

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 2, 2010

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2009AP1768-FT

Cir. Ct. No. 2002FA59

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

KAREN JEAN ANDERSON, P/K/A KAREN JEAN DIEMAN,

PETITIONER-RESPONDENT,

v.

WILLIAM EARL DIEMAN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Price County:
PATRICK J. MADDEN, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. William Dieman appeals an order denying his motion for revision of that part of a supplemental divorce judgment awarding \$1,200 in monthly spousal maintenance to Karen Anderson. Dieman argues that

because the circuit court did not find his retirement decision both voluntary and unreasonable, it erred by considering his earning capacity to deny the motion. We agree and, therefore, reverse the order and remand the matter to the circuit court for further proceedings.

BACKGROUND

¶2 Dieman and Anderson divorced in May 2003 after thirty-one years of marriage. Dieman's retirement and pension accounts were divided by qualified domestic relations orders, and Anderson elected lump sum distributions of her one-half shares in the 401(k) and pension accounts. In September 2003, the court entered a supplemental order and judgment requiring Dieman to pay \$1,200 in monthly spousal maintenance to Anderson, then fifty years old, until her remarriage or until she reached the age of sixty-two. At that time, Dieman's gross bi-weekly income was \$2,750. Five years later, when Dieman's retirement from his job as an electric utility lineman was imminent, Dieman filed the underlying motion for revision, seeking to terminate spousal maintenance. After a hearing, the court denied the motion and this appeal follows.

DISCUSSION

¶3 Under WIS. STAT. § 767.59(1k) (2007-08),¹ the circuit court may revise a maintenance order if there has been a substantial change in the parties' financial circumstances. We review a circuit court's decision to modify maintenance, including the decision whether there is a substantial change in circumstances, as a discretionary decision. *Cashin v. Cashin*, 2004 WI App 92,

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶44, 273 Wis. 2d 754, 681 N.W.2d 255. As long as the court “reaches a rational, reasoned decision based on the application of the correct legal standards to the record facts, the trial court’s exercise of discretion will be affirmed on appeal.” *Sellers v. Sellers*, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996).

¶4 A circuit court may consider earning capacity when determining a maintenance obligation if it finds a spouse’s job choice both voluntary *and* unreasonable. *Id.* at 587. The issue whether a spouse’s job choice is unreasonable presents a question of law. *Id.* However, we will give appropriate deference to the court’s legal conclusion because it is so intertwined with factual findings supporting that conclusion. *Id.*

¶5 At the motion hearing, Dieman testified regarding his decision to retire. Specifically, Dieman explained that he suffered from lower back problems, arthritis and Lyme’s Disease, and his back condition was becoming progressively worse with his “in and out of the bucket and bouncing around in the truck all the time.” When asked why, given his various ailments, Dieman had not elected to retire earlier, he explained the retirement date was selected based upon his employer’s “rule of 90”—the point at which his years of service and his age together would total 90.

¶6 According to Dieman, once the rule of 90 is reached, an employee is entitled to retire with full benefits and the company stops making contributions to the employee’s pension plan. Dieman stated that because the company was going to stop contributing to his pension, there was “not a lot of benefit to working longer ... and ... with my ongoing health problems, it would be good to do something not as stressful, physically demanding on your body.” Dieman further testified that post-retirement, his monthly gross income would consist of between

\$2,454 and \$2,954 in pension and 401(k) distributions, but he would be paying \$968 per month in health insurance premiums.

¶7 The court found there was a change in circumstances and noted that the change was voluntary. The court further noted: “I have absolutely no trouble believing that Mr. Dieman is probably wise in terms of getting out of a situation that has great wear and tear physically.” Although the court implicitly found that Dieman’s decision to retire was reasonable, it nevertheless looked to Dieman’s earning capacity, noting it could not assume Dieman would never work again. The court ultimately concluded it was “not satisfied that there has been a substantial change of circumstances as warrants a re-analysis of all these issues, or that there should be a change based on [the] presumption that Mr. Dieman will never work again.” In the absence of a finding that Dieman’s retirement was both voluntary *and* unreasonable, the court erroneously exercised its discretion by considering Dieman’s earning capacity to deny the maintenance revision motion. *See Sellers*, 201 Wis. 2d at 587. We will, therefore, reverse the order and remand the matter for additional proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded.

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

