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DISTRICT III

August 8, 2017

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

2015AP1245

Krystal Kaye Cornelius v. Lewis Cornelius
(L. C. No. 2012FA51)

Before Stark, P.J., Hruz and Seidl, 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).

Lewis Cornelius, pro se, appeals an order denying a motion to modify his child support obligation. Based upon our review of the briefs and record, we conclude at conference that this

case is appropriate for summary disposition. We reject Cornelius's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21 (2015-16).¹

Cornelius was convicted of first-degree sexual assault of a child and incest with a child and was sentenced to prison. Cornelius and his then-wife subsequently divorced. The August 2012 divorce judgment set Cornelius's child support obligation at \$319 per month for his three children, which is 29% of the federal minimum wage at thirty-five hours per week, as established by applicable guidelines. *See* WIS. ADMIN. CODE § DCF 150.03(1) and (3) (through July 2016). Cornelius filed the underlying motion to modify his child support obligation based on his incarceration. The decision whether a child support order should be modified is left to the circuit court's discretion. *Abitz v. Abitz*, 155 Wis. 2d 161, 174, 455 N.W.2d 609 (1990). Under WIS. STAT. § 767.59(1f), revision of a child support order "may be made only upon a finding of a substantial change in circumstances."

The burden of showing there has been a change in circumstances sufficient to justify a modification falls to the party seeking modification. *Parker v. Parker*, 152 Wis. 2d 1, 4, 447 N.W.2d 64 (Ct. App. 1989). A person's incarceration, however, should not, in and of itself, determine whether the modification of a child support order is warranted.² *See Rottscheit v.*

¹ All references to the Wisconsin Statutes are to the 2015-16 version.

² After briefing was completed, Cornelius filed what we construe as a Citation of Supplemental Authorities, suggesting a newly-amended federal regulation may impact his appeal. As relevant here, the federal regulation, 45 C.F.R. 303.8, notes that for states that do not already do so, a policy should be implemented to allow for any party to be able to request the circuit court review a child support order for possible modification upon incarceration of over 180 days. *See* 45 C.F.R. 303.8(b)(7)(ii). Further, subsection 303.8(c) notes that incarceration cannot be excluded as a factor to consider when reviewing the

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Dumler, 2003 WI 62, ¶14, 262 Wis. 2d 292, 664 N.W.2d 525. “The totality of circumstances surrounding the incarceration deserves examination.” *Id.* Thus, the circuit court should also consider

the length of incarceration, the nature of the offense and the relevant course of conduct leading to incarceration, the payer’s assets, the payer’s employability and the likelihood of future income upon release, the possibility of work release during incarceration, the amount of arrearages that will accumulate during the incarceration, and the needs of the children.

Id., ¶41. The *Rottscheit* court further observed that the only person to benefit if support is suspended is the incarcerated parent. *Id.*, ¶35. Recognizing that the purpose of the child support system is to protect the child and the child’s best interest, the *Rottscheit* court noted that “[d]epriving a child of financial support solely because his or her parent committed a criminal act does not serve that interest.” *Id.*

As an initial matter, we note that Cornelius was already incarcerated at the time his child support payments were set. Therefore, the fact of his incarceration does not constitute a substantial change in circumstances. Cornelius nevertheless argued his child support payments should be suspended because he could not “keep up with the payments” set under the inmate compensation plan. Cornelius noted his income from work in the prison was “\$30 per month plus per capita payments from the Oneida Tribe, which varies every four years out of the Tribe’s surplus.” Cornelius further contended it would be “unfair” for him to be over \$100,000 in debt

child support order. As the Shawano County Child Support Agency notes, however, Cornelius is presently appealing the decision in such a review, and Wisconsin does not exclude incarceration from a circuit court’s consideration as a factor when determining if modification of a child support order is warranted. Cornelius’s citation to this federal regulation, therefore, does not alter our view of this case.

at the time of his release, speculating he would be unable “to even attempt to pay” the arrears “without going back to jail” for then failing to pay.

The circuit court denied Cornelius’s motion to modify child support, noting Cornelius had a duty to support his children; the current order was already calculated “at the minimum wage”; and the reason for his imprisonment was an intentional act against a child. In light of these considerations, the court determined it would be “unfair that the parties who require the support wouldn’t receive [it].” We conclude we have no basis to disturb the circuit court’s exercise of discretion in denying Cornelius’s motion to modify child support. Not only did the circuit court rely on the proper standard of law, its decision is also consistent with guidelines established by the Wisconsin Department of Children and Families. WDCF Bulletin No. 13-04, promulgated February 14, 2013, provides that regardless of the length of incarceration, the Child Support Agency may not evaluate a case for review and adjustment if “[t]he payer is incarcerated for a crime committed against any child.” As the Shawano County Child Support Agency asserts, to hold otherwise would twice victimize a child: first by way of the crime itself and again by permitting a payer to reduce a support obligation to a child because of the payer’s crimes.

Upon the foregoing,

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

Diane M. Fremgen
Clerk of Court of Appeals