STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1355

In re the Marriage of:
Elaine M. Busswitz, f/k/a Elaine M. Johnson, petitioner,
Respondent,

vs.

Tedd Leroy Johnson,
Appellant.

Filed March 31, 2014
Affirmed
Kirk, Judge

Scott County District Court
File No. 70-2002-22467

Elaine M. Busswitz, Lakeville, Minnesota (pro se respondent)

Aneta Lennartson, Toporowska Law, LLC, Burnsville, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Kirk, Judge.

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

KIRK, Judge

Appellant-father challenges the district court's denial of his motion to modify custody, arguing that: (1) his affidavit established that he made a prima facie case to modify custody based on endangerment; (2) the district court relied too heavily on the

findings and recommendations of the Guardian Ad Litem (GAL) report; and (3) the district court judge exhibited bias against him. Because the district court did not abuse its discretion when it denied appellant's motion without an evidentiary hearing, and appellant waived the remaining issues, we affirm.

D E C I S I O N

I. Appellant did not make a prima facie case to modify custody.

This court reviews a district court's denial of an evidentiary hearing in a child custody matter under an abuse-of-discretion standard. *Geibe v. Geibe*, 571 N.W.2d 774, 777-78 (Minn. App. 1997). A district court's findings of fact will be sustained unless they are clearly erroneous. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985); *see* Minn. R. Civ. P. 52.01 (stating that findings of fact are not set aside unless clearly erroneous). Under Minn. Stat. § 518.18(d)(iv) (2012), a party seeking to modify custody must establish: (1) a change in circumstances; (2) that modification would be in the best interests of the child; (3) that the child's present environment endangers his physical or emotional health or emotional development; and (4) that the harm that might result from a change of environment is outweighed by the benefits of the proposed change. *In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002).

In order to obtain an evidentiary hearing on a motion to modify custody, the moving party must make allegations that, if true, would allow the district court to modify custody. *Nice-Peterson v. Nice-Peterson*, 310 N.W.2d 471, 472 (Minn. 1981). The party seeking modification of the custody order must submit affidavits that establish a prima facie case for modification. *Szarynski v. Szarynski*, 732 N.W.2d 285, 292 (Minn. App.

2007). When reviewing an order denying a motion to modify custody without an evidentiary hearing, this court: (1) first reviews de novo whether the district court accepted the moving party's allegations as true; (2) reviews for an abuse of discretion the district court's determination as to whether a prima facie case exists for the modification or restriction, and (3) reviews 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). But a district court may use an opposing party's affidavit to "explain the circumstances surrounding the accusations." *Geibe*, 571 N.W.2d at 779.

Appellant-father Tedd Johnson argues a change in circumstances is established because the child is in imminent danger of T.B., the husband of respondent-mother Elaine Busswitz. Appellant submitted an affidavit in support of his motion, alleging that the custody modification is in the child's best interest because respondent and T.B. constantly fight, and the child is afraid of being hurt by T.B. Appellant alleges that T.B. is a dangerous man because he was charged in January 2012 with misdemeanor domestic assault and disorderly conduct stemming from a fight with his ex-wife during a custody drop-off of their children. T.B. pleaded guilty to disorderly conduct and the domestic assault charge was dismissed. Appellant alleges that the child expressed a preference to live with him, and he would provide a safe and loving environment.

Endangerment is an "unusually imprecise" standard that "must be based on the particular facts of each case." *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991); *Lilleboe v. Lilleboe*, 453 N.W.2d 721, 724 (Minn. App. 1990). Evidentiary hearings are strongly encouraged if there are allegations of present endangerment to a child's health or

emotional well-being. *Ross*, 477 N.W.2d at 756. "Fear of the custodial parents has been found to be a recognized sign of present endangerment." *Harkema v. Harkema*, 474 N.W.2d 10, 14 (Minn. App. 1991). We have remanded for an evidentiary hearing when a father's affidavit alleged that his sons' step-father scared them by "yelling, throwing things, hitting walls, and driving the car like a maniac." *Id.* at 12-14.

However, the district court can also consider statements and reports of other parties that provide context to the allegations. *Geibe*, 571 N.W.2d at 779. Here, the district court asked the GAL, as an unbiased party, to consider the child's best interests and make a report addressing which party should receive temporary and permanent custody, temporary parenting time, and whether the child is *endangered*.

We conclude that the district court properly denied appellant's motion to modify custody without granting him an evidentiary hearing. The district court did not abuse its discretion in concluding that appellant failed to establish a prima facie case for the modification of custody. The GAL report provided context for appellant's allegations. Appellant had no firsthand knowledge of the child's relationship with T.B. By appointing a GAL, the district court obtained information based on actual observations of the relationship between the child and T.B. The GAL report stated that the child enjoyed being with all of the family members, including T.B. The child did not act nervous, afraid, or anxious around T.B. Because the district court properly determined that a prima facie case was lacking, it appropriately denied appellant's motion without an evidentiary hearing. *See Boland*, 800 N.W.2d at 186. Under these circumstances, the district court is not required to make particularized findings. *See Abbott v. Abbott*, 481

N.W.2d 864, 868 (Minn. App. 1992) (holding that the district court does not need to make specific findings under Minn. Stat. § 518.18 when denying a custody-modification motion without an evidentiary hearing for failure to make a prima facie case).

Appellant next alleges that respondent suffers from a substance abuse problem and does not communicate with him about the child's progress at school. Again, we conclude that the district court did not abuse its discretion in concluding that appellant failed to establish a prima facie case for the modification of custody. The GAL report did not find any evidence that respondent suffered from a substance abuse problem, and the child's teachers reported that they were in contact with both parents about the child's progress at school. The district court properly denied appellant's motion without an evidentiary hearing.

II. Appellant waived the issue of the district court's reliance on the GAL report.

The amount of weight to be given to a GAL report is within the discretion of the district court. *See Rutanen v. Olson*, 475 N.W.2d 100, 104 (Minn. App. 1991). Appellant argues that he was prejudiced because he was denied an opportunity to fully review, analyze, and critique the findings of the GAL report.

The district court's February 21, 2013 order appointing a GAL to investigate appellant's claims stated that a party objecting to the GAL report must schedule a hearing within 30 days of receipt of the report. The GAL report was distributed to the parties at a hearing on May 14, 2013, but was dated May 13, 2013. Because appellant failed to object either at the May 14 hearing or within 30 days after receiving the GAL report, he has waived any objection to the district court's adoption of the report and its

recommendations. An appellate court will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

III. Appellant waived the issue of bias.

The Code of Judicial Conduct states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Minn. R. Jud. Conduct 2.11(A). However, "[t]he mere fact that a party declares a judge partial does not in itself generate a reasonable question as to the judge's impartiality." *Hooper v. State*, 838 N.W.2d 775, 790 (Minn. 2013).

Appellant argues that the district court judge's statements demonstrate prejudice and bias against him. A review of the record shows that appellant failed to file a notice of removal of the judge within ten days of learning which judge would preside in the matter. *See* Minn. R. Civ. P. 63.03. After a judge has presided at a motion or other proceeding in a case, the judge "may not be removed except upon an affirmative showing of prejudice on the part of the judge." *Id.* Appellant did not file a motion to remove the district court judge because of bias. For this reason, this court declines to address it on appeal. *See Braith v. Fischer*, 632 N.W.2d 716, 725 (Minn. App. 2001) (holding that when the issue of judicial bias is not presented to the district court, this court declines to address the issue).

Affirmed.