*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2010-134

OCTOBER TERM, 2010

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| Maura E. Breslin | } | APPEALED FROM: |
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| v. | } | Chittenden Family Court |
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| James Synnott | } | DOCKET NO. F856-10-99 Cndm |
| | | Trial Judge: M. Patricia Zimmerman |

In the above-entitled cause, the Clerk will enter:

Wife appeals the family court's order denying her request to modify spousal maintenance. On appeal, wife argues that the court erred in failing to find a real, substantial, and unanticipated change of circumstances due to the change in mandatory retirement age of husband's employer. We affirm.

The parties married in 1976 and were legally separated in 2001. They have two children, who have now reached the age of majority. Division of marital property and maintenance were contested and were resolved in an order of separation dated June 2001. In relevant part, wife received the marital home, half of defendant's pension as of the date of separation and other assets totaling more than half of the marital estate, noting that wife sought "a large share of the marital assets and a reduced maintenance award" and that husband's fault was a factor in the division of assets. Wife also received monthly maintenance of $5000 with yearly increases "until [husband] retires at age 60 and the parties become eligible to receive pension benefits."

Husband is employed by U.S. Airways as an international pilot. He has been with the airline for thirty-three years. At the time of the legal separation in 2001, his earnings were expected to be $185,000. At that time, pilots had a mandatory retirement age of sixty years old. The mandatory retirement age was litigated and in 2007, changed to sixty-five, although U.S. Airways pilots are still eligible to retire at age sixty. In August 2008 and May 2009, husband sustained injuries to his right hip and knee that have prevented him from working as a pilot since August 2008. He has twice attempted to return to work and both times failed to qualify. Husband now walks with a cane and cannot put pressure on his leg. In May 2009, husband stopped receiving his full salary and went on long-term disability. In June 2009, husband filed a motion to modify spousal maintenance based on his decreased earnings. Soon thereafter, in July 2009, wife also filed a motion to modify maintenance. She argued that the change in mandatory retirement age from sixty to sixty-five was an unanticipated change of circumstances. Husband turned sixty on September 20, 2009.

Following a hearing, the court concluded that husband had met his burden of demonstrating a real, substantial and unanticipated change of circumstances. Consequently, the court decreased husband's maintenance obligation from June 11 to September 20. The court

concluded that wife had failed to meet the jurisdictional threshold on her motion because the change in the mandatory retirement age was not a real, substantial and unanticipated change of circumstances. Wife appeals the denial of her motion.

A motion to modify maintenance may be entertained only "upon a showing of a real, substantial, and unanticipated change of circumstances." 15 V.S.A. § 758. This jurisdictional threshold is dependent on the factual circumstances involved and subject to the family court's discretion. Braun v. Greenblatt, 2007 VT 53, ¶ 6, 182 Vt. 29. The burden of proof rests on the party seeking modification. Gil v. Gil, 151 Vt. 598, 599 (1989). We review the trial court's findings in the light most favorable to the judgment, and will not set them aside unless clearly erroneous. Stickney v. Stickney, 170 Vt. 547, 548 (1999) (mem.).

Wife first argues that the court abused its discretion in this case because it relied on improper evidence to conclude that the extension of the mandatory retirement age was not unanticipated. At the modification hearing, husband testified that at the time of the final order wife knew the retirement age was being challenged in court and also that it was common for pilots to continue working for private or international airlines after age sixty. Wife contends that it was error for the court to consider evidence of the parties' understanding about the retirement age at the time of the separation.

In considering a motion to modify, the trial court must "assess the parties' current circumstances in light of their circumstances at the time of the divorce." DeKoeyer v. DeKoeyer, 146 Vt. 493, 496 (1986). To do this the court should compare the findings of the court that issued the original order with the parties' current circumstances. Tetreault v. Tetreault, 148 Vt. 448, 452 (1987). "It is permissible for the modification court to make explicit reference to the original court's findings if appropriate, but it should not ordinarily take evidence of or make independent findings concerning events that transpired prior to the divorce decree." Id. (quotation omitted). According to wife, the court was required to determine what the parties anticipated solely from the final order and not based on additional evidence.

We do not find it necessary to reach this issue. Even excluding husband's testimony, wife has still failed to meet her burden of demonstrating a real, substantial, and unanticipated change of circumstances. The final order states that wife is to receive spousal maintenance until husband is sixty and "the parties become eligible to receive pension benefits." The cessation of maintenance is not dependent on husband's actual retirement, but on wife's ability to obtain her share of husband's pension. At the hearing, husband testified that wife is eligible to receive her portion of the pension immediately now that husband is sixty and the process is underway to get wife the funds. Wife offered no contradictory testimony. Therefore, the increased mandatory retirement age has not changed the expectation from the time of the final order—that the parties would be eligible to receive husband's pension benefits when husband reaches age sixty.

Wife's argument that the intent of the final order was to provide wife with seamless support and that purpose is being thwarted may have some weight if wife were not eligible to receive her portion of husband's pension until husband officially retires. She is, however, eligible to obtain her portion of husband's pension once husband reaches age sixty, whether he retires at that time or not. The real issue is that, according to wife, the benefits from husband's pension are significantly less than what she expected them to be, due to two U.S. Airways bankruptcies. There are two problems with this argument. The first is that wife failed to introduce any credible evidence at the final hearing of the pension's value at the final hearing compared to its value today. Wife testified that she thought originally the benefit would have been $5000 a month, but that with the bankruptcies it will be only $1000. This opinion was not

based on any accounting, however, and the trial court found that neither of the parties knows the amount of defendant's pension benefits. The parties have hired an expert to determine the value of the pension and wife's share. Second, even assuming that wife is correct and the value of her portion of the pension has dramatically decreased, the pension was part of the court's property division, and the court lacks jurisdiction to alter that portion of the original order. "Vermont law is clear that the court cannot modify the property disposition aspects of a divorce decree absent circumstances, such as fraud or coercion, that would warrant relief from a judgment generally." Boisselle v. Boisselle, 162 Vt. 240, 242 (1994). Therefore, we conclude that the court did not abuse its discretion in concluding that the change in mandatory retirement was not a real, substantial, and unanticipated change of circumstances.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice