SCHALLER, J., concurring. Although I agree with the result, I respectfully disagree with the majority's conclusion that the trial court made all of the requisite findings under the circumstances of this case. The majority states: "The court did not state expressly that it found either (1) that there had been a material change of circumstances that altered its earlier finding concerning the best interest of the child or (2) that the original custody order was not based on the best interest of the child. See *Kelly* v. *Kelly*, 54 Conn. App. 50, 55–56, 732 A.2d 808 (1999). The court clarified in its articulation, however, that '[t]he change of custody motion was determined by the court under the best interest of the child standard as set forth in General Statutes § 46b-56.' *Because of its explicit reference to the standard enunciated in § 46b-56, we are satisfied that the court made all of the requisite findings in deciding the motion for modification.*" (Emphasis added.) I cannot agree that it is enough simply to refer to the standard stated in § 46b-56 without making specific findings of a material change in circumstances or that the original custody order was not made in the best interest of the child.

On April 12, 2006, the court issued an articulation of its order awarding the plaintiff, Thomas Payton, custody of the minor child. It stated that the "alleged instability [of the defendant, Mary Ellen H. Payton] was the sole issue of the modification . . . ." It further opined that "a complete reading of the transcripts will show [that] the defendant was not emotionally stable. The defendant throughout the three days of hearings acted unstable, and her testimony was emotionally charged and she deteriorated significantly during the trial." The court noted that this motion "was determined . . . under the best interest of the child standard as set forth in . . . § 46b-56."

In granting the plaintiff's motion, the court relied on the testimony of Sidney Horowitz, a neuropsychologist, and attorney Gayle Carr, the guardian ad litem for the child. Horowitz indicated that the defendant exhibited the traits of borderline personality disorder and of a histrionic personality disorder. Carr testified that the emotional stability and the well-being of the child was lost in the defendant's home. The court expressly stated that it "especially listened carefully to the testimony of . . . Horowitz and [Carr] . . . ." It also made its determination to change physical custody on its observations of the plaintiff's interactions with the child and his ability to care for a special needs child. The court also took into account the defendant's "significant and obvious mental and emotional deterioration during the trial . . . ." Absent in both the original order of a change of

physical custody and the articulation is the prerequisite finding of either a material change in circumstances or that the custody order sought to be modified was not based on the best interest of the child.

The standard for a trial court's modification of a custody order is clearly stated in our case law. "The authority to render orders concerning custody and visitation is found in General Statutes § 46b-56, which provides in relevant part: (a) In any controversy before the Superior Court . . . the court may at any time make or modify any proper order regarding . . . custody and visitation . . . . That section further provides that in modifying any order with respect to custody or visitation, the court shall . . . be guided by the best interests of the child . . . . General Statutes [Rev. to 1997] § 46b-56 (b). [*Our Supreme Court*] *has limited the broad discretion given the trial court to modify custody orders under . . . § 46b-56 by requiring that modification of a custody award be based upon either a material change of circumstances which alters the court's finding of the best interests of the child . . . or a finding that the custody order sought to be modified was not based upon the best interests of the child. . . .*

"To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a *condition precedent* to a party's relief, *it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order*. In making such an inquiry, the trial court's discretion is essential." (Citation omitted; emphasis added; internal quotation marks omitted.) *Kelly* v. *Kelly*, supra, 54 Conn. App. 55–56; see also *Hall* v. *Hall*, 186 Conn. 118, 122, 439 A.2d 447 (1982); *Daddio* v. *O'Bara*, 97 Conn. App. 286, 292, 904 A.2d 259, cert. denied, 280 Conn. 932, 909 A.2d 957 (2006); *Senior* v. *Senior*, 4 Conn. App. 94, 96, 492 A.2d 523 (1985).

The court must first consider what circumstances have changed warranting a custody change and then make a custody determination on the basis of the best interest of the child. See *Kelly* v. *Kelly*, supra, 54 Conn. App. 56 (trial court's modification of dissolution decree without requisite finding was improper.) In this case, the modification was sought because, as the plaintiff alleged in his motion for modification, "[t]he current home *continues to be* an unstable environment, emotionally [and] financially . . . . " (Emphasis added.) In its August 31, 2005 order, the court stated that it was in the best interest of the child to award joint legal custody to the parties with physical possession to the plaintiff. There is no express finding of either a material change in circumstances or that the original order was

not based on the best interest of the child.

The court, in its articulation dated April 12, 2006, stated that its decision was based on the best interest of the child standard. Again, the court did not make any determination as to a material change of circumstances warranting a custody change. Furthermore, there was no finding regarding the propriety of the original custody order. In the articulation, the court cited the defendant's emotional instability, as evidenced by her behavior during trial, and relied on portions of testimony. It also stated that an immediate custody change was warranted because "[t]he defendant throughout the three days of hearings acted unstable, and her testimony was emotionally charged and she deteriorated significantly during the trial." Beyond the ambiguity of those comments, the court's strong reliance on its observations of the defendant's demeanor and emotional state during this highly charged, contested custody matter is troubling. It is not evident whether these observations bear any relation whatsoever to her continuing capability as a parent as opposed to her response to the stress of going through a trial concerning a change in custody of her child, an experience which would be no small matter to any parent. Even the testimony containing allusions to her "alleged instability" is neither *here nor there* as it relates to how she performed or could perform in raising her child. It is apparent that there are no findings whatsoever concerning a material change in circumstances from the time of the original custody order or that the original custody order was not based on the best interest of the child. The court's observations during the course of the hearing are not a suitable substitute for the specific findings that would warrant an immediate change in custody.

In *Kelly* v. *Kelly*, supra, 54 Conn. App. 50, we stated emphatically: "To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. In making such an inquiry, the trial court's discretion is essential. . . . [T]he trial court's discretion [however] only includes the power to adapt the order to some distinct and definite change in the circumstances or conditions of the parties." (Internal quotation marks omitted.) Id., 55–56.

In my view, the court failed to make the required findings with respect to the plaintiff's motion for modification of custody.[1] It is axiomatic that it is not our function, as an appellate court, to engage in fact finding. *Miller* v. *Westport*, 268 Conn. 207, 221, 842 A.2d 558 (2004); see also *Monette* v. *Monette*, 102 Conn. App. 1,

22, 924 A.2d 894 (2007) (*Schaller*, *J.*, concurring). It is, however, also well established that our review is limited to claims raised by the parties in their briefs.[2] "We need no citation for our long settled rule that an appellant's claims must be fully and adequately briefed and argued in the brief submitted to this court." *Legnos* v. *Legnos*, 70 Conn. App. 349, 250 n.1, 797 A.2d 1184, cert. denied, 261 Conn. 911, 806 A.2d 48 (2002). A thorough review of the defendant's brief reveals that she did not make a claim with respect to the court's failure to find either a material change in circumstances or that the custody order sought to be modified was not based on the best interest of the child. Although the absence of findings by the court is troubling, it cannot provide a basis for reversing the judgment of the court changing custody of the minor child.

For those reasons, I respectfully concur in the judgment.

[1] I am mindful of our decision in *Lambert* v. *Donahue*, 78 Conn. App. 493, 506, 827 A.2d 729 (2003), in which we rejected a claim that the court modified custody without making a finding of changed circumstances, in part, on the basis of the court's references to General Statutes §§ 46b-56, 46b-84, 46b-62 and 46b-87. In *Lambert*, we also noted that the court's memorandum of decision was "replete with references to evidence that demonstrates a change in circumstances by the parties' complete inability to communicate concerning the child." *Lambert* v. *Donahue*, supra, 506. Such evidence is absent in the present case.

[2] Our Supreme Court recently stated: "We long have held that, in the absence of a question relating to subject matter jurisdiction, the Appellate Court may not reach out and decide [an appeal] before it on a basis that the parties never have raised or briefed. . . . To do otherwise would deprive the parties of an opportunity to present arguments regarding those issues. . . . If the Appellate Court decides to address an issue not previously raised or briefed, it may do so only after requesting supplemental briefs from the parties or allowing argument regarding that issue." (Citations omitted; internal quotation marks omitted.) *State* v. *Dalzell*, 282 Conn. 709, 715, 924 A.2d 809 (2007).