STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1629

In re the Marriage of:
Jonathan Robert Repp, petitioner,
Appellant,

vs.

Bethany Ann Marie Lorge,
n/k/a Bethany Snesrud,
Respondent.

Filed August 28, 2017
Affirmed
Ross, Judge

Dakota County District Court
File No. 19-AV-FA-10-3841

Ahmed Bachelani, Bachelani Law Office, Bloomington, Minnesota (for appellant)

Victoria M.B. Taylor, Crossroads Legal Services, L.L.C., St. Paul, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Ross, Judge; and Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

ROSS, Judge

In this child-custody dispute, father Jonathan Repp appeals from the district court's denial of his motion to modify the existing custody order, arguing that the court erroneously concluded that he did not make a sufficient showing of endangerment to justify the motion. He also argues that the district court abused its discretion by addressing mother Bethany Snesrud's untimely request to modify legal custody. In her appellate brief, Snesrud requests that we award her conduct-based attorney fees for this appeal. Because the district court acted within its discretion by rejecting Repp's motion based on Repp's failure to identify evidence of endangerment, we affirm. And because Snesrud filed no motion for attorney fees, we decline to address her fee request.

FACTS

Jonathan Repp and Bethany Snesrud's 2011 divorce decree granted Snesrud sole physical custody and granted the parties joint legal custody of their two minor children. That arrangement remains in effect despite a 2014 amendment to the decree. In July 2016, Repp alleged that Snesrud's conduct puts the children in danger and moved to modify the custody arrangement, seeking either sole or joint physical custody. Repp's motion notified Snesrud of an August 11, 2016 hearing date.

Snesrud responded on August 5, 2016, asking the district court both to deny Repp's motion and to grant her an evidentiary hearing to modify the custody order by awarding her sole legal custody. Snesrud did not support her request with an affidavit or a memorandum of law. Repp moved to dismiss Snesrud's request three days later on

procedural grounds, arguing that it raised new legal issues and was both untimely and inadequate.

The district court held the hearing as scheduled and invited additional submissions from the parties. Repp filed a memorandum and an additional affidavit to support his own motion and oppose Snesrud's request. The district court issued an order refusing to modify custody. The court reasoned that neither party had presented a prima facie case of endangerment warranting an evidentiary hearing. Repp alone appeals.

D E C I S I O N

I

Repp challenges the district court's order denying his motion to modify the extant custody order without first holding an evidentiary hearing. He argues that he made a prima facie showing of endangerment and that the district court committed misconduct by "blatantly ignor[ing]" the allegations in his affidavit. We review the district court's decision as to whether Repp established a prima facie case for an abuse of discretion. *See Boland v. Murtha*, 800 N.W.2d 179, 185 (Minn. App. 2011). And we review de novo the district court's treatment of Repp's affidavits. *See id.* Neither argument prevails.

Endangerment

Repp does not establish that he offered sufficient support for his endangerment-based motion to modify the custody arrangement. He had the burden to make a prima facie case for modification. *See Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). He could have met this burden with a factual showing in a supporting affidavit. *See Boland*, 800 N.W.2d at 182–83. This required Repp to present facts that identify a significant

change in circumstances that occurred after the district court issued the extant custody order; that show that modification would serve the children's best interests; that establish that the children's present environment endangers their physical or emotional health; and that would prove that a change to this environment will benefit more than harm the children. *See* Minn. Stat. § 518.18(d)(iv) (2016). Repp maintains that he made a clear showing of each element. We will focus on the endangerment element because our assessment of it resolves the issue.

Endangerment demands a showing of a "significant degree of danger." *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991). Repp had to allege facts that illustrate that Snesrud's conduct resulted in an actual adverse effect on the children. *See In re Weber*, 653 N.W.2d 804, 811 (Minn. App. 2002). Repp maintains that his affidavits show that the children were endangered because Snesrud failed to properly manage their medication; missed or rescheduled medical appointments; allowed inappropriate visitors to stay at her home; failed to adequately clothe the children in cold weather; threatened to call the police on the children; and allowed the children's stepfather to show "severe aggression" by pushing one of the children. We conclude that Repp's affidavits fall short.

Instead of providing factual details to substantiate allegations of endangerment, Repp's affidavits mostly consist of generalized, conclusory statements that criticize Snesrud's parenting and that assert that the children would be better off living primarily with him. Many of the exhibits accompanying his affidavits relate to communications that occurred more than two years before Repp filed his motion, and we do not construe a continuation of ongoing problems as a significant change of circumstances. *Roehrdanz v.*

Roehrdanz, 438 N.W.2d 687, 690 (Minn. App. 1989), *review denied* (Minn. June 21, 1989). Contemporaneous or not, the facts presented in Repp's affidavit tend primarily only to illuminate a significant lack of cooperation between the parties. Although the communication difficulties readily support Repp's concerns about the parties' co-parenting challenges, they fall far short of alleging that the children face a significant degree of danger in Snesrud's care.

The district court's order addresses the factually supported issues that Repp's affidavits raise. For example, it directs the parties to actively use a joint electronic calendar, to comply with the communication and mediation provisions in prior orders, and to not discuss the custody proceedings or disparage the other parent in the children's presence. It recognizes the children's special needs and gives due regard for the importance of their medication. And it reassigns the parties' responsibilities to obtain the medication in a manner that seems intended to allay tension between the parents over those duties. All of these adjustments respond reasonably to the factually supported, nonconclusory problems that Repp identified in his affidavits.

But Repp identified no facts that would have proved endangerment under the standard we have outlined. When the moving party fails to present a prima facie case, no evidentiary hearing is necessary. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007). The district court did not abuse its discretion by concluding that Repp failed to present a prima facie case of endangerment. And it therefore did not abuse its discretion by denying Repp's motion for custody modification without scheduling an evidentiary hearing.

Judicial Misconduct

We reject Repp's allegation that the district court judge violated several Code of Judicial Conduct canons. If Repp was concerned about the district court judge's fairness before the order, he had the opportunity to seek the judge's removal. *See* Minn. R. Gen. Pract. 106. If a party fails to move the district court for removal, he forfeits the argument. *Ag Servs. of Am., Inc. v. Schroeder*, 693 N.W.2d 227, 236 (Minn. App. 2005). Repp did not move the district court for removal but rather claims judicial bias for the first time on appeal. Because the district court had no opportunity to respond to Repp's claims, we conclude that Repp forfeited this issue. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that appellate courts only consider issues presented to and decided by the district court). To the extent that Repp's argument rests on criticism about the district court's order, Repp merely speculates that the "only logical conclusion" to be drawn from the district court's denying his motion is that the judge unfairly failed to read and consider his affidavits. But we have carefully read the same affidavits, and we have explained why we believe the district court's conclusion is indeed logical.

II

Repp argues that the district court abused its discretion by permitting Snesrud to argue in favor of her untimely and inadequately filed motion for sole legal custody. The district court denied Snesrud's motion entirely, and Snesrud does not challenge that denial on appeal. Repp did not request any attorney fees, and he seeks no other remedy for the district court's allegedly inappropriate consideration of Snesrud's modification request. We decline to issue an advisory opinion deciding whether the district court should or

should not have considered Snesrud's request. We merely point out that the rules may not restrain the district court in the strict manner that Repp suggests. *See* Minn. R. Gen. Pract. 303.03(b) (explaining that the district court, using its discretion, "*may* refuse to permit oral argument by the party not filing the required documents, *may* consider the matter unopposed, *may* allow reasonable attorney's fees, or *may* take other appropriate action" (emphasis added)).

III

Snesrud's brief asks that we award her attorney fees and costs for this appeal, contending that Repp's motion was redundant and that his appeal was unnecessary. "A party seeking attorneys' fees on appeal shall submit such a request by motion under Rule 127." Minn. R. Civ. App. P. 139.06, subd. 1. Snesrud did not file any motion for fees or costs on appeal, so her request is not properly before us. We will not address it further.

Affirmed.