STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1890

In re: the Custody of the Minor Child V. E.;
Ricardo Elizondo, petitioner,
Appellant,

vs.

Katie Irene Halvorson,
Respondent.

Filed August 13, 2018
Affirmed
Peterson, Judge

Norman County District Court
File No. 54-FA-07-477

Sarah Gereszek, Kalash & Pettit, Grand Forks, North Dakota (for appellant)

Leah Sonstelie Warner, Vogel Law Firm, Fargo, North Dakota (for respondent)

Considered and decided by Kirk, Presiding Judge; Peterson, Judge; and Stauber, 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

PETERSON, Judge

In this appeal from a district court order that denies his motion to modify child custody, appellant-father argues that he established a prima facie case for modification and the district court erred by failing to hold an evidentiary hearing. We affirm.

FACTS

Appellant-father Ricardo Elizondo and respondent-mother Katie Irene Halvorson are the parents of V.E., who was born in 2004. The parties never married, but father signed a recognition of parentage on the day after V.E. was born. For reasons not specified in the record, mother's mother (grandmother) was appointed as mother's legal guardian and conservator in 2004.

In 2006, mother obtained an order for protection (OFP) against father. A second OFP application was denied in 2007. Nothing in the file reflects further incidents between the parties. In 2007, father sought joint legal custody of V.E., with sole physical custody in mother. In October 2007, the district court granted mother sole legal and physical custody, subject to father's reasonable visitation rights.

In 2017, father moved to modify custody, asking that the parties share joint legal custody of the child, with sole physical custody in father. Father alleged that V.E. lived "on and off" with mother between 2010 and 2013, depending on mother's health. Mother was civilly committed for a short time in 2013. After mother's commitment, V.E. lived with grandmother until grandmother died in 2017. Father alleged that mother visited but

did not live with V.E. Mother did not deny this, but averred generally that the child lived with her, grandmother, and mother's brother and sister-in-law since the 2007 custody order.

After grandmother's death in June 2017, V.E. lived with father in North Dakota until mother's brother (uncle) brought V.E. back to live with his family. Uncle had been appointed as mother's successor legal guardian and conservator. V.E. now lives with uncle and his family, not with mother. Father states that 12-year-old V.E. expressed a preference to live with father.

The district court held a motion hearing, but no testimony was taken. The district court denied the modification motion and made the following finding: "[Father] has failed to allege a prima facie case justifying modification of custody. [Father] conceded at the hearing that his claims of endangerment to the child are speculative at this point."[1] The district court made no other findings. Father appeals.

D E C I S I O N

Minn. Stat. § 518.18 (2016) governs the modification of a custody order. A court may not modify a custody order that specifies the child's primary residence unless it finds "that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child." Minn. Stat. § 518.18(d).

[1]During the motion hearing, the district court asked, "In terms of the prima facie case, what's the danger in the present environment?" Father's counsel answered, "Your Honor, unfortunately it is a little speculative right now as to whether or not there's endangerment um, because the child hasn't been living with [mother] for three to four years. So it's not quite certain um, what the endangerment may be but there is concern that ah, [mother] is not able to meet the needs of the child emotionally, physically um, spiritually, what have you, based um, on her limitations."

The change in circumstances must be significant, must have occurred since the original custody order, and "must be a real change and not a continuation of ongoing problems" or "conditions existing prior to the [original] order." *Spanier v. Spanier*, 852 N.W.2d 284, 288 (Minn. App. 2014) (quotations omitted).

"In applying these standards the court shall retain the custody arrangement . . . that was established by the prior order" unless at least one of certain statutorily listed circumstances is present. Minn. Stat. § 518.18(d). One of the statutory circumstances supporting modification is that "the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of the change to the child." *Id.* (d)(iv). The party seeking modification has the burden of proof. *Crowley v. Meyer*, 897 N.W.2d 288, 293 (Minn. 2017).

Father argues that the district court erred by refusing to hold an evidentiary hearing. A district court must hold an evidentiary hearing on a modification motion if a party establishes a prima facie case for modification. *Id.* at 293-94.

> To establish a prima facie case [for an endangerment-based custody modification], the party seeking custody modification must allege that: (1) the circumstances of the children or custodian have changed; (2) modification would serve the children's best interests; (3) the children's present environment endangers their physical health, emotional health, or emotional development; and (4) the benefits of the change outweigh its detriments with respect to the children.

Id. at 293 (citation omitted).

We consider three things when reviewing a district court's decision to deny modification without an evidentiary hearing:

> First, whether the district court properly treated the allegations in the moving party's affidavits as true, disregarded the contrary allegations in the nonmoving party's affidavits, and considered only the explanatory allegations in the nonmoving party's affidavits, is reviewed de novo. Second, the district court's determination as to the existence of a prima facie case for modification is reviewed for an abuse of discretion. Lastly, we review de novo whether the district court properly determined the need for an evidentiary hearing. Whether a party makes a prima facie case to modify custody is dispositive of whether an evidentiary hearing will occur on the motion.

Spanier, 852 N.W.2d at 287 (footnote omitted) (quotations and citation omitted).

In his affidavit, father alleged that a change in circumstances had occurred because mother had been civilly committed since the original order, grandmother had been appointed as mother's legal guardian and conservator, grandmother had died, and the child was now living with mother's successor guardian and conservator. Mother explained in her affidavit that grandmother was appointed her legal guardian in 2004, prior to the original custody order. With respect to endangerment, father alleged:

> I'm not sure if [mother] can provide for [V.E.'s] needs given her current status or how having a guardian and conservator would play a role in providing for [V.E.'s] care. . . .
>
> . . . .
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> . . . [V.E.] has expressed a desire to live with me. She hasn't lived with her mother in quite some time. . . .
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> . . . .
>
> . . . I'm concerned about [mother's] physical and mental fitness to care for [V.E. Mother] is unable to provide for her

> own care which necessitated a guardian and conservator be appointed.
>
> . . . .
>
> I don't know what will happen if [V.E.] is to be in [mother's] primary care. I don't know the extent of her mental or physical condition or how that would impact her willingness to follow through with my parenting time. . . .
>
> . . . .
>
> . . . [V.E.] is not living with [mother] but living with [uncle] and his family. [Uncle] is still appointed as the guardian and conservator over [mother]. The relationship between [uncle, uncle's wife], and [V.E.] has become strained since [grandmother] passed away. [Uncle] cancelled a trip that [grandmother] set up for [V.E.] because [V.E.] chose not to go to [grandmother's] wake. . . . [V.E.] has been living with [uncle] and spending days with [mother]. [V.E.] has told me it is a very uncomfortable situation and frequently sends me messages wanting to live with me. . . .
>
> . . . I'm concerned [uncle] will try to control the situation and my ability to see [V.E.]

If father's allegations are treated as true and mother's allegations, other than her explanatory allegation that grandmother was appointed mother's legal guardian prior to the original custody order,[2] are disregarded, the district court did not abuse its discretion in determining that father failed to establish a prima facie case for modification because father's allegations do not establish that V.E.'s present environment endangers her physical health, emotional health, or emotional development.

[2] During the hearing on father's motion, father's attorney acknowledged that mother was under guardianship at the time of the original custody order in 2007.

Father's allegations establish that V.E. is uncomfortable in her present environment and that father is concerned about the possibility of endangerment, but they do not establish a prima facie case for modification. Mother was under a guardianship and conservatorship at the time of the original custody order, and the allegations do not show that the appointment of a successor guardian has been a significant change in circumstances. Father alleges that mother could be an inappropriate caregiver because of her mental illness, pointing to mother's commitment in 2013, but his allegations do not identify any inappropriate care.

As an alternative basis for finding endangerment, father alleged that V.E. expressed a preference to live with him rather than uncle.

> A child's preference has been found relevant to three of four modification factors. A child's strong preference to change residence after a custody decree can constitute a change in circumstances. The child's reasonable preference is also one of the statutory factors for the court to weigh in determining a child's best interests.
>
> Where the child is a teenager, Minnesota courts have taken preference into account in determining emotional endangerment.

Geibe v. Geibe, 571 N.W.2d 774, 778 (Minn. App. 1997) (quotation and citation omitted). But this court has explained that a child's preference "alone do[es] not provide sufficient evidence of endangerment to mandate a hearing." *Id.* A child's preference is of more importance when an evidentiary hearing is held "rather than in determining whether a prima facie case has been made." *Id.* at 778-79.

Because the district court did not abuse its discretion in determining that father did not establish a prima facie case for modification, it did not err by failing to hold an evidentiary hearing.

Affirmed.