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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2219

In re the Marriage of:
Aron Carl Bishop, petitioner,
Respondent,

vs.

Brandee Lyn Bishop,
Appellant.

Filed November 23, 2010
Affirmed
Halbrooks, Judge

Mower County District Court
File No. 50-FA-07-904

Thomas C. Baudler, Baudler Baudler Maus & Blahnik, LLP, Austin, Minnesota (for respondent)

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Considered and decided by Stauber, Presiding Judge; Halbrooks, 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

HALBROOKS, Judge

Appellant challenges the district court's decision to award sole physical custody of B.B. to respondent. Because we conclude that the district court acted within its discretion, we affirm.

FACTS

When appellant Brandee Lyn Bishop and respondent Aron Carl Bishop's marriage was dissolved on July 28, 2008, the parties were awarded joint legal and joint physical custody of their son, B.B. At that time, both parents lived in Austin; but appellant worked in Rochester and was contemplating a relocation. In awarding joint physical custody, the district court stated that "[s]hould either parent move from Austin, the Court will then have to determine at that time what is in the child's best interest based upon a motion for modification brought by either party in the change in circumstances caused by the move."

In May 2009, respondent moved the district court "[f]or an Order modifying the Court's Judgment and Decree dated July 28, 2008 to provide that [respondent] shall have parenting time with [B.B.] during the school year on school nights, so as to allow the child to attend school in Austin, Minnesota." Respondent submitted an affidavit with his motion, in which he stated that appellant had "indicated she had made an offer on a house and [was] definitely planning to move to Rochester." Respondent asserted that "[B.B.] should continue to attend preschool [or kindergarten] in Austin where he has in the past" and that "it is in [B.B.]'s best interest to remain in Austin, go to school in Austin, and

[that respondent] would request that the Court set up an evidentiary hearing so that this issue may be addressed." The district court held an initial hearing on respondent's motion on June 23, 2009, at which time appellant agreed to an evidentiary hearing. The record reflects that appellant's counsel stated at the hearing, "I'd spoken with [respondent's attorney] last week and it's my understanding that today their intention is merely to ask for a date for an evidentiary hearing, which we don't have an objection to."

In an order dated July 1, 2009, the district court stated that "[s]ince the entry of . . . Judgment [appellant] has moved to Rochester, Minnesota. [Appellant] seeks to enroll the child at a school in Rochester while [respondent] wants the child to continue to attend school here in Austin, Minnesota." The district court concluded that "[t]he facts set forth in [respondent]'s Motion and Affidavit, if taken as true, are sufficient to constitute a change of circumstances which may significantly endanger the child's health, emotional well-being or development." The district court then scheduled the matter for an evidentiary hearing. Appellant did not submit responsive pleadings, but she did attend the evidentiary hearing with her attorney and argued that B.B. should live with her and attend school in Rochester. At the conclusion of the evidentiary hearing, the district court asked both parties to submit proposed findings of fact and conclusions of law.

In her post-hearing submission, appellant requested "that the Court sever joint custody, place the minor child, [B.B.] in her primary custody and authorize her to enroll [B.B.] in school in Rochester Minnesota." Appellant argued that

> [a]lthough the existing Custody Order is for joint physical custody, pursuant to Minn. Stat. § 518.18, since more than one year has passed from the date entry of the decree the court has jurisdiction to determine child custody matters and may do so if it finds that the circumstances of the child or the parties have changed and that the modification is necessary to serve the best interests of the child.

The district court awarded respondent sole physical custody of B.B. This appeal follows.

D E C I S I O N

I.

Appellant contends that the district court lacked the authority to hear respondent's motion because the timing of the motion violated Minn. Stat. § 518.18(a) (2008). Minn. Stat. § 518.18(a) provides that "no motion to modify a custody order . . . may be made earlier than one year after the date of the entry of a decree of dissolution or legal separation containing a provision dealing with custody, except in accordance with paragraph (c)." Minn. Stat. § 518.18(c) (2008) provides that "[t]he time limitations prescribed in paragraphs (a) and (b) shall not prohibit a motion to modify a custody order . . . if the court . . . has reason to believe that the child's present environment may endanger the child's physical or emotional health or impair the child's emotional development."

This initial issue is one of statutory interpretation, which we review de novo. *See In re Welfare of S.R.S.*, 756 N.W.2d 123, 126 (Minn. App. 2008), *review denied* (Minn. Dec. 16, 2008). It is undisputed that respondent filed his notice of motion and motion before one year had passed from the date of the parties' dissolution. The dissolution

judgment was entered on July 28, 2008. Respondent filed his motion on May 21, 2009. But because the district court concluded that "[t]he facts set forth in [respondent]'s Motion and Affidavit, if taken as true, are sufficient to constitute a change of circumstances which may significantly endanger the child's health, emotional well-being or development," part (c) of section 518.18 was triggered, and the exception to the one-year prohibition on a modification motion was satisfied. As a result, respondent's motion was not barred by Minn. Stat. § 518.18(a), and the district court had the authority to consider the motion.

II.

Appellant argues that the district court erred by holding an evidentiary hearing on the ground that respondent failed to establish a prima facie case for custody modification. Generally, a district court need not hold an evidentiary hearing on a custody-modification motion unless the accompanying affidavit sets forth sufficient facts that, if true, demonstrate a prima facie case for modification. *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981). But here, appellant explicitly agreed on the record to an evidentiary hearing and never argued that respondent failed to make a prima facie case of endangerment. Because appellant failed to raise this argument to the district court, we conclude that she has waived it on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

III.

Appellant contends that the district court's award of sole physical custody of B.B. to respondent must be reversed because the district court did not find that B.B.'s present

circumstances endanger his health or emotional development. A district court shall not modify a custody order for endangerment-based reasons unless it finds that (1) there has been a change in circumstances, (2) modification is in the child's best interests, (3) the child's present environment endangers his or her physical or emotional health or impairs the child's emotional development, and (4) the benefit of a modification outweighs any likely harm. Minn. Stat. § 518.18(d) (2008). Although respondent did not initially request a modification from joint physical custody, a substantial change from a prior custody arrangement also requires a showing of endangerment. *Lutzi v. Lutzi*, 485 N.W.2d 311, 315 (Minn. App. 1992). "[T]he endangerment standard must be employed where a party proposes full custody during the school year after having previously shared custody on an equal basis." *Id.* We note at the outset that appellant never argued to the district court that the endangerment standard had not been met. As discussed, appellant did not assert that the endangerment standard had not been met at the initial hearing. She also failed to raise the issue at the evidentiary hearing or in her post-hearing submissions. Instead, she advocated for sole physical custody. By arguing for a modification of sole custody in her favor, appellant waived her opportunity to appeal the issue of whether the standard for modification was met. *See Thiele*, 425 N.W.2d at 582.

Even if appellant had properly preserved this issue for appeal, we would nevertheless affirm the district court's award of sole physical custody of B.B. to respondent. "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." *Goldman v. Greenwood*, 748 N.W.2d 279,

281-82 (Minn. 2008) (quotation omitted). Despite the district court's failure to explicitly state its conclusion that B.B.'s present environment endangered his health or emotional development, its consideration of this essential statutory factor is implicit in its other findings. *See Prahl v. Prahl*, 627 N.W.2d 698, 703 (Minn. App. 2001) ("We may treat statutory factors as addressed when they are implicit in the findings . . . .").

In its order, the district court reiterated that the proper standard was endangerment and then found that

> [a]s acknowledged by the parties, it is not appropriate that joint custody continue because of the effect it will have on their child's education. While the child is old enough to start kindergarten in either Rochester or Austin, it is being recommended by his preschool teachers that he continue with another year of preschool before entering kindergarten. They identify several areas in which the child is developmentally delayed and it is their opinion that he is not ready to begin kindergarten until those developmental delays are addressed. It is further their opinion that he should have continuity in his preschool program, which is provided for by attending one institution versus two schools in separate communities. Both parties recognize the child's delay and acknowledged during their testimony that he should attend school in one community—not two.

This passage demonstrates that the district court carefully considered B.B.'s emotional health and development and recognized the child's fundamental need for continuity in his preschool environment. Implicit in the district court's decision to modify custody is a finding that B.B.'s emotional development would be endangered if joint physical custody were to continue while his parents live in cities that are approximately 45 miles apart. We therefore conclude that the district court made the required statutory findings to

support a modification of custody and did not abuse its discretion by awarding respondent sole physical custody of B.B.

Affirmed.