**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-1349**
**A13-1657**

In re the Marriage of: Denise Marie Thompson, petitioner,
Respondent,

vs.

Kenneth James Thompson,
Appellant.

**Filed April 28, 2014**
**Affirmed**
**Connolly, Judge**

Scott County District Court
File No. 70-FA-05-17458

Karen I. Linder, Linder, Dittberner, Bryant & Winter, Ltd., Edina, Minnesota (for respondent)

Sean A. Shiff, Skolnick & Shiff, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Connolly, Judge; and Smith, Judge.

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

**CONNOLLY**, Judge

In this consolidation of appellant's challenges to two post-dissolution orders, he argues that the district court abused its discretion in: (1) granting respondent's motion to

discharge the parties' parenting consultant (PC), (2) voiding the parenting-time arrangement established by the PC and significantly decreasing appellant's parenting time without making appropriate findings as to the child's best interest, (3) denying appellant's motion for a change in custody or increased parenting time without holding an evidentiary hearing, (4) denying appellant's motion to modify respondent's spousal-maintenance award, and (5) awarding respondent conduct-based attorney fees. Because we see no abuse of discretion in the district court's decisions, we affirm.

## FACTS

Appellant Kenneth Thompson and respondent Denise Thompson were married in 1987. Their four sons were born in 1988, 1990, 1992, and 1999. The three youngest sons were minors when the marriage was dissolved in 2007.

The dissolution judgment provided in relevant part that: (1) the parties would have joint legal custody, (2) respondent would have physical custody, (3) appellant would pay $2,576 monthly in child support, (4) the parties would retain a PC, (5) respondent would receive a cash settlement of $680,000, and (6) respondent would receive temporary spousal maintenance of $7,600 monthly until the cash settlement was paid and permanent spousal maintenance of $4,600 thereafter.

In 2008, appellant moved for modification of physical custody, child support, and spousal maintenance. His motion was denied with respect to spousal maintenance, but physical custody was modified so that appellant had physical custody of the two teenaged sons while the youngest son, R., remained in respondent's custody. Parenting time for

the noncustodial parent was alternate weekends and one week night; appellant's child-support obligation was reduced to $762.

The order also directed the parties to retain a PC, but, by the time they did so in December 2010, the teenaged sons who had been in appellant's custody were emancipated. In March 2011, the PC, with the agreement of both parties, altered R.'s schedule so he spent alternate weeks with each parent. In April 2012, the PC again altered parenting time so that R. spent 11 of every 14 days with appellant.

In May 2012, appellant moved to require respondent to pay child support and to modify spousal maintenance. In August 2012, respondent moved to discharge the PC, to void the parenting-time arrangements of March 2011 and April 2012, and to reinstate the parenting-time arrangement established in 2008, i.e., to have R. spend only alternate weekends and one week night with appellant.[1] Respondent also moved for conduct-based attorney fees.

In November 2012, the district court issued an order granting respondent's motion to discharge the PC, ordering the parties to select another PC, voiding the parenting-time arrangements established by the PC in March 2011 (alternate weeks with each parent) and April 2012 (residence with appellant and alternate weekends with respondent) as de facto changes in R.'s custody, and reinstating R.'s parenting-time arrangement of 2008 (residence with respondent and alternate weekends and one week night with appellant) as of January 2013. The district court also, sua sponte, raised appellant's child-support

[1] The custody of the emancipated children was no longer an issue.

obligation to $1,094 and granted in part respondent's motion for conduct-based attorney fees, awarding her $3,000.

In January 2013, appellant moved for either a change in physical custody or increased parenting time, for an evidentiary hearing, and for a modification of child support; respondent moved for both need-based and conduct-based attorney fees. In April 2013, the district court granted appellant's motion to modify child support and returned child support to its April 2008 level, $762. In July 2013, the district court denied appellant's motion to modify custody or for an evidentiary hearing and respondent's motion for attorney fees.

Appellant challenges: (1) the discharge of the PC and the reinstatement of the 2008 parenting-time arrangement, (2) the denial of his motion to modify custody or parenting time and of an evidentiary hearing on those issues, (3) the denial of his motion to modify spousal maintenance, and (4) the award to respondent of conduct-based attorney fees.

## D E C I S I O N

### 1. Discharge of PC; Change in Parenting Time

The 2008 order changed custody of the two older sons from respondent to appellant but left custody of the youngest son with respondent; appellant's parenting time with him was alternate weekends and one week night. The order also directed the parties to retain a PC, which they did in December 2010. The dissolution judgment provided that the PC "shall not modify custody."

But in March 2011, the PC changed R.'s parenting time from residence with respondent and alternate weekend and one week night with appellant to alternate weeks with each parent, and in April 2012, he changed that arrangement to residence with appellant and alternate weekends with respondent. As the district court concluded, these changes in R.'s residence amounted to changes in R.'s custody, first from custody with respondent to joint custody, then from joint custody to custody with appellant. *See* Minn. Stat. § 518.003, subd. 3(c), (d) (2012) ("'Physical custody and residence' means the routine daily care and control and the residence of the child" and "'Joint physical custody' means that the routine daily care and control and the residence of the child is structured between the parties."). Thus, the PC exceeded the scope of his authority.

"[T]he district court can, using a best-interests-of-the-child standard, remove a parenting consultant." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 293 (Minn. App. 2007). The district court concluded that it was not in R.'s best interests to have custody with respondent, which had been established by the district court, effectively changed to custody with appellant by the PC. The district court did not abuse its discretion in granting respondent's motion to discharge the PC, and ordering that R. return to respondent's custody.

**2. Motion to Modify Custody**

"[T]he court shall not modify a prior custody order or a parenting plan provision which specifies the child's primary residence unless it finds . . . that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child." Minn. Stat. § 518.18(d) (2012).

"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*, 732 N.W.2d at 292 (citations omitted). On appeal from the denial, without an evidentiary hearing, of a motion to modify custody, this court

> review[s] three discrete determinations. First, we review de novo whether the district court properly treated the allegations in the moving party's affidavits as true, disregarded the contrary allegations in the nonmoving party's affidavits, and considered only the explanatory allegations in the nonmoving party's affidavits. Second, we review for an abuse of discretion the district court's determination as to the existence of a prima facie case for the modification . . . . Finally, we review de novo whether the district court properly determined the need for an evidentiary hearing.

*Boland v. Murtha*, 800 N.W.2d 179, 185 (Minn. App. 2011).

**A. The Parties' Allegations**

Thus, our first step is determining, de novo, whether the district court treated appellant's allegations as true and disregarded respondent's allegations. In his affidavit, appellant made two major allegations. First, he alleged that respondent continued to allow their oldest son, who "has schizophrenia and is addicted to meth," to be in her home during her parenting time with R. But the oldest son's problems were long-standing, and appellant provided no information indicating that they were sufficiently different from his problems in 2008 to constitute "a change . . . in the circumstances of the child or the parties" within the meaning of Minn. Stat. § 518.18(d).

Second, appellant alleges on appeal that R.'s grades fell after his court-ordered move back to respondent's primary custody in January 2013. But R.'s grades from January to March 2013 could not have been presented to the district court at or before the January 2013 hearing on appellant's motion for a change of custody. Thus, the district court could not have relied on them.

**B. Prima Facie Case for Custody Modification**

A district court has discretion to decide whether a moving party's allegations make a prima facie case for custody modification. *Id.* The district court found, as a threshold matter, that appellant had not made a prima facie case for modification of custody because he "failed to show substantially changed circumstances since the issuance of the Order of April 18, 2008, the most recent custody order issued in this case." The "changed circumstances" appellant alleged were: (1) that R.'s academic performance had fluctuated significantly; (2) that respondent permitted R. to spend time with his oldest brother, and (3) that R. expressed a preference to live with appellant. The district court concluded that none of these was a change from the situation in 2008 because appellant had relied on all of them in 2008. In 2013, appellant also alleged as a changed circumstance that, contrary to the custody arrangement established by the district court, R. had spent half or most of his time with appellant since March 2011, but the district court did not abuse its discretion in determining that a party's violation of a court's prior custody order does not enable that party to make a prima facie case for custody modification.

Appellant also relied on two alternative statutory bases to make a prima facie case for modification of custody: Minn. Stat. § 518.18(d) (iii) (integration of the child into the family of the parent seeking custody with the other parent's consent) and (iv) (endangerment of the child's emotional health in the present environment). The district court did not abuse its discretion in determining that appellant failed to make a prima facie case for modification of custody based on either integration or endangerment.

R.'s alleged integration into appellant's family occurred in violation of the district court's order that he be in respondent's custody, and appellant did not make a showing that R.'s physical or emotional health or emotional development would be endangered by the environment at respondent's residence. *See Szarzynski*, 732 N.W.2d at 292 (holding that a party seeking modification because of endangerment must show that the child's physical or emotional health or emotional development is endangered by the present environment). The district court noted that R. was with respondent from 2008 to March 2011, transferred to being with each parent in alternate weeks from March 2011 until April 2012, transferred to being with appellant from April 2012 until December 2012, and transferred to being with respondent, where he has remained, in January 2013, and concluded that another transfer would be a further disruption to R. and would outweigh any benefits resulting from the transfer. *See id.* (holding that a party seeking modification because of endangerment must show that the benefits of the change to the child would outweigh any harm).

### C. Denial of Evidentiary Hearing

The district court's denial of an evidentiary hearing is consistent with its determination that appellant failed to make a prima facie case for modification of custody and so was not entitled to a hearing. *See Boland*, 800 N.W.2d at 185.

## 3. Motion to Modify Spousal Maintenance

This court reviews a district court's decision on whether to modify an award of spousal maintenance for an abuse of discretion. *Hecker v. Hecker*, 568 N.W.2d 705, 710 (Minn. 1997). A district court abuses discretion regarding maintenance if its findings of fact are unsupported by the record or if it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 & n.3 (Minn. 1997).

The dissolution judgment provided respondent with permanent spousal maintenance of $4,600 and a cash settlement of $680,000 that would yield monthly investment income of $2,833, giving her a monthly income of $7,433. Respondent was not then working but was found able to earn $1,875 monthly. In its April 2013 order, the district court found that respondent's monthly needs were $8,753; her monthly income, without maintenance, was still $4,708 (investment income of $2,833 plus earnings of $1,875); and the difference between her needs and her income was $4,045. In light of this deficit, the district court concluded that appellant had not shown that the stipulated permanent maintenance award of $4,600 was unfair or unreasonable. *See* Minn. Stat. § 518A.39, subd. 2(a) (2012) (modification of spousal-maintenance order requires a showing that the order's terms are unreasonable or unfair for any of eight reasons).

Appellant does not argue that he is unable to pay permanent spousal maintenance; he argues that the district court failed to consider respondent's ability to meet her needs independently. Specifically, he argues that respondent could earn $3,623 per month by working full-time. The district court rejected this argument on the ground that full-time positions are not available in respondent's field and observed, "the reality is that [respondent] is approximately fifty years of age and has only a high school diploma." The district court also rejected appellant's argument that respondent could earn $3,575, as opposed to $2,833, in investment income, because "[respondent] placed the bulk of her cash settlement in a retirement annuity, and the funds are not available to her without penalty." Thus, the district court did consider whether appellant's ability to meet her needs independently had increased and concluded that it had not.

The district court did not abuse its discretion in denying appellant's motion to modify spousal maintenance.

**4. Attorney Fees**

Conduct-based attorney fees "are discretionary with the district court." *Szarzynski*, 732 N.W.2d at 295. In its April 2013 order, the district court granted respondent's motion for conduct-based attorney fees in the amount of $3,000. The district court found that, while

> neither party comes to Court with entirely clean hands . . . , [appellant]'s current motions to modify child support and spousal maintenance in this instance are palpably lacking in any legal or evidentiary support and likely contributed to the litigation of the [PC] issue, which the parties might otherwise have been able to resolve through mediation.

Appellant argues that his motion to modify child support did not lack a legal or evidentiary basis: there had been a substantial change in circumstances in that the only remaining minor child was now spending most of his time with appellant, while child support had been set when he was spending most of his time with respondent. But this change was the direct result of violating the district court's custody order. Moreover, appellant's motion to modify spousal maintenance did lack an evidentiary basis, and the district court's grant of $3,000 in attorney fees to compensate respondent for dealing with it was not an abuse of discretion.

Because there was no abuse of discretion in any of the district court's determinations, we affirm.

**Affirmed.**