**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A18-0528**

In re the Marriage of:
David Brian Toft, petitioner,
Appellant,

vs.

Arirat Toft,
Respondent.

**Filed April 15, 2019**
**Affirmed**
**Ross, Judge**

Ramsey County District Court
File No. 62-FA-11-1673

Brian K. Lewis, Francis White Law, P.L.L.C., Woodbury, Minnesota (for appellant)

Karen A. Cooper, St. Paul, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Jesson, Judge.

**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, we hold that the district court did not abuse its discretion by denying father's motion to modify custody without holding an evidentiary hearing because father failed to present a prima facie case of endangerment on speculation that mother is plotting to remove the child from the country.

Arirat Toft (now Arirat Lason) and David Toft's 2012 divorce decree granted Lason sole physical and legal custody of their minor son and established a parenting-time schedule. In 2015, the parties agreed to adjust the parenting time to be divided about evenly and to appoint a parenting-time consultant to help resolve parenting issues.

Toft moved to modify custody in 2018. He premised the motion on his affidavit alleging that he had recently learned that Lason, who was previously a citizen of Thailand and whose mother lives in Germany, had obtained a passport for their 9-year-old son. Toft's affidavit also asserted that, "in the past," Lason threatened to remove the boy from the country and not return. Toft asked the district court to grant him joint legal and physical custody and order Lason to surrender the child's passport.

The district court conducted a motion hearing during which Toft argued that modification was necessary to avoid child endangerment, citing Minnesota Statutes, section 518.18(d)(iv) (2018). The district court rejected the argument, concluding that Toft had alleged insufficient facts to warrant an evidentiary hearing because his affidavit failed to establish "that the only logical explanation for getting a passport is to abduct the child and relocate out of the country." The district court held that Toft failed to present a prima facie case that the child faced a present and ongoing danger and failed to present any credible threat that Lason would abscond with the child.

Toft challenges that holding. Our review of modification orders is limited to considering whether the district court "abused its discretion by making findings of fact unsupported by the evidence or by improperly applying the law." *In re Marriage of*

*Goldman*, 748 N.W.2d 279, 284 (Minn. 2008) (quotations omitted). We see no abuse of discretion here.

We examine "three discrete determinations" when we review an order denying a motion to modify custody without an evidentiary hearing. *Boland v. Murtha*, 800 N.W.2d 179, 185 (Minn. App. 2011). We first review de novo whether the district court properly treated the allegations in the movant's affidavits as true and disregarded any conflicting allegations except to the extent they are explanatory rather than contradictory. *Id.* We next consider whether the district court's determination reflects an abuse of discretion as to whether a prima facie case exists for modification. *Id.* And we then "review de novo whether the district court properly determined the need for an evidentiary hearing." *Id.*

To present a prima facie case of endangerment-based modification, Toft needed to identify facts that reveal a significant change in circumstances that occurred after the extant custody order; that show that modification would serve the child's best interests; that establish that the child's present environment endangers his physical or emotional health; and that would prove that a change in environment will benefit more than harm him. *See* Minn. Stat. § 518.18(d)(iv). Toft failed to show that the child is endangered. An endangerment finding requires a showing of a "significant degree of danger." *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991). The undisputed clarifying facts about Toft's representations about the passport and the threat to leave the country reveal that his allegations fall short of showing endangerment.

Our conclusion assumes that a current plan for one parent to abscond with a child would constitute endangerment. But Toft's affidavit, informed by the clarifying facts in the

record and the undisputed facts presented by Lason, fails to reveal any current plan or suggest any danger. Toft's temporally vague affidavit statement, "In the past, [Lason] has made threats to me that she would take the minor child to Thailand and not return to the United States," does not show a present danger because it is detached from any context as to circumstance or time. If the alleged statement and the obtaining of the passport were recent, contemporaneous events, Toft's allegations might imply a plan. But he made no attempt to inform the court how far "in the past" the alleged threat occurred, and the district court could draw no inference about its timing.

The district court knew of other information rendering Toft's speculation unreasonable. Among other things, it had access to the parties' stipulated judgment and decree. In that stipulation, Toft and Lason contemplated international travel with the child, agreeing that "[i]f either parent plans to travel out of the United States for vacation, a copy of the round trip ticket and travel itinerary must be provided to the other parent." Given that the parties made this agreement simultaneously with their agreement that Lason would have sole legal custody, the parties actually or constructively also knew that Lason could, and potentially would, obtain a passport for the child to travel abroad. And the court learned from Lason's responsive affidavit that Lason became an American citizen in 2014 and that she then updated her own passport and obtained one for the child. She submitted a copy of the child's passport card, which confirmed that she has had the child's passport since 2014. Her affidavit also asserted—again without dispute—that, although Lason hopes one day to be able to afford to visit Germany with her son, she has not taken the child out of the

country in the four years since she obtained a passport for him and has no intention to live anywhere other than Minnesota.

In this context, Toft's affidavit gave the district court no reason to convene a hearing to explore his speculation. Although he focuses on the *recency of his learning* of the passport, the district court relevantly focused instead on the *lengthy period of its existence*. So do we. Because the child's four-year-old passport does not evidence any current plan by Lason to take him permanently from the country, Toft has not established a prima facie case of endangerment. When the moving party fails to make out a prima facie case, no evidentiary hearing is necessary. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007); *see also Axford v. Axford*, 402 N.W.2d 143, 145 (Minn. App. 1987) (finding no requirement for an evidentiary hearing when "[a]ppellant's affidavit was devoid of allegations supported by any specific, credible evidence"). Because the district court did not abuse its discretion by concluding that Toft failed to present a prima facie case of endangerment, it did not abuse its discretion by denying Toft's motion without an evidentiary hearing.

**Affirmed.**