JONATHAN M. TANZMAN *v.* MARGARET E. MEURER
(SC 18812)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh, McDonald and Vertefeuille, Js.

*Argued February 5—officially released July 9, 2013*

*Samuel V. Schoonmaker IV*, with whom was *Wendy Dunne DiChristina*, for the appellant (plaintiff).

*Gaetano Ferro*, with whom were *Spencer H. Higgins* and, on the brief, *Livia D. Barndollar*, for the appellee (defendant).

*Opinion*

ROGERS, C. J. The question that we must resolve in this appeal is whether a trial court that bases a financial support order on a party's earning capacity must determine the specific dollar amount of the party's earning capacity. We conclude that it must. The plaintiff, Jonathan M. Tanzman, appealed to the Appellate Court from the judgment of the trial court denying his postjudgment motion to modify his unallocated alimony and child support obligations to the defendant, Margaret E. Meurer. *Tanzman* v. *Meurer*, 128 Conn. App. 405, 406, 16 A.3d 1265 (2011). The Appellate Court affirmed the judgment of the trial court. Id., 413. We then granted certification to appeal to this court, limited to the following issue: "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*, 301 Conn. 930, 23 A.3d 724 (2011). We answer that question in the negative. Accordingly, we reverse the judgment of the Appellate Court.

The record reveals the following undisputed facts, facts that were found by the trial court and procedural history. On November 6, 2006, in connection with its judgment of dissolution of the parties' marriage, the trial court entered an order requiring the plaintiff to pay the defendant $16,000 per month in unallocated alimony and child support for a period of fourteen years. The court found that the plaintiff had an earning capacity far exceeding his then current income, but did not specify the amount of the earning capacity. The court also found that the plaintiff had earned a yearly average of $988,064.43 in his career as a day trader over the previous seven years. In addition, the court found that, due to changes in the day trading industry, the plaintiff recently had been much less successful. The plaintiff claimed that he was unable to find another job in the same field, that he was currently working fewer than forty hours per week trading his own money, and that he was looking for a new job in a related field. The court concluded, however, that, "[a]lthough the changes in the market and the industry have proven a challenge to [the plaintiff's] continued financial success, the court does not believe that he has made satisfactory efforts [toward] gaining new employment."

On January 9, 2008, the plaintiff filed a motion to modify the support order in which he represented that he had obtained employment at an annual salary of $100,000. He contended that, because this amount constituted "a fraction of the earning capacity previously attributed to him by the [trial court]," there had been a substantial change in circumstances justifying a modification of the award. Thereafter, the plaintiff filed a

motion for articulation of the original support order in which he asked the trial court to articulate the specific earning capacity that it had attributed to him at that time. The trial court denied that motion "without prejudice . . . ."

After a hearing, the trial court denied the plaintiff's motion for modification. The court stated that, at the time of the original support order, it "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." Again, however, the court did not specify the amount of the plaintiff's estimated earning capacity. The court also stated that the plaintiff's income had not been reduced since the date of the original support order, and that his taxable income in 2008 was going to be in excess of $800,000. Accordingly, the court concluded that the plaintiff had not clearly shown a substantial change in circumstances justifying a modification of the award.

Thereafter, the plaintiff filed a motion for clarification of the court's decision in which he requested the court to clarify whether it had considered "any amount of 'earning capacity' " in connection with the motion for modification and, if so, "what amount did it consider?" In addition, the plaintiff asked whether the trial court had considered his earning capacity as of any specific date and, if so, what date. The trial court denied the motion.

The plaintiff then appealed from the denial of the motion for modification to the Appellate Court. After filing the appeal, the plaintiff filed a motion for articulation in the trial court requesting that court to clarify whether it had determined his earning capacity and, if so, what amount. The trial court denied the motion. The plaintiff then filed a motion for review in the Appellate Court. The Appellate Court granted the motion and ordered the trial court "to state the following with regard to its decision dated October 6, 2008: (1) Whether the 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 . . . ." In response, the trial court issued an articulation in which it stated that it "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 plaintiff then filed another motion for review in the Appellate Court in which he requested the court to order the trial court to clarify whether the trial court had " 'made a finding of the plaintiff's current earning capacity,' irrespective of the fact that the trial court

did not set forth a specific dollar amount for earning capacity in its memorandum of decision." The Appellate Court granted the motion and ordered the trial court to articulate whether it had determined a specific amount for the plaintiff's earning capacity that was not set forth in the October 6, 2008 memorandum of decision. The trial court then issued an articulation in which it stated that it had not made a specific finding of the plaintiff's earning capacity in connection with its October 6, 2008 decision denying the motion for modification.

The plaintiff then filed a motion for review of the trial court's articulation, claiming that the trial court had impermissibly changed the reasoning of its denial of the plaintiff's motion for modification. Specifically, the plaintiff claimed that the trial court initially had found that his earning capacity was, at the time of the requested modification, "almost identical" to his earning capacity at the time of the original order but at the time of the plaintiff's motion for review the court stated that it had made no findings on that question. The plaintiff also filed an amended appeal, in which he referred to the trial court's articulation as a "[f]inal judgment . . . altering [the] findings and reasoning" of the court's initial support order and its ruling on the motion for modification.[1] The Appellate Court denied the motion for review without prejudice to the plaintiff's right to address that issue in his brief to the Appellate Court.

Thereafter, the Appellate Court affirmed the judgment of the trial court. The Appellate Court reasoned that, because the trial 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," and because "the plaintiff has failed to provide us with any statute, case law or rule of practice that require[d] the trial court to specify an exact earning capacity when calculating an alimony and child support award"; *Tanzman* v. *Meurer*, supra, 128 Conn. App. 412; the trial court's failure to specify an amount did not require reversal. Id., 413. This appeal followed.

The plaintiff claims that the Appellate Court improperly determined that the trial court is not required to determine the specific amount of a party's earning capacity when that factor provides the basis for a support award, even when requested by way of a motion for articulation or clarification. The plaintiff also contends that, if we agree with his claim that the trial court was required to specify his earning capacity, we should reverse the judgment of the Appellate Court affirming the trial court's denial of his motion for modification and the case should be remanded to the trial court for a new hearing at which the court must determine the plaintiff's earning capacity. We agree both that the trial

court was required to specify the plaintiff's earning capacity and that the plaintiff's requested relief is appropriate.

We begin our analysis with the standard of review. "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 . . . .

"[General Statutes §] 46b-86[2] governs the modification or termination of an alimony or support order after the date of a dissolution judgment. When . . . the disputed issue is alimony, the applicable provision of the statute is § 46b-86 (a), which provides that a final order for alimony may be modified by the trial court upon a showing of a substantial change in the circumstances of either party. . . . Under that statutory provision, the party seeking the modification bears the burden of demonstrating that such a change has occurred." (Citation omitted; internal quotation marks omitted.) *Simms* v. *Simms*, 283 Conn. 494, 502, 927 A.2d 894 (2007).

"It is well established that the trial court may under appropriate circumstances in a marital dissolution proceeding base financial awards [pursuant to General Statutes §§ 46b-82 (a)[3] and 46b-86] on the earning capacity of the parties rather than on actual earned income. *Lucy* v. *Lucy*, 183 Conn. 230, 234, 439 A.2d 302 (1981). Earning capacity, in this context, is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn considering such things as his vocational skills, employability, age and health." (Internal quotation marks omitted.) *Weinstein* v. *Weinstein*, 280 Conn. 764, 772, 911 A.2d 1077 (2007). "When determining earning capacity, it . . . is especially appropriate for the court to consider whether [a person] has wilfully restricted his [or her] earning capacity to avoid support obligations." *Bleuer* v. *Bleuer*, 59 Conn. App. 167, 170, 755 A.2d 946 (2000).

In the present case, the Appellate Court relied on its decision in *Chyung* v. *Chyung*, 86 Conn. App. 665, 862 A.2d 374 (2004), cert. denied, 273 Conn. 904, 868 A.2d 744 (2005), to support its conclusion that, when a trial court relies on a party's earning capacity to determine the amount of a financial award, the court is not required to specify the particular dollar amount of the party's earning capacity. In *Chyung*, the trial court awarded the plaintiff a lump sum alimony payment of $350,000; id., 667; based in part on the parties' earning capacities. Id., 675. The plaintiff appealed from the judgment, claiming that "the court's failure to identify the defendant's precise earning capacity resulted in an

award that was based on speculation and conjecture." Id. The Appellate Court rejected the plaintiff's claim, stating that she had "failed to provide us with any statute, case law or rule of practice that requires the trial court to specify an exact earning capacity." Id., 675–76. The Appellate Court also noted that the plaintiff had failed to file a motion for articulation of the court's decision, rendering her claim unreviewable. Id., 676.

The Appellate Court's decision in *Chyung* reasonably may be interpreted, however, as holding only that, when the trial court had *determined* the specific amount of the defendant's earning capacity when it crafted the support award; id., 675 ("[w]e must presume . . . that the court properly considered the defendant's earning capacity when its award was drafted"); but it has merely failed to *articulate* that amount in its support order, that failure does not automatically require reversal. We would agree with that conclusion, but that is not the case here.[4] The trial court in the present case specifically stated in response to the Appellate Court's order for an articulation that it "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 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.[5] We also agree with the decision in *Chyung* to the extent that it held that, when a party has failed to seek clarification as to whether the trial court failed to determine the specific amount of earning capacity or whether it merely failed to articulate the specific amount in its support order, a claim that the trial court improperly failed to determine a specific amount of earning capacity is unreviewable for lack of an adequate record. Id., 676 (plaintiff's claim was unreviewable because she failed to seek articulation). That also is not the case here.

Moreover, this court has held in a different context that, even though it was not expressly required by statute, "a trial court, when utilizing a method to ascertain the value of a pension [for purposes of valuing and distributing marital assets], should reach that value on the record. *Casting the judgment in specific amounts will make the result more comprehensible for the litigants and will facilitate appellate review as often as such review may become necessary.*" (Emphasis added; internal quotation marks omitted.) *Krafick* v. *Krafick*, 234 Conn. 783, 804, 663 A.2d 365 (1995). Although this court in *Krafick* did not specify the source of its authority to impose this requirement on the trial courts, it

presumably did so pursuant to its inherent supervisory authority.

We can perceive no reason why a different rule should apply when the trial court has issued a financial award based on a party's earning capacity. As the present case shows, the failure to specify the dollar amount of the earning capacity leaves the relevant party in doubt as to what is expected from him or her, and makes it extremely difficult, if not impossible, both for a reviewing court to determine the reasonableness of the financial award and for the trial court in a subsequent proceeding on a motion for modification to determine whether there has been a substantial change in circumstances. We therefore conclude, pursuant to our inherent supervisory authority, that, when a trial court has based a financial award pursuant to § 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.[6] We further conclude 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.

Finally, we conclude that the remedy when the trial court has indicated that it failed to determine the specific amount of a party's earning capacity at the time of the original financial award is for the trial court to conduct a new hearing on the issue.[7] Just as a party is not bound by an injunction that is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"; (internal quotation marks omitted) *Emhart Industries, Inc.* v. *Amalgamated Local Union 376, U.A.W.*, 190 Conn. 371, 409, 461 A.2d 422 (1983); a party to a marital dissolution proceeding cannot be forever bound by a finding that is so vague that no reviewing court could reasonably ascertain whether the finding, and, by extension, the legal conclusions based on the finding, were correct, and no trial court could ever reasonably determine whether there has been a substantial change in circumstances for purposes of ruling on a motion for modification pursuant to § 46b-86.

In support of her claim that the trial court properly denied the plaintiff's motion for modification, the defendant contends that, because the trial court did not specify a particular dollar amount for the plaintiff's earning capacity in the original financial award, and the plaintiff did not seek an articulation "at the time of the dissolution judgment," the plaintiff's claim that his current earning capacity is a fraction of his former earning capacity is "fatally flawed." We disagree. "There is no time restriction imposed on the filing of a motion for

clarification" of a court order. (Internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 244, 796 A.2d 1164 (2002). As we have noted, the trial court indicated that, at the time that it issued the original support order, it had concluded *only* that the plaintiff had not maximized his earning capacity and that it had made *no* finding as to what his maximum earning capacity was. Accordingly, it is the support order that is flawed, not the plaintiff's claim that there has been a substantial change in his circumstances.

The defendant also contends that the plaintiff failed to meet his burden of proving that his earning capacity had substantially changed. As we have indicated herein, however, the very point of requiring the trial court to determine a party's specific earning capacity is to provide the parties and the trial court in a subsequent modification proceeding with a baseline to which the current circumstances can be compared. In the absence of such a baseline, a party attempting to prove a substantial change of circumstances is effectively playing a game of blindman's bluff, a situation that is hardly consistent with the orderly administration of justice. See *Herrick* v. *Wilson*, 429 N.J. Super. 402, 407, 59 A.3d 604 (2011) ("A lawsuit is not a parlor game; it is a solemn search for truth conducted by a court of law. . . . [Trial procedures should] make a trial less a game of [blindman's] bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." [Citation omitted; internal quotation marks omitted.]).

Accordingly, we conclude 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 presented by the parties, the specific amount of the plaintiff's earning capacity at the time of the original financial award.[8] In addition, because the trial court did not determine the specific amount of the plaintiff's earning capacity at the time that he filed his motion for modification, the court must also determine that amount.[9] We note that, at oral argument before this court, both parties agreed that this would be the appropriate procedure under the particular circumstances of this case.[10]

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court for further proceedings consistent with this opinion.

In this opinion NORCOTT, PALMER, ZARELLA and McDONALD, Js., concurred.

[1] In an apparent typographical error, the plaintiff's amended appeal referred to a decision dated October 6, 2010, which was after the date of the amended appeal, instead of October 6, 2008, which was the date of the court's ruling denying the plaintiff's motion for modification.

The dissent appears to contend that the plaintiff appealed from the trial

court's denial of his motions for articulation. We disagree. First, the denial of a motion for articulation is reviewable only by way of a motion for review. See 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 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, and that is the ruling referenced in the plaintiff's appeal forms.

Second, the trial court ultimately did not *deny* the plaintiff's motions for articulation, but responded to them after being ordered to do so by the Appellate Court. The trial court merely articulated that it had made no specific finding as to the plaintiff's earning capacity. It is clear, therefore, that the Appellate Court could not have "affirm[ed] the trial court's denial of the motions for articulation and/or clarification," as stated by the dissent. Rather, it merely held that the trial court was not required to determine a specific earning capacity in order to rule on the plaintiff's motion for modification. *Tanzman* v. *Meurer*, supra, 129 Conn. App. 412–13.

Third, 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.

[2] General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support, an order for alimony or support pendente lite or an order requiring either party to maintain life insurance for the other party or a minor child of the parties may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . ."

[3] General Statutes § 46b-82 (a) provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall hear the witnesses, if any, of each party, except as provided in subsection (a) of section 46b-51, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability of such parent's securing employment."

[4] For the reasons that we explain later in this opinion, however, we emphasize that, although the failure to specify the amount of earning capacity in the support order will not *automatically* result in reversal, trial courts should specify the amount to facilitate appellate review and potential future trial court proceedings relating to the order.

[5] The dissent disagrees with this conclusion. In response to the Appellate Court's second order to the trial court, however, in which it ordered the trial court to articulate whether it had determined a specific amount for the plaintiff's earning capacity that was not set forth in the October 6, 2008 memorandum of decision denying the defendant's motion for modification, the trial court issued an articulation in which it stated that it had not made any specific finding of the plaintiff's earning capacity at that time. If the trial court previously had made such a determination, and it was relying on that previous determination to support its finding that the circumstances had not substantially changed, we can perceive no reason why the trial court would not have said so.

[6] To the extent that *Chyung* v. *Chyung*, supra, 86 Conn. App. 675–76, may be interpreted as holding to the contrary, it is hereby overruled.

The Appellate Court in the present case also relied on a number of cases for the proposition that "earning capacity . . . is meant to be a flexible concept, particularly suited to cases where the designation of a precise monetary value of earned income is inappropriate." *Tanzman* v. *Meurer*, supra, 128 Conn. App. 412. We agree that, when it is determining earning capacity, the trial court's *consideration* of such things as vocational skills, employability, age, health and evidence that the party has deliberately avoided employment is meant to be flexible and adapted to the particular facts and circumstances of the case. Id., 412–13. That does not mean, how-

ever, that the ultimate *determination* of the earning capacity is meant to be flexible and nonspecific. We also reject the defendant's contention that "[r]equiring the [trial] court to find earning capacity is 'inappropriate' where a litigant has . . . intentionally minimized it." Nothing in our case law supports such a proposition.

[7] We recognize that the trial court has no jurisdiction to open judgments outside the four month period prescribed by General Statutes § 52-212a "[u]nless otherwise provided by law and except in such cases in which the court has continuing jurisdiction . . . ." Although the trial court has continuing jurisdiction to modify an alimony order pursuant to § 46b-86 (a) upon proof of a substantial change in circumstances after the date of the original order, the court does not have continuing jurisdiction to modify the original order on the basis of new evidence pertaining to the circumstances that existed at the time the order was issued. Accordingly, we emphasize that if the trial court renders a financial award based on a party's earning capacity but fails to determine the specific amount of earning capacity, and there is no appeal from the financial award within the appeal period, the court's failure to determine the specific amount of earning capacity does not subject the financial award *itself* to attack after the four month period has expired. Rather, the purpose of the new hearing is to ensure that: (1) if there *was* an appeal from the original financial award, the reviewing court has an adequate record to determine whether the award was an abuse of discretion; and (2) if a motion for modification has been filed, the trial court has an adequate record to determine whether there has been a substantial change in circumstances since the original award.

The dissent contends that "it is unclear . . . what effect the outcome of [the hearing on remand] will have on the financial orders that have been in place since the time of dissolution in October, 2006, almost seven years ago." We trust that the foregoing makes it perfectly clear, however, that the new hearing can have *no* effect on the original support award, because there was no appeal from that award. At the new hearing, the court will merely make factual determinations as to what the defendant's earning capacity was at the time of the original order and what it is now. 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.

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.

[8] We recognize that earning capacity is a flexible concept and its determination is a matter of judgment requiring the court only to make a reasonable estimate. See *Weinstein* v. *Weinstein*, supra, 280 Conn. 772 (earning capacity "is an amount which a person can realistically be expected to earn considering such things as his vocational skills, employability, age and health" [internal quotation marks omitted]). We further recognize that trial courts occasionally have estimated earning capacity within a range of dollar amounts. See *Chyung* v. *Chyung*, supra, 86 Conn. App. 674 (trial court estimated plaintiff's earning capacity at between $12,000 and $30,000). We caution, however, that estimating earning capacity within a *broad* range of dollar amounts will lead to the same difficulties as the complete failure to provide a specific estimate. Accordingly, the trial court should attempt to provide as precise an estimate as possible based on the evidence presented by the parties.

[9] We recognize that the trial court suggested in its memorandum of decision denying the plaintiff's motion for modification that the plaintiff's earning capacity had not changed from the time of the original financial award to the time that the plaintiff filed his motion for modification. Nevertheless, because a conclusion that the plaintiff's earning capacity had not changed would be inconsistent with the court's statement that it had made no determination of the plaintiff's earning capacity at the time that it denied the motion for modification, we conclude that the plaintiff is entitled to present evidence that his earning capacity had changed.

[10] The dissent disagrees with this interpretation of the defendant's remarks at oral argument before this court. As the remarks quoted by the dissent indicate, however; see footnote 4 of the dissenting opinion; the defendant

conceded that, when a party has filed a motion for modification based on a change in earning capacity, and the trial court previously has not specified earning capacity, the remedy is an evidentiary hearing at which the party can present evidence of his earning capacity at the time of the original order. Accordingly, although the defendant did not concede that the trial court in the present case improperly denied the plaintiff's motion for modification, it is implicit in her attorney's remarks that, if this court were to reach that conclusion, she would agree that a new hearing would be appropriate.