

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 15, 1997

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

NOTICE

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

No. 95-3425

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

ANNETTE J. MUELLER,

PETITIONER-RESPONDENT,

V.

CHARLES R. MUELLER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Charles R. Mueller appeals from a postjudgment order extending the duration of maintenance. The issues are whether the trial court's finding that there was a substantial change in circumstances was clearly

erroneous, and whether the court erroneously exercised its discretion in extending maintenance. We conclude that the trial court's finding that Annette was unable to become self-supporting was not clearly erroneous and that the trial court properly exercised its discretion in extending maintenance for an additional five years. Therefore, we affirm.

Charles and Annette Mueller divorced after a twenty-eight-year marriage, when Charles was fifty-three years old and Annette was forty-nine. The trial court found that Charles was the primary wage earner while Annette raised their five children, who are now adults. The trial court also found that Charles was "employed as a highly skilled mason with a significant earning capacity." At the time of the divorce, the trial court awarded Annette \$400 monthly maintenance for four years, as an incentive to become self-supporting within that time.

In the fourth year following the divorce, Annette moved to modify the amount and duration of maintenance. After an evidentiary hearing, the trial court found that there was a substantial change in circumstances and extended maintenance for five additional years.¹ Charles appeals.

A party seeking to modify maintenance must demonstrate that there has been a substantial change in circumstances. *Harris v. Harris*, 141 Wis.2d 569, 573, 415 N.W.2d 586, 588 (Ct. App. 1987). A factual finding that the recipient spouse was unable to become self-supporting during a period of time, as contemplated by the original award of limited maintenance, can constitute a substantial change in circumstances. See *Fobes v. Fobes*, 124 Wis.2d 72, 81-82,

¹ The trial court did not modify the amount of monthly maintenance.

368 N.W.2d 643, 647 (1985). Once the trial court has determined that a substantial change in circumstances has occurred, it must exercise its discretion in deciding whether and how to modify maintenance. See *id.*; *Harris*, 141 Wis.2d at 573-74, 415 N.W.2d at 588-89. “A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.” *LaRocque v. LaRocque*, 139 Wis.2d 23, 27, 406 N.W.2d 736, 737 (1987) (quotations and quoted source omitted).

Charles contends that the trial court did not expressly find a substantial change in circumstances and that we should recognize that the trial court “penn[ed] in a handwritten footnote as an afterthought” to belatedly incorporate the evidence that purportedly established a substantial change in circumstances. Charles’s argument ignores the trial court’s oral decision. The trial court found that Annette “has made every effort to be employed, and has incurred debt to improve her job prospects.” Although Annette paid \$2400 to attend secretarial classes, she has been unable to find that type of employment despite diligent efforts. She works at Woodman’s Supermarket—fifty-one weeks per year, frequently at night and on weekends—because that is the best employment available to her. However, she is required to lift groceries and stock shelves, which is difficult because she suffers from fibro myalgia, a disease that affects muscles in her neck, shoulders and arms. Although she incurred significant debt since the divorce, it consists principally of money spent on uninsured medical expenses for emergency gallbladder surgery, her secretarial tuition, and necessary living expenses, such as tires for the vehicle she received in the divorce.

The trial court found that Annette lives a very “modest existence” and that “she’s never going to get much above where she is now. The older she

gets, the harder it's going to be for her to work because her job does have some physical demands." The court found that "she attempted to better her circumstances," but was unable to do so. We conclude that the trial court's finding of a substantial change in circumstances, due to Annette's unavailing efforts to become self-supporting, is not clearly erroneous. See *Fobes*, 124 Wis.2d at 81-82, 368 N.W.2d at 647; § 767.26(6), STATS.

Charles also contends that the trial court erroneously exercised its discretion when it extended maintenance because it ignored the statutory factors of § 767.26, STATS. We disagree.

The trial court acknowledged that this was a long-term marriage and that Annette had physical problems, which were likely to worsen as she continued employment requiring her to stock shelves and lift groceries. It also recognized the unlikelihood of Annette securing other comparable employment. See § 767.26(1),(2),(5) and (6), STATS.

The trial court also considered Charles's earning capacity and his testimony that he works approximately twenty-four hours per week, eight months per year. See § 767.26(5), STATS. He is self-employed and seeks work only when he "[needs] to pay the bills." He testified that his business operates on a cash basis and he keeps very limited financial records. He reports the identical amount of gross and net income. Although the trial court found no evidence that Charles was concealing income, it stated that he "somehow got in trouble with the tax man and looked at his age and said basically the hell with it, he wasn't going to work any harder than he had to."

The trial court found that Charles's earning capacity exceeded Annette's. Although it concluded that Charles did not live extravagantly, his

lifestyle was far beyond what Annette could afford.² The trial court concluded that the “significant unknown” was “to what extent could [Charles] work more if he chose to do so.” Consequently, under these circumstances, its decision to require Charles to pay maintenance for an additional five years was a proper exercise of discretion.

By the Court.—Order affirmed.

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

² Annette testified that she could not afford a new vehicle or visits to her children who lived out of state. The trial court found that circumstances, through no fault of her own, compelled her to incur debt.

