This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2068

In re the matter of: Michael John Hernandez, petitioner,
Appellant,

vs.

Jodie Marie Haaland,
Respondent.

Filed January 27, 2020
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-PA-FA-15-359

Margaret M. Murphy, Windhorse Law, P.A., Oakdale, Minnesota (for appellant)

Emily Cooper, Cooper Law, LLC, Minneapolis, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Larkin, Judge; and Slieter, Judge.

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

LARKIN, Judge

In this ongoing child-custody dispute, appellant challenges the district court's summary denial of his motions to modify custody and change his child's daycare provider. We affirm.

FACTS

In December 2014, L.T. was born to appellant-father Michael John Hernandez and respondent-mother Jodie Marie Haaland. Mother and father were not married to each other when L.T. was born. In November 2015, the district court adjudicated father's paternity of L.T. In November 2016, pursuant to the parties' partial stipulation regarding custody and interim parenting time, the district court granted the parties joint physical and joint legal custody of L.T.

In September 2017, the district court issued an order denying father's motion to modify custody. The order established a permanent parenting-time schedule, the parties' child-support obligations, and drug-testing requirements for mother. Paragraph six of the order explained that "[u]ntil December 1, 2017, Mother shall continue to submit to random drug urinalysis testing . . . two (2) times a month" and that "[a]ny missed testing will be treated as a positive test result." The order also provided that

> Father may request urinalysis and nail testing at any time he has reasonable suspicion that Mother is under the influence of a controlled substance or alcohol. If the test is negative, Father shall reimburse Mother for the test cost within one (1) week. If the test is positive, Mother's parenting time shall be suspended until further Court Order or agreement of the parties.

In August 2018, father moved the district court to immediately grant him sole physical and sole legal custody based on endangerment resulting from mother's alleged drug use. He also asked the district court to suspend mother's parenting time until she proved her sobriety. Lastly, he asked the district court to change the child's daycare to a "provider who accepts children for less than full time and reduces the price accordingly."

In a supporting affidavit, father claimed that on July 4, 2018, he suspected that mother had been using drugs, so he "drafted a notice to report for drug testing and attached page 18 from the Court's September 2017 order." On July 8, 2018, he again "strongly suspected that [mother] was using drugs, so [he] handed her the [notice to report for drug testing] document." He asserted that because mother did not test within 24 hours of his request, she had "failed the test," and that her parenting time therefore should be suspended. His affidavit also included a comparison of daycare rates and a daycare attendance log regarding L.T.

Mother responded that father provided her with the drug-test request on July 8 at approximately 6:00 p.m. and "[a]t that time the testing facility was closed." Mother explained that father "demanded [that she] test within 24 hours," that she "called the lab and it takes its last appointment at 4:30 p.m.," and that she was working on July 9 and therefore was unable to arrive at the facility by 4:30 p.m. She explained that she "presented [herself] at the testing facility the morning of July 10, 2018 first thing" and was told that father had cancelled the test. She also responded that the September 2017 order does not require her to test immediately upon demand.

Father submitted an affidavit in response, along with documentation showing that he notified mother of his drug-test request through the "OurFamilyWizard" messaging system at 4:09 p.m. on July 8 and that he gave mother the notice to report for drug testing at 4:59 p.m. that same day. Father also provided information regarding L.T.'s daycare attendance and a letter from father's proposed lower-cost daycare provider confirming that it could hold a spot for L.T. pending the outcome of the custody-modification hearing.

Mother responded, denying that she had used illegal drugs and asking the court "to issue an order that will deter [father] from continuing to come back on the same topics that have already been rehashed."

The district court held a hearing on father's motion and summarily denied his requests to modify custody and change the child's daycare provider. In its order, the district court noted its "concerns . . . about Father's attempts to serially re-litigate some of these issues." As to father's custody-modification request, the district court found, "Neither party provides any information warranting a claim that the child's health or well-being is endangered or impaired in either party's care. Father asks the Court to speculate that the child is endangered by his unsubstantiated claims of Mother's drug use." As to father's allegation that mother had failed a drug test, the district court found:

> Father provided Mother with a written demand for drug testing on July 8, 2018, at around 6:00 p.m. Father demanded testing within 24 hours. Mother did not go to testing the next day, asserting she could not afford to miss work to test by the 4:30 p.m. closing time at the testing facility. Mother instead went to the facility on the morning of July 10, 2018, only to be told Father had cancelled the testing.

The district court acknowledged that its September 2017 order included a provision that "Father may request urinalysis and nail testing if he has a reasonable suspicion that Mother is under the influence of a controlled substance or alcohol" and that if the test was positive, "Mother's parenting time shall be suspended until further Court Order or agreement of the parties." However, the district court clarified that the testing provision "[did] not contain the condition pertaining to Mother's pre-December 1, 2017, random testing requirement that any missed testing will be treated as a positive test result." The

district court therefore rejected father's allegations regarding mother's drug use, explaining, "Simply put, there is no persuasive evidence indicating that Mother is abusing drugs at this time."

As to father's request to change the child's daycare provider, the district court determined that father "fail[ed] to offer sufficient, credible information that Mother is being overcharged" for daycare and offered "no authority for the proposition that child care support must be restrained by a website list of purportedly average child care costs." The district court modified its drug-test requirements for mother, ordering that father could continue to request drug tests, but that he is to "prepay for the test" and if the test is positive, mother is "required to reimburse Father for the test cost within one (1) week." The district court also ordered that the testing "be performed through Minnesota Monitoring," which is "[o]pen 24 hours a day for most services."

Father appeals.

D E C I S I O N

I.

Father contends that the district court erred by denying his endangerment-based motion to modify custody without first holding an evidentiary hearing. Minn. Stat. § 518.18(d)(iv) (2018) governs such a motion and "requires a court to retain the custody arrangement that was established by the prior order unless the party seeking the modification makes a prima facie case for modification." *Amarreh v. Amarreh*, 918 N.W.2d 228, 230 (Minn. App. 2018) (quoting *In re Custody of M.J.H.*, 913 N.W.2d 437, 440 (Minn. 2018)), *review denied* (Minn. Oct. 24, 2018). "The existence of endangerment

must be determined on the particular facts of each case." *Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Sept. 27, 2000). "While the concept of endangerment is unusually imprecise, in the context of child custody, the legislature likely intended to demand a showing of a significant degree of danger." *Id.* (quotation omitted).

To make a prima facie case for an endangerment-based custody modification, the moving party must allege: "(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." *Amarreh*, 918 N.W.2d at 230 (quotation omitted). "If the party establishes a prima facie case, the district court must then hold an evidentiary hearing to consider evidence on each factor." *M.J.H.*, 913 N.W.2d at 440. But if the affidavits accompanying the motion for modification do not allege sufficient facts to allow a court to make the required findings, the district court should deny the motion without an evidentiary hearing. *Englund v. Englund*, 352 N.W.2d 800, 802 (Minn. App. 1984).

"When this court reviews an order denying a motion to modify custody . . . without an evidentiary hearing, we review three discrete determinations." *Amarreh*, 918 N.W.2d at 230 (quotation omitted). 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." *Boland v. Murtha*, 800 N.W.2d 179, 185

(Minn. App. 2011). Next, we review the district court's determination of whether the moving party has made a prima facie case for an abuse of discretion. *Id.* "Finally, we review de novo whether the district court properly determined the need for an evidentiary hearing." *Id.*

Father argues that the district court erred because, "The proof [of endangerment] is a failed drug test. That dirty test, taken in the context of the case as a whole, shows serious endangerment. Drugs, by their very nature are dangerous." Father's sole current allegation of endangerment is based on the incorrect premise that mother failed his requested drug test because she did not take it within 24 hours. But as the district court explained, the relevant testing provision "[did] not contain the condition . . . that any missed testing will be treated as a positive test result." *See LaChapelle v. Mitten*, 607 N.W.2d 151, 162 (Minn. App. 2000) (stating that this court defers to a district court's interpretation of its own order), *review denied* (Minn. May 16, 2000). Indeed, the order governing father's demand for a drug test did not contain a requirement that mother test within 24 hours, nor did it provide that a missed test would be treated as a positive result. Thus, there was no evidence of a positive drug test.

Father also argues that "a child is endangered if he is near drugs." The district court found that "[n]either party provide[d] any information warranting a claim that the child's health or well-being is endangered or impaired in either party's care" and reasoned that "Father [was asking] the Court to speculate that the child is endangered by his unsubstantiated claims of Mother's drug use." Because mother's failure to test did not constitute a positive test, the district court did not abuse its discretion in determining that

father did not make a prima facie case warranting an evidentiary hearing before denial of his motion for a change in custody.

Lastly, father argues that the district court clearly erred by finding that mother "had been served around 6:00 p.m." because he "showed [the district court] pictures of when he notified [mother] of the test via Our Family Wizard at 4:09 p.m. and pictures of [mother] receiving the notice at 4:59 p.m. at the exchange." Even if father's evidence showed that mother received the notice before 6:00 p.m., any error in the district court's finding regarding the time was harmless because it does not impact the district court's conclusion that mother's failure to test was not a positive test. *See* Minn. R. Civ. P. 61 (stating that harmless error is to be ignored); *see also Goldman v. Greenwood*, 748 N.W.2d 279, 285 (Minn. 2008) (concluding that district court's error did not require reversal because its ultimate conclusion "that respondent failed to make a prima facie case of other elements of section 518.18(d)" was correct and noting that under rule 61 courts are to disregard harmless error).

In sum, the district court did not reversibly err in summarily denying father's motion to modify custody.

II.

Father contends that the district court erred by denying his request to change the child's daycare provider because he "showed that there were day care options, of equally high quality, in a better neighborhood, that would have saved the family $110 per week." Father does not cite legal authority indicating that the district court was required to change the child's daycare provider. "An assignment of error based on mere assertion and not

supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quotation omitted); *see also Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295-96 (Minn. App. 2007) (citing to *Modern Recycling* and concluding that because the father's argument on appeal was not specific, he waived the issue).

The district court found that father failed to offer "sufficient, credible information that Mother is being overcharged" or "authority for the proposition that child care support must be restrained by a website list of purportedly average child care costs." The district court also found, "The child attends an established child care facility, KinderCare, which operates a number of locations in the Twin Cities. Father provided no persuasive information that the Court must direct a new child care provider by judicial fiat."

Because father does not provide legal authority to support his assertion that the district court erred by refusing to change the child's daycare provider and prejudicial error is not obvious, he is not entitled to relief. *See Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949) (stating that error on appeal is never presumed and it "must be made to appear affirmatively before there can be reversal," and "the burden of showing error rests upon the one who relies upon it" (quotation omitted)).

Affirmed.