STATE OF MINNESOTA
IN COURT OF APPEALS
A10-883

County of Washington, co-plaintiff,
Respondent,
Kelli R. Dickinson, co-plaintiff,
Respondent,

vs.

Robert D. Storberg,
Appellant.

Filed March 15, 2011
Affirmed
Stauber, Judge

Washington County District Court
File No. 82F602050597

Kelli R. Dickinson, Coon Rapids, Minnesota (pro se respondent)

Robert D. Storberg, Arden Hills, Minnesota (pro se appellant)

Considered and decided by Kalitowski, Presiding Judge; Worke, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from the denial of his motion to modify child custody, pro se appellant-father argues that the district court erred in (1) finding that father failed to present a prima facie case to modify custody; (2) limiting his parenting time and ordering him to pay

certain costs associated with parenting time; and (3) not ordering the parties to participate in mediation. Because we find no error or abuse of discretion by the district court, we affirm.

FACTS

Mother, respondent Kelli R. Dickinson, gave birth to K.J.D., the parties' child, in September 1998. In February 2003, appellant Robert D. Storberg was adjudicated the father of K.J.D. and ordered to pay child support. Mother was granted sole legal and physical custody of the child, and appellant's right to parenting time was reserved.

On February 4, 2010, appellant filed a motion to modify custody and establish parenting time, asserting that (1) mother is not able to provide stable housing for K.J.D.; (2) mother lives on-and-off with her abusive boyfriend, who has a conviction for malicious punishment of a child; (3) mother does not keep a clean and orderly home; and (4) he is concerned that mother abuses alcohol in front of K.J.D.

Mother responded with an affidavit stating that she has lived in the same home since July 2007 and she has not lived with her boyfriend since 2005. Mother asserts that appellant has provided "no proof that [K.J.D.] is being at all harmed," as he has not produced any police reports, medical reports, or school reports indicating that K.J.D. was or is experiencing adverse affects while living with her mother.

At the modification-of-custody hearing, mother requested that any parenting time between appellant and K.J.D. be supervised because appellant has exhibited animosity toward mother, making "inappropriate, unproven statements" in his affidavit, and submitting "potentially fabricated inadmissible reports" with his affidavit. Mother also

expressed concern regarding appellant's ability to establish boundaries, because he indicated that he has discussed the nature of his criminal record and the facts of this case with his 14-year-old daughters (from another mother).

In an order dated April 9, 2010, the district court found that appellant failed to make a prima facie case to modify custody. The district court also found that "[i]t is in the best interests of the minor child that any parenting time by [appellant] be at a Level A Supervision at the Children's Safety Center," and that "[i]t is equitable for [appellant] to pay all costs assessed by the Children's Safety Center." The district court stated on the record at the hearing that it considered appellant's arguments to be "unsubstantiated opinions," and that while appellant had put forth "allegations that are somewhat troubling, . . . on balance, . . . they don't meet the requirement for a prima facie case for change of custody." Appellant now appeals from that order.

D E C I S I O N

I. Motion to change custody

A district court has broad discretion in awarding child custody and parenting time. *Crosby v. Crosby*, 587 N.W.2d 292, 295 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). Our review of custody determinations is limited to whether the district court abused that discretion by making findings unsupported by the evidence or by improperly applying the law. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). We review the district court's factual findings for clear error, giving due regard to the district court's opportunity to assess credibility. Minn. R. Civ. P. 52.01; *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006).

The district court shall not modify a child-custody order unless a child's present environment endangers the child and the advantage of a change outweighs any harm likely to be caused by a change. Minn. Stat. § 518.18(d)(iv) (2008). "A district court is required under section 518.18(d) to conduct an evidentiary hearing *only* if the party seeking to modify a custody order makes a prima facie case for modification." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (emphasis added). "A district court . . . has discretion in deciding whether a moving party makes a prima facie case to modify custody." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007).

Appellant argues that the district court abused its discretion in finding that appellant had not presented a prima facie case to support child custody modification. We disagree.

Appellant has not shown that K.J.D.'s present environment endangers the child, and as the district court stated, appellant has presented only his "unsubstantiated opinion" that K.J.D.'s physical or emotional health is endangered in mother's care. Appellant's affidavit focuses on mother's abusive boyfriend. While appellant notes that mother's boyfriend was convicted of malicious punishment of one of mother's other children, that was in 2006. Furthermore, appellant could not say affirmatively whether K.J.D. even witnessed the event that led to the conviction, merely stating that "[b]ased on common sense," K.J.D. must have witnessed the event. Appellant states that mother's boyfriend has had several convictions for domestic assault against mother, the most recent in 2008. But appellant stated in his affidavit that mother "has allowed [her boyfriend] to physically abuse her, her other children, and *most probably* [K.J.D.]," and that "it's been

a stroke of pure luck that [K.J.D.] *has not been* seriously injured yet" while in mother's care. (Emphasis added). Additionally, mother indicated in her affidavit that her boyfriend has not lived with her since December 2005 and that they are currently in counseling.

Appellant stated that police were called to mother's home 32 times, but this was during the time period from "late 2004 to December 2005." Appellant specifically refers to an incident which occurred on April 24, 2009, almost a year prior to appellant's motion to modify custody, in which mother was intoxicated and the police were called. But mother provided a doctor's note explaining that she was having trouble breathing due to asthma that night and she was experiencing vertigo, which the doctor stated may have been contributing factors to the incident.

Although appellant indicates in his affidavit that from December 2005 until March of 2006, mother "move[d] [K.J.D.] from a stable school environment" while they lived in shelters, according to mother, she has lived in her current residence since 2007.

Appellant's assertions regarding the current environment in mother's home are mere assumptions based on incidents that happened in the past. Appellant did not present any evidence that mother's children have needed or are currently in need of child protection services, or that K.J.D. has otherwise been adversely affected while in mother's care. The record supports the district court's finding that appellant did not present sufficient facts that, if true, establish a prima facie case showing a change in circumstances to warrant a custody modification. Thus the district court did not abuse its discretion making such a finding and not ordering an evidentiary hearing.

II. Appellant's visitation with the minor child

The district court has broad discretion in deciding parenting-time questions based on the best interests of the child and will not be reversed absent an abuse of discretion. *Matson v. Matson*, 638 N.W.2d 462, 465 (Minn. App. 2002). But "the court may not restrict parenting time unless it finds that: (1) parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development or (2) the parent has chronically and unreasonably failed to comply with court-ordered parenting time." Minn. Stat. § 518.175, subd. 5 (2008). However, failure to make findings to support visitation limitations is not necessarily grounds for reversal if the evidence in the record as a whole supports the limitations. *See Gregory v. Gregory*, 408 N.W.2d 695, 698 (Minn. App. 1987) (stating that while this court has noted the failure of trial courts to make a finding of endangerment to support visitation restrictions, it has not reversed on that ground).

Appellant argues that the district court abused its discretion in failing to make findings to support its order that appellant's parenting time be supervised. We disagree.

The district court granted mother's request that appellant's parenting time with K.J.D. be supervised, finding that "[i]t is in the best interests of the minor child." While the district court did not make further findings as to why supervised parenting time is in the child's best interests, the record supports the district court's order. Appellant states that he has not seen K.J.D. since 2005. Even if this was because mother "has not stayed in a single location long enough for [appellant] to formally petition for any type of custody and visitation of [K.J.D.] until now," the record reflects that appellant's contact

with K.J.D. over the years has been, at best, sporadic. As appellant aptly states in his affidavit, "introducing an unfamiliar adult into a child's life can be complicated and a process that should be done over time through mediation or social services."

Because the record was sufficient to support the order, the district court did not abuse its discretion in ordering that appellant's parenting time be supervised at this time.

Appellant also argues that the district court erred in requiring him to cover the costs associated with parenting time. He asserts that he should not be required to cover the costs of parenting time because (1) his motions to proceed in forma pauperis in December 2009 and in this appeal were granted and (2) since mother requested supervised visitation, mother should "be required to shoulder half the expenses required in parenting time."

Appellant provides no legal support for his arguments. An assignment of error in a brief based on "mere assertion" and not supported by authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quoting *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519–20, 187 N.W.2d 133, 135 (1971)). Furthermore, granting a motion to proceed in forma pauperis merely waives the requirement of prepayment of costs and fees associated with a court proceeding, not subsequent money judgments or other costs assessed by the court following the proceeding. *See* Minn. Stat. § 563.01, subd. 3 (2008) ("Any court of the state of Minnesota . . . may authorize *the commencement or defense of any civil action*, or appeal therein, without *prepayment* of fees, costs and security for costs." (emphasis added)).

The district court did not abuse its discretion in ordering appellant to pay the costs associated with supervised parenting time.

III. Mediation

Appellant also argues that the district court erred by not ordering the parties to participate in mediation to determine parenting time. We disagree.

The district court's decision as to whether the issues of custody or parenting time matter should go to mediation is discretionary. Minn. Stat. § 518.619, subd. 1 (2008).

Although appellant now argues on appeal that the matter should have gone to mediation, there is no indication that he requested mediation at the hearing. As such, the district court did not abuse its discretion by not ordering that the matter go to mediation. Appellant remains free to request mediation regarding these issues in the future.

Affirmed.