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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1954

In re the Marriage of:
Francis Terrance Higgins, Jr.,
petitioner,
Respondent,

vs.

Sabrina Lynn Fritz,
Appellant.

Filed April 1, 2008
Affirmed
Crippen, Judge*

Isanti County District Court
File No. 30-F6-03-050012

Michelle L.A. Kelsey, Tessneer & Kelsey, 440 Emerson Street North, Suite 1, Cambridge, MN 55008 (for respondent)

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Charlene Larsen, P.O. Box 569, Anoka, MN 55303 (guardian ad litem)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Crippen, Judge.

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

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

CRIPPEN, Judge

In the most recent stage of this contentious custody dispute, appellant challenges the denial of her last motion for a change of custody and related relief. There being no merit in her various claims of error in the district court's order, we affirm.

FACTS

Respondent Francis Higgins, Jr., and appellant Sabrina Fritz are the parents of a six-year-old son. In 2005, pursuant to the parties' stipulated agreement, the district court awarded the parties joint legal custody and awarded respondent sole physical custody of the child. Additionally, the court prohibited appellant's mother and stepfather, Jennie and William Carlson, from having any contact with the child.

In June 2006, appellant moved for, among other things, a modification of the custody order, an order lifting the no-contact order concerning the Carlsons, and an order requiring that the child be provided with counseling. The district court denied appellant's motion for custody modification and determined that there was "insufficient evidence for the Court to make a finding that it is necessary for the child to receive therapy at this time." But the court appointed a guardian ad litem to prepare a report concerning whether the Carlsons should have scheduled contact with the child.

Appellant filed a second motion with the court in April 2007. She moved again for modification and for an order implementing the guardian ad litem's recommendation that the no-contact order be lifted. She also asked for a guardian ad litem's investigation of alleged emotional abuse of the child, compensatory parenting time, an order requiring

counseling for the child, an order requiring respondent to provide appellant with a health insurance card, and an order awarding appellant attorney fees. Respondent filed a responsive motion requesting, among other things, an order awarding respondent attorney fees.

In August 2007, following a hearing, the district court lifted the no-contact order but denied appellant's other requests. In a separate order, the court awarded respondent $2,980 in attorney fees.

D E C I S I O N

1.

Appellant argues that the district court abused its discretion when it denied her motion to modify custody without holding an evidentiary hearing. A party moving to modify a custody order is not entitled to an evidentiary hearing unless she establishes a prima facie case for modification. *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981). We apply an abuse-of-discretion standard to a district court's determination that the moving party has not established a prima facie case for modification. *Valentine v. Lutz*, 512 N.W.2d 868, 872 (Minn. 1994); *Nice-Petersen*, 310 N.W.2d at 472.

Viewed most favorably to her petition, appellant's custody motion is flawed for having failed to address critical statutory considerations. To establish a prima facie case for modification on the basis that the child is endangered by his present environment, the moving party must demonstrate that (1) there has been a change in the child's environment since the issuance of the prior custody order that endangers the child's

physical or emotional health or impairs the child's emotional development, (2) a modification would be in the child's best interests, and (3) the benefits of the modification will outweigh any harm associated with the modification. Minn. Stat. § 518.18(d) (2006); *Frauenshuh v. Giese*, 599 N.W.2d 153, 157 (Minn. 1999), *superseded in part on other grounds by statute*, 2000 Minn. Laws ch. 444, art. 1, §5, at 980-84 (codified at Minn. Stat. § 518.18(d)(i) (2006)).

Appellant failed to argue or present evidence showing that a custody modification would be in the child's best interests. She also failed to argue or present evidence showing that the benefits of the modification would outweigh the harm. Appellant failed to propose a new custody arrangement; she did not explain whether she was seeking joint physical custody or sole physical custody or seeking to modify the legal-custody arrangement. Without providing this specific information, she could not establish that the new arrangement would be an improvement.

Furthermore, appellant failed to make a showing that, since the prior custody order, there had been a change in the child's environment that endangered him. This claim was first stated in appellant's June 2006 motion, and the district court determined in August 2006 that the allegations failed to state a prima facie case. Although appellant's 2006 motion stated concern that the child had been taught profane words, used violent words, and suggested he would like to live with affiant, her affidavit stated no time or context for the child's expressions and offered no evidence of dangerous conduct by respondent or others.

Appellant's current affidavit is similar, adding the assertion that the child said his father was "mean" and stating an occasion when the child rubbed himself in the bathtub and said, when asked about this, that "my daddy does it to me." As the district court concluded, the affidavit is not probative of danger. *See Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000) (stating that statute requires showing of significant degree of danger), *review denied* (Minn. Sept. 26, 2000). Appellant found no further supporting evidence of sexual abuse. Moreover, the quoted comment does not significantly enlarge the claim of danger already found deficient in 2006. *See Phillips v. Phillips*, 472 N.W.2d 677, 680 (Minn. App. 1991) (examining whether second claim of changed circumstances shows significant enough evidence to indicate incremental effect of substantially changed circumstances). In addition, the record shows that a county department investigated appellant's allegation that respondent had sexual contact with the child and concluded that the information it gathered did not support the allegation of abuse. When viewed in light of the other evidence presented, appellant's evidence does not establish a prima facie showing that respondent sexually abused the child. *See Geibe v. Geibe*, 571 N.W.2d 774, 779 (Minn. App. 1997) (stating that a district court must accept facts stated in the moving party's affidavits as true, but it may consider other evidence that explains the circumstances surrounding the accusations).

Finally, there is no merit in appellant's argument that, because respondent had "repeatedly denied and/or interfered with [her] parenting time," she was entitled to an evidentiary hearing on her motion to modify custody. The supreme court has held that an unwarranted denial of or interference with parenting time is not in itself a sufficient basis

for modifying custody. *See Grein v. Grein*, 364 N.W.2d 383, 386 (Minn. 1985) (recognizing seemingly contradictory language in statute, concluding that "[i]n and of itself an unwarranted denial of or interference with visitation is not controlling," and requiring showing of endangerment).

Because appellant failed to establish a prima facie case for modification on the basis of endangerment and because denial of parenting time does not independently justify modification, the district court properly denied appellant's motion for custody modification without holding an evidentiary hearing.

2.

Appellant also argues that the district court abused its discretion when it denied her motion for an order requiring counseling for the child. As a joint legal custodian, appellant has a "right to participate in major decisions determining the child's upbringing, including education, health care, and religious training." Minn. Stat. § 518.003, subd. 3(b).

A court resolves issues of custodial care according to the best interests of the child. *Novak v. Novak*, 446 N.W.2d 422, 424 (Minn. App. 1989), *review denied* (Minn. Dec. 1, 1989). The moving party has the burden of proof. *See Nice-Petersen*, 310 N.W.2d at 472 (stating that movant has burden in custody-modification proceeding); *Novak*, 446 N.W.2d at 424 (stating that "[t]he law makes no distinction between general determinations of custody and resolution of specific issues of custodial care"). We review child-custody determinations for an abuse of discretion. *Frauenshuh*, 599 N.W.2d at 156.

The district court did not abuse its discretion when it denied appellant's motion for an order requiring counseling. Because appellant did not explain the nature and duration of counseling and because she did not show how the parties would pay for counseling, it was reasonable for the court to conclude that appellant did not meet her burden of demonstrating that counseling was in the child's best interests. *See* Minn. Stat. § 518.17, subd. 1(a) (2006) (stating that "'[t]he best interests of the child' means *all* relevant factors to be considered and evaluated by the court" (emphasis added)); *cf. In re Paternity of B.J.H.*, 573 N.W.2d 99, 102 (Minn. App. 1998) (stating that statutory best interests factors in Minn. Stat. § 518.17, subd. 1(a) are not exclusive when addressing conflicting paternity presumptions).

Appellant argues that she demonstrated how the parties would pay for counseling when she stated that a counselor she had contacted would accept respondent's insurance. But appellant did not indicate how much the counseling would cost, how much of the cost would be covered by insurance, or whether the parties would be required to pay a deductible or a co-pay. The district court did not abuse its discretion when it found that appellant did not show how the parties would pay for counseling and denied appellant's motion for an order.

3.

Appellant also argues that the district court abused its discretion when it awarded respondent attorney fees and did not award appellant conduct-based attorney fees. In child custody proceedings, district courts may award "fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding."

Minn. Stat. § 518.14, subd. 1 (2006). Absent a clear abuse of discretion, we will not disturb a district court's award of attorney fees under Minn. Stat. § 518.14, subd. 1. *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999).

The district court did not clearly abuse its discretion when it determined that appellant's statements supporting her motion for compensatory parenting time lacked credibility and unreasonably contributed to the length and expense of the proceeding. The record includes an affidavit from appellant's former attorney indicating that, on many of the days appellant alleged she was denied parenting time, appellant was not actually scheduled to have parenting time. Additionally, appellant's statements about the number of days she was denied parenting time indicate that she only saw her son on rare occasions. This is inconsistent with other parts of the record, including the guardian ad litem's report, which suggested that appellant had regular contact with her son. The record supports the district court's finding that appellant's statements lacked credibility. Consequently, the court acted within its discretion when it awarded respondent attorney fees.

The amount of attorney fees awarded by the district court was not excessive. The court specifically stated in its initial order on appellant's motion that it would award attorney fees only for the cost of responding to appellant's statements that she had been denied parenting time and her related motions. And the court requested an affidavit that would specify the amount spent by respondent "for work on [these] issues." After

receiving the requested affidavit and supporting billing statements, the court awarded respondent $2,980 in attorney fees on August 28.

Appellant argues that the some of the language in the court's August 28 order indicates that $2,980 represents the cost of responding to all of the issues raised in appellant's April 2007 motion, not just those related to her statements about being denied parenting time. But in context, the language in the order may be interpreted as addressing only the fees indicated in the August 13 order and does not compel reversal.

Finally, the district court did not abuse its discretion when it denied appellant's motion for attorney fees, which was based on respondent's alleged refusal to provide her with insurance information. Counsel for respondent stated in an affidavit that respondent had previously provided appellant with insurance information and would have provided it again if appellant's counsel had simply asked for it. Additionally, counsel for appellant admitted at oral argument that respondent eventually provided the requested insurance information. The district court could conclude that respondent did not unreasonably increase the length or expense of the proceeding by withholding insurance information.

Affirmed.