STATE OF MINNESOTA
IN COURT OF APPEALS
A09-799

In re the Marriage of:

Charles Michael Tabor, petitioner,
Appellant,

vs.

Avelina Garado Tabor,
n/k/a Avelina Molde,
Respondent.

Filed January 26, 2010
Affirmed
Lansing, Judge

Hennepin County District Court
File No. 27-FA-000232995

Sean Linnan, Linnan & Associates, LLC, St. Paul, Minnesota (for appellant)

Avelina Garado Tabor, Farmington, Minnesota (pro se respondent)

Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Johnson, Judge.

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

LANSING, Judge

Following an evidentiary hearing on a custody-modification motion, the district court ordered the transfer of sole physical custody of two minor children from Charles Tabor to Avelina Molde. In this appeal from the modification order, Tabor asserts that the evidence was insufficient to support the district court's finding that a change in the children's circumstances impaired their emotional health and development and that the guardian ad litem's report should have been excluded for failure to meet statutory standards. Because we conclude that the district court's custody-modification order is properly grounded on facts that satisfy the statutory modification standards and that the guardian ad litem complied with her statutory duty to conduct an independent investigation, we affirm.

F A C T S

Charles Tabor and Avelina Molde are the parents of SAGT who is currently age sixteen and SMGT who is currently age fourteen. Tabor and Molde were married in 1991 and separated in 1997. The judgment dissolving their marriage was entered in 1999. SAGT and SMGT lived with Tabor during the separation. Consistent with Tabor and Molde's marital-dissolution stipulation, the district court granted sole physical custody to Tabor and joint legal custody to Tabor and Molde. From the 1999 dissolution until 2008 SAGT and SMGT remained in Tabor's sole physical custody and Molde spent parenting time with both children. More recently, Molde has spent less parenting time

with SAGT and problems have arisen between Tabor and Molde relating to Molde's parenting time with SAGT.

In the course of the 2007-2008 school year, SAGT's and SMGT's attendance dropped sharply and they began failing a majority of their classes. In May 2008 Molde moved to modify the 1999 dissolution judgment to transfer sole physical custody of both children to her. The district court assigned a guardian ad litem who, based on the agreement of both parties, recommended that Molde assume temporary custody of SMGT and Tabor retain custody of SAGT while the custody-modification motion was pending.

After a hearing, the district court determined that Molde had established a prima facie case for custody modification based on endangerment and ordered an evidentiary hearing. Tabor, Molde, and the guardian ad litem testified at the evidentiary hearing. The guardian ad litem recommended that sole physical custody of both children be transferred to Molde. The district court granted the custody modification. Tabor appeals from this order.

D E C I S I O N

I

Appellate review of custody modification centers on 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). We sustain a district court's findings unless the findings are clearly erroneous. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). When reviewing the record, we view the evidence in the light most favorable to the district court's findings. *Ayers v. Ayers*, 508

N.W.2d 515, 521 (Minn. 1993). The overriding principle in custody cases is the best interests of the child. *Pikula*, 374 N.W.2d at 711; *see* Minn. Stat. § 518.17, subd. 3(a) (2008) (requiring court to consider best interests of child when determining custody).

A court may modify a custody order based on endangerment only if it finds (1) that a significant change has occurred in the circumstances of the child or the parties to the order; (2) that modification is necessary to serve the best interests of the child; (3) that the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development; and (4) that the advantages of the change in environment will outweigh the harms of change to the child. Minn. Stat. § 518.18(d)(iv) (2008); *Goldman*, 748 N.W.2d at 284 (identifying four elements of prima facie case for endangerment-based custody modification).

Tabor challenges the district court's determinations that the children's absenteeism and failing grades constituted a change of circumstances and that SAGT's and SMGT's present environment endangers and impairs their emotional health. He does not address the district court's conclusions that it would be in the best interests of both children to live with Molde or that the advantages of the change for SAGT's and SMGT's education outweigh the harm of the change.

Changed circumstances sufficient for custody modification "must be significant and must have occurred since the original custody order." *In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002). No specific rule defines what constitutes changed circumstances; instead this determination must be made on a case-by-case basis. *Lilleboe v. Lilleboe*, 453 N.W.2d 721, 723 (Minn. App. 1990).

The record shows that beginning in the fall of 2007, SMGT started receiving D's and F's in his classes. Until this point, he received mostly A's and B's. Similarly, SAGT began failing all but two of his classes in the 2007-2008 school year. SAGT was recognized for his near perfect attendance in the first quarter of the year but, by the middle of the year, was referred to juvenile court for truancy. SMGT was also one absence away from referral to juvenile court by the end of the year. In light of the sharp decline in both SAGT's and SMGT's school performance and attendance, the district court did not misapply the law or make a finding unsupported by the record when it concluded that a change of circumstances had occurred.

What constitutes endangerment for the purposes of custody modification is similarly based on the particular facts of each case. *Lilleboe*, 453 N.W.2d at 724. To establish endangerment, the moving party must show "a significant degree of danger." *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991). The danger may be purely to a child's emotional development. *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997). But the parent's conduct must be shown to result in an actual adverse effect on the child. *Dabill v. Dabill*, 514 N.W.2d 590, 595-96 (Minn. App. 1994). Poor school performance can be an indicator of endangered emotional health or impaired emotional development. *See Ross*, 477 N.W.2d at 756; *Kimmel v. Kimmel*, 392 N.W.2d 904, 908-09 (Minn. App. 1986), *review denied* (Minn. Oct. 29, 1986).

Despite SAGT's and SMGT's failing grades and absenteeism, the record indicates that Tabor did not take corrective action. SAGT fell far behind in credits for his grade, yet at the time of the evidentiary hearing, Tabor had still not facilitated SAGT's

participation in an after-school program that would allow him to make up his missing credits. SAGT's participation in this program had been recommended by the school's truancy program, the juvenile-probation officer, and the guardian ad litem several months earlier. SAGT's attendance in the 2008-2009 school year improved somewhat. But Tabor testified that the school placed SAGT in their truancy program and that he is monitored by the juvenile court. Tabor did not present evidence of actions he had taken to address the situation. Instead, Tabor's incorrect understanding of the school's registration policy resulted in additional unexcused absences for SAGT and a failing grade in one class at the beginning of the 2008-2009 school year.

The record contains no evidence that Tabor was working with SAGT's or SMGT's teachers to improve either child's performance. In contrast, evidence shows that Molde maintains email contact and had a conference call with SAGT's teachers to try to address his continuing poor grades and that she monitors SAGT's attendance through the school's website. SMGT's grades and attendance have improved significantly since relocating to Molde's home, which indicates that Tabor's passive approach to the children's education contributed to their problems.

Additionally, the district court found that Tabor has not facilitated SMGT's and SAGT's visits with Molde and has, at times, supported SAGT's decision not to see his mother rather than encouraging both children's relationship with their mother. *See Grein v. Grein*, 364 N.W.2d 383, 386 (Minn. 1985) (holding unwarranted denial of or interference with visitation is one factor to be considered in determining whether custody orders should be modified). Finally, the record includes a reference to an investigation of

Tabor's home by child protection services in response to concerns that it was unsafe and inadequate for SAGT and SMGT. Molde submitted photographs of Tabor's home taken at approximately the same time as the investigation occurred. While the condition of the home has improved and is not enough to establish endangerment on its own, it is an additional indicator of the environment in which SAGT and SMGT lived.

The record supports the district court's finding that SAGT's and SMGT's education suffered as a result of living with Tabor and that Tabor did not take corrective action to address the children's educational needs or their school attendance. Additionally, the record supports the district court's findings that Tabor's actions have impeded Molde's relationship with SAGT. We conclude that the district court did not abuse its discretion in determining that these circumstances impaired SAGT's and SMGT's emotional development.

II

Tabor's second challenge is directed to the district court's acceptance and consideration of the guardian ad litem's report. He argues that the district court abused its discretion by following the recommendations of the guardian ad litem because the guardian ad litem did not fulfill her statutory duty to conduct an independent investigation. Minnesota law requires a guardian ad litem to conduct an independent investigation to determine the situation of the family and the child. Minn. Stat. § 518.165, subd. 2(a)(1) (2008). This must include reviewing relevant documents, meeting with and observing the child in the home setting, considering the child's wishes, and interviewing the parents, caregivers, and others. *Id*.

Tabor did not object to the guardian ad litem's testimony at the evidentiary hearing, choosing instead to cross-examine her on the grounds for her recommendation and the additional sources of information she did not pursue. Thus, Tabor's argument that the guardian did not fulfill her duties was not presented to the district court, and is not proper for appellate review. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that appellate courts will generally not consider matters not argued and considered in district court).

Even if Tabor had properly preserved the issue for appeal, the result would not change because the record indicates that the guardian ad litem's investigation met the statutory requirements. Tabor states that the guardian ad litem did not contact SAGT or SMGT to discuss their wishes, failed to return Tabor's call, and did not visit the children in his home.

The guardian ad litem submitted a report to the court on July 25, 2008, based on visits to each house and interviews with both children and both parents. She contacted SAGT's school to verify his progress and his performance at summer school and reviewed reports from child-protection services. Between submitting the report and the evidentiary hearing, the guardian ad litem spoke with both children and both parents one or two more times. The guardian ad litem met the statutory requirements through these actions.

In addition, the district court also received testimony and documentary evidence that corroborated many of the statements made by the guardian ad litem and independently supported the district court's custody-modification order. The district

court did not abuse its discretion in admitting testimony of the guardian ad litem or giving weight to her recommendation in its order.

Affirmed.