STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2229

In re the Marriage of: Susan M. Lee, petitioner,
Appellant,

vs.

Daniel R. Lee,
Respondent.

Filed August 15, 2011
Affirmed
Connolly, Judge

St. Louis County District Court
File No. 69-F5-04-600664

Julianne L. Emerson, Attorney at Law, Carlton, Minnesota (for appellant)

Daniel R. Lee, Hermantown, Minnesota (pro se respondent)

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

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

CONNOLLY, Judge

Appellant, a noncustodial parent, challenges the denial of her motion to modify physical custody of two of the parties' children. Because the district court did not abuse its discretion in denying the motion, we affirm.

FACTS

Appellant Susan Lee and respondent Daniel Lee are the parents of four children, A. (now 19), C. (16), S. (15), and T. (12). When the parties' marriage was dissolved in 2005, they were granted joint legal custody, respondent was granted physical custody, and the issue of child support was reserved. The subsequent determination of child support was complicated by the facts that respondent has had a steady job for 20 years and earns an annual income of about $40,000, while appellant has had 13 different jobs since the dissolution and her income has varied with time.

In 2006, appellant's monthly child-support obligation (MCSO) was set at $329, and A. began living with appellant. In 2007, her MCSO was reduced to $86 per month. She moved for physical custody of A., and this was granted in 2008. In its memorandum, the district court stated:

> It is unclear whether [A.'s] placement in [appellant's] home is in [A.'s] best interests. The court has grave concerns regarding [appellant's] ability to be a proper parent to [A.] Family members have expressed concerns regarding [appellant's] ability to parent any of the children.
>
> Of even more concern are allegations that [appellant] is attempting to undermine [respondent's] position as physical custodian of the younger children. The Court will be very cautious in considering any change of legal or physical custody of the other children in the future.

A. turned 18 in May 2010. In response to respondent's motion, appellant's MCSO was increased to $175 for June 2010 and to $200 thereafter, but in September 2010, it was reduced to $90.

That same month, appellant moved to modify physical custody of C. and S., alleging that C. has lived with her since February 2010 and S. since May 2010.[1] The district court held an evidentiary hearing, at which both parties appeared pro se. Following the hearing, the district court denied appellant's motion. She challenges the denial, arguing that the district court abused its discretion.

D E C I S I O N

> Appellate review of custody modification and removal cases is limited to considering whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law. Appellate courts set aside a district court's findings of fact only if clearly erroneous, giving deference to the district court's opportunity to evaluate witness credibility. Findings of fact are clearly erroneous where an appellate court is left with the definite and firm conviction that a mistake has been made.

Goldman v. Greenwood, 748 N.W.2d 279, 284 (Minn. 2008) (quotations and citations omitted).

"To warrant modification of custody, the change in [children's] circumstances must be significant and must have occurred since the original custody order. Moreover, [for an endangerment-based modification of custody,] the change in circumstances must endanger the child's physical or emotional health or development." *In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002) (citations omitted).

[1] Appellant states in her brief that her "interest in having physical custody of the minor children is not about child support" but also that "[f]rom the facts presented by and to the trial court, it is apparent that this case is, in some regards, about child support, of course it is. . . ."

A prima facie case for an endangerment-based custody modification requires:

> (1) a change in the circumstances of the child or custodian, (2) that a modification would serve 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 to the child likely to be caused by the change of environment is outweighed by the advantage of change.

Id.

The district court found:

> Based on the information provided, it is clear to this Court that [C. and S.] are living with [appellant] due to [appellant's] statements about having to pay child support to [r]espondent and [r]espondent's house rules.
>
> [Appellant] may have shown there has been a change of circumstances with [C. and S.] but she has utterly failed to show a modification would serve the best interests of the children, that [r]espondent's home presents any type of endangerment [or that] any harm would be outweighed by the benefits to the children.

The evidence supports these findings. Appellant testified that: (1) she was put on probation after an incident in which A. attacked her and they were both charged; (2) she had not spoken to her own father for seven years or to her sister for almost two years; (3) when the children stay with her, they have no contact with extended family; and (4) she is not able to get the children to visit their grandmother because they do not want to. Appellant offered no evidence to oppose respondent's statement that changing A.'s custody to appellant "was a big mistake. I should have never let [appellant] have [A.]."

Respondent also testified that: (1) the police were at appellant's house because the children were fighting; (2) appellant permitted A., while a minor, to move in with an

adult boyfriend; and (3) respondent thinks the children do better with him, although he conceded, "Granted, they don't like curfews. They don't like me checking on their homework and stuff." He testified further that appellant did not make necessary dental and eye appointments for the children.

Appellant offers nothing except the children's preference for living with her to show that modifying custody would be in their best interests or that they are endangered by living at respondent's. But "a child's preference does not alone provide sufficient evidence of endangerment." *Id.* at 811.

Appellant relies on *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991) (holding that "[t]he choice of an older teenage child is an overwhelming consideration in determining the child's custody or in deciding whether he is endangered by preserving the custodial placement he opposes"). But *Ross* is distinguishable. It involved a child who was a month short of 16 when a dissolution judgment gave his custody to his mother, with whom he lived for only six months before moving in with his father. *Id*. at 754. Here, custody of C. and S. was given to respondent when they were eight and nine, and they lived with him until they were 14 and 15. Thus, in *Ross*, the child was older than C. and S. and had only a brief exposure to living with the custodial arrangement; C. and S. have lived a significant part of their lives in respondent's custody.

A child's preference for a change of custody is not dispositive of a motion to change custody. *See Weber*, 653 N.W.2d at 812 (affirming denial of motion to modify custody in part because child's wish to change custody did not prove emotional endangerment required for a prima facie case to modify custody). *Weber* distinguished

Ross, noting that, in *Ross*, "the teenage child held a strong preference to live with his father, the child physically relocated to the father's home, and the child suffered emotional distress that led to poor school performance [while living with his mother] . . . [whereas in *Weber*] the record demonstrates only that the child wishes to change custody." *Weber*, 653 N.W.2d at 811. This case is more analogous to *Weber* than to *Ross*.

The district court did not abuse its discretion in denying appellant's motion to modify custody of C. and S.

Affirmed.