STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2099

In re the Marriage of:
Nicholle S. Freitag n/k/a Nicholle S. Zurn, petitioner,
Respondent,

vs.

Gregory L. Freitag,
Appellant.

Filed August 19, 2008
Affirmed
Toussaint, Chief Judge

Becker County District Court
File No. 03-F6-05-001827

Maureen Holman, Serkland Law Firm, 10 Roberts Street, P.O. Box 6017, Fargo, ND 58108-6017 (for respondent)

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Considered and decided by Toussaint, Chief Judge; Johnson, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Chief Judge

Appellant-father Gregory L. Freitag challenges the district court's order granting the motion of respondent-mother Nicholle S. Freitag, n/k/a Nicolle S. Zurn to remove the parties' children from Minnesota. Because the district court properly applied the removal statute, Minn. Stat. § 518.175, subd. 3 (2006), because an evidentiary hearing to address mother's motion was not required, and because the record supports the district court's factual findings, we affirm.

D E C I S I O N

I.

Mother was married before marrying father and, in an attempt to be closer to her former husband, moved the district court for permission to remove the residence of the parties' children from Minnesota to North Dakota. The district court found that mother's proposed move was in the children's best interests under both Minn. Stat. § 518.175, subd. 3 (2006) and Minn. Stat. § 518.17 (2006). Father argues on appeal that section 518.175, subdivision 3 does not apply because the amount of parenting time that the judgment awarded him constitutes joint physical custody and because the parties' parenting plan under Minn. Stat. § 518.1705 (2006) recites a different standard for modifying the plan. Identifying and construing the applicable statute are legal questions reviewed de novo. *Goldman v. Greenwood*, 748 N.W.2d 279, 282 (Minn. 2008).

For three reasons we reject father's argument that the district court erred in applying section 518.175, subdivision 3. First, because of the distance of mother's

proposed move, the parties' parenting plan requires use of the section 518.17 best-interests standard to evaluate the proposed move, and the district court found that standard to be satisfied here. Thus, any error in also applying a different standard is harmless. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

Second, father questioned the applicability of section 518.175, subdivision 3 in only two sentences of his memorandum to the district court opposing mother's motion and did not pursue that argument at the hearing. The district court, understandably, did not address the question. Therefore, the issue is not properly before this court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). On this record, we conclude that father abandoned any argument that section 518.175, subdivision 3 did not apply to this case. *Cf. Hicks v. Hicks*, 533 N.W.2d 885, 886 (Minn. App. 1995) (holding that because respondent abandoned motion, he "waived any claim to retroactive modification").

Third, father's assertion that he is a joint physical custodian is incorrect. The judgment does not award or address physical custody. Also, father admits that, in the stipulation on which the judgment was based, the parties affirmatively refused to identify a physical custodian[1]. Thus, his current argument that the judgment's lack of an award of sole physical custody to mother means that the parties share joint physical custody is inconsistent with his description of how the parties reached their stipulation. Moreover,

[1] The parties' failure to address physical custody unnecessarily complicated this case. *Cf. Maschoff v. Leiding*, 696 N.W.2d 834, 840 (Minn. App. 2005) (stating, in context of stipulated child-support award: "Unless a support order provides a baseline for future modification motions by reciting the parties' then-existing circumstances, the litigation of a later motion to modify that order becomes unnecessarily complicated because it requires the parties to litigate not only their circumstances at the time of the motion, but also their circumstances at the time of the order sought to be modified.").

the judge who, in the current proceeding, ruled that the parties' parenting plan awards mother sole physical custody is the same judge who incorporated the parties' mediated-settlement agreement, and the parenting plan therein, into the dissolution judgment.

"Great weight" is given to a judge's construction of his own judgment. *Mikoda v. Mikoda*, 413 N.W.2d 238, 242 (Minn. App. 1987), *review denied* (Minn. Dec. 22, 1987). To support a challenge to the district court's reading of the judgment, father cites Minnesota's income-shares child-support statute, which became effective on January 1, 2007. 2006 Minn. Laws ch. 280, §44, at 1145. He also cites foreign caselaw. But the parenting-plan provisions of the parties' amended dissolution judgment were based on the parties' October 13, 2006 mediated-settlement agreement, and father cites no authority holding that a statute that was not then effective or foreign caselaw should govern the construction of a judgment based on the mediated settlement agreement.

II.

Father argues that he was entitled to an evidentiary hearing on removal and on his own motions to modify child support and the parenting plan. Whether to hold an evidentiary hearing is generally discretionary with the district court. *Thompson v. Thompson*, 739 N.W.2d 424, 430 (Minn. App. 2007). In family matters, however, it is presumed that noncontempt motions will be decided without an evidentiary hearing "unless otherwise ordered by the court for good cause shown." Minn. R. Gen. Pract. 303.03(d). Motions for evidentiary hearings longer than 30 minutes are to be supported by documents containing the information required by Minn. R. Gen. Pract. 303.03(d) regarding the need for the hearing. Father's failure to submit any of this information to

the district court precluded the court from addressing whether there was good cause for a hearing. A failure to show "good cause" justifies denying an evidentiary hearing. *Thompson*, 739 N.W.2d at 432. Also, father's hearing requests are each unpersuasive.

Father moved to modify support in his August 14, 2006 "RESPONSE TO MOTION AND/OR COUNTER MOTION." The August 14, 2006 motion raising the then-new issue of child support was not timely vis-à-vis the then-scheduled August 16, 2007 non-evidentiary hearing. *See* Minn. R. Gen. Pract. 303.03(a)(2) (stating that party must file motion raising new issues at least ten days before hearing). Thus, the district court did not abuse its discretion in not holding an evidentiary hearing on father's motion to modify child support. *See Clark v. Clark*, 642 N.W.2d 459, 466 (Minn. App. 2002) (holding that, because appellant's motion was filed three days before scheduled hearing, it was untimely).

We reject father's argument that he is entitled, under this court's opinion in *Goldman v. Greenwood*, 725 N.W.2d 747 (Minn. App. 2007), to an evidentiary hearing on removal. *Goldman* was reversed after briefing in this appeal was completed. *Golman*, 748 N.W.2d 279 (Minn. 2008). Also, because father did not request a hearing regarding removal until the day of the then-scheduled non-evidentiary hearing, the motion was untimely. Minn. R. Gen. Pract. 303.03(a)(3) (requiring party responding to motion to file response at least five days before hearing).

Further, father's argument incorrectly assumes that section 518.175, subdivision 3 is the applicable statute. His argument that, under *Doering v. Doering*, 629 N.W.2d 124 (Minn. App. 2001), *review denied* (Minn. Sept. 11, 2001), an evidentiary hearing on

removal is required because his affidavit creates fact questions about whether removal is in the children's best interests, is unpersuasive. 629 N.W.2d at 132 (holding that appellant was entitled to evidentiary hearing on motion because his affidavits presented fact question). Even if *Doering*'s procedural posture did not render it distinguishable from the current case, to obtain an evidentiary hearing under *Doering* the allegations of the party seeking a hearing must be more current and more specific than father's allegations are here. *See Silbaugh v. Silbaugh*, 543 N.W.2d 639, 642 (Minn. 1996) (stating that bare allegations are insufficient to entitle party to removal-related evidentiary hearing).

Under Minn. Stat. § 518.18(d) (2006), parenting plans and custody awards may be modified under certain circumstances. Here, the parties stipulated that, if mother moved her residence more than 30 miles from Detroit Lakes, Minnesota, the best-interests standard of section 518.17 would be used to address whether to modify the parenting plan. A motion to modify must be supported by an affidavit reciting the relevant facts. Minn. Stat. § 518.185 (2006). To obtain an evidentiary hearing on a motion to modify, the moving party must establish the elements of a prima facie case for modification which, given the parties' stipulation here, includes (1) changed circumstances of the child or custodial parent; (2) that the modification would be in the best interests of the child; and (3) that the harm associated with the proposed modification would be outweighed by the benefits of the change. *See Frauenshuh v. Giese*, 599 N.W.2d 153, 157 (Minn. 1999), *superseded on other grounds by statute*, Minn. Stat. § 518.18(d)(i).

In deciding whether a party makes a prima facie case to modify custody, the court must accept the facts in the moving party's affidavits as true but may consider allegations by others that are not contrary to the allegations of the moving party. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007). Whether a party makes a prima facie case to modify custody is dispositive of whether an evidentiary hearing will occur on the motion, but a district court has discretion in deciding whether a moving party makes a prima facie case to modify custody. *See id.* Here, father alleges that mother's move is a changed circumstance, and that the move will be harmful to the children. But mother's move was contemplated by the parties when they entered their mediated settlement agreement, and the allegations of harm in father's affidavit are insufficiently specific to require an evidentiary hearing.

While father argues that the lack of a designation of physical custody in the parenting plan was intended to allow him to seek sole physical custody "under the less onerous burden of the parenting plan," that lack of a designation of physical custody in the parenting plan violated section 518.1705, subdivision 4, which requires, for enforcement purposes, parenting plans to identify which parent has physical custody. We decline to reward father at this time for the failure to comply with the statute in the first place.

III.

Father challenges the district court's findings of fact. Findings of fact will not be altered on appeal unless they are clearly erroneous. Minn. R. Civ. P. 52.01. A finding is clearly erroneous if the appellate court, considering the record in the light most favorable

to the findings and deferring to the fact-finder's credibility determinations, is "left with the definite and firm conviction that a mistake has been made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (quotation omitted). A finding is not clearly erroneous simply because there is evidence in the record to support a finding other than that made by the child support magistrate or the district court. *Id.* at 474.

For two reasons, father is wrong in asserting that because the district court decided the matter on affidavits, this court need not defer to the district court's findings. First, since 1985, appellate courts have reviewed findings of fact, whether based on oral or documentary evidence, for clear error. *See First Trust Co. v. Union Depot Place, Ltd. P'ship*, 476 N.W.2d 178, 181-82 (Minn. App. 1991) (explaining 1985 amendment of rule 52.01), *review denied* (Minn. Dec. 13, 1991); *see also Straus v. Straus*, 254 Minn. 234, 235, 94 N.W.2d 679, 680 (1959) (stating that appellate courts defer to district court's resolution of fact questions presented by conflicting affidavits); *Hestekin v. Hestekin*, 587 N.W.2d 308, 310 (Minn. App. 1998) (applying *Straus*). Second, this court cannot make findings of fact on appeal. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988); *Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966).

Finding 4 addresses the parties' intent in agreeing to use a best-interests standard for addressing proposed moves of the children of more than 30 miles. To prevail on appeal, an appellant must show both error and prejudice resulting from the alleged error. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (generally); *Braith v. Fischer*, 632 N.W.2d 716, 724 (Minn. App. 2001) (family matters), *review denied* (Minn. Oct. 24, 2001). Father did not identify any prejudice

arising from the district court's alleged misidentification of the parties' intent. Nor is any prejudice obvious. Father has not shown that finding 4 is clearly erroneous.

Finding 10 states: "There has not been a showing of any facts, that have arisen since the Amended Decree, and that were unknown to the Court at the time of that Decree, that a change has occurred in the circumstances of the children and the parties." Father argues that this finding is unsupported by the record and is inconsistent with the statement by mother's counsel that if mother's removal request was denied by the district court, mother would move closer to her former husband, but less than 30 miles from her current home. The judgment requires application of the best-interests standard if mother moves her residence more than 30 miles and father's affidavit states that mother was involved with her former husband "[a]t the time of the mediation and divorce." Thus, the possibility of mother moving more than 30 miles, possibly to be near her former husband, was contemplated by the parties when they entered into their mediated settlement agreement.

The changed circumstances necessary to support modification of custody, however, "must be significant and must have occurred since the original custody order; it cannot be a continuation of conditions existing prior to the order." *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997). Here, any changed circumstances occasioned by mother's move was contemplated by the parties and, apparently, was the basis of the parties' 30-mile agreement. The finding of no changed circumstances is not clearly erroneous.

Finding 6 states that mother's proposed relocation will not "seriously impair" the children's visitation with father. Father opaquely challenges this finding, arguing that "the parenting plan granted [him] significantly more than just visitation." Because father's argument apparently assumes that the parenting plan awarded him joint physical custody, it is resolved by our affirmance of the district court's determination that the judgment did not do so.

In addressing the removal statute, section 518.175, subdivision 3, the district court found that father is opposing the relocation because of the "increased distance" between himself and the children. Father correctly notes that this is an incomplete recitation of the reasons he opposed mother's proposed removal; he was worried about whether the removal was otherwise in the children's best interests. But because this finding was made in the district court's application of section 518.175, subdivision 3, and because the applicable statute is section 518.17 rather than section 518.175, any error in the finding is harmless due to the fact that the district court reached the same result under section 518.17.

Affirmed.