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DISTRICT III

February 21, 2024

To:

Hon. Maureen D. Boyle
Circuit Court Judge
Electronic Notice

John M. Muench
Electronic Notice

Sharon Millermon
Clerk of Circuit Court
Barron County Justice Center
Electronic Notice

Elizabeth J. Smith
Electronic Notice

Jaime Silva Jr.
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP467

Kelsey Jean Smith v. Jaime Silva, Jr. (L. C. No. 2019PA3PJ)

Before Stark, P.J., Hruz and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jaime Silva, Jr., pro se, appeals from an order that modified his child support payments to Kelsey Smith based upon a change in Silva's income level. Silva contends that the circuit court should not have relied upon what Silva views as a temporary increase in his income and asserts that the new amount will be more than he can afford after his current employment ends. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

The facts relevant to this appeal are as follows. On July 29, 2019, the circuit court in this paternity action entered an order awarding primary placement of the parties' minor child to Smith, with Silva having four days of placement per month. Those provisions of the placement order remained in effect throughout the subsequent child support proceedings.

On December 15, 2020, the circuit court approved a stipulation by the parties that set Silva's monthly child support obligation at \$204. The stipulation was based upon Silva having a monthly income of \$1,200, which sum was derived solely from Veterans Administration (VA) disability benefits.

On August 25, 2021, Smith moved to modify the child support award on the grounds that Silva was by then working full time in addition to receiving VA disability benefits, significantly increasing his income. At a hearing on the modification motion, Silva acknowledged that he had held a series of different jobs since the stipulated support order was entered. He was currently employed full time at Dart Container with an annual salary of \$74,500. In addition, Silva's disability rating had been increased from 60% to 80% since the stipulated order had been entered, resulting in increased monthly VA disability payments of \$1,877.

Silva did not provide the circuit court with any medical records diagnosing the exact nature of his disability.² He testified that his disability was a form of PTSD that was linked to an incident he had with a military supervisor and that he had been working with the VA to control his disability by taking medication and going to counseling. Notwithstanding his efforts, Silva

² Silva removed the pages discussing the nature of his disability from an exhibit to protect his privacy interests and refused to answer a question asking whether his disability was "mental" in nature.

stated that he had difficulty holding down a job due to his disability and that he could lose his job “at any moment.”

Silva testified that he had not held any one job for more than a few months after leaving the Marines and he explained that his only “steady income” came from his VA disability benefits. He described having lost several jobs due to incidents or arguments with a supervisor, which triggered his PTSD, and he said that he had already had a meeting with Human Resources at Dart Container due to multiple “situations” with his current supervisor. After Silva advised Dart Container about his disability status, the employer moved Silva to working nights in order to stay away from his supervisor. Silva nonetheless anticipated it was highly likely that he would again be fired within the next month or two.

Silva argued that the requested modification was unfair because it did not take his disability into account. Silva further argued that modifying his support obligation based upon any earning capacity beyond his disability benefits would harm him because he would be unable to meet his basic needs if he lost his current job. Silva asserted that the VA had recommended that he “change [his] career” to accommodate his disability. However, Silva did not present any evidence regarding what specific type of work he had been performing at any of the jobs he had held or what other type of work the VA recommended Silva seek. Nor did Silva present any evidence from a vocational expert.

The circuit court observed that there was no medical documentation or expert testimony that Silva was unemployable due to his disability. It noted that Silva had not been fired from Dart Container and the court stated that if he chose to leave it would be “of his own accord.” Based upon the series of jobs that Silva was able to obtain, the court determined that Silva was

capable of earning \$5,590 per month from employment in addition to \$1,877 per month from disability benefits. The court found no evidence that Silva could not earn up to his full potential if he worked with the VA vocational rehabilitation program. The court then followed the standard 17% child support guideline applicable to a payor having less than 25% placement and it ordered Silva to pay \$1,255 per month in child support.

In this appeal, Silva contends that: (1) sporadic jobs do not constitute a substantial change in circumstances; (2) the revised award is unfair because it does not take into account Silva's impaired ability to hold a job due to his disability; and (3) the revised award is unfair because Silva will not be able to meet his basic needs if he loses his employment again.

A court may modify a child support order only upon finding a "substantial change in circumstances." *See* WIS. STAT. § 767.59(1f)(a). A court may find a substantial change in circumstances based upon a change in the payor's income or earning capacity since the last order, a change in the needs of the child, or any other factor that the court determines is relevant. Sec. 767.59(1f)(c). We will not overturn a circuit court's findings of fact regarding what, if any, circumstances have changed unless the findings are clearly erroneous. *Benn v. Benn*, 230 Wis. 2d 301, 307, 602 N.W.2d 65 (Ct. App. 1999). Whether any such changes are substantial, however, presents a question of law that we review de novo. *Jalovec v. Jalovec*, 2007 WI App 206, ¶22, 305 Wis. 2d 467, 739 N.W.2d 834.

Once a substantial change of circumstances has been established, a circuit court has discretion in setting the amount of a modified child support award. *Id.*, ¶21. The court applies the same standards applicable to initial child support determinations. *See* WIS. STAT. §§ 767.59(2)(a), 767.511(1j) and (1m); WIS. ADMIN. CODE § DCF 150.03 (Dec. 2023). We will

uphold a determination as to the amount of a child support award as long as the court “examined the relevant facts, applied a proper standard of law, and used a rational process to reach a conclusion that a reasonable judge could reach.” *Rumpff v. Rumpff*, 2004 WI App 197, ¶10, 276 Wis. 2d 606, 688 N.W.2d 699.

Here, we are satisfied that the circuit court properly considered the conditions that existed at the time of the hearing to determine whether a substantial change in circumstances had occurred since the time of the prior child support order. As of the hearing date, Silva had obtained full-time employment in addition to receiving disability benefits. Pursuant to WIS. ADMIN. CODE §§ DCF 150.03(1) and 150.02(13) (Dec. 2023), the court properly included both Silva’s earning capacity and his disability benefits in its calculation of his gross income available for child support.

The additional income Silva was earning from employment at the time of the hearing was more than four times the amount he was receiving in disability benefits at the time the prior order was entered and that increase constituted a substantial change in circumstances. Silva’s contention that he might lose his current job due to his disability is merely speculative. Moreover, the circuit court took into account that Silva might change jobs again by setting Silva’s earning capacity based upon a range of salaries he had earned in his recent jobs. In the event that Silva were to be fired from the job he held at the time this current order was entered and be unable to find another job with comparable pay, he could seek a new modification order.

Therefore,

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals