

NOTICE

Memorandum decisions of this court do not create legal precedent. A party wishing to cite such a decision in a brief or at oral argument should review Alaska Appellate Rule 214(d).

THE SUPREME COURT OF THE STATE OF ALASKA

ANTHONY V. BENNETT,)	
)	Supreme Court No. S-17323
Appellant,)	
)	Superior Court No. 3AN-14-10875 CI
v.)	
)	<u>MEMORANDUM OPINION</u>
EUGENIA BENNETT,)	<u>AND JUDGMENT</u> *
)	
Appellee.)	No. 1742 – September 25, 2019
_____)		

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Eric A. Aarseth, Judge.

Appearances: Mario L. Bird, Ross, Miner & Bird, PC, Anchorage, for Appellant. Notice of nonparticipation filed by Kara A. Nyquist, Nyquist Law Group, Anchorage, for Appellee.

Before: Bolger, Chief Justice, Winfree, Stowers, Maassen, and Carney, Justices.

I. INTRODUCTION

Anthony Bennett appeals the denial of his motion to modify child custody. He argues there has been a substantial change in circumstances warranting an evidentiary hearing and that the superior court abused its discretion when it modified the visitation schedule without a hearing. We disagree and affirm the judgment of the superior court.

* Entered under Alaska Appellate Rule 214.

II. FACTS AND PROCEEDINGS

A. Facts

Anthony Bennett and Eugenia Bennett were married in August 2001. They have two children. Anthony filed for divorce in December 2014. During the divorce hearings, Eugenia sought permission to move with the children to Germany. The superior court was “unable to find, with the evidence before it, that relocation to Germany would be in the children’s best interests.” But the court also noted that Anthony had previously violated a court order by removing funds from his Thrift Savings Plan; it cautioned that anything Anthony did to further affect his retirement would be a substantial change in circumstances allowing Eugenia to renew her motion to relocate to Germany.

The parents divorced in July 2015, with the superior court awarding primary physical and legal custody to Eugenia. In March 2016 the court modified its custody order to award the parents shared physical custody and joint legal custody. In August Anthony filed for bankruptcy. As part of the bankruptcy, he attempted to discharge equalization payments ordered as part of the divorce, though the bankruptcy court did not allow this.

In September 2016 Anthony relocated to New Mexico for a United States Air Force permanent duty assignment. Eugenia filed a motion to modify custody. The superior court deemed Anthony’s move a substantial change of circumstances warranting a modification of the custody order. The court noted that Anthony’s declaration of bankruptcy “undermine[d] any ability that the mother could remain in the family home and support [her] schooling to start a career in the United States.” The court maintained shared legal custody but returned primary physical custody to Eugenia to account for the geographic distance between the parties.

In February 2017 Anthony separated from his active duty with the Air Force and returned to Anchorage as a member of the Air Force Reserve. This change of service delayed the date on which Anthony would be eligible for retirement. Anticipating Anthony's change in employment, Eugenia filed an amended motion to modify custody to allow her to move to Germany with the children. The superior court granted this motion in April 2017, giving Eugenia primary physical custody and sole legal custody and authorizing her move to Germany with the children. Eugenia and the children moved to Germany in the summer of 2017.

In the following year, Anthony learned that the children were not participating in all of their courses due to their limited ability to speak German and the additional time they were spending in their language classes. As a result their teachers were unable to give them grades in many of their courses.

B. Proceedings

Anthony moved to modify custody or visitation in April 2018 and requested a custody investigation. He alleged that there had been a change in circumstances warranting such a modification, based on: (1) the deficiencies in the children's German education; (2) a failure to meet the emotional needs of the children; and (3) the older child's ability to express a custody preference.

The superior court concluded that Anthony had not identified any substantial change in circumstances, and it denied his motion. The court declined to hold an evidentiary hearing because "[t]he arguments raised by the father have already been considered and decided by the court and the other arguments, even if weighed in favor of the father, would not outweigh the other custodial factors." The court noted that it was aware of the difficulties the children would face in Germany when it entered the April 2017 order allowing Eugenia to relocate with the children. It also stated that Anthony's concern about the children's happiness was not a valid basis for modification,

especially since he “had an opportunity to ensure that the mother and boys could remain in Alaska, but he made voluntary choices that made it impossible for them to stay.” The court additionally provided that “even if [the preference] factor were weighed in the father’s favor, it would not outweigh the totality of the other custodial factors.”

Following a motion for reconsideration, the superior court decided to consider a revised visitation schedule to account for the German school calendar. Anthony filed a proposed visitation schedule, which Eugenia contested, suggesting her own modifications. The superior court modified the visitation schedule in December 2018 to allow the parents to alternate visitation during the children’s breaks in the school year, with Anthony getting visitation for the upcoming holiday break.

Anthony now appeals both the denial of his motion to modify custody and the order modifying visitation. Eugenia declined to participate in this appeal.

III. DISCUSSION

A. Anthony Has Not Demonstrated A Substantial Change Of Circumstances.

Alaska Statute 25.20.110(a) allows a court to modify a custody award if there is a change of circumstances and the modification would be in the best interests of the child. If there has been a change of circumstances, AS 25.24.150(c) requires the court to consider several enumerated factors to determine if a custody modification would be in “the best interests of the child.”¹

Anthony alleges that he has shown prima facie evidence that a substantial change of circumstances has occurred. In particular he suggests that both the problems with the children’s German education and the age of the elder child are sufficient bases

¹ See also *Georgette S.B. v. Scott B.*, 433 P.3d 1165, 1171 (Alaska 2018) (discussing factors considered in custody modification).

to warrant an evidentiary hearing.² “Whether a moving party has made a prima facie showing of changed circumstances warranting a hearing is a question of law that we review de novo.”³ We have cautioned that “[a] change in circumstances is unlikely to be substantial enough to ‘overcome our deep reluctance to shuttle children back and forth . . .’ unless the change affects the child[]’s welfare and ‘reflect[s] more than mere passage of time.’ ”⁴ Having considered the allegations, we conclude that the changes identified are the outgrowth of the superior court’s difficult decision to allow Eugenia to move to Germany with the children, and thus Anthony has not identified a change in circumstances warranting an evidentiary hearing.⁵

² Anthony also alleges that his improved financial situation is a change in circumstances deserving of an evidentiary hearing. But we have “held that mere improvement in the position of one of the parties is not sufficient to justify a change in custody.” *Gratrix v. Gratrix*, 652 P.2d 76, 83 (Alaska 1982); *see also Garding v. Garding*, 767 P.2d 183, 186 (Alaska 1989) (finding that the financial improvement of both parties did not justify modifying the custody arrangement).

³ *Yvonne S. v. Wesley H.*, 245 P.3d 430, 432 (Alaska 2011). When multiple changed circumstances are suggested, we review them “in the aggregate to determine whether modification would be warranted if the allegations were proven true at a hearing.” *Id.* “[W]e will affirm the denial if ‘the facts alleged, even if proved, cannot warrant modification, or if the allegations are so general or conclusory, and so convincingly refuted by competent evidence, as to create no genuine issue of material fact requiring a hearing.’ ” *Fredrickson v. Hackett*, 407 P.3d 480, 482 (Alaska 2017) (alteration in original) (quoting *Abby D. v. Sue Y.*, 378 P.3d 388, 391 (Alaska 2016)).

⁴ *Hope P. v. Flynn G.*, 355 P.3d 559, 565 (Alaska 2015) (fourth alteration in original) (quoting *C.R.B. v. C.C.*, 959 P.2d 375, 381 (Alaska 1998)); *see also Abby D.*, 378 P.3d at 394.

⁵ Anthony additionally argues that the superior court abused its discretion by improperly weighing the best interests factors. But because we hold that Anthony has not alleged a prima facie change of circumstances, we need not address this argument.

1. The anticipated educational difficulties are not a substantial change of circumstances.

Anthony asserts that the children's difficulties adapting to their German education constitute a substantial change of circumstances. But the superior court was well aware that moving to Germany would entail a difficult transition for the children. In its first order addressing custody, the superior court considered whether moving to Germany would be in the children's best interests. It stated, The children do not speak German. Their entire scholastic history derives from and within the United States. The stress of immersion within a foreign culture, education, and language system would more than likely set the children's educational careers back." (Footnote omitted.) The court again acknowledged these difficulties when it later awarded Eugenia custody and allowed her to move to Germany: "While this court stands by its original findings that remaining in the United States is the path of least resistance to ensure the children's educational needs are met, Mr. Bennett by his choices has made that virtually impossible."

In denying Anthony's motion to modify custody, the superior court further stated, "Normally such a motion would warrant an evidentiary hearing, but in this matter it does not. The arguments raised by the father have already been considered and decided by the court" The court continued:

When the court was deciding the mother's and father's competing motions to modify, the court readily acknowledged the difficulties the boys might face in the German educational system. The father had argued that the boys would struggle with a German curriculum. The court allowed the mother to relocate the boys to Germany knowing full well, but hoping for the best, that the boys would likely struggle in school because of the language.

(Footnotes omitted.) We agree with the superior court. The court anticipated that there

might be setbacks as the children adapted to German schooling, so those same setbacks do not constitute a substantial change in circumstances.

2. The age of a child is not a substantial change in circumstances.

Alaska Statute 25.24.150(c)(3) requires a superior court determining custody to consider “the child’s preference if the child is of sufficient age and capacity to form a preference.” Anthony argues that the eldest child has expressed a preference to live in Alaska and the child’s increased age is a change of circumstances warranting modification. He points to the superior court’s 2017 order allowing Eugenia to move to Germany, in which the court noted, The oldest child is nearing the age of being able to express a preference that the court would have to consider. However, under the present dynamics in the family, the court would be concerned about undue influence exerted by the father.”

We have noted that a change in circumstances must “reflect[] more than mere passage of time.”⁶ And Anthony has not addressed the superior court’s concern that he is able to exert undue influence on the children. We have found no abuse of discretion in denying a change of custody when a parent did not “address the concerns about the children potentially having been coached and influenced, making it impossible to determine their true preferences.”⁷ We likewise conclude that the eldest child’s age alone does not constitute a change in circumstances here.

B. The Superior Court Did Not Abuse Its Discretion When Modifying Visitation.

On appeal Anthony argues that by modifying visitation in early December 2018, the superior court made it financially impractical for him to buy the plane tickets

⁶ *Abby D.*, 378 P.3d at 394 (quoting *Hope P.*, 355 P.3d at 565).

⁷ *Schaeffer-Mathis Schaeffer v. Mathis*, 407 P.3d 485, 493 (Alaska 2017).

necessary for his visitations later that month and in February 2019. He contends this effectively reduced his visitation days.⁸ But he never raised such concerns before the superior court. Absent argument or evidence that could have alerted the superior court to these issues, we cannot conclude that it abused its discretion when it modified visitation as it did in early December.

IV. CONCLUSION

The superior court's judgment is **AFFIRMED**.

⁸ We review modification of a visitation order for an abuse of discretion and the underlying factual findings for clear error. *Acevedo v. Liberty*, 956 P.2d 455, 457 (Alaska 1998). Anthony styles his challenge to the visitation modification as a claim of clear error. But his argument does not challenge any specific factual findings by the court; instead, it challenges the court's decision to issue a visitation modification in early December that did not account for the difficulty in buying last-minute tickets. This was a matter of the court's discretion. Therefore, we review for abuse of discretion.