EVELEIGH, J., with whom, VERTEFEUILLE, J., joins, dissenting. I respectfully disagree with the majority opinion. I respectfully assert that, in my view, the majority opinion does not fully address the certified question in a manner that relates to the issue of whether the trial court abused its discretion in its denial of the motion to modify filed by the plaintiff, Jonathan M. Tanzman. I agree with the overriding principle espoused by the majority to the effect that a trial court must always state either the precise amount or a range of earning capacity upon which it based its order in a divorce judgment. Due to the procedural posture of this case, however, I disagree with the majority's use of this court's supervisory authority to apply this rule in the present case. I further disagree with the majority's opinion to the extent that it opines that the trial court could not have denied the motion to modify without first having at least a range of the earning capacity figure upon which it based its original decision.

Although the majority opinion acknowledges the certified question, it only addresses whether the trial court properly granted the motion for modification. Respectfully, I disagree with that approach. Instead, I would first address the certified question as it is written and then rephrase the certified question to add the following additional issue presented in this appeal: "If the answer to the first question is in the negative, did the Appellate Court properly conclude that the trial court properly denied the plaintiff's motion for modification because he did not meet his burden of demonstrating a change in circumstances?" See, e.g., *State* v. *Ouellette*, 295 Conn. 173, 184, 989 A.2d 1048 (2010) (court may reformulate certified question to conform to issue actually presented); *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 191, 884 A.2d 981 (2005) (court may "reformulate . . . the certified question to reflect more accurately the issues presented"); *Ankerman* v. *Mancuso*, 271 Conn. 772, 777, 860 A.2d 244 (2004) (court may rephrase certified questions in order to render them more accurate in framing issues that case presents); *State* v. *Brown*, 242 Conn. 389, 401, 699 A.2d 943 (1997) (court may reframe certified question to eliminate focus on improper issue); *Stamford Hospital* v. *Vega*, 236 Conn. 646, 648 n.1, 674 A.2d 821 (1996) (court may reframe certified question to render it more accurate in framing issues presented).

Thus, if the certified question was rephrased, I would agree with the majority opinion on the first issue and disagree with the majority opinion on the second. Although I would conclude that the trial court improperly denied the plaintiff's motions for articulation and/or clarification seeking a specific figure for the earning

capacity of the plaintiff at the time of dissolution, I disagree that the Appellate Court improperly affirmed the trial court's motion for modification in the present appeal on the ground that the trial court did not abuse its discretion in determining that the plaintiff did not meet his burden of demonstrating a change in circumstances. I would, therefore, reverse the judgment of the Appellate Court as it relates to affirming the trial court's denial of the motions for articulation and/or clarification and affirm the judgment of the Appellate Court as it relates to affirming the trial court's denial of the motion for modification. Accordingly, I dissent.

I agree with the facts and procedural history set forth in the majority opinion. I will, however, highlight additional facts and procedural history as necessary to my dissent. As a preliminary matter, I set forth the standard of review and legal principles relevant to my discussion. "The well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . ." (Internal quotation marks omitted.) *Simms* v. *Simms*, 283 Conn. 494, 502, 927 A.2d 894 (2007).

"As has been repeatedly stated by this court, judicial review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the [trial] court correctly applied the law and could reasonably have concluded as it did. . . . Our function in reviewing such discretionary decisions is to determine whether the decision of the trial court was clearly erroneous in view of the evidence and pleadings in the whole record. . . . With respect to the financial awards in a dissolution action, great weight is given to the judgment of the trial court because of its opportunity to observe the parties and the evidence. Moreover, the power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances which arise out of the dissolution of a marriage. . . . For that reason, we allow every reasonable presumption . . . in favor of the correctness of [the trial court's] action." (Citations omitted; internal quotation marks omitted.) *Unkelbach* v. *McNary*, 244 Conn. 350, 366, 710 A.2d 717 (1998). "Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Internal quotation marks omitted.) *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 372, 999 A.2d 721 (2010).

I

The first issue in this certified appeal is whether the

trial court was required to specify the earning capacity amount it relied on in determining alimony and child support, after motions for articulation and/or clarification are filed requesting that information. *Tanzman* v. *Meurer*, supra, 301 Conn. 930. Although I agree with the majority opinion that the trial court should have specified the earning capacity amount it relied on in determining alimony and child support in this matter, I respectfully disagree with the manner in which the majority opinion addressed this issue. Specifically, the majority opinion relies on "our inherent supervisory authority" to conclude "that, when a trial court has based a financial award pursuant to [General Statutes] § 46b-82 or § 46b-86 on a party's earning capacity, the court must determine the specific dollar amount of the party's earning capacity." The majority opinion goes on to state that "[t]o the extent that *Chyung* v. *Chyung*, [86 Conn. App. 665, 675–76, 862 A.2d 374 (2004), cert. denied, 273 Conn. 904, 868 A.2d 744 (2005)], may be interpreted as holding to the contrary, it is hereby overruled." See footnote 6 of the majority opinion. I disagree that this holding is necessary in the present case due to the procedural posture of this appeal. Instead, I would conclude that the trial court should have granted the plaintiff's motions to clarify and/or articulate the specific amount or range of the plaintiff's earning capacity at the time of dissolution.

The following additional facts and procedural history are necessary to our resolution of this issue. In November, 2006, after the trial court issued its judgment and memorandum of decision in the dissolution matter, the plaintiff filed a motion for reargument and clarification. In that motion, the plaintiff requested that the trial court clarify the order pertaining to unallocated alimony. The trial court denied the plaintiff's motion for clarification, stating that "[n]o clarification is needed."

In January, 2008, the plaintiff filed a motion to modify support. Prior to the hearing on the motion to modify support, the plaintiff filed a motion for articulation of the dissolution judgment on August 4, 2008. In the motion, the plaintiff requested the trial court to "articulate the specific earning capacity that it attributed to the plaintiff, which served as the basis for its judgment and memorandum of decision." The trial court denied the plaintiff's motion for clarification.

The trial court also denied the plaintiff's motion for modification, finding as follows: "At the time of trial the court was not persuaded that there was a serious commitment and effort to maximize his earning capability and the court's position has not changed. . . . [The] [p]laintiff has failed to establish the threshold predicate required to entertain a motion for modification. . . . "[The] [p]laintiff's motion for modification must be denied. The party seeking the modification must clearly and definitely show facts and circumstances which have

substantially changed. The court must consider all evidence back to its original order. *Borkowski* v. *Borkowski*, [228 Conn. 729, 738, 638 A.2d 1060 (1994)]. At the time of the hearing the plaintiff's income was almost identical to what he disclosed at the time of trial." (Citation omitted; emphasis omitted.)

Thereafter, the plaintiff filed multiple postjudgment motions, including a motion for clarification, in which he sought clarification of the trial court's findings as they related to the plaintiff's earning capacity. The trial court denied the plaintiff's motion for clarification. The plaintiff then appealed from the judgment of the trial court to the Appellate Court. In his appeal, the plaintiff explicitly indicated that he appealed from the "[f]inal judgments entered [October 7, 2008] as reflected in [the] memorandum of decision type dated [October 6, 2008], including denial of [the] plaintiff's motion to modify support . . . and orders relating to counsel fees, interest, contempt, purge, denial of a motion for articulation on or about [August 4, 2008], and other rulings related to the October 7, 2008 memorandum of decision . . . rulings on motions for clarification, and other related rulings."

Pending appeal to the Appellate Court, the plaintiff filed a motion for review of the trial court's denial of his motion for articulation. The Appellate Court entered an order, dated July 15, 2009, requiring the trial court to render an articulation of earning capacity and income. The Appellate Court's order stated in relevant part as follows: "(1) whether the [trial] court made a finding of the plaintiff's current earning capacity and, if so, to state that amount and the factual basis for that finding; (2) whether the [trial] court made a finding of the plaintiff's current net income and, if so, that amount and the factual basis for that finding; [and] (3) whether, in reaching its decision dated October 6, 2008, the [trial] court made a finding of the plaintiff's income or earning capacity at the time of the dissolution judgment and, if so, to state that amount and the factual basis for that finding . . . ."

The trial court responded as follows: "1. The [trial] court did not in its memorandum of decision dated October 6, 2008, set forth a specific amount of [the plaintiff's] current earning capacity, but found that at the time of trial there was no commitment or effort to maximize his earning capability and that based on the evidence presented at the modification hearing including his financial affidavits the [trial] court's position was essentially the same. 2. The [trial] court made a finding that [the] plaintiff's current net income was a salary of $100,000 per year. It was based on his financial affidavit that is part of the record. 3. The plaintiff testified that his taxable income in 2008 would be in excess of $800,000 and that he would probably be receiving a distribution in connection with pending litigation. The

finding was also based on the plaintiff's financial affidavit submitted at the hearings."

After the trial court issued its articulation, the plaintiff filed a second motion for review on October 13, 2009, on the ground that the trial court had not answered the Appellate Court's questions. The Appellate Court granted the plaintiff's motion for review and ordered that the trial court "articulate the following with regard to its decision dated October 6, 2008: (1) whether the [trial] court made a finding of a specific dollar amount of the plaintiff's current earning capacity, which finding was not set forth in the [trial] court's memorandum of decision, and, if so, to state that amount and the factual basis for that finding; (2) whether, in reaching its decision dated October 6, 2008, the [trial] court made a finding of a specific dollar amount of what the plaintiff's earning capacity was at the time of the underlying dissolution judgment, and, if so, to state that amount and the factual basis for that finding; and (3) whether, in reaching its decision dated October 6, 2008, the [trial] court made a finding of a specific dollar amount of what the plaintiff's net income was at the time of the underlying dissolution judgment, and, if so, to state that amount and the factual basis for that finding."

The trial court responded as follows: "1. The [trial] court did not [make] a finding of a specific dollar amount of the plaintiff's current earning capacity. 2. The [trial] court did not make a specific finding of a specific dollar amount of [the] plaintiff's earning capacity at the time of the underlying dissolution judgment. 3. The [trial] court did not make a specific finding of the dollar amount of [the] plaintiff's net income at the time of judgment." The plaintiff then filed another motion for review in the Appellate Court. The Appellate Court granted the plaintiff's motion for review, but denied the relief requested therein, "without prejudice to the parties addressing the alleged discrepancy in the trial court's decisions in their briefs on the merits of the appeal."[1]

The Appellate Court affirmed the judgment of the trial court in denying the plaintiff's motion for modification. In doing so, the Appellate Court concluded as follows: "In emphasizing the near identical monetary values of the plaintiff's total income at the time of the parties' divorce and at the time when the plaintiff sought a modification to his alimony and child support obligations, the court articulated adequately its threshold finding that no substantial postjudgment change had occurred with respect to the plaintiff's financial circumstances, specifically as they related to his earning capacity. We find it telling that the court's evaluation of the plaintiff's earning capacity, as a foundation for its award and denial of the plaintiff's motion for modification, remained unchanged throughout the underlying proceedings. Indeed, the fact that the plaintiff's earning

capacity had deteriorated was as readily apparent at the time of the parties' divorce as it was at the time that the court denied the plaintiff's motion for modification. Finally, despite his arguments to the contrary, the plaintiff has failed to provide us with any statute, case law or rule of practice that requires the trial court to specify an exact earning capacity when calculating an alimony and child support award." *Tanzman* v. *Meurer*, 128 Conn. App. 405, 412, 16 A.3d 1265 (2011). In support of this conclusion, the Appellate Court relied on *Chyung* v. *Chyung*, supra, 86 Conn. App. 675–76.

Thereafter, the plaintiff filed a petition for certification to appeal to this court. In his petition, the plaintiff stated as follows: "Certification should be allowed under Practice Book § 84-2 (1), (2) and (4). This decision is an unwarranted extension of *Chyung* v. *Chyung*, [supra, 86 Conn. App. 675–76]. The *Chyung* court held that there is no requirement that a trial court specify an exact earning capacity at the time of dissolution and so the trial court did not abuse its discretion by failing to provide a number. The [Appellate Court in the present case] held that courts do not need to provide earning capacity numbers to litigants even after they properly move for clarification or articulation. This decision is in conflict with Appellate Court cases holding that once a party requests guidance about an earning capacity finding through an articulation or clarification, the court should articulate a number or range of numbers. . . . Neither the defendant nor the court identified an appellate case approving of a trial court's refusal to articulate in these circumstances. Reviewing the Appellate Court's decision in this case also would help clarify when articulations are appropriate and necessary in dissolution cases." (Citations omitted.) The plaintiff also noted as follows: "The Appellate Court decision erroneously notes that the plaintiff does not dispute that the trial court made no earning capacity finding. *Tanzman* v. *Meurer*, [supra, 128 Conn. App. 409 n.10]. In fact, the plaintiff asserted that awarding alimony and child support based on earning capacity required at least an implicit determination of some number or range of numbers. Otherwise, there would be no proper basis for the $16,000 per month unallocated alimony and child support award."[2]

We granted the plaintiff's petition for certification to appeal, limited to the following question: "Did the Appellate Court properly determine that, in a family case, the trial court is not required to specify the earning capacity amount it relied on in determining alimony and child support, after motions for articulation and/or clarification are filed requesting said information?" *Tanzman* v. *Meurer*, supra, 301 Conn. 930.

In the present case, the plaintiff's central claim on appeal is that when a court bases an alimony or support award on earning capacity, it must provide an earning

capacity number to a party *upon proper motion for clarification or articulation*. As the foregoing procedural history demonstrates, the plaintiff made many attempts to have the trial court articulate the earning capacity number, filed repeated motions for review of the trial court's denials of articulations with the Appellate Court, and was finally told by the Appellate Court that he could address the issue in his brief to that court. When the Appellate Court did not address the obligation of the trial court as it related to the plaintiff's repeated motions for articulation regarding earning capacity, the plaintiff petitioned this court for certification to appeal regarding the trial court's obligation to specify the plaintiff's earning capacity after motions for clarification and/or articulation.

Nevertheless, in my view, the majority opinion does not address the trial court's obligation to specify the plaintiff's earning capacity upon a motion for articulation, despite the fact that this issue is presented as the main claim in the plaintiff's brief. Instead, the majority opinion takes the extraordinary approach of disturbing the underlying dissolution judgment and remanding the case for a new hearing, despite the fact that there was no appeal from the underlying dissolution judgment. In doing so, the majority opinion acknowledges that the trial court has no jurisdiction to open judgments outside the four month period prescribed by General Statutes § 52-212a and that "althoughit is unusual for a trial court to make new factual findings to support a judgment that is final and immune from attack, in the context of financial support awards, which are subject to modification at any time, there simply is no other practical alternative to this procedure when the trial court that issued the original award failed to make the necessary factual findings." See footnote 7 of the majority opinion.

The majority opinion concludes that the trial court did not make the necessary factual findings as to what the plaintiff's earning capacity was at the time of the dissolution judgment based on the following statement from the trial court's articulation dated September 28, 2009: "The court did not in its memorandum of decision dated October 6, 2008, set forth a specific amount of [the plaintiff's] current earning capacity, but found that at the time of trial there was no commitment or effort to maximize his earning capability and that based on the evidence presented at the modification hearing including his financial affidavits the court's position was essentially the same." The majority opinion states that "[t]he most reasonable interpretation of this statement is that, at the time of the original trial, the court had concluded *only* that the plaintiff had not maximized his earning capacity and that it had made *no* finding as to what was in fact his maximum earning capacity." (Emphasis in original.) I disagree. Nothing in the trial court's statement indicates that it had not made a finding of the plaintiff's earning capacity at the time of

dissolution. I wholeheartedly disagree that this statement warrants such a departure from our final judgment law so as to remand this matter for a new hearing on the original dissolution judgment.

Instead, I would conclude that the record demonstrates that the trial court was asked in the motion for articulation filed on August 4, 2008, by the plaintiff to "articulate the specific earning capacity that it attributed to the plaintiff, which served as the basis for its judgment and memorandum of decision." The trial court denied that motion for articulation, and the plaintiff included that denial in his original appeal and filed multiple motions for review with the Appellate Court, seeking clarification of this precise issue. The trial court, however, never answered that precise question. Therefore, I disagree that the only remedy possible in the present case is a new hearing on the plaintiff's earning capacity. Instead, I think the plaintiff has properly preserved his claim that the trial court should have been required to articulate the amount of the plaintiff's earning capacity at the time of dissolution.

As I explained previously in this opinion, the majority opinion relies on the exercise of its supervisory authority and, to the extent it may be interpreted as holding contrary to the majority opinion, overrules *Chyung* v. *Chyung*, supra, 86 Conn. App. 665, the case on which the Appellate Court relied. As the plaintiff himself asserts, I would conclude that *Chyung* is distinguishable from the present case. In *Chyung*, the wife appealed from the judgment of dissolution, claiming that the court's failure to identify the husband's precise earning capacity resulted in an award that was based on speculation and conjecture. Id., 675. Relying on the fact that the wife failed to file a motion for articulation asking the court to specify the husband's earning capacity, despite it being her burden to do so, the Appellate Court in *Chyung* concluded that "[the wife] failed to utilize an available procedural vehicle to clarify the court's decision, namely, [the husband's] specific earning capacity. In short, we conclude that the court did not abuse its discretion by not finding the [husband's] specific earning capacity." Id., 676. Contrary to the facts of *Chyung*, the plaintiff in the present case filed a motion for articulation.

I find the majority opinion's efforts to overrule *Chyung* and exercise its supervisory authority unnecessary. Instead, I would rely on the numerous cases where trial courts routinely provide guidance about factual findings related to financial orders, providing a specific number or range of numbers. See, e.g., *Pellow* v. *Pellow*, 113 Conn. App. 122, 128–29, 964 A.2d 1252 (2009) (Appellate Court required trial court to articulate gross and net income upon motion for articulation); *Mundell* v. *Mundell*, 110 Conn. App. 466, 471, 955 A.2d 99 (2008) (trial court articulated findings that earning capacity was at

least one half of previous earnings); *Schade* v. *Schade*, 110 Conn. App. 57, 61, 954 A.2d 846 (court articulated defendant's earning capacity was at least $100,000), cert. denied, 289 Conn. 945, 959 A.2d 1009 (2008). Accordingly, I would conclude that the trial court improperly denied the plaintiff's repeated motions for review and would order the trial court to articulate its finding as to the specific amount or range of the plaintiff's earning capacity at the time of dissolution.[3]

Furthermore, it is unclear from the majority opinion what the parameters of the new hearing will be and what effect the outcome of that hearing will have on the financial orders that have been in place since the time of dissolution in October, 2006, almost seven years ago. It is well established that support awards are not subject to retroactive modification. Indeed, this court has repeatedly recognized the dangers of such retroactive modification. "One reason which has been advanced by the courts is that unpaid alimony installments are in the nature of a final judgment which cannot be retroactively disturbed, and the court's right to modify the alimony decree therefore extends only to the executory portion of the order, i.e., to payments to become due in the future. See, e.g., *Bean* v. *Bean*, 86 R.I. 334, 340, 134 A.2d 146 [1957]. Another, most persuasive, consideration would be to prevent hardship to alimony recipients by protecting their expectations and enabling them to rely upon the continuing alimony obligation of the paying spouse. [H. Clark, Law of Domestic Relations (1968) § 14.9, p. 454]. Of equal concern is the fact . . . that a modifiable alimony decree is not entitled to full faith and credit in another state's courts, at least not where the spouse has failed to take the 'final step of reducing the alimony arrearage to a judgment for money owed.' *Walzer* v. *Walzer*, 173 Conn. 62, 68, 376 A.2d 414 [1977]; see annot., 157 A.L.R. 170 [1945], and cases collected therein. 'If the accrued installments are not modifiable, full faith and credit must be given to them. Enforcement in a foreign state is thus faster and simpler . . . . If accrued installments are modifiable, full faith and credit need not be given.' [H. Clark, supra, § 14.9 n.15]. Yet another consideration is that trial courts asked to modify retroactively the original alimony order might well become engaged in what would essentially be appellate review of another trial court's judgment, or in 'second-guessing' another trial court. There is no need to elaborate on the confusion, uncertainty or even 'judge-shopping' that might result." (Footnote omitted.) *Sanchione* v. *Sanchione*, 173 Conn. 397, 405–406, 378 A.2d 522 (1977).

Despite the well established principle that support awards are not subject to retroactive modification, the majority opinion simply concludes "that the matter must be remanded to the trial court for a new hearing on the plaintiff's motion for modification at which the trial court should determine, based on evidence pre-

sented by the parties, the specific amount of the plaintiff's earning capacity at the time of the original financial award." The majority, however, does not address the ramifications of the new hearing. Specifically, the majority opinion does not address how the money owed under the original dissolution judgment will be impacted if the trial court determines that the plaintiff's earning capacity does not support the original award of $16,000 of unallocated alimony and support per month.

Also, the majority does not address whether the new findings on earning capacity at the time of dissolution will impact the "carefully crafted mosaic" of the financial awards that were part of the original dissolution. *Misthopoulos* v. *Misthopoulos*, supra, 297 Conn. 378. "We previously have characterized the financial orders in dissolution proceedings as resembling a mosaic, in which all the various financial components are carefully interwoven with one another. . . . Accordingly, when an appellate court reverses a trial court judgment based on an improper alimony, property distribution, or child support award, the appellate court's remand typically authorizes the trial court to reconsider all of the financial orders. . . . We also have stated, however, that [e]very improper order . . . does not necessarily merit a reconsideration of all of the trial court's financial orders. A financial order is severable when it is not in any way interdependent with other orders and is not improperly based on a factor that is linked to other factors. . . . In other words, an order is severable if its impropriety does not place the correctness of the other orders in question. . . . Determining whether an order is severable from the other financial orders in a dissolution case is a highly fact bound inquiry." (Citations omitted; internal quotation marks omitted.) *Tuckman* v. *Tuckman*, 308 Conn. 194, 214, 61 A.3d 449 (2013). Furthermore, the majority opinion also does not address whether there will be any limitation on the evidence to be introduced at the hearing. For instance, it is unclear whether the plaintiff will be limited to evidence presented at the original dissolution hearing or can he introduce new evidence regarding his earning capacity at that time.

Moreover, the majority opinion states as follows: "We note that, at oral argument before this court, both parties agreed that [a new hearing on the plaintiff's motion for modification at which the trial court should determine, based on evidence presented by the parties, the specific amount of the plaintiff's earning capacity at the time of the original financial award] would be the appropriate procedure under the particular circumstances of this case." I disagree. A careful review of the recordings of the oral argument before this court demonstrates that the defendant, Margaret Meurer, never conceded that a new hearing on the plaintiff's motion for modification that is the subject of this appeal would be appropriate. Instead, the defendant conceded,

that upon *a new motion for modification*, the plaintiff should be able to introduce evidence of what his earning capacity was at the time of the dissolution and what the plaintiff's earning capacity is at the time of the motion for modification.[4] Although the defendant may have conceded that the plaintiff could bring a new motion for modification and, in an effort to demonstrate a change of circumstances, introduce evidence regarding his capacity at the time of the dissolution judgment, the defendant never conceded that the plaintiff should be allowed to do so on the motion for modification that is the subject of this appeal.[5]

Accordingly, I would reverse the judgment of the Appellate Court as it relates to affirming the trial court's denial of the motions for articulation and/or clarification and would order the trial court to articulate its finding as to the plaintiff's earning capacity at the time of the dissolution judgment.

II

Although I would conclude that the trial court improperly denied the plaintiff's motions for articulation and/or clarification and would order the trial court to articulate its finding as to the plaintiff's earning capacity at the time of the dissolution judgment, I disagree with the majority opinion that the Appellate Court improperly affirmed the trial court's denial of the plaintiff's motion for modification. To the contrary, as I explained previously herein, I would consider the issue of whether the Appellate Court properly affirmed the denial of the motion for modification separately and would conclude that the Appellate Court properly affirmed the trial court's denial of the plaintiff's motion for modification on the ground that the plaintiff did not meet his threshold burden of demonstrating a change in circumstances.

The following additional facts are necessary to my resolution of this issue. The trial court denied the plaintiff's motion for modification. In denying the motion for modification, the trial court found as follows: "By memorandum of decision dated November 3, 2006, as part of a dissolution action the court entered, among other things, an order requiring the plaintiff to pay $16,000 per month as unallocated income and child support for a period of [fourteen] years and thereafter $1 per month dependent upon the status of the defendant's health. At that time the court found that the plaintiff had an earning capacity far exceeding his then income. The court rejected [the] plaintiff's argument that it should base its orders on actual income because [the] plaintiff's education, age and experience warranted a finding based on earning capacity.

"At the time of trial the court was not persuaded that there was a serious commitment and effort to maximize his earning capability and the court's position has not

changed. [The] [p]laintiff now claims that there has been a genuine commitment and effort to try and replicate the substantial income he was used to earning during the prior [years] of his marriage. He has expended funds for an employment marketing action plan and despite only four meaningful interviews he claims he has worked assiduously to obtain bona fide and productive employment. He is presently employed . . . with a three year employment agreement that states his salary at $100,000 per year. He anticipates that he will continue his employment there for at least three years but if employment with substantially greater income presented itself, he would probably change his current employment.

"It should be noted that at the time of the dissolution, [the] plaintiff testified he wanted to change his lifestyle so that he could enjoy more leisure activities. His present position almost two years later is basically the same as at the time of judgment which was the most recent court order. *Borkowski* v. *Borkowski*, [supra, 228 Conn. 738]. [The] [p]laintiff has failed to establish the threshold predicate required to entertain a motion for modification. [The plaintiff's] present income has not been reduced from the income disclosed at the time of trial. In addition, [the plaintiff] testified his taxable income in 2008 will be in excess of $800,000. The court is not unaware of the probable distribution he is soon to receive in connection with the litigation involving [a] bankruptcy estate.

"[The] [p]laintiff's motion for modification must be denied. The party seeking the modification must clearly and definitely show facts and circumstances which have substantially changed. The court must consider all evidence back to its original order. [Id.] At the time of the hearing the plaintiff's income was almost identical to what he disclosed at the time of trial." (Emphasis omitted.)

As a preliminary matter, I set forth the legal parameters of a motion for modification. "Modification of alimony is governed by . . . § 46b-86, subsection (a) of which provides in relevant part: Unless and to the extent that the decree precludes modification . . . an order for alimony . . . may at any time thereafter be . . . altered or modified . . . upon a showing of a substantial change in the circumstances of either party . . . ." (Internal quotation marks omitted.) *Eckert* v. *Eckert*, 285 Conn. 687, 693, 941 A.2d 301 (2008). As the party seeking modification, the defendant had the burden of proving a substantial change in circumstances. See *Simms* v. *Simms*, supra, 283 Conn. 503.

We previously have "explained the specific method by which a trial court should proceed with a motion brought pursuant to § 46b-86 (a). 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 and, on the basis of the § 46b-82 criteria, make an order for modification. . . . The court has the authority to issue a modification only if it conforms the order to the distinct and definite changes in the circumstances of the parties." (Emphasis omitted; internal quotation marks omitted.) *Gervais* v. *Gervais*, 91 Conn. App. 840, 850–51, 882 A.2d 731, cert. denied, 276 Conn. 919, 888 A.2d 88 (2005). Simply put, before the court may modify an alimony award pursuant to § 46b-86, it must make a threshold finding of a substantial change in circumstances with respect to one of the parties. Id., 854; see also *Borkowski* v. *Borkowski*, supra, 228 Conn. 736.

The majority opinion concludes that "because the trial court in the present case could not reasonably have concluded that there had been no substantial change in the plaintiff's earning capacity between the time of the original financial award and the motion for modification without ever having determined the plaintiff's specific earning capacity, the trial court abused its discretion when it denied the motion for modification." I respectfully disagree. Instead, I would conclude that the trial court reasonably found that the plaintiff had not demonstrated a change in circumstances and that, without this predicate finding, the trial court did not need to compare the plaintiff's earning capacity at the time of trial to the plaintiff's earning capacity at the time of the motion for dissolution.

First, it is important to note that the trial court judge that heard the evidence and issued the decision in the dissolution action was the same judge that heard the evidence and issued the decision in the motion for modification. Therefore, that trial court judge was in the best position to determine whether there had been any changes in the plaintiff's circumstances during the intervening two years that would have affected his earning capacity. Indeed, as stated previously in this opinion, this court has repeatedly recognized that "[w]ith respect to the financial awards in a dissolution action, great weight is given to the judgment of the trial court because of its opportunity to observe the parties and the evidence. Moreover, the power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances which arise out of the dissolution of a marriage. . . . For that reason, we allow every reasonable presumption . . . in favor of the correctness of [the trial court's] action." (Citation omitted; internal quotation marks omitted.) *Unkelbach* v. *McNary*, supra, 244 Conn. 366.

Second, it is important to examine the basis for the trial court's determination that the plaintiff had not demonstrated a change in circumstances. In denying the plaintiff's motion for modification, the trial court

found as follows: "At [the time the trial court issued its November 3, 2006 memorandum of decision in connection with the dissolution judgment] the [trial] court found that the plaintiff had an earning capacity far exceeding his then income. . . . At the time of trial the court was not persuaded that there was a *serious* commitment and effort to maximize [the plaintiff's] earning capability *and the court's position has not changed*." (Emphasis added.) The trial court determined, at the time of the dissolution action, the plaintiff was not seriously committed to maximizing his earnings and found that nothing had changed in the intervening two years. In my opinion, this finding is a sufficient basis for the trial court to base its denial of the motion for modification. Once the trial court made that finding, the trial court does not need to make any findings regarding the amount of the plaintiff's earning capacity.

In his motion for modification, the plaintiff asserted that there had been a change in circumstances because he had tried to find a job making more money, but had been unsuccessful. The trial court rejected the plaintiff's claim, finding, that the plaintiff "now claims that there has been a genuine commitment and effort to try and replicate the substantial income he was used to earning during the prior [years] of his marriage. He has expended funds for an employment marketing action plan and despite *only four meaningful interviews he claims he has worked assiduously to obtain bona fide and productive employment*." (Emphasis added.) The trial court further explained that, during the hearing on the dissolution, the plaintiff had testified that he wanted to change his lifestyle and enjoy more leisure time and that, although he now said that if a position with substantially more income presented itself he would probably change his current employment, he was still working at essentially the same position that he was at the time of dissolution. Furthermore, the trial court also found that the plaintiff's taxable income in 2008 was substantially similar to his income at the time of dissolution, namely, in excess of $800,000 in 2008 and, on average, $988,064.43 during the seven years prior to the dissolution. Indeed, in my view, the motion to modify raised the same issue as the divorce—whether the plaintiff was using his best efforts to maximize his earning potential. The trial court found in the divorce that he was not maximizing his earning capacity and found on the motion for modification that nothing had changed. Therefore, the trial court was not required to determine the amount of the plaintiff's earning capacity. In effect, the trial court found that the plaintiff was malingering to keep his payments down, both at the time of the dissolution and at the time of the motion for modification. On the basis of the evidence that the plaintiff went on only four interviews in two years, worked in substantially the same position as he did at the time of the dissolution, continued to make approximately

$800,000 less than he had in his previous employment and had a taxable income that exceeded $800,000 in 2008, I would conclude that the trial court did not abuse its discretion when it found that the plaintiff had not demonstrated a change in circumstances.

Accordingly, I would affirm the judgment of the Appellate Court as it relates to affirming the trial court's denial of the plaintiff's motion for modification because the trial court reasonably concluded that the plaintiff had not met his burden of demonstrating a change in circumstances. Therefore, I respectfully dissent.

[1] I agree with the majority that, pursuant to Practice Book § 66-5, "[t]he sole remedy of any party desiring the court having appellate jurisdiction to review the trial court's decision on [a motion for rectification or motion for articulation] filed pursuant to this section, or any other correction or addition ordered by the trial court during the pendency of the appeal shall be by motion for review under Section 66-7." The majority further notes that "the only ruling in the trial court that constituted a final judgment from which the plaintiff could have appealed was the trial court's denial of his motion for modification, which is the ruling referenced in the plaintiff's appeal forms." See footnote 1 of the majority opinion.

As previously indicated, however, the plaintiff filed several motions for review regarding the trial court's denial of its motion for articulation. The Appellate Court twice granted the plaintiff's motions for review. The plaintiff then filed a third motion for review. The Appellate Court granted the plaintiff's motion for review, but denied the relief requested, "without prejudice to the parties addressing the alleged discrepancy in the trial court's decisions in their briefs on the merits of the appeal." Thus, in my view, the Appellate Court allowed the issue to be framed as part of the appellate appeal.

In his appeal papers the plaintiff explicitly indicated that he appealed from the "[f]inal judgments entered [October 7, 2008], as reflected in [the] memorandum of decision type dated [October 6, 2008], including denial of [the] plaintiffs motion to modify support . . . and orders relating to counsel fees, interest, contempt, purge, *denial of a motion for articulation on or about* [*August 4, 2008*] and other rulings related to the October 7, 2008 memorandum of decision . . . rulings on motion for clarification, and other related rulings." (Emphasis added.)

[2] If, indeed, as suggested by the majority, the trial court had answered the Appellate Court's questions to its satisfaction, it is curious to me that the Appellate Court would add the phrase in its subsequent order: "without prejudice to the parties addressing the alleged discrepancy in the trial court's decisions in their briefs on the merits of the appeal."

[3] The majority indicates that "we do not understand why the dissent would order the trial court to articulate its finding as to the plaintiff's earning capacity after concluding that the trial court's ruling on the motion for modification should be affirmed. If this court were to affirm the ruling on the motion for modification, there would be no basis to remand the case to the trial court for any further proceedings." See footnote 1 of the majority opinion. My response is that I would enter this ruling for the very reason that the majority is using the extraordinary remedy of exercising our supervisory authority. I arrive, however, at the same conclusion in another way. In my view, the issue presented in this case is one of fundamental fairness. The question certified by the court was properly framed and briefed by the parties. This court should, in my view, answer that question and require the judge who tried the case to make a factual finding as to the amount that he considered to be the plaintiff's earning capacity.

The majority has already acknowledged the unusual procedural posture of this case. Specifically, as noted previously in this opinion, the majority states: "Although we recognize that it is unusual for a trial court to make new factual findings to support a judgment that is final and immune from attack, in the context of financial support awards, which are subject to modification at any time, there simply is no other practical alternative to this procedure when the trial court that issued the original award failed to make the necessary factual findings. Prohibiting an ex post facto factual finding would mean that the affected party would be effectively barred forever from requesting a modification based on a substantial change in circumstances." See footnote 7 of the majority opinion. I agree with the

majority that the situation needs to be corrected. I arrive at my conclusion, however, through an alternative means, namely, by answering the question certified on appeal.

Also, in my view, it would be much fairer to the parties to have the judge who tried the case determine the earning capacity which formed the basis of his opinion, rather than have a new judge make that determination on the basis of surmise and guesswork. In its present posture, as remanded by the majority, there is no guarantee that the original trial judge will be the judge determining the earning capacity. We have already acknowledged the unique status of family cases in our jurisprudence. "This principle of complete disclosure is consistent with the notion that the settlement of a marital dissolution case is not like the settlement of an accident case." (Internal quotation marks omitted.) *Billington* v. *Billington*, 220 Conn. 212, 221, 595 A.2d 1377 (1991). "Although marital parties are not necessarily in the relationship of fiduciary to beneficiary, we believe that no less disclosure is required of such parties when they come to court seeking to terminate their marriage." Id. I compare the present case to *Ahneman* v. *Ahneman*, 243 Conn. 471, 482–84, 706 A.2d 960 (1998), wherein the defendant appealed from the trial court's refusal to consider her financial motions. In making this comparison, I note that the trial court in the present case issued a nominal response to the plaintiff's motions for articulation after being ordered to do so by the Appellate Court while the trial court in *Ahneman* refused to consider the defendant's financial motions in their entirety. Id. Despite this difference, I believe that our decision in *Ahneman* remains applicable to the present case in light of the fact that the Appellate Court order denying the plaintiff's final motion for review did so "without prejudice." In *Ahneman*, the Appellate Court dismissed the defendant's appeal for lack of a final judgment and we granted certification to appeal on the final judgment issue. *Ahneman* v. *Ahneman*, supra, 472. On the certified issue, we concluded that the trial court's refusal to consider the defendant's motions was a final judgment for purposes of appeal. Id., 480. In order to avoid further confusion and delay, and because the parties had briefed and orally argued the issue, however, we then went on to consider "the closely related issue of the propriety of the trial court's refusal to consider the defendant's motions." Id., 472 n.1. In *Ahneman* we stated that "[c]ourts are in the business of ruling on litigants' contentions, and they generally operate under the rule essential to the efficient administration of justice, that where a court is vested with jurisdiction, over the subject-matter . . . and . . . obtains jurisdiction of the person, it becomes its . . . duty to determine every question which may arise in the cause . . . . This general rule is particularly important in the context of marital dissolution cases because of the *likelihood of continuing changes in the parties' circumstances requiring continuing dispute resolution by the court.*" (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 484. Thus, in *Ahneman*, this court exercised its supervisory authority and remanded the case to the Appellate Court with direction to remand it further to the trial court for prompt resolution of the defendant's motions. Id., 485. Thus, the precedent has been set. I differ with the majority on the means by which to accomplish the same goal.

Further, in a family case we have concluded that, unlike our standard rule, the party that precipitated disclosure misconduct should bear the burden of showing no harm to the plaintiff. *Ramin* v. *Ramin*, 281 Conn. 324, 348, 915 A.2d 790 (2007). Indeed, the majority acknowledges the potential for continuing review of family court orders when it states that "[p]rohibiting an ex post facto factual finding would mean that the affected party would be effectively barred forever from requesting a modification based on a substantial change in circumstances." See footnote 7 of the majority opinion. It is for this reason that I would require the original trial judge to state the earning capacity of the plaintiff upon which he based his original decision, in compliance with the plaintiff's prior motion for articulation. In my view, requiring the original trial judge to respond to the plaintiff's motion for articulation to "articulate the specific earning capacity that it attributed to the plaintiff, which served as the basis for its judgment and memorandum of decision" is in accord with both the letter and spirit of the *Ahneman* decision. It also recognizes the need for an earning capacity baseline due to the "likelihood of continuing changes in the parties' circumstances requiring continuing dispute resolution by the court." *Ahneman* v. *Ahneman*, supra, 243 Conn. 484.

[4] The following colloquy occurred at the oral argument in this court:

"[Question]: So you're conceding then that they could go, they could bring

a motion . . . I think you're saying, yeah right, there should be an earning capacity finding, but we should just do a do over.

"[Answer]: Because there wasn't a do in the first place. A fair reading of this is [that the trial court is saying the plaintiff is] in the same position, nothing has changed, look at the original memorandum, he tanked, he wasn't trying hard, he wasn't making real efforts to maximize his earnings, here we are two years later, same deal, nothing has changed . . . .

"[Question]: So, then is he precluded forever? What happens five years from now? Ten years from now?

"[Answer]: Put on evidence, real evidence.

"[Question]: Of what? And you wouldn't object to that, that you could go back and now make a finding from the original time as to what the earning capacity was?

"[Answer]: I don't . . .

"[Question]: Is that a yes or a no?

"[Answer]: Is the question—would I object? The answer is no.

"[Question]: You wouldn't say he is precluded from doing that?

"[Answer]: I would say he is not precluded from showing a change in circumstances and where the record doesn't clearly show what the circumstances are at point A, he can put that evidence on as to point A and point B."

[5] The majority states: "If the trial court finds that the evidence presented at the new hearing does not support the original finding that the plaintiff's earning capacity exceeded his income, the only recourse will be to modify the award going forward." See footnote 7 of the majority opinion. Insofar as this statement is intended to impact the fact that any further order will only have prospective effect from the date of the new order, I am in full accord with that statement.