STATE OF MINNESOTA
IN COURT OF APPEALS
A11-419

In re the Marriage of:
Lucinda Ann Ochoada, f/k/a
Lucinda Ann Ochoada Corcoran, petitioner,
Respondent,

vs.

Dennis John Corcoran,
Appellant,

and

Dakota County,
Intervenor.

Filed October 31, 2011
Affirmed
Bjorkman, Judge

Dakota County District Court
File No. 19-F7-02-009280

Merlyn L. Meinerts, Burnsville, Minnesota (for respondent)

Mark Gray, Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Bjorkman, 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

BJORKMAN, Judge

Appellant-father challenges the district court's denial of an evidentiary hearing on father's motion for custody modification and the district court's order to pay attorney fees. Because father failed to make a prima facie case for custody modification, we affirm.

FACTS

Appellant Dennis John Corcoran and respondent Lucinda Ann Ochoada divorced in 2003. The district court awarded mother sole physical custody of the parties' two children and ordered father to pay child support. E.J.C., the parties' younger child and the subject of this appeal, graduated from high school in June 2011 and turned 18 during the pendency of this appeal.[1]

In July 2010, father brought a motion to modify custody and support based on endangerment of the child. Father's motion alleged the statutory requirements for modification but stated no supporting facts except that E.J.C. preferred to live with father and had moved into father's home in June 2010. The district court denied father's motion because father failed to make a prima facie showing of changed circumstances that endangered E.J.C. The court ordered father to pay attorney fees and costs that mother incurred in responding to the motion. Father did not appeal.

[1] Because E.J.C. is now emancipated, neither parent has custody over him. Nevertheless, we address whether the district court should have granted father's custody-modification motion because the resolution of that question impacts the parties' responsibility to pay child support. *See* Minn. Stat. § 518A.39, subd. 2(e) (2010).

In December 2010, the parties agreed to participate in a parent-consulting program. Specifically, they agreed that E.J.C. would return to mother's home and that he and mother would start a therapeutic reunification process. But before the therapeutic reunification process began, father brought a second motion to modify custody and support. Again, father alleged that changed circumstances endangered E.J.C. but offered no factual support apart from E.J.C.'s stated preference to live with father and his limited contact with mother. The district court, without conducting an evidentiary hearing, denied father's motion and ordered father to pay mother $750 in attorney fees and costs. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by denying father's request for an evidentiary hearing on his motion to modify child custody.

This court's review of custody-modification 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." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted). We will set aside the district court's findings of fact only if they are clearly erroneous. *Id.*

Father contends that the district court erred by refusing to grant him an evidentiary hearing on his motion for custody modification. When, as here, a party makes an endangerment-based motion to modify custody, the district court must conduct an evidentiary hearing only if the party seeking modification makes a prima facie showing that (1) the child's or custodian's circumstances have changed since the disposition of the

court's last custody order, (2) the modification would serve the child's best interests, (3) the child's present environment endangers the child's physical or emotional health or development, and (4) the benefits of the modification outweigh the likely detriments. Minn. Stat. § 518.18(d)(iv) (2010); *Goldman*, 748 N.W.2d at 284. In determining whether the moving party has made a prima facie showing, the district court must accept the facts contained in the party's affidavit as true. *Geibe v. Geibe*, 571 N.W.2d 774, 777 (Minn. App. 1997).

Father moved for custody modification in both July and December 2010. The district court denied the July motion, and the record shows that father alleged *no* changed circumstances in the intervening five and a half months. Father's December motion recites the same grounds for modification that he alleged in his July motion—that E.J.C. moved in with father and no longer desires to live with mother—in slightly greater detail. But even if we construe father's December motion to allege a change in circumstances, E.J.C.'s preference alone does not mandate an evidentiary hearing. *See In re Weber*, 653 N.W.2d 804, 809-10 (Minn. App. 2002).

Wholly absent from both 2010 motions is any allegation or factual assertion that E.J.C.'s preference to live with father and his lack of contact with mother endangers his physical or emotional health or development. While a child's preference and his relationship with each parent are relevant to the child's best interests, they are not dispositive. Minn. Stat. § 518.17, subd. 1(a) (2010). Moreover, ignoring E.J.C.'s preference and placing him with a parent with whom he has had little contact does not automatically expose him to the "significant degree" of danger necessary to constitute

endangerment. *See Johnson-Smolak v. Fink*, 703 N.W.2d 588, 591 (Minn. App. 2005) (holding that endangerment must be "significant"); *cf. Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991) (finding endangerment where 16-year-old's preference for living with father was accompanied by additional signs that he suffered emotional distress, leading to declining school performance, while living with mother). On this record, we conclude that the district court did not abuse its discretion by finding that father failed to make a prima facie case and denying his request for an evidentiary hearing.

Because we affirm the district court's denial of an evidentiary hearing regarding child custody, we need not address father's request for child-support modification.

II. The district court did not abuse its discretion by awarding mother attorney fees.

We review an award of attorney fees for an abuse of discretion. *In re Adoption of T.A.M.*, 791 N.W.2d 573, 578 (Minn. App. 2010). A district court abuses its discretion when it misapplies the law or makes a decision contrary to the facts in the record. *Id*.

Father argues that the district court erred by awarding attorney fees to mother.[2] We disagree. A district court may grant conduct-based attorney fees "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2010). Conduct-based attorney fees must be based on behavior occurring during the litigation, and the court must identify the specific conduct on which it bases the fee award. *Geske v. Marcolina*, 624 N.W.2d 813, 819 (Minn. App. 2001). Here, the district court identified three bases for the award. First, father's December

[2] Father challenges the award itself, not the amount of the award or the reasonableness of the attorney labor underlying the award.

motion alleged no changed circumstances since his July motion, which was denied. Second, the December motion, like the July motion, "fails to address any statutory thresholds for a change in custody that are not related to [father's] own behavior." Third, father filed the December motion before the completion of the therapeutic reunification process that the parties agreed to undertake. The record supports the district court's reasoning and demonstrates that each of these factors contributed to the length and expense of litigation. Thus, the district court did not abuse its discretion by ordering father to pay attorney fees.

Affirmed.