

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1677

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

RICHARD J. DEES,

PETITIONER-APPELLANT,

v.

JEAN MAE DEES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County:
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Richard J. Dees appeals from an order denying his motion to terminate or reduce maintenance to his former wife, Jean Mae Dees. He argues that there has been a substantial change in circumstances in the fifteen years since the parties' divorce and that it was error for the circuit court to

consider his pension income in determining his ability to pay maintenance. We affirm the order denying Richard's motion.

¶2 A request for maintenance modification is addressed to the circuit court's discretion. See *Haeuser v. Haeuser*, 200 Wis. 2d 750, 764, 548 N.W.2d 535 (Ct. App. 1996). Discretion is properly exercised when the record demonstrates that the circuit court undertook a reasonable inquiry and examination of the facts and had a reasonable basis for its decision. See *id.* at 765. When requesting a modification of maintenance, the moving party has the burden of establishing a positive showing of a substantial change in the financial circumstances of the parties. See *id.* at 764. Thus, the first step in a substantial change analysis is a factual inquiry. See *Eckert v. Eckert*, 144 Wis. 2d 770, 774, 424 N.W.2d 759 (Ct. App. 1988). It involves a comparison of the facts when the maintenance order was entered with the present facts. See *Licary v. Licary*, 168 Wis. 2d 686, 692, 484 N.W.2d 371 (Ct. App. 1992).

¶3 The circuit court did not make findings on the "before" and "after" circumstances of the parties but those circumstances are undisputed. The Deeses were divorced in 1984 after twenty-two years of marriage. In 1984, Richard's income was \$42,672 and Jean's was \$5,436. Jean's monthly expenses, including expenses for two children then living with her, were \$1,847. Richard was ordered to pay \$1,500 family support. In 1991, the amount reduced to \$900 per month maintenance upon emancipation of the youngest child.

¶4 Since the divorce, Richard has remarried and fathered two children. When Richard filed his motion in 1999, he had retired from his federal government job having been offered incentives to do so. His pension is now his main source of income, but he also has earnings from a consulting enterprise he

started. His 1998 income was \$69,566. Jean's 1998 income was \$18,923. Her monthly expenses amount to approximately \$1,965.

¶5 Even with his retirement, Richard's earnings have increased since the divorce. Jean's earnings have increased as well. However, at the time of the divorce the circuit court contemplated that Jean would acquire some additional job skills and earn more. The increase in Jean's income was within the range the circuit court anticipated and does not demonstrate a lack of diligence on her part. *See Enders v. Enders*, 147 Wis. 2d 138, 146, 432 N.W.2d 638 (Ct. App. 1988) (in determining whether a change in circumstances has occurred, a "critical point is whether the trial court took the factor alleged to have changed into account when it made its initial decision"). Richard still has the ability to pay maintenance and Jean's need for maintenance still exists. The circuit court's finding that a substantial change in circumstances did not exist is not clearly erroneous.

¶6 Richard argues that his pension income should be shielded from consideration since the pension was awarded to him as part of the property division. *See Olski v. Olski*, 197 Wis. 2d 237, 244, 540 N.W.2d 412 (1995) (recognizing that a retirement benefit should not be double counted). The increases in the retirement benefit because of postdivorce employment are available for postdivorce maintenance. *See id.* at 248. Here, it was Richard's burden to establish the facts showing a substantial change of circumstances. He failed to provide the circuit court with the necessary financial analysis to carve out that portion of the pension fund and interest attributable to amounts accumulated during the marriage and accounted for in the property division. Richard cannot be heard to complain that the circuit court erroneously exercised its discretion when he left the court in an evidentiary vacuum. *See Popp v. Popp*, 146 Wis. 2d 778, 796, 432 N.W.2d 600 (Ct. App. 1988).

¶7 We need only briefly touch on Richard’s concern that the circuit court improperly applied the “fairness” objective in addressing the motion for maintenance modification. See *Johnson v. Johnson*, 217 Wis. 2d 124, 128, 576 N.W.2d 585 (Ct. App. 1998), *review denied*, 225 Wis. 2d 491, 594 N.W.2d 385 (Wis. Apr. 27, 1999) (No. 98-2141) (“The ‘fairness objective’ does not apply to a postdivorce situation.”). The circuit court’s one-time mention of the fairness objective at the end of its ruling does not reflect that it was a consideration in the ruling. At most, the circuit court’s reference to fairness could be to accommodate the requirement that a substantial change in circumstances should be such that it would be unjust or inequitable to strictly hold either party to the original maintenance award. See *Rosplock v. Rosplock*, 217 Wis. 2d 22, 33, 577 N.W.2d 32 (Ct. App.), *review denied*, 219 Wis. 2d 922, 584 N.W.2d 123 (Wis. May 18, 1998) (No. 96-3522). Since we affirm the finding that there was no substantial change on the financial circumstances, the “fairness” of holding a party to the original order does not come into play. For the same reason, we need not address Richard’s claim that the circuit court relied too heavily on Richard’s decision to reduce his income by early retirement.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

