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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1004

In re the Marriage of:

David Jeffrey Stoeger,
Appellant,

vs.

Shara Marie Porter-Stoeger, n/k/a Shara Marie Porter-Casper,
Respondent.

Filed January 7, 2019
Reversed and remanded
Rodenberg, Judge

Fillmore County District Court
File No. 23-FA-10-603

Jill I. Frieders, O'Brien & Wolf, L.L.P., Rochester, Minnesota (for appellant)

Shara Marie Porter-Casper, Winona, Minnesota (pro se respondent)

Considered and decided by Cleary, Chief Judge; Bjorkman, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellant-father David Stoeger challenges the district court's order denying his motion to modify child custody without affording him an evidentiary hearing. He argues

that he made a prima facie case to modify custody based on endangerment and integration. We agree, and therefore reverse and remand.

FACTS

During their marriage, father and respondent-mother Shara Porter-Casper had one child, E.P-S., in 2010. Father and mother divorced when daughter was seven months old. The parties' decree provided that father and mother shared legal custody of daughter, and mother was granted sole physical custody subject to father's reasonable and liberal parenting time. On May 1, 2018, father moved the district court to modify the custody provision of the decree and grant him sole legal and physical custody of daughter. Father alleged by affidavit that daughter had been physically abused by mother's former significant other in 2013, suffered an unexplained rib fracture in 2014, and was being locked in her bedroom during 2015. Father also alleged that daughter had an inappropriate sexual encounter in 2015 with another child in the household and that she was sharing a bedroom with that child and another half-sibling. Additionally, father alleged that daughter was not performing well in school, and was repeatedly absent or tardy in 2015 and 2016. Father's affidavit stated that daughter was forced to share a single-serving meal with her half-sister, and that the power at mother's home was turned off due to nonpayment.

Father's affidavit also indicated that daughter began living with him in July of 2017 and that she was thriving in his care. After father moved to modify custody and made his affidavit in support of his custody-modification motion, daughter was returned to mother's custody. Following a hearing, the district court denied father's motion without an

evidentiary hearing, concluding that father failed to make a prima facie case for modification.

This appeal by father followed.

D E C I S I O N

A district court "is accorded broad discretion in its consideration and disposition of a motion to modify an award of child custody made incident to a judgment and decree of marital dissolution." *Nice-Peterson v. Nice-Peterson*, 310 N.W.2d 471, 471 (Minn. 1981). A district court shall not modify a prior custody order 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) (2018). In applying these standards the district court shall retain the existing custody arrangement unless:

> (i) the court finds that a change in the custody arrangement or primary residence is in the best interests of the child and the parties previously agreed [to application of the best-interests standard to custody-modification motions];
> (ii) both parties agree to the modification;
> (iii) the child has been integrated into the family of the petitioner with the consent of the other party;
> (iv) 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 a change to the child; or
> (v) the court has denied a request of the primary custodial parent to move the residence of the child to another state, and the primary custodial parent has relocated to another state despite the court's order.

Minn. Stat. § 518.18(d). If the affidavits accompanying the motion for modification do not allege sufficient facts to allow a court to reach the required findings, the district court should deny the motion and no evidentiary hearing is needed. *Englund v. Englund*, 352 N.W.2d 800, 802 (Minn. App. 1984). "If the party establishes a prima facie case, the district court must then hold an evidentiary hearing to consider evidence on each factor." *In re Custody of M.J.H.*, 913 N.W.2d 437, 440 (Minn. 2018).

Multiple determinations are required of a district court considering a motion to modify custody, and they are subject to different standards of review. *Boland v. Murtha*, 800 N.W.2d 179, 183 (Minn. App. 2011). First, "we review de novo 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." *Id.* at 185. Next, we review the district court's determination of whether the moving party has made a prima facie case for the modification for an abuse of discretion. *Id.* "Finally, we review de novo whether the district court properly determined the need for an evidentiary hearing." *Id.*

The district court succinctly stated its reasoning for denying father's motion to modify custody as follows:

> While [father's] affidavit alleges matters involving the child from 2013 to 2016 that were of concern and may have had an effect on the child, no motions were filed for change of custody for those incidents at that time. The incidents alleged by [father's] affidavit for 2017 and 2018 [are insufficient] to find that a prima facie case has been presented for this Court to order an evidentiary hearing. The child is residing with [mother] and attending school in Winona.

Father's argument is two-fold. First, he argues that the district court believed endangerment was the only standard that applies and that it failed to consider whether daughter had been integrated into his home. Second, father argues that the district court erred in determining that father had not made a prima facie case of endangerment because the district court limited its inquiry to a 16-month period in which daughter spent over nine months living with father.

The district court denied father's motion without an evidentiary hearing because it found that father's affidavit evidence, taken as true, failed to show a change in circumstances of the daughter or parents and that modification is necessary to serve daughter's best interests. We agree with father that the district court failed to address whether father made a prima facie showing that daughter had been integrated into father's home. We also conclude that the district court did not adequately address whether daughter's physical or emotional health was endangered.

The burden is on the moving party to first establish on a preliminary basis that a change of circumstances has occurred and that modification is necessary to serve the best interests of the child. *See Nice-Petersen*, 310 N.W.2d at 472. Next, that parent must satisfy any one of the conditions described in parts (ii) through (v) of Minn. Stat. § 518.18(d). *Pfeiffer v. Pfeiffer*, 364 N.W.2d 866, 868 (Minn. App. 1985). Accordingly, we first address whether father preliminarily established that a change of circumstances has occurred making modification of the decree necessary to serve the best interests of the child, and, if so, whether father has also preliminarily established either integration under Minn. Stat. § 518.18(d)(iii) or endangerment under Minn. Stat. § 518.18(d)(iv).

Change in Circumstances

"What constitutes changed circumstances for custody-modification purposes is 'determined on a case-by-case basis.'" *Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000) (quoting *Lilleboe v. Lilleboe*, 453 N.W.2d 721, 723 (Minn. App. 1990)), *review denied* (Minn. Sept. 26, 2000). "The change in circumstances must be significant." *Spanier v. Spanier*, 852 N.W.2d 284, 288 (Minn. App. 2014) (quotation omitted). There must be a real change and not a continuation of ongoing problems. *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 690 (Minn. App. 1989), *review denied* (Minn. June 21, 1989).

Father alleged several changes in circumstances, including: (1) daughter was physically assaulted by mother's former significant-other in 2013; (2) daughter suffered an unexplained broken-rib injury in 2014; (3) a sexual encounter in 2015 between daughter and another child in mother's home that resulted in daughter developing a preoccupation with certain sexual activity; (4) daughter began receiving counseling for post-traumatic stress disorder (PTSD) and anxiety-related issues in 2015; (5) in 2016, daughter's half-sister expressed that there was not enough food in the house, and this issue was addressed in a December 2017 child-protection report; (6) daughter missed 16.5 days of school in kindergarten, and another 10 days of school in first grade, but missed only one school day in the last year during which daughter was living with father; (7) mother allowed her troubled co-worker to live at her already-crowded home with mother's husband and four children; and (8) mother is verbally abusive to daughter and loses control when she is upset and worried. While a district court must accept these allegations as true and disregard any contrary evidence, a district court may nevertheless use an affidavit from the non-moving

parent to explain the circumstances surrounding the accusations. *Tarlan v. Sorenson*, 702 N.W.2d 915, 922 (Minn. App. 2005).

Mother's affidavit explained several of father's allegations by stating that: (1) mother's former partner was charged with the 2013 assault and no longer has "any contact with any party involved"; (2) daughter did not fracture a rib, but fractured her collarbone after jumping off a couch and a child-protection investigation revealed no threat of child abuse or maltreatment; (3) child-protection workers found the sexual encounter between daughter and another child to be consistent with the exploratory ages of the children; (4) daughter's absences from school were related to a plethora of winter-related illnesses; and (5) daughter shares a room with only one other child.

In *Larson v. Larson*, we held that an evidentiary hearing was justified "in light of the mother's possibly escalating drug use and continuing changes of residence and male occupants, all having increasingly harmful effects on the children." 400 N.W.2d 379, 381 (Minn. App. 1987). In *Tarlan*, the district court found a significant change in circumstances where, regardless of specific timing, respondent's concern about his daughter's weight had escalated in recent years and father began to regularly weigh his daughter at home. 702 N.W.2d at 923. Father's affidavit here alleges several instances of apparent parental neglect, changes in the emotional health of both mother and daughter, and changed housing circumstances since the previous custody order. Despite mother's affidavit providing some context to father's concerns, father's affidavit sufficiently establishes a change in circumstances under Minn. Stat. § 518.18(d).

Best Interests

A child's best interests are determined according to the factors listed in Minn. Stat. § 518.17 (2018). One best-interest factor includes the child's physical and emotional needs, and the effect of the proposed arrangements on the child's needs. Minn. Stat. § 518.17, subd. 1(a)(1). Other best interest factors include domestic abuse that affects the child, the physical or mental health of a parent that affects the child's safety or developmental needs, and the history and nature of each parent's participation in providing care for the child. Minn. Stat. § 518.17, subd. 1(a)(1)-(12). Father's affidavit alleged that mother and daughter both suffer from PTSD, daughter has been physically and sexually abused, and daughter had been performing poorly in school before moving into father's care. Taking these allegations as true, as we must in this procedural posture, these allegations suffice to preliminarily establish that modifying custody is in the best interests of the child.

Integration

Father alleged in his affidavit dated May 1, 2018, that daughter resided with him from July 2017 until his motion was made. Daughter returned to mother's home "a couple of weeks" before the district court heard father's motion for custody transfer on May 15, 2018. Whether a child has been integrated into a parent's home with the consent of the other parent presents a question of fact. *Greenlaw v. Greenlaw*, 396 N.W.2d 68, 71 n.1 (Minn. App. 1986).

In *Peterson v. Peterson*, we affirmed a district court's denial of an evidentiary hearing on a claim that a child had been integrated into the father's home when the minor

child had lived with the father for less than two of the nine years since dissolution. 365 N.W.2d 315, 318 (Minn. App. 1985), *review denied* (Minn. June 14, 1985). We noted that "we cannot ignore the fact that father's motion for custody was brought, not while the minor child was residing with him, but five months after [the child] had returned to her mother's home, and then only in response to mother's request for increased child support and support arrearages." *Id.* In *Pfeiffer*, we affirmed the district court's determination that the child had been integrated into the father's home when the child had spent one year living with the father and mother following their divorce, and father had spent over half of the time taking care of the children. 364 N.W.2d 868-69. We stated in *Pfeiffer* that "[c]hanging physical custody to [father] was a recognition of the status quo and enforcement of his custodial rights." *Id.*

In *Downey v. Zwigart*, we held that the district court erred in denying an evidentiary hearing to modify custody based on a change in circumstances and that the child had been substantially integrated into the moving party's home. 378 N.W.2d 639, 642-43 (Minn. App. 1985). We noted that the moving party had made a preliminary showing that the child had been integrated into her home when the five-year-old child had lived with the moving party for all but seven months of his life. *Id.* at 642. In *Englund*, we determined that a two-month period where the child lived with the moving party was not sufficient to establish an "integration period" when there was no evidence that the nonmoving party consented to the integration. 352 N.W.2d at 803.

Although the facts here do not fall neatly within any of the precedential cases, father's affidavit provides enough evidence that a court *could* conclude that daughter had

been integrated into father's home with the consent of mother. Daughter had been living with father for an entire school year when father moved the district court to modify the custody order, and daughter returned to mother's care only after father's motion. An evidentiary hearing would resolve the factual issue of whether daughter was integrated into father's home with mother's consent. Because father's affidavit made a sufficient preliminary showing of a change in circumstances since the previous order, that modification of the previous custody order would serve daughter's best interests, and that daughter had been integrated into father's home, father made a prima facie case for modification. Consequently, the district court erred by denying father's motion without an evidentiary hearing.

Endangerment

To make a prima facie case for an endangerment-based motion to modify custody, the moving party 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." *M.J.H.*, 913 N.W.2d at 440 (quotation omitted). As discussed above, father's affidavit established the first two elements.

Emotional abuse alone may amount to endangerment, and "when an allegation of such abuse is supported by some evidence, an evidentiary hearing is appropriate." *Tarlan*, 702 N.W.2d at 923-24 (citing *Abbott v. Abbott*, 481 N.W.2d 864, 868-69 (Minn. 1992) (reversing denial of an evidentiary hearing when mother's history of throwing children out

of house created stress and anxiety in anticipation of being thrown out again in the future); *Harkema v. Harkema*, 474 N.W.2d 10, 14 (Minn. App. 1991) (reversing denial of an evidentiary hearing where appellant made allegations of emotional abuse by stepfather who would yell and throw objects); *Lilleboe*, 453 N.W.2d at 724 (reversing denial of an evidentiary hearing where facts alleged might have established endangerment of child's emotional health or development)). "[B]ehavioral problems and poor school performance by the child have served as indications of endangerment to a child's physical and emotional health." *In re Weber*, 653 N.W.2d 804, 811 (Minn. App. 2002).

As previously noted, mother's affidavit provided context and explained why some of father's allegations are no longer a concern. The district court determined that father's affidavit alleges matters involving daughter from 2013 to 2016, but that the incidents from 2017 and 2018 are insufficient to find that a prima facie case has been made to warrant an evidentiary hearing. While the supreme court has made clear that the endangerment element of Minn. Stat. § 581.18(d)(iv) is concerned with whether the child's *present* environment endangers the child's physical or emotional health, the supreme court has not held that an endangerment finding cannot be based on evidence of an anticipated adverse effects of a child's present environment. *Goldman v. Greenwood*, 748 N.W.2d 279, 285 (Minn. 2008). Indeed, we have upheld an endangerment finding based on evidence of anticipated adverse effects of the current custodial environment. *See Sharp*, 614 N.W.2d at 263-64 (concluding that record supported finding of endangerment when it contained testimony that mother's alleged present conduct "*will* cause emotional psychological damage to her child," and absent suggested therapy, "would pose emotional damage to her

child"); *see also Johnson-Smolak v. Fink*, 703 N.W.2d 588, 591 (Minn. App. 2005) ("Endangerment implies a significant degree of danger or *likely* harm to the child's physical or emotional state." (Emphasis added.)). Accordingly, the matters of concern relating to daughter alleged by father to have occurred between 2013 and 2016 while daughter was in mother's care are relevant concerning whether the present environment is likely to endanger daughter's physical or emotional state.

Despite many of the events occurring several years before this motion, father's affidavit also alleges ongoing issues with both mother and daughter. Father alleged that mother is verbally abusive to daughter and that daughter's emotional health and development have been a concern due to daughter's PTSD. Father also alleged that, in 2017, daughter engaged in very inappropriate sexual conduct (the details of which there is no need to recite here). Moreover, father alleged that daughter has been to the emergency room on thirteen occasions while she was living with mother. Taking father's allegations as true, as we must, father provided sufficient evidence to demonstrate on a preliminary basis that daughter's physical health, emotional health, or emotional development are endangered. *See Harkema*, 474 N.W.2d at 14 ("Where some dispute exists as to whether the present environment endangers the [children's] emotional development, an evidentiary hearing would be helpful and is justified.").

In order to obtain an evidentiary hearing based on an allegation of endangerment, father must show that the advantages of changing the child's environment outweigh the harm likely to be caused by the change. *Tarlan*, 702 N.W.2d at 924. Here, father has alleged and documented daughter's positive strides academically, socially, and

emotionally while residing in father's home. Daughter's teacher has confirmed that daughter's academic and social performance improved during the last year while she was living with father. Taking these allegations as true, again as we must, father has adequately made a prima facie showing under Minn. Stat. § 518.18(d)(iv).

We therefore reverse the district court's denial of father's motion and remand for an evidentiary hearing.

Reversed and remanded.