STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2056

In re the marriage of:

Aaron Peterson, petitioner,
Respondent,

vs.

Brandi Peterson,
Appellant.

Filed September 8, 2020
Affirmed
Cochran, Judge

Marshall County District Court
File No. 45-FA-16-123

Kerry S. Rosenquist, Rosenquist Law Office, Grand Forks, North Dakota (for respondent)

Kevin T. Duffy, Duffy Law Office, Thief River Falls, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Cochran, Judge; and Slieter, Judge.

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

COCHRAN, Judge

Appellant challenges the district court's order denying, without an evidentiary hearing, her motion to modify child custody. She argues that she established a prima facie case for modification based on endangerment. We affirm.

FACTS

Appellant Brandi Peterson (mother) and respondent Aaron Peterson (father) were married in 2010. Mother and father have three children together, C.P., D.P., and S.P.

Both mother and father have full congenital hearing loss. Their youngest child, S.P., also has full congenital hearing loss. The middle child, D.P., has mild congenital hearing loss in one ear. And, the oldest child, C.P., has no hearing loss.

Mother and father divorced in April 2016 pursuant to a stipulated judgment and decree. At the time, the parties' children were ages four years, two years, and nine months. The parties agreed to share joint legal custody of their minor children. The parties also agreed that father would have sole physical custody and residential responsibility of the minor children, subject to mother's right of liberal, unsupervised parenting time. Under the terms of the decree, mother had parenting time every weekend during the school year, and every other week during the summer. The decree also specified that the parents would alternate most holidays with the children. According to the divorce decree, both mother and father lived in Warren, Minnesota, at the time of the divorce.

Just before the divorce, mother enrolled at a college in the Fargo-Moorhead area. Mother subsequently moved to Fargo to attend college. At the time of the divorce, mother planned to remain in Fargo for a maximum of two years. Mother moved back to Warren in May 2018 after completing her degree.

Father and the children remained in Warren while mother lived in Fargo. Father worked at his agricultural-aviation business, a business that he has owned and operated

since before the parties married. After the parties divorced, father hired nannies to help with childcare.

In August 2019, mother moved the district court to modify the physical-custody and parenting-time provisions of the stipulated divorce decree. Mother requested that the court award her shared physical custody of the children. At that time, the children were ages seven, five, and four. Mother asserted in her motion that a modification was appropriate based on changed circumstances and because the existing custody arrangement and parenting schedule endangered the children's physical, emotional, and psychological well-being.

In a supporting affidavit, Mother identified a number of circumstances that she claimed had changed since the divorce. First, mother alleged that she had moved back to Warren after living in Fargo and, as a result, was now more able to be involved in the children's lives. Second, she alleged that father had relied excessively on the help of nannies to care for the children. Third, she alleged that, since moving back, she had become very involved in the education of the two youngest children, both of whom have hearing loss.

With regard to endangerment, mother alleged that father was not meeting the educational and developmental needs of the parties' youngest child, S.P.—specifically that S.P. was deprived of learning sign language. Mother also alleged that father was not meeting the children's emotional needs because the children were being cared for primarily by nannies. And mother alleged that father has a drinking problem that endangers the children.

Mother also addressed the best interests of the children. Mother alleged that the best interest factors favored modifying custody. She emphasized again that, in her view, father was not meeting S.P.'s special needs related to hearing loss. She noted that the first nanny that father hired did not know sign language. She acknowledged that father ultimately fired the nanny because the nanny refused to learn sign language and hired a new nanny. Mother recognized that the new nanny, although not fluent in sign language, is learning and using signs with S.P. Mother also alleged that a custody modification was in the children's best interests because she had become very involved in the children's education since returning to Warren. She stated that, as a result of her increased involvement, S.P. has improved greatly in his sign-language skills. She noted that S.P. was participating in early intervention education and that he surpassed the goals in his individualized education plan (IEP) for the 2018-19 school year. D.P. also met her IEP goals for the school year. For these reasons, and others outlined in her affidavit, mother alleged it was in the children's best interests to modify custody.

Father opposed mother's motion to modify custody and moved the district court to deny mother's motion because she failed to allege facts sufficient to satisfy the statutory requirements. Father submitted two affidavits in support of his position—his own affidavit and an affidavit of the children's grandmother. Mother then filed two responsive affidavits.

The district court concluded that mother's allegations, taken as true, did not establish a prima facie case for modification under the custody-modification statute.

Because mother failed to make a prima facie case for modification, the district court denied her motion without an evidentiary hearing.[1]

Mother appeals.

D E C I S I O N

On appeal from the district court's denial of her motion to modify custody, mother argues that the district court erred when it concluded that she failed to make a prima facie case for custody modification based on endangerment of the parties' children. We are not persuaded.

Custody modification based on endangerment is governed by Minn. Stat. § 518.18 (d)(iv) (2018). Section 518.18(d)(iv) requires the district court to retain the original custody arrangement unless "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."

"Under section 518.18, the district court must first determine whether the party seeking to modify the custody arrangement in the judgment and decree has made a prima facie case for modification." *Crowley v. Meyer*, 897 N.W.2d 288, 293 (Minn. 2017). To establish a prima facie case for custody modification based on an allegation of endangerment, 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

[1] The district court also denied mother's motion for an evidentiary hearing on the issue of restricting father's parenting time. Mother does not challenge this ruling on appeal.

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.* (citing *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008)). If the affidavits accompanying the motion for modification do not allege facts sufficient to allow a court to make the required findings, the district court is required to deny the motion and no evidentiary hearing is necessary. *Englund v. Englund*, 352 N.W.2d 800, 802 (Minn. App. 1984) (citing *Nice-Peterson v. Nice-Peterson*, 310 N.W.2d 471, 472 (Minn. 1981)).

On appeal from an order denying a motion to modify custody without an evidentiary hearing, we review three discrete determinations. *Boland v. Murtha*, 800 N.W.2d 179, 185 (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.* "Second, we review for an abuse of discretion the district court's determination as to the existence of a prima facie case for the modification . . . ." *Id.* "Finally, we review de novo whether the district court properly determined the need for an evidentiary hearing." *Id.*

Accordingly, we first address whether the district court properly treated the allegations in mother's affidavits as true. In its order, the district court expressly stated that it accepted the facts alleged in mother's affidavits "as true." And the district court relied exclusively on the allegations in mother's affidavits in reaching its decision. The district court did not mention any contrary allegations in the affidavits of father or

grandmother in its order. We therefore conclude that the district court properly treated the allegations in mother's affidavits as true and disregarded the contrary allegations.

Having determined that the district court accepted mother's affidavits as true, we review "for an abuse of discretion the district court's determination as to the existence of a prima facie case for the modification." *Boland*, 800 N.W.2d at 185. A district court abuses its discretion if it misapplies the law or "resolves the matter in a manner that is contrary to logic and the facts on record." *Sinda v. Sinda*, __N.W.2d __, __ No. A19-1291, 2020 WL 4577462, at *2 (Minn. App. Aug. 10, 2020) (quotation omitted); *see Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). We "set aside a district court's findings of fact only if clearly erroneous." *Goldman*, 748 N.W.2d at 284.

A. Changed Circumstances

A district court "shall not modify" a custody order unless it first finds that a change has occurred in the circumstances of the child or the parties. Minn. Stat. § 518.18(d) (2018). The "change in circumstances must be significant." *Spanier v. Spanier*, 852 N.W.2d 284, 288 (Minn. App. 2014) (quotation omitted). And "it cannot be a continuation of conditions existing prior to the order." *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997).

In its order, the district court recognized that mother alleged a number of changed circumstances, including that she moved back to the children's hometown of Warren, that she disagreed with father's "use and choice of a nanny for the children," and that she is now more involved in educational services for the children. The district court concluded that mother's allegations failed to make a prima facie showing of changed circumstances

for purposes of the custody-modification statute. The district court noted that mother's relocation to Warren was anticipated and determined that none of mother's allegations, either in isolation or cumulatively, could reach the changed-circumstances "threshold required under the *Nice-Peterson* framework." *See Nice-Peterson*, 310 N.W.2d at 472 (requiring a moving party to establish "that there has occurred a significant change of circumstances").

Mother argues that the district court abused its discretion when it concluded that she failed to make a prima facie case of changed circumstances. Mother challenges the district court's determination that her return to Warren was anticipated by the parties and was not a change of circumstances. But mother's own affidavit supports the district court's determination that, at the time of the divorce, mother expected to return to Warren after completing her college degree. In her affidavit, mother stated that she "planned to remain in Fargo for a maximum of two (2) years" and that her "ultimate goal was to move back in with [father] and the children." Mother also stated in her affidavit that the parties agreed at the time of the divorce that "it would not be in the children's best interests to *temporarily* move" with her to Fargo. (Emphasis added.) Because the facts alleged in mother's affidavit support the district court's determination that mother's relocation "back to Warren was anticipated by the parties," we discern no abuse of discretion by the district court in its conclusion that mother's move back to Warren did not constitute changed circumstances for custody modification purposes.

Mother also argues that the district court abused its discretion when it determined that father's use of a nanny to help with childcare was not a change of circumstances.

Mother contends that father does not actively participate in parenting the children and that deferring his parenting responsibilities to a nanny is a change of circumstances. We are not persuaded. Father's work schedule was known to the parties at the time they were divorced and had not changed. The fact that father hired a nanny to help care with the children is not a change of circumstances.

Lastly, mother argues that the district court abused its discretion by not considering her increased involvement in the children's educational services to be a change in circumstances. While the district court did not address this alleged change in detail, we agree with the district court's conclusion that mother's increased involvement is not a significant change warranting a modification in custody. We recognize that the logistics of being involved in the children's education may have been more challenging while mother lived in Fargo, but mother points to no reason why she could not have been involved in ensuring the children received adequate educational support while she was living in Fargo. Under the terms of the stipulated divorce decree, mother has shared legal custody of the children and the right to be involved in decisions relating to their education.

In sum, we discern no abuse of discretion by the district court in its determination that mother failed to make a prima facie case of changed circumstances.

B. Endangerment

Even if we assume that mother alleged sufficient facts to establish a prima facie case of changed circumstances, the district court did not abuse its discretion by concluding that mother failed to make a showing of endangerment. To modify custody under section 518.18(d)(iv), the district court must determine that the child's *present*

environment endangers the child physically, emotionally, or developmentally. A showing of endangerment to support a custody modification requires a "significant degree of danger." *Geibe*, 571 N.W.2d at 778 (quotation omitted). Therefore, to obtain an evidentiary hearing on an endangerment-based motion to modify custody, the moving party must allege that the child's current custodial arrangement puts the child in a significant degree of danger. *Id.*

Mother argues that she made a prima facie case of endangerment because (1) father has failed to address the children's developmental needs and (2) father has a drinking problem. Taking mother's allegations to be true, the district court determined that the children's development was not endangered because the children's needs are presently being met. The district court also concluded that mother's allegations about father's drinking failed to show that the children were in danger when father was drinking.

Mother first argues that she made a prima facie case of endangerment because father's neglect or minimization of a serious medical condition—S.P.'s language development—supports a finding of endangerment. To support this contention, mother relies on *Allen v. Allen*, 626 P.2d 16 (Wash. Ct. App. 1981).[2] In *Allen*, a father appealed from an order granting custody to the child's non-biological stepmother. 626 P.2d at 18-19. The child was profoundly deaf and the trial court awarded custody to the stepmother under a "best interests of the child" standard. *Id.* at 22. The Washington Court of Appeals

[2] We note that decisions from foreign jurisdictions are not binding precedent. *See Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 861 (Minn. 1984) (concluding that foreign cases are not binding precedent but may have persuasive value).

affirmed because, among other reasons, placement with father would have "detrimentally affected" the child's development. *Id.* But mother's reliance on *Allen* is misplaced. *Allen* is an appeal from a custody determination, not from a motion to modify custody. And the legal standard applied by the Washington state court to award custody is different than the legal standard applied under Minn. Stat. § 518.18(d)(iv) for a modification of custody. *Compare id.* at 21-22 (applying an actual-detriment test to award custody to a nonparent), *with* Minn. Stat. § 518.18(d)(iv) (requiring a showing that the child's present environment endangers the child). The only similarity between *Allen* and this case is that both cases involve a child who is profoundly deaf. Therefore, the analysis in *Allen* is not instructive in this case.

Mother also relies on an unpublished decision of this court to argue that a parent's failure to address a medical condition is a sufficient basis to support a finding of endangerment. *See Hudson v. Hudson*, No. A14-0004, 2014 WL 3397140, at *4 (Minn. App. July 14, 2014) (affirming district court's custody modification where the custodial parent failed to address the chronic constipation of the child), *review denied* (Minn. Sept. 16, 2014). Mother's reliance on this non-precedential case is unpersuasive. While we agree with mother that a parent's neglect of a medical condition can be grounds for an endangerment finding, the record in this case supports the district court's determination that mother failed to demonstrate that the parties' hearing-impaired children are presently endangered in terms of their speech and language development. As the district court noted, mother expressly stated in her affidavit that "[D.P.'s] progress and goals for the [2018-19] school year were on track and met. As for [S.P.], he surpassed our expectations and goals

for the school year. He thrived because he has the access he needs at school." And while mother disagreed with father's use of a nanny for childcare, mother concedes that father fired the nanny who could not speak sign language, and that he subsequently hired a nanny who is using sign language with S.P. Accordingly, mother's allegations show the opposite of endangerment—that S.P. is thriving and significantly improving in his current environment and that D.P. is also doing well. We recognize and understand the importance of speech and language development for hearing-impaired children,[3] but we cannot conclude on the record before us that the district court abused its discretion when it determined that mother failed to demonstrate that the parties' children are endangered for reasons related to their speech and language development.

Lastly, mother argues that the district court erred when it concluded that the children are not endangered by father's drinking. In her initial affidavit, mother alleged that the children see father drink and "fetch beer" for him. And mother alleged that father has had "one for the road" with the children present. But mother's allegations are vague. They do not describe when the events occurred or whether father was impaired at the time. In a supplemental affidavit, mother also discussed two separate marital incidents during hotel stays when father became violent after the couple had been drinking. But there is no allegation that the children were present during either altercation. Accordingly, we cannot

[3] Mother also submitted an article on the effects of language deprivation for deaf children. The article was not submitted to the district court and we do not consider it. *See In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 86-87 (Minn. App. 2012) (indicating that an appellate court may not base its decision on matters outside the record on appeal, and matters not produced and received in evidence below may not be considered).

confidently conclude that the district court's determination that mother failed to establish that "the children were in danger when father was drinking" is erroneous.

In sum, mother's affidavits fail to adequately allege that the children are presently endangered. *See M.J.H.*, 913 N.W.2d at 440 (indicating that the moving party must show that "the children's present environment endangers their physical health, emotional health, or emotional development"); *see also Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991) (requiring a "significant degree of danger" to show endangerment). And because mother's allegations regarding endangerment are inadequate, the district court did not abuse its discretion when it determined that mother's allegations failed to establish a prima facie case of endangerment.

Finally, we review "de novo whether the district court properly determined the need for an evidentiary hearing." *Boland*, 800 N.W.2d at 185. Because the district court concluded that mother failed to make a prima facie case, and the court did not abuse its discretion in reaching that conclusion, the district court properly denied the petition without an evidentiary hearing. *See Englund*, 352 N.W.2d at 802 ("If the affidavits accompanying the motion for modification do not allege sufficient facts to allow a [district] court to reach the findings required by [section] 518.18, the [district] court is required to deny the motion.").

Affirmed.