

COURT OF APPEALS OF VIRGINIA

Present: Judges Elder, Clements and Senior Judge Annunziata

ROBERT L. WALLER, JR.

v. Record No. 0263-07-3

COMMONWEALTH OF VIRGINIA,
DIVISION OF SOCIAL SERVICES,
DIVISION OF CHILD SUPPORT ENFORCEMENT,
ex rel. TERI L. STATHAM

MEMORANDUM OPINION*
PER CURIAM
JUNE 19, 2007

FROM THE CIRCUIT COURT OF THE CITY OF LYNCHBURG
J. Leyburn Mosby, Jr., Judge

(James J. Angel, on brief), for appellant.

(Robert F. McDonnell, Attorney General; Craig M. Burshem, Senior Assistant Attorney General; Beth J. Edwards, Regional Special Counsel; Alice G. Burlinson, Regional Special Counsel; Eugene N. Butler, Special Counsel, on brief), for appellee.

Robert L. Waller, Jr. (father) contends the circuit court erred in denying his motion for a reduction in child support due to his incarceration. Upon reviewing the record and the briefs of the parties, we conclude that this appeal is without merit. Accordingly, we summarily affirm the trial court's decision. See Rule 5A:27.¹

On July 18, 2005, the circuit court entered an order requiring father to pay \$300 per month for the support of his two daughters, Amiyah and Ariana. That order noted that "father is presently incarcerated and will be until 2008."

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

¹ Based upon our review of the record and father's opening brief, we find no merit in appellee's argument that father's appeal is barred by Rule 5A:18 or Rule 5A:20(c).

On August 23, 2006, father filed a “Motion to Amend or Review Order” in the Lynchburg Juvenile and Domestic Relations District Court (J & DR court) requesting that the last support order be reduced to \$65 per month. On October 24, 2006, the J & DR court dismissed father’s motion, and he appealed to the circuit court.

At the hearing in the circuit court and on appeal to this Court, father argues that his incarceration justified a decrease in his child support obligation. Pursuant to representations from father’s guardian *ad litem*, the record shows that father will be incarcerated until September 2008. The circuit court affirmed the J & DR court’s order denying father’s motion, finding he failed to prove a material change in circumstances since the last support order was entered.

The party seeking to reduce a support obligation has the burden to establish that a material change in circumstances warrants modification of support. Edwards v. Lowry, 232 Va. 110, 112, 348 S.E.2d 259, 261 (1986). That party must establish an inability to pay that is not due to voluntary action or neglect. Antonelli v. Antonelli, 242 Va. 152, 154, 409 S.E.2d 117, 119 (1991). The proof must amount to a preponderance of the evidence. Hammers v. Hammers, 216 Va. 30, 31, 216 S.E.2d 20, 21 (1975).

Here, father presented no evidence that a material change in circumstances had occurred since the last support order was entered on July 18, 2005. Father was incarcerated at the time of that order due to his voluntary act, and remains incarcerated, with a release date of September 2008. Thus, we find no error in the circuit court’s decision affirming the J & DR court’s denial of father’s motion for a reduction in child support.

Accordingly, we affirm the circuit court’s decision.

Affirmed.