SCHALLER, J., concurring. Although I agree that the judgment must be reversed, I respectfully disagree with the majority's conclusion that article 2.04 of the parties' consent to judgment agreement contained a condition precedent that prohibited the plaintiff, Carole A. Monette, from seeking modification of child support until she could establish that the defendant, Claude Monette, had obtained gainful employment.[1] I conclude, instead, that the trial court failed to find a substantial change in circumstances prior to modifying the child support order as required by General Statutes § 46b-86. I would reverse the judgment of the trial court on that ground.

I agree with the majority that the consent to judgment agreement of the parties constitutes a contract of the parties. See *Williams* v. *Williams*, 276 Conn. 491, 497, 886 A.2d 817 (2005). "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract." (Internal quotation marks omitted.) *Dowd* v. *Dowd*, 96 Conn. App. 75, 79, 899 A.2d 76, cert. denied, 280 Conn. 907, 907 A.2d 89 (2006); see also *Scoville* v. *Scoville*, 179 Conn. 277, 282, 426 A.2d 271 (*Healy*, *J.*, dissenting).

The relevant portion of article 2.04 of the parties' agreement reads as follow: "[A]s neither party is presently employed, no [child support] will be determined at this time for the children. The parties agree that they will make diligent efforts to resolve the child support issue prior to Court intervention as soon as the [defendant] has ascertained gainful employment. That all eventual [support] payments for the children shall be made through the automatic perception system, or through the corresponding U.S. agency were the [defendant] to move to the United States . . . ."[2]

My colleagues in the majority conclude that the relevant clause, which provides when the parties intend "to resolve the child support issue," constitutes a *condition precedent* that requires the plaintiff to establish that the defendant is gainfully employed *before* she can seek a child support order in court.[3] In my view, the plain language of article 2.04 does no more than express the parties' intention as to the appropriate time when they should undertake a diligent effort to resolve between themselves the issue of child support. It does not, by any means, create a threshold requirement that must

be satisfied before the plaintiff is allowed to seek an order of child support. A statement of intention to resolve the issue between themselves is far different from a condition precedent intended to bar a party from court intervention for child support. By virtue of article 2.03, the parties demonstrated their ability to specify when a condition precedent was intended. In that article, they provided that the amount of life insurance would automatically increase when the defendant "ascertains gainful employment . . . ." No such language was used in article 2.04.

The contract provides another example of the parties' ability to create a condition precedent. Article 2.06 states in relevant part: "That the [defendant] agrees that as soon as he is re-employed, and within two months of such re-employment, he shall establish a college, university or any other form of ongoing education savings program for the children, and shall invest therein an amount proportionately commensurate with his income to satisfy future college tuition needs." The language used by the parties regarding the children's future education demonstrates their intent that the defendant is not required to begin such a fund *until* he has been reemployed. At that time, the condition precedent is satisfied, and the defendant must complete his contractual obligation, that is, establish a college fund within two months. Comparing the language used in article 2.06 with that contained in article 2.04, it is apparent that the former is a clear demonstration of the parties' intent to establish a condition precedent, while the latter remains nothing more than a description of the appropriate time to begin discussing the issue among themselves.

Our Supreme Court has stated that "[w]hether the performance of a certain act by a party to a contract is a condition precedent . . . depends on the intent of the parties as expressed in the contract and read in light of the circumstances surrounding the execution of the instrument." (Internal quotation marks omitted.) *Christophersen* v. *Blount*, 216 Conn. 509, 512, 582 A.2d 460 (1990); see also *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 56, 873 A.2d 929 (2005); *Blitz* v. *Subklew*, 74 Conn. App. 183, 189, 810 A.2d 841 (2002).

The majority's interpretation of article 2.04 has dire consequences for the plaintiff and her children. If the defendant were to acquire income or assets by means other than employment in an amount that would qualify as a substantial change in circumstances, the plaintiff would be precluded from seeking a court order of child support because she would be barred by the "condition precedent" found by the majority. The defendant would be insulated from claims of child support as long as he is not gainfully employed, despite having acquired substantial resources and income. The children of the marriage would thereby be denied access to support.

Such a result runs contrary to the purpose of child support, which is to provide for the care and well-being of minor children. *Battersby* v. *Battersby*, 218 Conn. 467, 473, 590 A.2d 427 (1991); see also *Foster* v. *Foster*, 84 Conn. App. 311, 322, 853 A.2d 588 (2004). It is elementary to conceive of various alternate ways in which the defendant could obtain income and assets outside of gainful employment, including inheritance, gift, investment income, sale of assets or property.

In reviewing the contract, and the circumstances surrounding its execution, it does not appear that the parties, in drafting the consent to judgment agreement, could have intended or envisioned such a drastic and unfair result. That is evidenced by the fact that the language of article 2.04 addressed only the parties' mutual obligation to resolve the issue and said nothing about seeking court intervention. A statement of what the parties may have anticipated to be a suitable time to begin negotiations about support should not be transposed into a condition precedent that bars the plaintiff from access to child support.

I would reverse the judgment on the ground that the court failed to find a substantial change in circumstances. "General Statutes § 46b-86 governs the modification of a child support order after the date of a dissolution judgment. . . . [A] child support order cannot be modified unless there is (1) a showing of a substantial change in the circumstances of either party or (2) a showing that the final order for child support substantially deviates from the child support guidelines absent the requisite findings. . . . The party seeking modification bears the burden of showing the existence of a substantial change in the circumstances. . . . In these matters, as in other questions arising out of marital disputes, this court relies heavily on the exercise of sound discretion by the trial court. . . .

"Both the substantial change of circumstances and the substantial deviation from child support guidelines provision establish the authority of the trial court to modify existing child support orders to respond to changed economic conditions. The first allows the court to modify a support order when the financial circumstances of the individual parties have changed, regardless of their prior contemplation of such changes. The second allows the court to modify child support orders that were once deemed appropriate but no longer seem equitable in the light of changed social or economic circumstances in the society as a whole . . . ." (Citations omitted; internal quotation marks omitted.) *Syragakis* v. *Syragakis*, 79 Conn. App. 170, 173–74, 829 A.2d 885 (2003). The only issue in the present case was whether the plaintiff established a substantial change in the circumstances of either party. See *Sheppard* v. *Sheppard*, 80 Conn. App. 202, 206 n.2, 834 A.2d 730 (2003).

The court set forth several findings in it memorandum of decision. Specifically, it found that the defendant had a change in revenues in that he received income in the amount of CDN$41,000 and that he had received CDN$100,000 as a result of the sale of the marital residence. The court also found that the defendant had an earning capacity of $300,000 per year and that he had been "reemployed in the calendar year 2003 . . . ."[4] The court, however, did not make a specific finding that there had been a substantial change in circumstances of either party. The individual findings made by the court, whether taken in isolation or in the aggregate, do not replace the necessity of a specific finding of substantial change in circumstances. If we were to infer a substantial change in circumstances from those findings actually made by the trial court, we would be finding facts, a function which we cannot do. *Claveloux* v. *Downtown Racquet Club Associates*, 246 Conn. 626, 633 n.5, 717 A.2d 1205 (1998); *Southington* v. *Commercial Union Ins. Co.*, 71 Conn. App. 715, 721, 805 A.2d 76 (2002).

In the present case, the court did not find that there had been a substantial change in circumstances of either party. Absent such a finding, modification of the child support award was improper. "A party moving for a modification of a child support order must clearly and definitely establish the occurrence of a substantial change in the circumstances of either party that makes the continuation of the prior order unfair and improper." *Savage* v. *Savage*, 25 Conn. App. 693, 696, 596 A.2d 23 (1991); see *Bunche* v. *Bunche*, 180 Conn. 285, 289, 429 A.2d 874 (1980); *Aren*a v. *Arena*, 92 Conn. App. 463, 467, 885 A.2d 765 (2005) ("[O]nce the trial court finds a substantial change in circumstances, it can properly consider a motion for modification . . . . After the evidence introduced in support of the substantial change in circumstances establishes the threshold predicate for the trial court's ability to entertain a motion for modification," that evidence comes into play in the structuring of the modification orders. [Internal quotation marks omitted.]); *Kalinowski* v. *Kropelnicki*, 92 Conn. App. 344, 350, 885 A.2d 194 (2005); *Grosso* v. *Grosso*, 59 Conn. App. 628, 631, 758 A.2d 367, cert. denied, 254 Conn. 938, 761 A.2d 761 (2000); *Hayward* v. *Hayward*, 53 Conn. App. 1, 9, 752 A.2d 1087 (1999); *Crowley* v. *Crowley*, 46 Conn. App. 87, 92, 699 A.2d 1029 (1997) ("When presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion [to modify]." [Internal quotation marks omitted.]); *Fiddelman* v. *Redmon*, 37 Conn. App. 397, 401, 656 A.2d 234 (1995) ("[t]he court . . . retains continuing jurisdiction to modify final orders for the periodic payment of alimony or support, and the care, custody and visitation of minor children,

subject to proof of certain conditions as provided in General Statutes [§ 46b-86]").

I would reverse the judgment on the ground that the there was no finding of a substantial change in the circumstances of either party. I agree that resolution of the other issues pertaining to the issue of child support is not necessary.

I respectfully concur.

[1] I agree with reversal of the award of attorney's fees because they were claimed only in the plaintiff's motion for contempt, which was not granted by the court. No notice was given to the defendant of any other claim for attorney's fees.

[2] The choice of the word "ascertained" suggests that the parties thought it would be prudent to begin discussing child support when the defendant had discovered or learned with certainty about gainful employment. The focus of the parties on when they would begin attempting to resolve the issue is clear.

[3] I note that it does not appear that the issue of a condition precedent was raised before the trial court. The defendant did not appear in court to contest the plaintiff's motion for modification of child support, although he was properly notified. It is well established that "[w]e will not decide an appeal on an issue that was not raised before the trial court. . . . To review claims articulated for the first time on appeal and not raised before the trial court would be nothing more than a trial by ambuscade of the trial judge." (Internal quotation marks omitted.) *Histen* v. *Histen*, 98 Conn. App. 729, 737, 911 A.2d 348 (2006); *McCann Real Equities Series XXII, LLC* v. *David McDermott Chevrolet, Inc.*, 93 Conn. App. 486, 526–27, 890 A.2d 140, cert. denied, 277 Conn. 928, 895 A.2d 798 (2006); see also Practice Book § 60-5.

Moreover, because the issue was not raised at trial and the court made no finding as to the meaning of article 2.04, to the extent that it is an issue of fact; see *K. A. Thompson Electric Co.* v. *Wesco, Inc.*, 27 Conn. App. 120, 126, 604 A.2d 828 (1992); the majority is engaging in fact-finding, which is not an appropriate function of an appellate court. "[Appellate courts] . . . may not retry a case. . . . The [fact-finding] function is vested in the trial court with its unique opportunity to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties, which is not fully reflected in the cold, printed record which is available to us. Appellate review of a factual finding, therefore, is limited both as a practical matter and as a matter of the fundamental difference between the role of the trial court and an appellate court." (Internal quotation marks omitted.) *Welsch* v. *Groat*, 95 Conn. App. 658, 666, 897 A.2d 710 (2006).

[4] I agree with the majority that the court's finding that the defendant had been employed was clearly erroneous.