STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0009

In re the Marriage of:

Kathryn Jo Shanley, petitioner,
Respondent,

vs.

Brian James Shanley,
Appellant,

County of Anoka,
Intervenor.

Filed November 16, 2020
Affirmed
Cochran, Judge

Anoka County District Court
File No. 02-FA-10-1514

Kathryn Jo Shanley, Fridley, Minnesota (pro se respondent)

Kristian L. Oyen, Savage, Minnesota (for appellant)

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

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

COCHRAN, Judge

Appellant-father appeals from the district court's denial of his motion to modify child custody based on endangerment of the children, arguing that the district court abused

its discretion by denying his motion without an evidentiary hearing. Because father failed to make a prima facie case for modification based on endangerment, we affirm.

FACTS

Appellant Brian Shanley (father) and respondent Kathryn Shanley (mother) were married in March 2007 and had two children, a now-11-year-old son and 12-year-old daughter. The parties divorced in December 2012. In the judgment and decree dissolving the marriage, the district court granted mother sole legal and physical custody of the children. The district court granted father supervised parenting time with the children, which was later modified to be held once a week for two hours at a facility called FamilyWise.

In November 2019, father filed a motion to modify custody based on endangerment of the children. He supported his motion with an affidavit alleging, in relevant part:

> [O]n the last two parenting time sessions on December 13 and 20, 2018, [son] stated that I had abused him. I have never abused my children, and because my parenting time is supervised, a record is maintained for each visit. I believe [mother] has been telling this to our children.

His affidavit also alleged that FamilyWise discontinued parenting-time sessions around the same time "because they [had] provided the service for too long." Father asked the district court to grant him sole physical and legal custody of the children on this basis. He requested that the district court hold an evidentiary hearing on his motion and that it order the children to undergo a forensic psychological examination.

The district court denied father's motion without holding an evidentiary hearing. It concluded that father was not entitled to an evidentiary hearing because he failed to make

a prima facie case that the children were endangered in mother's care. The district court reasoned that father's allegations did not show a significant change of circumstances and that the children's belief that father had previously abused them did not constitute endangerment. The district court relied on this same reasoning in denying father's request to have the children examined by a forensic psychologist.

Father appeals.

D E C I S I O N

Father challenges the district court's denial of his motion for custody modification without an evidentiary hearing. He argues that the district court abused its discretion when it concluded that he had failed to establish a prima facie case of endangerment and denied his motion without an evidentiary hearing. We are not persuaded that the district court abused its discretion.

Modification of an existing custody order is permitted only in limited circumstances. *See* Minn. Stat. § 518.18 (2018). Section 518.18(d)(iv) addresses modification based on changed circumstances involving child endangerment. This provision requires a district court to retain an existing 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." The party seeking the modification based on endangerment bears the burden of proof. *Crowley v. Meyer*, 897 N.W.2d 288, 293 (Minn. 2017).

To establish a prima facie case for modification based on 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 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)). A district court is not required to hold an evidentiary hearing on a motion for modification unless the moving party makes a prima facie case for modification. *Goldman*, 748 N.W.2d at 284.

In determining whether a prima facie case is shown, the district court must accept the allegations in the moving party's affidavits as true. *Boland v. Murtha*, 800 N.W.2d 179, 183 (Minn. App. 2011). 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)).

We review de novo whether the district court properly treated the allegations in the moving party's affidavits as true. *Boland*, 800 N.W.2d at 185. But we review for an abuse of discretion a district court's determination whether a prima facie case exists for modification. *Id.*

We conclude that the district court did not abuse its discretion by determining that father failed to make a prima facie showing of endangerment. We agree with the district court that father's affidavit did not allege sufficient facts to allow the district court to make

the required findings on the third element of the prima facie case—that the children's physical or emotional health or emotional development is presently endangered in mother's care.[1]

Endangerment requires a showing of a "significant degree of danger." *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997) (quotation omitted). And, normally, the custodial parent's conduct must have "an actual adverse effect on the child." *In re Weber*, 653 N.W.2d 804, 811 (Minn. App. 2002). The only allegations in father's affidavit supporting endangerment are that his son told him during two supervised-parenting-time sessions that father had abused him in the past. Father's affidavit provides no detail about the alleged abuse. Father's affidavit also does not explain how his son's belief about father's past abuse has adversely affected either child's emotional health or otherwise means that the children are in danger while in mother's care. We agree with the district court that father's vague, limited allegation is insufficient to demonstrate a "significant degree of danger" to the children and does not rise to the "level of endangerment" required by the modification statute.

[1] The district court also determined that father failed to show "that the children's belief that [father] abused them is a new belief," suggesting that father failed to make a prima facie showing on the first element, a change in circumstances. The district court seems to be referring to the 2012 judgment and decree dissolving the marriage, in which the district court noted that father used corporal punishment on the children. But because father's affidavit does not specify whether son's claims of abuse refer to those instances of corporal punishment or some other incident, it is unclear whether the children's claims are a "new belief." Based solely on the allegations in father's affidavit, we cannot say that the alleged claims are a continuation of previous circumstances. We therefore affirm the district court's order only on the endangerment element.

We are not persuaded otherwise by father's argument that mother has interfered with the parent-child relationship and thereby endangered the children. In support of his position, father cites *Amarreh v. Amarreh*, in which we recognized that "a sustained course of conduct by one parent designed to diminish a child's relationship with the other parent" may constitute emotional endangerment. 918 N.W.2d 228, 231-32 (Minn. App. 2018) (quotation omitted). We noted that allegations of interference with the parent-child relationship that are "substantial" may establish a prima facie case of endangerment. *Id.* at 232; *see also Geibe*, 571 N.W.2d at 780 (recognizing that "[*r*]*epeated, concrete efforts* to prevent" the children from contacting other family members may show endangerment (emphasis added)).

While *Amarreh* establishes the general principle that substantial interference with the parent-child relationship may constitute emotional endangerment, father's reliance on *Amarreh* is misplaced because the specific allegations by father in this case differ significantly from the allegations in *Amarreh*. In *Amarreh*, the father alleged that the mother: (1) moved the children out of state without notifying him, (2) refused to allow him to have contact with the children for eight months, (3) blocked his calls to the children and forbade them from talking with him, and (4) told the children that the father was going to have other children and forget about them. 918 N.W.2d at 231. Based on these allegations, we concluded that the father in *Amarreh* made a prima facie showing of emotional endangerment. *Id.* at 232-33. Here, in contrast, father alleges just two occasions, close in time, in which his son commented that father had abused him in the past. Father contends without support that mother is responsible for son's belief. But father's affidavit does not

suggest that mother has engaged in a sustained course of conduct aimed at interfering with his relationship with the children.[2] Father does not allege mother failed to bring the children to any supervised-parenting-time sessions. Nor does father allege that FamilyWise ended the sessions for reasons relating to son's comments about the alleged abuse. Rather, father affirmatively acknowledges in his affidavit that his supervised-parenting-time sessions with FamilyWise ended because the facility decided it had been providing "the service for too long." And, father's affidavit contains no allegation that mother's alleged conduct has adversely affected his relationship with his children. Father's limited allegations, taken as true, do not show that mother has substantially interfered with the parent-child relationship such that it would endanger the children's emotional health or development. Moreover, at the district court hearing, mother's attorney affirmatively indicated that mother wanted to explore other options for supervised parenting time and believed that continued visitation with father would be in the children's best interests. The record supports the district court's conclusion that father failed to make a prima facie case for modification based on endangerment.

Father argues relatedly that the district court erred by denying his request to have the children examined by a forensic psychologist. The district court denied his request

[2] During oral argument, father also argued that mother is interfering with the parent-child relationship by trying to prevent father from expanding parenting time, and he suggested that we look to other documents in the record to show a sustained course of interference. But father did not make this allegation in his affidavit, and he did not argue this theory of endangerment before the district court. We do not address theories that were not presented to and considered by the district court, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), and so we decline to address this argument.

because father failed to make a prima facie case for modifying custody. This was an appropriate exercise of the district court's discretion. Because the district court did not abuse its discretion by determining that father failed to make a prima facie case for modification based on endangerment, it properly denied father's request for an evidentiary hearing and for a forensic examination of the children.

Affirmed.