OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

May 25, 2021

To:

Hon. Carolina Stark
Circuit Court Judge
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room G-8
901 N. 9th Street
Milwaukee, WI 53233

Sheila Sullivan
Legal Action of Wisconsin, Inc.
633 West Wisconsin Ave, Suite 2000
Milwaukee, WI 53203

Brian Allen Barwick 604239
Redgranite Correctional Inst.
P.O. Box 925
Redgranite, WI 54970-0925

Redgranite Correctional Inst.
Redgranite Correctional Inst.
P.O. Box 925
Redgranite, WI 54970-0925

Special Litigation & Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

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

2019AP244 In re the marriage of: Rae Ann Barwick v. Brian Allen Barwick (L.C. #2012FA4865)

Before Dugan, Donald and White, 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).

Brian Allen Barwick, *pro se*, appeals from an order of the circuit court that dismissed his postjudgment motion to modify child support, child support arrears, placement, and guardian ad litem fees in this divorce case. 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 (2019-20).[1] The order is summarily affirmed.

Brian and Rae Ann Barwick were divorced by a judgment entered in January 2014. A decision on custody and placement of the parties' two children was held open until October 2014, when the circuit court granted sole legal custody and primary placement to Rae Ann. Brian was granted periods of placement with conditions, but that placement time was suspended before it began after Rae Ann and the guardian ad litem received threatening emails. In the final suspension order, Brian was ordered to pay the guardian ad litem's fees. In January 2015, the guardian ad litem moved to have Milwaukee County pay the outstanding fees due to Brian's indigency. In March 2015, the circuit court granted the guardian ad litem's request and ordered Brian to repay the County at a rate of $25 per month.

In May 2015, Brian filed a motion to modify placement and child support. The motion was not pursued because Brian was incarcerated on new criminal charges and a probation hold.

In March 2016, Brian filed another motion to modify child support, alleging that his "loss of and inability to obtain employment and income" following his incarceration constituted a substantial change in circumstances. A court commissioner denied the motion, explaining that because Brian had committed intentional crimes against Rae Ann, it was unreasonable to relieve him of the child support obligation simply because he was incarcerated. Brian moved for *de novo* review by the circuit court, which dismissed the request as untimely. Brian did not appeal the dismissal.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In September 2017, Brian filed his third modification motion, which underlies this appeal. He sought to modify his child support obligation, the amount of arrears he owed, the children's placement schedule, and the amount of guardian ad litem fees for which he was required to reimburse the County. The circuit court denied relief, dismissing each of Brian's modification requests for a different reason. Brian appeals.

Child Support

Brian moved to modify his child support obligation, set by the judgment of divorce at $650 per month, asking for it to be held open. Whether to modify a child support judgment is a matter for the circuit court's discretion. *See* ***Abitz v. Abitz***, 155 Wis. 2d 161, 174, 455 N.W.2d 609 (1990). Modifications "may only be made upon a finding of a substantial or material change in circumstances of the parties[.]" *See* ***id.***; *see also* WIS. STAT. § 767.59(1f).

The circuit court dismissed the request to modify child support because it concluded that the "specific legal issue"—whether Brian's child support obligation should be modified and held open "because an asserted substantial change of circumstances had occurred, specifically, that [Brian] was incarcerated as of July 11, 2015"—had already been litigated through Brian's 2016 motion. Thus, the circuit court explained, it did not have "any legal authority because that issue has already been tried and reached a final order at the trial court level. I do not have any legal authority to revisit that issue."

Brian contends that the circuit court erred because, under WIS. STAT. § 767.01(1), "[t]he circuit courts have jurisdiction of all actions affecting the family[.]" However, the circuit court was not disavowing subject matter jurisdiction; rather, it was invoking issue preclusion, which "refers to the effect of a judgment in foreclosing relitigation … of an issue of law or fact that has

been actually litigated and decided" previously. *See* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995); *see also* ***Precision Erecting, Inc. v. M&I Marshall & Ilsley Bank***, 224 Wis. 2d 288, 304, 592 N.W.2d 5 (Ct. App. 1998) (holding that issue preclusion can be applied to subsequent proceedings within the same action). That is, the fact of Brian's 2015 incarceration had already been rejected as a "substantial change in circumstances" sufficient to justify support modification when it was raised by the March 2016 modification motion, so that same 2015 incarceration cannot again be claimed as a substantial change in circumstances in the 2017 motion.

Whether issue preclusion applies is a question of law, *see* ***Wittig v. Hoffart***, 2005 WI App 198, ¶10, 287 Wis. 2d 353, 704 N.W.2d 415, and we agree with the circuit court's application of the doctrine here. However, even if it was inappropriate to have applied issue preclusion, we would still uphold the circuit court's dismissal of the child support modification request. "The term 'substantial change of circumstances' is well known in family law. It focuses on the facts. It compares the facts then and now. It requires that the facts on which the prior order was based differ from the present facts[.]" ***Licary v. Licary***, 168 Wis. 2d 686, 692, 484 N.W.2d 371 (Ct. App. 1992). Brian's September 2017 motion simply fails to establish any substantial change in circumstances between the time of the prior order and the present facts—he relies solely on the fact of his incarceration, just as he did previously. Thus, the circuit court did not err in dismissing the request for child support modification.

Placement

Brian also moved to have the placement order amended to allow him to have "visit[ation] with children, supervision by [Brian's] parents, who will bring children to visit in controlled

prison visiting room." Whether to modify a physical placement order is a matter of circuit court discretion. *See* ***Licary***, 168 Wis. 2d at 692.

The circuit court dismissed the motion to modify placement because it concluded that a prior order in the case required Brian to pay the guardian ad litem fees before bringing a new placement modification motion. Indeed, an order entered on October 31, 2014, specified that "Brian Barwick shall be allowed to file a new motion to modify custody or placement only after paying the outstanding Guardian ad Litem fees owed … and paying an initial deposit towards the appointment of a new Guardian ad Litem." However, when the circuit court entered the March 31, 2015 order directing the County to pay the guardian ad litem fees and Brian to reimburse the County, it vacated that portion of the October 2014 order requiring Brian to pay the fees as a condition precedent to further filing.[2] Thus, the circuit court's decision to dismiss Brian's placement modification motion was premised on a factual error, and a circuit court decision based on an error of fact is an erroneous exercise of discretion. *See* ***Rohde-Giovanni v. Baumgart***, 2004 WI 27, ¶18, 269 Wis. 2d 598, 676 N.W.2d 452.

Nevertheless, we may affirm a circuit court if it reaches a proper result, even if it reached that result for the wrong reason. *See* ***State v. King***, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984) ("If a trial court reaches the proper result for the wrong reason it will be affirmed."). As with a motion to modify child support, a motion to modify child placement must be based on a substantial change in circumstances. *See* WIS. STAT. § 767.451(1)(b)1. The only change that

[2] The October 31, 2014 and March 31, 2015 orders were both entered by the Honorable Frederick C. Rosa. The March 31 order said, in relevant part: "The prior order of the court prohibiting Brian Allen Barwick from bringing motions relating to custody and placement … until he has paid … Guardian ad Litem fees in full is vacated."

Brian alleged was his incarceration, but this is not even a minor change, much less a substantial change, in circumstances since the last order. Accordingly, the circuit court's dismissal of the request to modify child placement was not erroneous.

Guardian Ad Litem Fees

Brian sought to have the "guardian ad litem" costs reduced from the $2,723 he was previously determined to owe. With respect to the present motion, Brian claimed that the actual amount he owed to the guardian ad litem was $500, and that he had paid that amount. The circuit court stated that it did not "have the legal authority to revisit or reevaluate" the sum of $2723 because Brian had not challenged that amount at the time it was determined, despite being given an express fifteen-day objection period. The circuit court further stated that "jurisdiction over that issue has expired … when no objection was filed by any party with the circuit court."

On appeal, Brian contends that the order to pay guardian ad litem fees has prevented him from visiting with his children. However, he develops no argument to show that the circuit court erred when it concluded that, because of the lack of a timely objection, he could not challenge the specific sum owed. We thus decline to consider the issue further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed … [and a]rguments unsupported by references to legal authority will not be considered.").

Arrears

Finally, Brian sought to "change arrears," which he confirmed referred to his child support arrears.[3] The circuit court stated that the only way it could "consider the support that he was due to pay prior to filing the motion" was to determine whether any portion of WIS. STAT. § 767.59(1r) "would allow the Court to give him a credit toward the arrears amounts that were owed." The circuit court noted that there was nothing in Brian's motion that would qualify as an offset under § 767.59, so it dismissed the request "because, in essence, it does not assert any claim that [Brian] could prevail on[.]" Brian develops no appellate argument on this aspect of the circuit court decision either, so we will not consider it further. *See* ***Pettit***, 171 Wis. 2d at 646.

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals

[3] Brian appears to argue at one point that the circuit court erred when it declined to apply the percentage standards for child support, *see* WIS. ADMIN. CODE § DCF 150.03(1), to his modification requests, and that any percentage of his zero-dollar income results in a zero-dollar support obligation. However, while application of the percentage standards is the default starting position for *initial* child support calculations, *see* WIS. STAT. § 767.511(1j), whether to apply the percentages to a *revision* of child support is committed to the circuit court's discretion. *See* ***Abitz v. Abitz***, 155 Wis. 2d 161, 182, 455 N.W.2d 609 (1990).