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DISTRICT III

December 3, 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:

2022AP2184

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 denying his motion to modify his child support payments to Kelsey Smith. The dispositive issue is whether there has been a substantial change in circumstances since entry of the last child support order sufficient to warrant a modification of Silva's payments. Based on 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.

This is the third time a dispute between these parties has come before this court. We have detailed the factual and procedural history of this matter in our prior opinions. See *Smith v. Silva*, No. 2022AP467, unpublished op. and order (WI App Feb. 21, 2024); *Smith v. Silva*, No. 2021AP1765, unpublished op. and order (WI App Aug. 2, 2022).

As relevant to this appeal, on April 28, 2022, Silva was ordered to pay \$1,255 per month in child support for I.S., born on September 26, 2017. This award was based on Silva’s earning capacity of \$5,590 per month and his disability payment from the military of \$1,877 per month.² On September 27, 2022, Silva moved the circuit court to modify the award. The court held a hearing on December 19, 2022, and denied the motion, concluding that there had been no substantial change in circumstances in the five months between the April 28 child support order and Silva’s motion. Silva now appeals.

A court may modify a child support order only if it finds that there has been a “substantial change in circumstances.” See WIS. STAT. § 767.59(1f)(a). A substantial change in circumstances may include a change in the payer’s income or earning capacity since the last order, a change in the child’s needs, or any other factor deemed relevant by the court. See § 767.59(1f)(c). We will not overturn a circuit court’s findings of fact regarding whether circumstances have changed unless those findings are clearly erroneous. *Benn v. Benn*, 230 Wis. 2d 301, 307, 602 N.W.2d 65 (Ct. App. 1999). However, whether those changes are “substantial” presents a question of law which we review de novo. *Jalovec v. Jalovec*, 2007 WI

² Although the circuit court considered Silva’s earning capacity to be \$5,590 per month based upon evidence from the April 28, 2022 hearing, at that time Silva was earning—and is still earning—\$6,208 per month from his current employer.

App 206, ¶22, 305 Wis. 2d 467, 739 N.W.2d 834. If a substantial change in circumstances is established, the circuit court has discretion to determine the modified child support amount. *Id.*, ¶21.

Silva argues that there has been a substantial change in circumstances because the military has increased his disability rating from 60% to 100%. He contends that this reclassification demonstrates a reduction in his earning capacity and that he may lose his current employment at any time due to the need for a job accommodating his medical needs and appointments.

Silva's arguments are unsupported by the record. He remains employed full-time at his prior job, earning the same salary as when the April 28, 2022 child support order was entered. His potential future job loss is speculative at best and it does not provide a basis for the circuit court to conclude that a substantial change in circumstances warranting a modification of his child support obligation has occurred. While Silva suggests that his increased disability rating affects his earning capacity, he has failed to provide evidence to support this claim. Furthermore, a mere change in earning capacity, without a change in actual earnings, is insufficient to justify modifying child support. The fact that Silva continues to earn the same income despite his increased disability rating indicates that his earning capacity has not materially changed.

Silva further argues that his child support payments should be based solely on his monthly military disability payment, with the option to make a lump-sum child support payment at the end of each year based on his employment income. This argument relies on Silva's assertion that his employment is unstable due to his disability. However, there is no legal or

factual basis for Silva's request. The circuit court properly included both Silva's earnings from employment and military disability when calculating his monthly income for child support, consistent with WIS. ADMIN. CODE §§ DCF 150.03(1) and 150.02(13) (Jan. 2024).

Upon the foregoing,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* 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