STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0331

In Re the Custody of: J. B. D., Jason A. Duenes, petitioner,
Appellant,

vs.

Jennifer A. Hage,
Respondent.

Filed December 13, 2021
Reversed and remanded
Connolly, Judge

Steele County District Court
File No. 74-FA-15-2217

Shirlene R. Perrin, Perrin Law Office, St. Paul, Minnesota (for appellant)

Jennifer Hage, Waseca, Minnesota (pro se respondent)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Klaphake, Judge.*

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant-father challenges the district court's denial of his motion to modify custody of his child without an evidentiary hearing, arguing that he made a prima facie case for modifying custody in his affidavit and was therefore entitled to an evidentiary

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

hearing. Because the district court did not treat appellant's allegations as true when it concluded that he had not made a prima facie case for modifying custody, we reverse and remand for an evidentiary hearing.[1]

FACTS

Appellant Jason Duenes and respondent Jennifer Hage are the parents of a seven-year-old son, J.B.D.[2] The parties separated when he was a year old, and appellant's petition for sole legal custody and sole physical custody of him was granted. Following a Child in Need of Protection or Services (CHIPS) petition, J.B.D. was placed in relative custody with respondent in February 2018; he remains in her custody. J.B.D. was adjudicated CHIPS in April 2018, and appellant was ordered to comply with a case plan. A petition for termination of the parental rights (TPR) of appellant was filed, and in August 2019, appellant voluntarily transferred sole legal custody and sole physical custody of J.B.D. to respondent.

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[1] Appellant also moved to hold respondent in contempt and challenges the denial of that motion. In light of our decision to remand this matter for an evidentiary hearing at which time that motion can be addressed, we do not review that denial. Appellant did not file a parenting-time motion, but he requested expanding parenting time and altering its restrictions as an alternative to modifying custody. Parenting time was discussed by the attorneys and the district court at the hearing, but other than noting that "[appellant] admits that he is currently exercising parenting time regularly," did not mention parenting time in its order, so there is no parenting-time decision for us to review. Like contempt, parenting time can be addressed on remand at the evidentiary hearing, provided that appellant files a separate parenting-time motion.

[2] Respondent has taken no part in this appeal, which proceeded by order of this court under Minn. R. Civ. App. P. 142.03 (directing that, when a respondent fails to file a brief or seek an extension, the matter is to be decided on the merits).

In December 2020, respondent filed a petition for a harassment restraining order (HRO) against appellant. A temporary ex parte HRO was granted for two weeks in late December 2020 and early January 2021; during this period, appellant did not have parenting time. The HRO petition was dismissed in January 2021 because respondent's allegations had not been proven.

Appellant then moved for modification of "legal and physical custody as the child is being physically and emotionally harmed." The parties' attorneys attended a hearing on the motion. Appellant's attorney concluded her argument: "So we ask the court to grant an evidentiary hearing. Clearly . . . there is [a] dispute as to [the] facts in this issue. But if everything that [appellant] says is true, he has shown that there is endangerment and emotional harm and physical harm to the child." The district court implicitly denied appellant's request for an evidentiary hearing, saying, "I'm going to take the matter under advisement. Parties will be notified in writing once a decision is reached." A written denial of appellant's motion was filed two days later.

Appellant challenges the denial, arguing that the district court erred by denying his motion to modify custody on grounds of endangerment without an evidentiary hearing.

DECISION

In reviewing a decision made without an evidentiary hearing on a motion to modify custody on grounds of endangerment, this court: (A) reviews de novo whether the district court treated the moving party's allegations as true, disregarded the opponent's contrary allegations, and considered only the explanatory allegations in the opponent's affidavits; (B) reviews for an abuse of discretion the district court's determination as to whether the

moving party made a prima case for modifying custody; and (C) reviews de novo whether the district court properly determined the need for an evidentiary hearing. *Amarreh v. Amarreh*, 918 N.W.2d 228, 230-31 (Minn. App. 2018).

Amarreh concluded that

> [t]he district court abused its discretion by concluding that father [the party seeking modification] failed to allege facts which, if true, would make a prima facie case for modification because he sufficiently alleged emotional endangerment by providing examples of mother's substantial interference with his relationship with his children. We conclude that father's affidavit contains allegations that, if true, amount to child endangerment and that the district court erred by determining that no need existed for an evidentiary hearing on father's endangerment-based custody-modification motion.

Id. at 232; *see also Harkema v. Harkema*, 474 N.W.2d 10, 14 (Minn. App. 1991), *cited in Amarreh*, 918 N.W.2d at 232, for the proposition that, when there is a dispute as to whether a child's present environment endangers emotional development "an evidentiary hearing would be helpful and is justified."

The district court's order reflects both its view that appellant's credibility was questionable ("[appellant's] repeated unfounded complaints to law enforcement and child protection call into question his credibility") and its reliance on respondent's opposing allegations, e.g., that she had not deprived appellant of parenting time, that her unsuccessful attempt to obtain an HRO against appellant was made in good faith, and that the child's therapy was being continued.[3]

[3] The district court did accept as true appellant's allegations that respondent had denied him access to the child's records and ordered that, "[t]o the extent that [respondent] may have directed school personnel and care providers not to share information with [appellant],

In *Amarreh*,

> the district court concluded that father did not allege facts which, if taken as true, would show that the emotional health or development of the children was presently endangered and that father had not established the four elements required to establish a prima facie case. But the court found that father's affidavit alleged that mother had interfered with his relationship with the minor children. At the prima-facie-case stage of the proceeding, father need not *establish* anything. Father need only make allegations which, if true, would allow the district court to grant the relief he seeks.

Amarreh, 918 N.W.2d at 231 (quotations omitted). The section of appellant's affidavit labeled "Endangerment" makes six allegations to support the statement that there has been a change in circumstances; five to support the statement that modification of custody would be in J.B.D.'s best interest; seven to support the statement that J.B.D.'s present environment endangers his physical health, emotional health, or emotional development; and five to support the statement that the [benefits] of the change outweigh its detriments for J.B.D.; it provides 15 further allegations as appellant's reasons for concluding that he should be given custody of J.B.D. If true, these allegations, like the allegations in *Amarreh*, would provide a prima facie case for modifying custody and would therefore entitle appellant to an evidentiary hearing.

We reverse and remand for further proceedings in accord with this opinion; the district court has discretion as to reopening the record.

Reversed and remanded.

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she shall cease doing so. [He] has the right of direct access to the child's medical, dental, and school records." But with this one exception, the district court did not appear to accept any of appellant's allegations as true.