STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0423

Bruce John Weidenborner, petitioner,
Respondent,

vs.

Staci Alayne Weidenborner, n/k/a Staci Alayne Robertson,
Appellant.

Filed August 12, 2008
Affirmed
Collins, Judge[*]

Beltrami County District Court
File No. 04-FX-01-000017

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Considered and decided by Wright, Presiding Judge; Klaphake, 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

COLLINS, Judge

Appellant challenges the district court order denying, without an evidentiary hearing, her motion to modify custody. Because the record supports the district court's determination that appellant did not make a prima facie case to modify custody, appellant was not entitled to an evidentiary hearing on her motion, and we affirm.

FACTS

Appellant Staci Alayne Weidenborner, now known as Staci Alayne Robertson (mother) and respondent Bruce John Weidenborner (father) are the parents of three children, ages 13, 10, and 9. Since the dissolution of the parties' second marriage in 2001, father has had joint legal and sole physical custody of the children. Mother was granted an evidentiary hearing on her October 2005 motion to modify custody, and a guardian ad litem (GAL) was appointed to investigate mother's allegations and report on (1) whether the children's home environment endangered their physical or emotional health or impaired their emotional development, and (2) whether the harm to the children likely to be caused by a change of environment was outweighed by the advantage of a custody change. Following receipt of the GAL's report, in July 2006 the parties agreed that it was in the children's best interest and welfare that they remain in father's custody, and mother's motion to modify custody was dismissed. In December 2007, mother again moved to modify custody and requested an evidentiary hearing. The district court denied the motion, concluding that mother failed to make a prima facie case to modify custody and hence that she was not entitled to an evidentiary hearing. This appeal follows.

D E C I S I O N

The focal point in this appeal is whether the district court abused its discretion by denying, without an evidentiary hearing, mother's motion to modify custody where mother's affidavit alleged that father was abusing the children.

A district court has broad discretion to provide for the custody of the parties' children. *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989). "Appellate review of custody determinations is limited to whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996) (quotation omitted). Given the broad discretion of district courts related to custody matters, this court reviews decisions denying motions to modify custody without holding an evidentiary hearing for an abuse of discretion. *See Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981); *Geibe v. Geibe*, 571 N.W.2d 774, 777-78 (Minn. App. 1997).

Custody may be modified if the moving party shows, among other things, that the existing custodial arrangement endangers a child's "physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." Minn. Stat. § 518.18(d)(iv) (2006). The party requesting modification of custody must submit an affidavit asserting facts which, if true, would be sufficient to allow modification. *Nice-Petersen*, 310 N.W.2d at 472; *see* Minn. Stat. § 518.185 (2006) (requiring the moving party to submit an affidavit setting forth facts supporting the motion). The district court must accept the facts in the moving party's affidavit as true and disregard contrary

allegations by others, but the district court may consider allegations by others that are not contrary to the moving party's allegations and which put the moving party's allegations in an appropriate context. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007). If the moving party's affidavit asserts facts sufficient to support a custody modification, a district court must hold an evidentiary hearing to determine the truth of the allegations, and evidentiary hearings are strongly encouraged when there are allegations of endangerment to a child's physical or emotional well-being. *Geibe*, 571 N.W.2d at 777; *see Szarzynski*, 732 N.W.2d at 292 (stating "[w]hether a party makes a prima facie case to modify custody is dispositive of whether an evidentiary hearing will occur on the motion. A district court, however, has discretion in deciding whether a moving party makes a prima facie case to modify custody") (citations omitted).

To make a prima facie case for an endangerment-based modification of custody, and hence to get an evidentiary hearing on that motion, the moving party must allege that (1) a change has occurred in the circumstances of the child or custodial parent; (2) the proposed modification would serve the child's best interests; (3) the child's present environment endangers his physical or emotional health or emotional development; and (4) the harm caused by a change in custody would be outweighed by the benefits of the change. Minn. Stat. § 518.18(d)(iv); *Szarzynski*, 732 N.W.2d at 291-92; *Geibe*, 571 N.W.2d at 778. If moving party fails to make prima facie case, the district court "[is] require[d] . . . to deny [the] motion." *Nice-Petersen*, 310 N.W.2d at 472. The lack of a prima facie case to modify custody also absolves the district court of the need to make particularized findings. *Axford v. Axford*, 402 N.W.2d 143, 145 (Minn. App. 1987).

To satisfy the endangerment element of a prima facie case, the moving party "must demonstrate a significant degree of danger." *In re Marriage of Goldman*, 748 N.W.2d 279, 285 (Minn. 2008) (quotation omitted). The conduct that the moving party alleges endangers the child must create an actual adverse effect on the child. *Dabill v. Dabill*, 514 N.W.2d 590, 595-96 (Minn. App. 1995). When the moving party's affidavit is devoid of allegations that are supported by specific, credible evidence, endangerment is not shown. *Axford*, 402 N.W.2d at 145.

Here, mother alleges that father "has been told not to spank the children so he kicks them." Mother states that the kicking incidents came to light during a visit with her daughter, who stated that the parties' son had been having "accidents" related to a longstanding bowel problem and that father kicks him while yelling and swearing. Mother further alleges that father declines to follow medical advice for the parties' son and refuses counseling and regular medical appointments. These allegations would ordinarily satisfy the endangerment element of a prima facie case to modify custody and very similar allegations led the district court to grant an evidentiary hearing on mother's October 2005 motion to modify custody. However, in that proceeding, the GAL's investigation did not substantiate mother's allegations of abuse, and the GAL did not state that endangerment existed.

It is unclear from mother's current motion whether she is alleging recent events or merely reiterating allegations of the conduct addressed in her prior modification proceeding, which she voluntarily dismissed. Thus, regardless of the nature of mother's current allegations, they lack specificity. *See Smith v. Smith*, 508 N.W.2d 222, 227-28

(Minn. App. 1993) (affirming the denial, without evidentiary hearing, of a motion to modify custody where, among other things, moving party's "report of [the custodial parent's] alleged statements [was] too vague to support a finding of endangerment"); *Axford*, 402 N.W.2d at 145 (stating that an evidentiary hearing is not required if the moving party's affidavit is "devoid of allegations supported by any specific, credible evidence"). Because mother's renewed allegations of endangerment are insufficiently specific, they do not support a prima facie claim of endangerment, meaning that mother failed to make a necessary element of her prima facie case. *See Szarzynski*, 732 N.W.2d at 292 (stating that "[a] lack of endangerment is fatal to a motion to modify custody"). Therefore, we need not address the other elements of a prima facie case to modify custody, an evidentiary hearing was not required on mother's motion, and we affirm the district court.

We observe, however, that the district court's refusal to consider what it deemed to be hearsay evidence of the children's residency preference runs afoul of caselaw. *See Geibe*, 571 N.W.2d at 778 (stating that a child's preference to change residence can constitute a change in circumstances and is relevant in determining a child's best interests); *Madgett v. Madgett*, 360 N.W.2d 411, 414 (Minn. App. 1985) (noting the father detailed his children's concerns in his affidavit and that this court had no reason to believe that the district court did not consider those concerns). We also note that if mother presents specific, credible allegations of endangerment, an evidentiary may be warranted to determine whether the children face a significant degree of danger in father's custody, as well as the other best-interest concerns, and ultimately, whether

custody modification would serve the children's best interests. *Cf. AFSCME Council 96 v. Arrowhead Reg'l Corrs. Bd.*, 356 N.W.2d 295, 299 (Minn. 1984) (stating that collateral estoppel is not rigidly applied and "is qualified or rejected when [its] application would contravene an overriding public policy") (quoting *Tipler v. E.I. duPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971)); *Dailey v. Chermak*, 709 N.W.2d 626, 630 (Minn. App. 2006) (stating that "the paramount concern in all custody and custody-related decisions [is a child's best interests]"), *review denied* (Minn. May 16, 2006).

Affirmed.