s]ubmit to random drug testing," "[n]ot use illegal drugs or abuse alcohol or medicine," "[a]ttend and complete an appropriate domestic violence program," "[c]ooperate with the [children's] therapy," or, "[w]ithin thirty . . . days . . . tell [the department] in writing the name, address, family relationship and birth date of any [person] who [he or she] would like the department to investigate and consider as a placement resource for the [children]." Specific Steps Form, supra, pp. 1–2. In addition, the specific steps form contains a line marked "[o]ther" on which the court may write individual orders tailored to the particular parent. Id., p. 2. The trial court, therefore, could have required: (1) that the respondent also establish that he and his wife, Lillian G.,[12] have adequate housing for the children before and after his release from prison; (2) that he and his wife cooperate with respect to any visits to the wife's home by either the department or the children before his release; (3) that he cooperate with prison officials and refrain from further infractions of prison rules; and (4) that he maintain communication with the children by telephone or mail as often as prison officials and the department permit. The adaptability of the specific steps form suggests that it is not intended to provide parents with steps that they could not meet but, rather, that it is a flexible document intended to adapt to the situation of each family.[13]

Thus, the provision of specific steps is not a mere exercise in directing parents what they *should have known* but, rather, an important safeguard to ensure that parents do not lose their children without a meaningful opportunity for rehabilitation and reunification. The language of the statute itself reflects the significance of this safeguard by contemplating inability or unwillingness in other provisions of the statute but not in the provision at issue in this case. It would be fundamentally unfair for courts to ignore this statutory mandate, not provide specific steps, and later conclude that notice and guidance were unnecessary because the par-

ent *should have known* that engaging in certain conduct would result in the termination of his or her parental rights.[14] Under the majority's approach, incarceration effectively would be a sufficient ground for termination because of a failure to rehabilitate in almost every case in which the parent is incarcerated for any significant period of time.[15]

In summary, I believe that harmless error review is inappropriate in the present case because § 17a-112 (j) (3) (B) does not provide that a court should examine a parent's ability or willingness. Furthermore, I believe that it is our "constitutional duty to ensure that, when [a parent's fundamental right to raise his or her children] has been curtailed, all relevant legal standards have been fully satisfied . . . ." *In re Joseph W.*, 305 Conn. 633, 649, 46 A.3d 59 (2012). I thus would conclude that the trial court improperly failed to provide specific steps to the respondent to facilitate reunification with his children, as § 17a-112 (j) (3) (B) requires, and would reverse the judgment of the trial court terminating the respondent's parental rights. Accordingly, I respectfully dissent.

[1] The majority quotes *In re Juvenile Appeal (Anonymous)*, 181 Conn. 638, 644–45, 436 A.2d 290 (1980), for this proposition.

[2] See, e.g., *Small* v. *Commissioner of Correction*, 286 Conn. 707, 723, 946 A.2d 1203 ("[i]t is well settled that a reviewing court evaluates a trial error of constitutional magnitude [in a criminal case] under the harmless error standard set forth by the United States Supreme Court in *Chapman* v. *California*, [386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]"), cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008); *Rozbicki* v. *Huybrechts*, 218 Conn. 386, 387, 395–96, 589 A.2d 363 (1991) (applying harmless error review in civil case involving violation of state constitutional right of party to be present during voir dire).

[3] See, e.g., *Earlington* v. *Anastasi*, 293 Conn. 194, 201, 976 A.2d 689 (2009) (improper jury interrogatories); *Hayes* v. *Camel*, 283 Conn. 475, 488–89, 927 A.2d 880 (2007) (improper evidentiary ruling); *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, 267 Conn. 279, 295, 838 A.2d 135 (2004) (improper instruction on burden of proof); *Brookfield* v. *Candlewood Shores Estates, Inc.*, 201 Conn. 1, 5, 513 A.2d 1218 (1986) (failure of court to follow rules pertaining to decision on summary judgment motions).

[4] See, e.g., *Carrano* v. *Yale-New Haven Hospital*, 279 Conn. 622, 635–37, 904 A.2d 149 (2006) (rejecting argument that one-sided award of additional peremptory challenges was structural error that should have been deemed per se reversible error and instead applying harmless error review).

While I agree with the majority that the presence of a statutory right is not determinative of whether an appellate court should apply harmless error review; see footnote 20 of the majority opinion; the existence of such a right in a statute or constitutional provision is certainly relevant. See, e.g., *Wiseman* v. *Armstrong*, supra, 295 Conn. 110 (determining that lack of statutory right or constitutional provision providing for right to poll jury in civil cases is factor to consider in deciding whether harmless error review is appropriate).

[5] Furthermore, "[i]f, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 301 Conn. 323, 338, 21 A.3d 737 (2011).

[6] The legislature was particularly concerned about forcing children to

reunify with parents who might cause them harm. Representative Konstantinos Diamantis stated before the House of Representatives that examples of situations in which "reunification [efforts] would not be necessary" included parents who had "subjected a child to aggravated circumstances such as . . . abandonment, torture, chronic abuse, [or] sexual abuse; [or who had] committed murder or voluntary manslaughter [with respect to] another child; [or who had] aided or [abetted] or attempted to conspire to solicit to commit such a murder or voluntary manslaughter; [or who had engaged in felonious assault of] the child or [the parent's other] children causing serious bodily injury; [or who had their] . . . parental rights involuntarily terminated [with respect to] a sibling of [the] child." 41 H.R. Proc., Pt. 12, 1998 Sess., p. 4149. Because a petition for the termination of parental rights must meet all three prongs of § 17a-112 (j) (1) through (3), a child will be protected from premature reunification by the "unable or unwilling" exception to the reasonable efforts requirement regardless of which grounds for termination are alleged.

[7] For example, the majority states that, "until his release . . . the respondent *could not* begin to attempt to secure legal employment, establish a household appropriate for the children and demonstrate his ability to refrain from further involvement in the criminal justice system. In short, as long as he remained incarcerated, specific steps directing him to make the foregoing efforts would have been pointless." (Emphasis added.) Text accompanying footnote 24 of the majority opinion.

[8] The majority states that "[w]e have at times found a trial court's noncompliance with a statutory requirement to be harmless error when it is clear that compliance could not have affected the outcome." Footnote 20 of the majority opinion. Although I agree with this statement generally, the majority slightly misstates the issue. In the cases on which the majority relies for this proposition, there was no indication by the legislature that harmless error review should not be applied to the statutes at issue. In the present case, however, we have before us a provision in which certain sections contain the functional equivalent of a harmless error exception but others do not.

[9] For example, the majority states the following: "[W]e agree with the trial court that, given the length of the respondent's incarceration and his disciplinary infractions, his history of failing to parent his children, and the children's myriad and specialized needs, the provision of specific steps would not have made a difference"; "damage to the parent-child relationship that justifies severance stems from the enforced, physical separation of the parent from the child"; and the effect of the "[e]xtended incarceration severely hinders" reunification of the family, "particularly . . . when a parent has been incarcerated for much or all of his or her child's life, and, as a result, the normal parent-child bond that develops from regular contact . . . is weak or absent." (Internal quotation marks omitted.)

[10] Although I agree that prolonged incarceration prior to the initiation of a termination proceeding *could*, in a proper case, constitute evidence of abandonment or lack of an ongoing parent-child relationship, the only ground for termination at issue in the present case is the respondent's alleged failure to rehabilitate.

[11] The majority states in response to this proposition that "[t]he benefit of hindsight makes it . . . apparent . . . that, in the present case, even if [specific] steps properly had been provided at that time, they could not have made a difference in the trial court's [subsequent] finding [regarding] the respondent's failure to rehabilitate." Footnote 20 of the majority opinion. The majority thus uses evidence of the respondent's behavior in the absence of specific steps as proof of what he would have done if the trial court had provided him with the steps. We cannot assume, however, that an individual's actions *without* notice are indicative of what the individual's actions would have been *with* notice.

Consider the following example. Stop signs provide notice to drivers that they should stop at a particular point. A driver approaches an intersection and, seeing no stop sign, proceeds through the intersection. Under the majority's reasoning, the driver's failure to stop at the intersection could be used as evidence that the driver would not have stopped even if there had been a stop sign. I would argue, however, that we have no way of knowing whether the driver would have stopped. His behavior, in the absence of the stop sign, does not make it "apparent" what he would have done if a stop sign had been installed. The purpose of notice—such as stop signs—is to notify individuals of what they should or should not do. Thus, an individual's actions in the absence of notice are not necessarily indicative of what the individual would have done if notice had been provided. Simi-

larly, the respondent's behavior in the absence of the court's provision of specific steps is not necessarily indicative of what the respondent would have done if he had been provided with them.

The United States Supreme Court has found that harmless error review should not be applied when it would require a court to engage in "a speculative inquiry into what might have occurred in an alternate universe." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 150, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). In the present case, the respondent's behavior prior to the termination proceeding is a fact to be found by the trial court. Just as the respondent's behavior could have been entirely different if he had been provided with specific steps, the trial court could have come to an entirely different conclusion when faced with potentially different evidence. When engaging in harmless error review, a reviewing court examines the record to determine whether the error "likely affected the result . . . ." (Internal quotation marks omitted.) *Kalams* v. *Giacchetto*, supra, 268 Conn. 249. As I explained previously, in the present case, we simply have no way of knowing whether providing specific steps would have affected the result. The respondent was improperly deprived of notice to change his behavior long before the termination proceedings even began, and thus the record might have been entirely different if the proper procedures had been followed. Harmless error review therefore is inappropriate in the present case because it would require this court to engage in a "speculative inquiry . . . ." *United States* v. *Gonzalez-Lopez*, supra, 150.

[12] The trial court stated that the respondent's contention that placing the children with Lillian G. would have facilitated reunification of the children with him upon his release from prison not only "does . . . not constitute a failure to exercise reasonable reunification efforts, but it also demonstrates [the respondent's] inability to put the children's needs before his own. It constitutes a hopeful possibility for [the respondent's] benefit at some time still in the future, keeping the children in limbo, with no recognition of the needs and ages of the children—a necessary part of rehabilitation and reunification." Thus, the trial court concluded that the only way that the respondent could have demonstrated that he was rehabilitated and would be a fit parent would have been to relinquish his interest in raising his children. In my view, such "catch-22" reasoning is fundamentally inconsistent with the governing constitutional principles and statutory scheme.

Moreover, the respondent should not be blamed for failing to request that Lillian G. have guardianship of the children until after the petitions for termination were filed. Section 17a-112 (j) (3) (B) places the burden on the trial court to provide specific steps to facilitate the return of the child to the parent. The respondent did not have notice that he had to request that his wife have guardianship before a specific point. Issuing specific steps perhaps would have avoided this issue altogether.

Finally, I simply do not understand the trial court's statement that transferring guardianship of the children to Lillian G., who, according to the trial court, "appears to be [a] fine person [who] may be suitable and worthy to raise children," "would not have assisted [the respondent] in his efforts to rehabilitate or reunify with the children in a timely manner . . . ." Certainly, providing Lillian G. with the opportunity to visit with and possibly to care for the children while the respondent was incarcerated would have made it much easier for Lillian G., the children, and the respondent to be reunited as a family after the respondent's release from prison.

The majority states in response to this position that the trial court properly determined that "it would have been inappropriate . . . to prepare [the children] for a reunification" with the respondent because the respondent had been incarcerated for "approximately ten of the last twelve years" and "had yet to demonstrate his ability to stay the straight and narrow in the nonstructured world to which he [would] be returning when he is released from prison." (Internal quotation marks omitted.) Footnote 24 of the majority opinion. That is exactly the point. The respondent did not have a meaningful opportunity to demonstrate to the trial court that he could rehabilitate because he was not provided with the specific steps necessary to put him on notice as to what he needed to do. If the respondent had received guidance and direction, he indeed might have shown an "ability to stay the straight and narrow in the nonstructured world" upon his release from prison. (Internal quotation marks omitted.) Id.

Furthermore, holding the respondent's past incarceration against him defeats the purpose of rehabilitation, as it serves to terminate his parental rights on the basis of past mistakes rather than current efforts. This evidence would have been more probative if the petitioner had sought to terminate the respondent's parental rights on the ground of abandonment or no ongoing parent-child relationship. This evidence, however, is neither probative nor relevant to harmless error review of the trial court's failure to provide the respondent with specific steps.

[13] In fact, there is ample evidence demonstrating the respondent's respon-

siveness to suggestions from the department regarding rehabilitation. The majority recognizes that "a department social worker who had taken [the children] to visit the respondent in prison, testified that . . . she had spoken with the respondent about parenting classes, anger management and developing vocational skills. She testified further that the department had provided the respondent with parenting information . . . and encouraged him to participate in prison services that would benefit him. The respondent testified that he attended . . . classes pertaining to parenting, mentoring and fitness training and, to a limited extent, participated telephonically in meetings, case review and family therapy." Footnote 25 of the majority opinion. In addition, the trial court found that the respondent "[took] advantage of . . . drug education, counseling, religion, public speaking . . . [and] leadership [classes] . . . ." The court also found that the respondent "appear[ed] to have made a turnaround in the last year or two" before the termination hearing and that "[t]he personal improvement in which [the respondent had] engaged [was] commendable . . . ." One can only imagine that the respondent would have been even more motivated if he had known what specific actions would have facilitated the return of his children, whom even the trial court acknowledged the respondent loves "very much . . . ."

The trial court concluded that this conduct did not necessarily demonstrate an ability to rehabilitate because the respondent had "yet to demonstrate his ability to stay the straight and narrow in the nonstructured world to which he [would] be returning when he is released from prison." This statement, in effect, would preclude any incarcerated parent from demonstrating his or her rehabilitation until after he or she leaves prison. I would suggest that there are plenty of ways that a parent can begin rehabilitation while incarcerated, many of which are outlined in the specific steps form. See Specific Steps Form, supra, pp. 1–2.

[14] Indeed, many of the specific steps enumerated in the specific steps form are a matter of common sense. For example, the form provides that the trial court may order a parent to maintain adequate housing and a legal income, to take care of the child's physical, educational, medical or emotional needs, to make all necessary child care arrangements to ensure that the child is properly supervised and cared for, not to use illegal drugs or abuse alcohol, and not to become involved in the criminal justice system. Specific Steps Form, supra, pp. 1–2. It also is a matter of common knowledge, however, that many parents fail to meet these standards of conduct and yet do not always, or even usually, have their parental rights terminated. If the failure to perform these acts constituted an automatic ground for the termination of parental rights even if the trial court has not provided specific steps, the statutory requirement that it do so would be superfluous. In the present case, for example, the respondent could have known that certain conduct, such as using marijuana, was not optimal or societally appropriate without knowing that it would result in the termination of his parental rights. If the respondent had been given notice that using drugs could result in the loss of his parental rights, he might have avoided the loss of his right to visit with his children in prison, which the trial court found to be a highly significant factor.

[15] In this particular case, I also believe that the majority overstates its concern about the respondent's length of incarceration. Although the majority claims that, at the time the termination petition was filed, the respondent's incarceration "was expected to continue for years," in fact, the petitions for termination were filed on March 30, 2010, the trial took place in late April, 2012, the order terminating the respondent's parental rights was issued on October 1, 2012, and, at the time of trial, the respondent anticipated that he would be released from prison in late 2012 or early 2013. It thus would have been perfectly appropriate for the trial court to have provided the respondent with specific steps at the beginning of this process, thereby preparing both the respondent and the children for the possibility of reunification upon the respondent's release from prison two or three years later if he had complied with the specific steps.