STATE OF MINNESOTA
IN COURT OF APPEALS
A10-995

In re the Marriage of: Lorrie Kathren Westphal,
f/k/a Lorrie Kathren Zetwick, petitioner,
Respondent,

vs.

Craig Goodwin Zetwick,
Appellant.

Filed December 14, 2010
Affirmed
Connolly, Judge

Dakota County District Court
File No. 19-F1-06-008229

Michael G. Hamilton, Tanner & Hamilton, P.A., Hastings, Minnesota (for respondent)

Harvey N. Jones, Harvey N. Jones, P.A., Hastings, Minnesota (for appellant)

Maureen F. Caturia, Assistant Dakota County Attorney, West St. Paul, Minnesota (for respondent-Dakota County)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's denial of his motion for an evidentiary hearing on custody of the parties' child and on modification of child support and spousal maintenance. Because the district court did not abuse its discretion, we affirm.

FACTS

Appellant Craig Zetwick and respondent Lorrie Westphal were married for about 19 years. When their marriage was dissolved in 2007, their son, G., born in 1995, was a minor. Respondent was awarded sole legal and physical custody; appellant had supervised parenting time, a monthly child-support obligation of $1,250, and a monthly maintenance obligation of $800 for five years. The parties attempted to reconcile and live together following the dissolution, but separated again in December 2008.

In March 2009, an order for protection (OFP) was issued preventing appellant from all contact with respondent and restricting his contact with G. to telephone calls and contact in accord with the recommendation of a guardian ad litem (GAL).

Three months later, in June 2009, appellant moved for, among other things, a change to joint legal and physical custody of G., for suspension of child support in June, July, and August, for termination of spousal maintenance, and for an evidentiary hearing on his motion. Following a hearing, the district court in July 2009 denied appellant's motion for a change in custody and for an evidentiary hearing on custody; granted his motion for an evidentiary hearing on parenting time and scheduled a hearing for October 16; ordered the parties to submit the appropriate form for appointment of a GAL;

denied appellant's motion to terminate spousal maintenance; reserved any decision on child support pending the evidentiary hearing; and modified the original judgment by ordering appellant to pay respondent $32,000.

The GAL's interim report recommended that appellant have unsupervised parenting time. On October 15, 2009, a stipulation and order granted appellant unsupervised parenting time of one weekday evening per week and every other weekend from Friday night to Sunday night. The stipulation and order also forgave appellant's $32,000 debt to respondent, applied $20,000 that appellant had previously paid in a homestead transaction to his child-support and spousal-maintenance arrearages, and cancelled the evidentiary hearing.

On March 9, 2010, appellant filed an amended notice of a motion very similar to his June 2009 motion. He sought joint legal and physical custody; parenting time of alternate weeks for each party; guideline child support, suspended during June, July, and August; termination of spousal maintenance; an evidentiary hearing on child support, custody, and parenting time; and an amendment of the March 2009 OFP. Following a hearing in April 2010, the district court denied the motion in its entirety.

In June 2010, G. attempted suicide following a weekend with appellant. The district court issued a temporary OFP that prohibited appellant from any contact with G. Respondent sought an OFP, which was issued in August 2010. It stated that G. has a diagnosis of major depression, is afraid of appellant, has witnessed appellant's physical abuse of respondent, was calmer and did well in summer school after the temporary OFP, and was afraid appellant would hit him if he expressed his opinions. The OFP also stated

that appellant "does not comprehend how his actions have harmed [G.]" The OFP provided that, until August 2012, appellant was to have no parenting time until either the district court ordered it or the GAL and G.'s therapist recommended it as being in G.'s best interest.[1]

Appellant challenges the April 2010 order, arguing that the district court abused its discretion by denying him an evidentiary hearing on his motion to modify custody, child support, and maintenance.

D E C I S I O N

I. Custody[2]

"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." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007) (citations omitted).

Because he moved for a change in custody less than two years after his previous motion on the subject was heard, appellant had to show either a persistent and willful denial of his parenting time or endangerment of G. to make a prima facie case for modification of custody. *See* Minn. Stat. § 518.18(b) (providing that no motion for

[1] Although appellant's brief was filed two weeks after the August 2010 OFP was issued, it does not mention or refute any part of the OFP, and the record does not indicate that appellant challenged the OFP in the district court.

[2] It is at least arguable that this issue is moot because a parent precluded by an OFP from any contact with a child for two years is unlikely to be able to make a prima facie case for a modification to give him joint legal and physical custody of that child.

modification of custody may be filed within two years of the disposition of a prior motion for modification), (c) (providing an exception to (b) if the court finds either a persistent and willful denial of parenting time or has reason to believe that the child's present environment will endanger physical or emotional health or impair emotional development) (2008).

The district court concluded both that "[appellant's] affidavits do not allege that [respondent] has denied him his scheduled parenting time" and that

> [t]he crux of [appellant's] motion rests on the fact that the child is currently performing poorly in school, which is not disputed. [Appellant] has not described any specific conditions in the child's environment that are causing his academic difficulties. The child's [summer] school performance does not indicate that his present environment endangers his physical or emotional health or impairs his emotional development. Accordingly, even viewing all the evidence in a light most favorable to [appellant], he has failed to make a prima facie case for endangerment . . . .

Neither conclusion was an abuse of the district court's discretion.

As to parenting time, appellant's affidavit did not show any persistent and willful denial on the part of respondent; the affidavit mentioned only two incidents. In one incident, respondent had not agreed to let appellant return G. at 9:30 p.m. instead of 9:00 p.m. one Sunday; the other incident resulted in an altercation between appellant and respondent's boyfriend over a video game. There was no evidence that appellant's weekly parenting time was ever denied.

Nor is there any evidence that G. is endangered in his present environment with respondent. After the temporary OFP in June 2010 prohibited parenting time with

appellant, G. attended summer school, where his performance improved. The district court did not abuse its discretion in finding that appellant did not make a prima facie case for change of custody and denying his motion for an evidentiary hearing.

II. Child Support and Maintenance

A maintenance or support order may be modified upon a showing of a substantial decreased gross income of an obligor. Minn. Stat. § 518A.39, subd. 2(a)(1) (2008). "The court need not hold an evidentiary hearing on a motion for modification of maintenance or support." *Id.*, subd. 2(g) (2008); *see also Long v. Creighton*, 670 N.W.2d 621, 626 (Minn. App. 2003) (noting that "a motion to modify child support may be determined on affidavits without the need for cross-examination" because only one party must "show a change in need or ability to pay" and that the district court has discretion to decide whether an evidentiary hearing is needed).

Appellant's child-support and maintenance obligations were based on a finding that his monthly income was $5,000. He argues that he is entitled to a modification of those obligations, and to an evidentiary hearing, because his 2008 income and his 2009 income were $24,000, or $2,000 per month. His affidavit of February 25, 2010, asserted that "my income per my tax returns for 2008 was approximately $24,000 and in 2009 I expect that my income will be approximately that same amount." But the affidavit provided no support for this assertion. In any event, because appellant is self-employed, his gross income is determined not by his tax returns but by "gross receipts minus costs of goods sold minus ordinary and necessary expenses required for self-employment or business operation." Minn. Stat. § 518A.30 (2008). Absent any documentation to

support appellant's claim of reduced gross income, the district court did not abuse its discretion in denying him an evidentiary hearing.

Affirmed.