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DISTRICT III

August 2, 2022

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

2021AP1765 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 an order denying his motion to modify physical placement. Silva contends the circuit court erred by concluding that no substantial change of circumstances had occurred since the entry of the last order substantially affecting physical placement. 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] We summarily affirm.

Silva and Kelsey Smith are the parents of a minor daughter who was born in September 2017. On June 27, 2019, the circuit court entered an order granting Silva and Smith joint legal custody of the child. The court granted Smith primary physical placement of the child and granted Silva four days of placement per month. At all times relevant to this appeal, Silva has resided in Chicago, and Smith has resided in Rice Lake. The June 2019 order provided that the parties would meet in Wisconsin Dells to exchange the child.

In March 2021, Silva filed a pro se motion to modify physical placement, asking the circuit court to grant him seven days of placement per month. Silva asserted that a substantial change of circumstances had occurred because his "employment or work shift" had changed and because Smith was violating the June 2019 order, making it difficult for him to see the parties' child. Silva elaborated: "I am no longer able to follow order in place with new work schedule. Also the 72 hours a month I have now is 100% not enough especially with all the traveling I must do with my daughter for pick up. Over 700 miles!"

The circuit court held a hearing on Silva's motion in August 2021. When the court asked Silva to describe the substantial change of circumstances that he believed had occurred since the entry of the June 2019 order, Silva responded that he had started graduate school, which "require[d] a lot of [his] time" and "caused [him] to … even lose more time with [his] daughter." Silva also testified that he had "prepared for [the child's] arrival" by enrolling her in daycare at

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

the University of Illinois Children's Center, "one of the best daycares in Chicago," and by obtaining health insurance for her through the university. Additionally, Silva asserted that Smith had started graduate school, which meant that she had "no time" for the child, forcing the child to spend long hours at daycare during Smith's periods of physical placement.

In addition to his enrollment in graduate school, Silva testified that he had recently started his own business. He also testified that he was currently employed working for a staffing agency. Silva further testified that he had saved about $10,000 and had purchased his own home since the last physical placement order was entered. He emphasized that the child has her own bedroom and bathroom at his home. Finally, Silva asserted that a change of circumstances had occurred because his daughter was older, was able to do more activities, and would have more opportunities in Chicago than in Rice Lake.

After Silva presented his case during the August 2021 hearing, Smith moved for a directed verdict, arguing Silva had failed to establish that a substantial change of circumstances had occurred or that it would be in the child's best interest to modify physical placement. The child's guardian ad litem (GAL) agreed that Silva had failed to establish a substantial change of circumstances. The GAL explained, "I think [Silva] has attempted to show that his work schedules have changed which would lead to that substantial change; but based on his testimony today, it sounds like he actually has more 'irons in the fire' than he did back in 2019."

The circuit court then asked Silva, once again, to explain why he believed a substantial change of circumstances had occurred. Silva responded that he had started graduate school, which "requires a lot of time"; that the child was older and therefore "require[d] more time in herself"; that the travel time to and from Wisconsin Dells took up too much of his placement

time; that he was a "great father" and would like to spend more time with the child; that he had started a business; that he had saved money to allow him to stay home with the child, rather than placing her in daycare; and that he had "tak[en] the extra steps with getting her into the best healthcare[] [and] schools."

The circuit court concluded Silva had failed to establish a substantial change of circumstances, as required by WIS. STAT. § 767.451(1)(b)1.b. The court explained that examples of substantial changes of circumstances would include Silva moving to Rice Lake, Smith moving to Chicago, or one of the parties contracting an illness. In contrast, the court found that Silva's mere enrollment in graduate school was not a substantial change of circumstances. The court further explained:

> [W]hat you're telling me is that if you have the child, you put her in a different daycare, you believe it to be a better daycare. I don't know if it's better or worse, same. Might even—might be a great daycare. If it's done by the university, no doubt it's a great daycare, but daycare … nonetheless.

The court also emphasized that Silva was "still in Chicago," a fact that had not changed since the last physical placement order was entered.

The circuit court acknowledged that Silva believed that the amount of physical placement he had been granted under the court's prior order was inadequate and unfair. The court explained, however, that the purpose of the hearing on Silva's motion to modify physical placement was not to "rehash" or "relitigate" the court's prior decision regarding physical placement. Instead, to obtain a modification of physical placement, Silva was required to show that a substantial change of circumstances had occurred since the prior order was entered.

Because Silva had failed to make that showing, the court denied his motion to modify physical placement.

If more than two years have elapsed since the entry of a final judgment determining physical placement, a circuit court may modify physical placement in a way that substantially alters the time a parent may spend with his or her child if the court finds that: (1) there has been a substantial change of circumstances since the entry of the last order substantially affecting physical placement; and (2) the modification is in the child's best interest. WIS. STAT. § 767.451(1)(b)1. "A substantial change of circumstances 'requires that the facts on which the prior order was based differ from the present facts, and the difference is enough to justify the court's considering whether to modify the order.'" ***Shulka v. Sikraji***, 2014 WI App 113, ¶24, 358 Wis. 2d 639, 856 N.W.2d 617 (citation omitted).

"Whether a party seeking to modify an existing physical placement order has established a substantial change in circumstances is a matter of law we review de novo." ***Id.***, ¶25. When conducting our review, however, we must give weight to the circuit court's decision because the determination of whether a substantial change of circumstances has occurred is "heavily dependent upon an interpretation and analysis of underlying facts." ***Id.*** (citation omitted).

In this case, the circuit court properly determined that Silva had failed to establish a substantial change of circumstances. In support of his claim that a substantial change of circumstances had occurred, Silva asserted that he had started graduate school, had secured daycare and health insurance for the child, had saved money, and owned a home where the child had her own bedroom and bathroom. He also asserted that there were more opportunities and activities for the child in Chicago than in Rice Lake.

The circuit court reasonably concluded that Silva's enrollment in graduate school was not a substantial change of circumstances. Silva attempted to argue that because he was enrolled in school and had saved $10,000, he was "in a position to not work for the next couple of months," which would allow him to spend more time with the child. The evidence showed, however, that at the time of the August 2021 hearing, Silva was enrolled in graduate school, was employed at a staffing agency, and had also started his own business. As the GAL aptly noted, it appeared Silva actually had more "irons in the fire" than he did at the time the prior order affecting physical placement was entered. On this record, the court could reasonably conclude that Silva's enrollment in graduate school would not actually result in him having more time to spend with the child and, therefore, did not constitute a substantial change of circumstances.

Additionally, while the circuit court acknowledged that Silva had enrolled the child in daycare and conceded that the daycare was likely a "great" facility, the court noted it was a "daycare … nonetheless." In other words, the court concluded that no substantial change of circumstances had occurred because Silva's own testimony showed that the child would still be required to attend daycare during his placement time. This determination was reasonable, under the circumstances.

To the extent Silva argued that the circumstances had changed because he had obtained health insurance for the child and owned a home where the child had her own bedroom and bathroom, Silva does not point to any evidence that those considerations were relevant to the court's prior determination of physical placement in June 2019. In other words, Silva does not cite any evidence showing that the court's allocation of physical placement in June 2019 was motivated by the fact that Silva did not have health insurance for the child or by the fact that the child did not have her own space in his home. As such, Silva has failed to show that any

"difference" with respect to those circumstances was "enough to justify the court's considering whether to modify the order." *See* ***Shulka***, 358 Wis. 2d 639, ¶24.

Moreover, while Silva argued that a substantial change of circumstances had occurred because the Chicago area offers more opportunities and activities for the child than Rice Lake, Silva failed to show that the opportunities and activities available to the child had changed since June 2019. He did not, for instance, present evidence regarding any specific activities or opportunities in Chicago that were not available to the child in June 2019 but would have been available to her in August 2021 if Silva were granted three additional days of placement each month. Silva therefore failed to establish either that a change in circumstances had occurred with respect to the activities available to the child or that any such change was substantial.

On this record, the circuit court properly determined that Silva had failed to establish a substantial change of circumstances sufficient to justify a modification of physical placement. On appeal, Silva alleges an additional change of circumstances, asserting that he "no longer [has] two male roommates" living in his home. As Smith correctly notes, however, Silva did not raise this argument in the circuit court. We need not consider arguments that are raised for the first time on appeal, *see* ***State v. Anderson***, 215 Wis. 2d 673, 683, 573 N.W.2d 872 (Ct. App. 1997), and we decline to do so here.

Silva raises several additional arguments on appeal, none of which convince us that the circuit court erred by denying his motion to modify physical placement. Silva contends, as a general matter, that courts in family law cases are not permitted to favor mothers over fathers. Be that as it may, there is nothing in the record to suggest that the circuit court in this case impermissibly favored Smith over Silva when denying Silva's motion to modify physical

placement. Instead, as explained above, the court properly determined that Silva had failed to establish that a substantial change of circumstances had occurred, which was a prerequisite to the court granting Silva's motion.

Silva also argues that his proposed modification of physical placement would be in the best interest of the child. The circuit court properly determined, however, that Silva had failed to establish a substantial change of circumstances. As such, the court was not required to consider the child's best interest. *See* ***Shulka***, 358 Wis. 2d 639, ¶24 ("If the circuit court finds that there has been a substantial change in circumstances, it then moves to the second step: considering whether modification would be 'in the best interest of the child.'" (citation omitted)); ***Green v. Hahn***, 2004 WI App 214, ¶22, 277 Wis. 2d 473, 689 N.W.2d 657 ("[W]here no substantial change of circumstances is shown, the question of the child's best interests need not be reached." (citation omitted)).

Silva additionally asserts that because he was self-represented during the circuit court proceedings, he was "not aware" that he needed to establish a substantial change of circumstances. He contends that he had a Sixth Amendment right to be represented by an attorney, and his "lack of an attorney contributed to the circuit court refusing to" modify physical placement.

We reject this argument because there is nothing in the record to indicate that Silva ever asked the circuit court to appoint an attorney for him or argued during the circuit court proceedings that his lack of an attorney violated his Sixth Amendment right to counsel. Again, we need not consider arguments raised for the first time on appeal. *See* ***Anderson***, 215 Wis. 2d at 683. Moreover, it is well established that "[t]he Sixth Amendment right to counsel does not

attach in civil proceedings." ***Oneida Cnty. Dep't of Soc. Servs. v. Nicole W.***, 2007 WI 30, ¶31, 299 Wis. 2d 637, 728 N.W.2d 652. Consequently, Silva did not have a constitutional right to counsel in this civil matter.

In his reply brief, Silva asserts that the circuit court was "trying to take advantage of [his] disabilities and lack of legal knowledge." We find no support in the record for this conclusory and undeveloped assertion, and, consequently, we do not address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments). Instead, for the reasons explained above, we conclude the court properly denied Silva's motion to modify physical placement on the grounds that Silva had failed to establish a substantial change of circumstances.

Therefore,

IT IS ORDERED that the order is summarily 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