STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1022

In re the Marriage of:

Kenneth M. Kuller, petitioner,
Appellant,

vs.

Elizabeth L. Kuller, n/k/a Elizabeth Ann Larson,
Respondent.

Filed April 7, 2009
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-FA-000301061

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Elizabeth Larson Kuller, P.O. Box 24913, Edina, MN 55425 (pro se respondent)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

KALITOWSKI, Judge

Appellant Kenneth M. Kuller challenges the district court's denial of his motion to modify the amended dissolution judgment and decree, arguing that the district court abused its discretion by failing to (1) modify his child-support obligation; (2) modify the custody award; and (3) rule on appellant's other motions. We affirm.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by denying his motion for modification of child support because he was not voluntarily underemployed and the district court's findings were insufficient to support imputation of income. Appellant also argues that the district court should have determined that the decrease in his income constituted a substantial change in circumstances rendering the existing support obligation unreasonable and unfair. We disagree.

Whether to modify child support is discretionary with the district court, and its decision will be altered on appeal only if it resolved the matter in a manner that is against logic and the facts on record. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002).

Imputation of Income

Whether to impute income to child-support obligors is discretionary with the district court. *Murphy v. Murphy*, 574 N.W.2d 77, 79-80, 82 (Minn. App. 1998). We review the amount of income attributed to an obligor for clear error. *Eisenschenk v.*

Eisenschenk, 668 N.W.2d 235, 243 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003).

Imputation of income to a child-support obligor is appropriate if the parent is "voluntarily unemployed, underemployed, or employed on a less than full-time basis" and child support must be calculated "based on a determination of potential income." Minn. Stat. § 518A.32, subd. 1 (2008). Determination of potential income is calculated by finding the parent's probable earnings level based on "employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community." Minn. Stat. § 518A.32, subd. 2(1). A parent is not considered voluntarily unemployed, underemployed, or employed on a less than full-time basis, however, when the unemployment, underemployment, or employment on a less than full-time basis is temporary, or if it represents a bona fide career change. Minn. Stat. § 518A.32, subd. 3(1), (2).

Prior to 2004, appellant, who has a B.A. degree in computer science and an M.S. degree in software engineering was employed in the IT/computer-industry field, earning $82,500 annually. At the time of the dissolution proceeding in 2007, and since 2004, appellant has earned approximately $27,000 annually from various jobs, none of which involve working in the IT industry. Appellant argues that because he has obtained employment at the highest level he can achieve without updating his skills, the district court abused its discretion in determining that he is voluntarily underemployed. We disagree.

During the dissolution, the district court utilized a neutral evaluator to conduct a vocational assessment of appellant to determine whether income should be imputed to him. The evaluator, as part of her assessment, also set up a meeting between appellant and employment recruiters to evaluate his "pathway to employment based on his strengths, skills and employment history." After meeting with appellant, the recruiters reported that if appellant were willing to accept an income lower than the amount he previously held in the IT industry, appellant would be able to become employed in a project manager position within two weeks. The recruiters also reported that appellant was unwilling to work in this field for unexpressed reasons. The evaluator concluded that appellant's ineffective job search and resistance to pursuing employment as a project manager were significant barriers to his finding employment. And based on the information provided by the employment recruiters, the evaluator concluded that appellant could earn $50,000 annually. The district court relied upon the evaluator's vocational assessment to impute income of $50,000 to appellant.

In his motion for modification, appellant included a vocational assessment report by a different evaluator that stated that if appellant were allowed to go to school to update his skills in the IT field or pursue a new field, his opportunities for full-time employment would be enhanced. But the district court determined that this report relied heavily on appellant's assertions and little else. The court found that the earlier report by the neutral evaluator was more credible than the new report, which the district court found to be "self-serving." This court defers to the district court's credibility determinations. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000).

In denying appellant's motion, the district court reaffirmed the findings made in its August 2007 amended judgment and decree: (1) appellant's reluctance to obtain employment as a project manager was a barrier to employment; (2) appellant's anger was a barrier to employment; (3) appellant's failure to follow up on any of the resumes he sent out made his job search unreasonable; (4) appellant failed to outline any educational plan whereby he would supplement his education or obtain training in a new field; and (5) appellant's resistance to trying new approaches to his employment search played a significant role in withdrawal of the employment recruiter's assistance in helping appellant seek employment. Because it was within the district court's discretion to adopt the neutral evaluator's vocational assessment, these findings are not clearly erroneous.

Finally, appellant argues that he is temporarily underemployed. We disagree because appellant has provided no evidence to suggest that he has taken steps to put himself in a position where he will earn the amount imputed to him.

Adequacy of district court findings

Appellant argues that the district court failed to adequately analyze why it considered appellant underemployed, and that the district court's findings are inadequate to support the denial of his motion to modify the child-support order. We disagree.

Because the findings in the district court's order denying appellant's motion to modify child support clearly reference its prior amended judgment and decree, which made extensive and detailed findings on the very same issue, we conclude that the findings in the 2008 order are not error. *See Eisenschenk*, 668 N.W.2d at 243 (reviewing the amount of income attributed to an obligor for clear error).

Substantial change in circumstances

Appellant asserts that his failure to be employed at the income rate imputed to him, six months after the dissolution, constitutes changed circumstances, and the district court erred by failing to address whether the award was unreasonable or unfair. We disagree.

A child-support order can be modified upon a showing of a change in circumstances that makes the award unreasonable or unfair. Minn. Stat. § 518A.39, subd. 2(a) (2008). A substantial increase or decrease in gross income of an obligor or obligee is one circumstance that can render an award unreasonable or unfair. *Id.*

A review of the record reveals that little has changed from the entry of the August 2007 amended judgment and decree to the time of appellant's motion to modify child support. Appellant is still earning approximately the same amount that he was earning at the time of dissolution, and is still considered capable of earning $50,000 annually. Although appellant expresses an interest in attending school, he is not currently in school. Appellant now claims that his mother is no longer giving him $1,600 per month to supplement his income. But the imputation of income in 2007 was based on what appellant was capable of earning, not what he was earning at that time.

Because appellant has failed to show changed circumstances that make the child-support award unreasonable or unfair, we conclude that the district court properly denied appellant's motion.

II.

Appellant argues that the district court abused its discretion by denying his custody-modification motion. We disagree.

The abuse-of-discretion standard applies to review of a district court's decision to deny a change-of-custody motion without an evidentiary hearing. *In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002). Appellate review of custody determinations is limited to determining whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). A district court's findings of fact must be sustained unless they are clearly erroneous. *Id.*

Endangerment

The district court found that appellant "did not allege events which endanger the children while in Respondent's custody and there is no evidence that the change of custody would outweigh the benefits of continuity." We agree.

Custody may be modified if the moving party shows, among other things, that the current 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) (2008). The party requesting the modification of custody must submit an affidavit asserting facts that, if true, are sufficient to support modification. *Nice-Peterson v. Nice-Peterson*, 310 N.W.2d 471, 472 (Minn. 1981); Minn. Stat. § 518.185 (2008). If a 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. *See Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007) (concluding that whether "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). If the moving party fails to make a prima facie case, the district court is required to deny the motion. *See Nice-Peterson*, 310 N.W.2d at 472 (stating that unless the movant's affidavits set forth sufficient justification, the district court must deny a custody-modification motion). And the movant's failure to make a prima facie case absolves the district court of the need to make particularized findings. *Axford v. Axford*, 402 N.W.2d 143, 145 (Minn. App. 1987).

A movant's prima facie case must establish four elements for an endangerment-based custody modification: (1) a change in circumstances since the prior custody order; (2) that a modification would serve the child's best interests; (3) that the child's present environment endangers her physical or emotional health; and (4) that the harm to the child likely to be caused by the change of environment is outweighed by any likely benefits of a change in custody. *Weber*, 653 N.W.2d at 809; Minn. Stat. § 518.18(d). After reviewing the record, we conclude the district court properly determined that appellant has not established a prima facie case.

In the affidavit submitted in support of his motion for a custody modification, appellant alleged that respondent has violated his legal custody rights by infringing on his parenting time with the children and by making important decisions without consulting

him. Specifically, appellant contends that: (1) respondent obtained dental care for one of the children against appellant's oral and written objections and after respondent informed the dentist that she was the sole legal custodian of the child; (2) respondent enrolled the children in the school of her choice without discussing the options with appellant; (3) respondent called ahead to the children's summer camp, intervening with appellant's parenting time, to inform them that appellant was picking the children up and caused the children's baggage to be segregated from the rest of the baggage; (4) respondent scheduled their daughter's Bat Mitzvah during a time period covered by an order for protection (OFP) against appellant, thereby barring appellant's attendance from the religious event and upsetting their child; and (5) respondent deprived appellant of his parenting time over Independence Day weekend by failing to cooperate with appellant by rescheduling meeting dates. We conclude that the district court properly found that these allegations do not support a modification of custody.

Appellant's complaints about respondent's decision regarding dental care for one of their daughters and choice of school enrollment were addressed at a motion hearing in February 2008. There, respondent explained that the child's dental care was recommended by a dentist and orthodontist, that she involved appellant in the decision and that he met with both the doctor and the orthodontist, and that the U-Care insurance that would pay for the dental procedure would soon lapse. Respondent also explained that she enrolled the children in the schools that they had been attending for several years because both of the children loved the school, excelled there, and because she did not want the children to have to change schools. Further, e-mails were submitted wherein

appellant specifically stated, "[Respondent], Yes, the children may continue to attend schools in Edina, but only if you register them."

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*, 732 N.W.2d at 292. We conclude that respondent's explanations during the motion hearing, as well as the submitted e-mail communications, are not contrary to appellant's allegations but provide an appropriate context for them. Thus, we conclude that appellant's contentions regarding dental care and education are insufficient to show changed circumstances warranting modification.

Appellant's complaint regarding the scheduling of his daughter's Bat Mitzvah is now moot because at the February 2008 hearing, the parties agreed to incorporate provisions in the OFP that would permit appellant to attend the event.

Appellant's additional complaints are focused on parenting-time violations. Under section 518.18, an unwarranted denial of parenting time can be considered when determining child custody matters. Minn. Stat. § 518.18(d). But the Minnesota Supreme Court has held that an unwarranted denial of or interference with parenting time is not *in itself* a sufficient basis for modifying custody. *Grein v. Grein*, 364 N.W.2d 383, 386 (Minn. 1985). Therefore, the district court did not err in finding that parenting-time issues were an insufficient basis on which to modify custody, appellant has not put forth a prima facie case showing changed circumstances sufficient to warrant a modification of

custody, and an evidentiary hearing on his motion was not required. Moreover, appellant has also failed to offer any explanation as to why a change in custody is in his children's best interests. *See* Minn. Stat. § 518.18(d) (requiring the movant to establish that a modification would be in the children's best interests).

Respondent's medical records

Appellant also argues that the district court abused its discretion by denying his custody-modification motion because it did so without permitting appellant to review respondent's medical records and without conducting an in camera review of the medical records. Appellant contends that the district court should have reviewed the medical records to determine whether respondent's medical condition was relevant to her mental ability to care for the children.

Appellant argues that the fact that respondent was hospitalized for a ten-day period in 2008 for unspecified reasons supports his motion for access to respondent's medical records. In denying appellant's motion to review respondent's medical records, as well as denying an in camera review of them, the district court stated that the court was already "apprised of the fact that Respondent has been suffering from mental health issues." Thus, the district court did not view respondent's mental health issues as a serious factor affecting her ability to care for the children, nor did it find that her hospitalization provided a basis for the determination that a change of circumstances had occurred to warrant modification of custody.

We note that the district court could have requested additional evidence to determine if an in camera review was appropriate. *See Lucas v. Lucas*, 389 N.W.2d 744,

747 (Minn. App. 1986) (concluding that, in a child custody dispute, it is the district court's burden to "uncover reliable evidence to show the best interests of the children" when the evidence presented indicates harm to the children) (citing *Rosenfeld v. Rosenfeld*, 311 Minn. 76, 82, 249 N.W.2d 168, 171 (1976)). Nevertheless, because there was no evidence presented to the district court regarding harm to the children and because the district court indicated its awareness of respondent's mental health issues, we conclude that the district court's failure to request additional evidence was not an abuse of discretion.

III.

The district court's order did not explicitly address several of appellant's motions. Because the district court did not explicitly address the motions, we conclude that they were implicitly denied. *See Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (determining that appellate courts cannot assume district court error); *Luthen v. Luthen*, 596 N.W.2d 278, 283 (Minn. App. 1999) (applying *Loth*).

Appellant has failed to establish that the implicit denial of these motions was not within the discretion of the district court. Thus, we conclude that the district court's denial of appellant's other motions was not an abuse of discretion.

Affirmed.