STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1969

St. Louis County Public Health and Human Services Department,
on behalf of: Joan Konczak and Shawn Henry, petitioner,
Respondent,

vs.

Shannon M. Henry, n/k/a Shannon M. Martens,
Appellant.

Filed June 30, 2009
Affirmed
Bjorkman, Judge

St. Louis County District Court
File No. 69DU-FA-05-339

Melanie S. Ford, St. Louis County Attorney, Benjamin M. Stromberg, Assistant County Attorney, 403 Government Services Center, 320 West 2nd Street, Duluth, MN 55802 (for respondent St. Louis County Public Health and Human Services Department)

Joan Konczak, 403 Garfield Street, Eveleth, MN 55734 (pro se respondent)

Shawn Henry, 403 Garfield Street, Eveleth, MN 55734 (pro se respondent)

William D. Paul, 1217 East 1st Street, Duluth, MN 55805 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant Shannon Martens, f/k/a Shannon Henry, contends that the district court abused its discretion when it failed to hold an evidentiary hearing on her motion to regain custody of two of her children. Because appellant failed to make the requisite prima facie showing, we affirm.

FACTS

Appellant is the mother of four children, including K.M.H., a 14-year-old girl, and K.A.M., an eight-year-old boy. In 2005, the district court terminated appellant's parental rights to one child, transferred custody of a second child to the child's paternal grandparents, and involuntarily transferred permanent legal and physical custody of K.M.H. and K.A.M. to appellant's brother, respondent Shawn Henry, and his fiancée, respondent Joan Konczak.

In July 2008, appellant moved the district court for (a) custody of K.M.H. and K.A.M., (b) appointment of a guardian ad litem to provide a custody recommendation, and (c) temporary parenting time pending a final custody order. In support of her motion, appellant submitted her own affidavit, an affidavit of her mother, and letters from two probation officers. The district court denied appellant's motion, concluding that she did not overcome the presumption of palpable unfitness to parent the children[1] and was not

[1] Appellant does not challenge the district court's determinations that the presumption applies to her and that she failed to rebut the presumption.

entitled to an evidentiary hearing because she did not make a prima facie case supporting a custody modification. This appeal follows.

D E C I S I O N

"An order for permanent legal and physical custody of a child may be modified under sections 518.18 and 518.185." Minn. Stat. § 260C.201, subd. 11(j) (2008). Our review of custody modification cases initiated under Minn. Stat. § 518.18 "is limited to considering whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted). The district court's findings of fact will be set aside only if clearly erroneous. *Id.*

A party seeking to modify custody of a child must submit an affidavit that establishes a sufficient factual basis for modification. Minn. Stat. § 518.185 (2008); *In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002). When, as here, a party makes an endangerment-based motion to modify custody, the district court must conduct an evidentiary hearing only if the party seeking modification makes a prima facie showing that: (1) the child's or custodian's circumstances have changed, (2) the child's best interests are served by a modification, (3) the child's present environment endangers the child's physical health or emotional health, or emotional development, and (4) as to the child, the benefits of the change outweigh the likely detriments. Minn. Stat. § 518.18(d)(iv) (2008); *Goldman*, 748 N.W.2d at 284. For the purposes of determining whether the party has made a prima facie showing, the district court is required to accept

as true the facts contained in the moving party's affidavit. *Geibe v. Geibe*, 571 N.W.2d 774, 777 (Minn. App. 1997).

Appellant agrees that she must make a showing with respect to all four elements. She also acknowledges that she has not done so, stating that "because her access to th[e]se children is virtually non-existent, it is impossible for her to provide facts showing that the children are endangered if a change of custody is not granted." Appellant, in effect, urges us to change the law so that she can have an evidentiary hearing despite her failure to make the requisite showing. We decline to do so.

As the district court determined, the affidavits supporting appellant's motion to modify custody establish only the first of the four elements: that her own circumstances have changed. And we note that appellant has made admirable progress toward addressing the issues that affected her parenting ability, including maintaining sobriety and securing employment. But as the district court concluded, appellant wholly failed to establish the other three elements necessary to obtain an evidentiary hearing.

Appellant offers little information regarding the 13 best-interests factors listed in Minn. Stat. § 518.17 (2008). At most, her affidavit establishes two things: her own desire to regain custody of the children, and that K.M.H. made one comment to her during a holiday visit stating a preference to live with appellant. Notably absent from appellant's motion is information regarding other relevant and weighty factors, such as the children's adjustment to their community and school, or the desirability of maintaining the more than three years' continuity the children have in their current home.

As to the present endangerment factor, appellant points to K.A.M.'s toileting issues, which appellant asserts are indicative of emotional problems. But she presents no competent factual support for this inference and there is no evidence that respondents are not adequately addressing the issue. Nor are we persuaded that it is illogical and contrary to law to require appellant to make a prima facie showing of endangerment when she has had no access to the children. The law requires her to establish endangerment, even if doing so is onerous under the circumstances. And whatever her present access may be, appellant's affidavit indicates that she had some access to the children before filing her motion.

Finally, appellant does not address the relative benefits and detriments of changing custody. The district court's assessment of the likely harm associated with modifying custody is supported by the evidence. Appellant now resides in Texas, but the children have known stability in Minnesota, attend school in their community, and have friends and relatives nearby. Other than the bare assertion that children should be with their mother, appellant offers no evidence of any potential benefit to K.M.H. and K.A.M. flowing from the proposed custody change.

On these facts, we conclude that the district court did not abuse its discretion in denying appellant an evidentiary hearing.

Affirmed.