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 II

March 22, 2023

To:

Hon. Daniel J. Bissett
Circuit Court Judge
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Peter J. Culp
Electronic Notice

Troy J. Johnston
1515 Witzel Ave., #15
Oshkosh, WI 54902

Kirsten L. Navarrette
Winnebago County Child Support
Courthouse 415
P.O. Box 2808
Oshkosh, WI 54903

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:

2020AP1832 In re the Paternity of K.S.K.-J.: Troy J. Johnston v. Michelle F. Karow (L.C. #2006PA212PJ)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Troy J. Johnston appeals pro se from an order deciding his post-adjudication motions filed in this paternity 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 (2021-22).[1] We affirm.

Johnston and Michelle F. Karow are the nonmarital parents of daughter K.J., who was born in 2006 and determined to be Johnston's biological child in 2007. Since then, the parties have litigated a variety of post-adjudication issues.

Johnston has been incarcerated on and off since before K.J.'s birth. While incarcerated in 2020, Johnston filed two motions seeking to modify legal custody, "visits with child," (or, periods of physical placement), child support, and his arrearage payments. His second motion added requests for the appointment of a guardian ad litem (GAL), a referral to mediation, education classes, and electronic communication with K.J. In setting forth the requisite change in circumstances, Johnston asserted the fact of his incarceration and that Karow had blocked his contact with K.J.

The court commissioner denied Johnston's motions, and Johnston was granted a de novo hearing in front of a circuit court judge.

At the initial de novo hearing, the court summed up the issues, heard the parties' arguments, and said it would "reactivate" the prior GAL "to investigate the best interests of the child as they relate to periods of placement or how much visitation and what the form of that may look like between the child and Mr. Johnston." The court stated that Johnston's requests for mediation, parenting classes, and mental health records were premature, but could be

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

reevaluated later on. The court withheld ruling on whether it would amend Johnston's child support order, stating that the parties should look into any new changes in the law regarding incarcerated parents and child support obligations.

At the continued de novo hearing, Johnston reiterated that he sought electronic contact with K.J., either by Zoom or telephone, while the COVID-19 pandemic restrictions on prison visits were in place. Karow objected to all of Johnston's requested modifications.[2] For the most part, the GAL agreed with Karow's position that no visitation should occur while Johnston was incarcerated, noting that the information provided by her attorney was generally "quite accurate" and that K.J. had listed a number of reasons for not wanting to visit Johnston. Emphasizing that Johnston had "made strides in maintaining contact with the child before" and that the two previously had "at least somewhat of a strong relationship," the GAL suggested that the court consider ordering an expert to perform psychological evaluations on K.J. and perhaps Johnston, too.

The circuit court began its oral ruling by noting that K.J. was "well-adjusted" and "doing well academically[,]" even though she had been through "a lot of chaos, a lot of drama in her life." Explaining that its lodestar was the child's best interest, the court denied Johnston's request for visitation and electronic communication with K.J. In reaching its decision, the court considered that, given the COVID-19 pandemic, in-person visits would not be available for some time. It then determined that it was not in K.J.'s best interest to force her into telephonic or

[2] In the circuit court and on appeal, Karow asserts that Johnston's request for joint legal custody is superfluous as the parties already share joint custody. Johnston concedes the point. We will not further address it.

video contact with Johnston. The court opined that Johnston could write letters to K.J., and they "should be made available to her to allow her to read them and respond to them as she wishes." It added that if Johnston was released early, "he can certainly petition the Court or motion the Court for some additional time or some type of visitation placement."

In declining to modify Johnston's child support or arrearage payments, the circuit court stated:

> As to the child support issues, this is a situation where the father has by his own conduct placed himself in prison. I think he should have known that his actions would have resulted in him being imprisoned. It sounds like he had a fairly significant record and that's something certainly courts take into consideration when people commit law violations. And I think the case law indicates, again, that it's a case-by-case determination based on the facts and circumstances as to whether or not to modify child support based on incarceration, and, in this case, I don't think it is appropriate to modify the child support order, so I will continue to order the child support as previously ordered.

Johnston appeals.

"Child custody and placement determinations are committed to the sound discretion of the circuit court." ***Valadez v. Valadez***, 2022 WI App 2, ¶12, 400 Wis. 2d 523, 969 N.W.2d 770 (2021). "We will sustain discretionary acts as long as the [circuit] court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Goberville v. Goberville***, 2005 WI App 58, ¶7, 280 Wis. 2d 405, 694 N.W.2d 503.

We conclude that the circuit court's order denying Johnston's requests for relief was a proper exercise of discretion.[3] On each claim, the court applied the correct legal standard to the facts, explained its rationale, and reached a reasonable result. In terms of placement and communication, the court explained that in-person visits were unavailable given the prison's COVID-19 restrictions and that forcing electronic or other contact was not currently in K.J.'s best interest. In addition, it clarified that Johnston could write letters to K.J. and that he was free to seek a modification if he was released from prison early.

Nor did the circuit court erroneously exercise its discretion in declining to reduce Johnston's child support and arrearage payments. It is well established that a court may, but is not required to, modify a support order based on the payor's incarceration. *See, e.g.*, ***Rottscheit v. Dumler***, 2003 WI 62, 262 Wis. 2d 292, 664 N.W.2d 525. Though Johnston may disagree with the court's ultimate decision, he has shown no misuse of discretion. There is no evidence that K.J.'s financial need was reduced by Johnston's incarceration or that Johnston will not be able to make up the accrued arrearage once released.

Finally, Johnston has not shown any erroneous exercise of discretion in the circuit court's remaining decisions, including its determination that mediation, parenting classes, and

[3] Karow suggests that we dismiss the appeal or summarily affirm the circuit court as a sanction for procedural defects in both Johnston's notice of appeal and his appellate brief. We deny the request. Johnston's "early" notice of appeal is timely and sufficient under WIS. STAT. § 808.04(8) ("If the record discloses that the judgment or order appealed from was entered after the notice of appeal … was filed, the notice shall be treated as filed after that entry and on the day of the entry."). As for briefing defects, this court accepted Johnston's brief, and Karow was able to file a cogent respondent's brief.

psychological evaluations were unwarranted. The court explicitly considered, but was not bound by, the GAL's recommendation concerning psychological evaluations.[4]

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals

[4] To the extent we do not address one of Johnston's arguments, that argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).