STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1956

Thomas Grant Osborn, Sr., petitioner,
Appellant,

vs.

Sheree Bayne Faulk,
Respondent.

Filed May 27, 2008
Affirmed
Toussaint, Chief Judge

St. Louis County District Court
File No. 69-F5-94-101831

Clarissa L.C. McDonald, Indian Legal Assistance Program, 107 West First Street, Duluth, MN 55802 (for appellant)

Sheree Bayne Faulk, Post Office Box 665, Libby, MT 59923 (pro se respondent)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Crippen, Judge.*

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

TOUSSAINT, Chief Judge

Appellant-father Thomas Grant Osborn, Sr. seeks review of a district court order granting the motion of respondent-mother Sheree Bayne Faulk to remove the parties'

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

minor child to Montana and denying appellant's motion for a change of custody. Because the district court did not abuse its discretion by denying appellant's custody-modification motion without an evidentiary hearing, making findings under the removal statute and not accepting appellant's factual allegations regarding removal as true, we affirm.

D E C I S I O N

The abuse-of-discretion standard applies to review of a district court's decision to deny a change-of-custody motion without an evidentiary hearing. *In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002). On appeal in a custody matter, appellate courts review "whether the trial court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1999) (quoting *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985)).

Appellant argues that the district court (1) abused its discretion when it denied his custody-modification motion without an evidentiary hearing because he made a prima facie case for modification; (2) applied the wrong standard when it made findings under the removal statute rather than the custody-modification statute; and (3) failed to follow precedent that required it to accept appellant's allegations as true.

I.

A district court must hold an evidentiary hearing on a custody-modification motion if the moving party makes a prima facie case by asserting facts sufficient to support a modification of custody. *Geibe v. Geibe*, 571 N.W.2d 774, 777 (Minn. App. 1997). Custody modifications are governed by Minn. Stat. § 518.18 (2006). A prima

facie case for an endangerment-based custody modification under section 518.18 is made by establishing four elements: (1) a change in circumstances; (2) that a modification would be in the child's best interests; (3) that the child's present environment endangers his physical or emotional health or emotional development; and (4) that the harm is outweighed by any likely benefits of custody change. *Weber*, 653 N.W.2d at 809; Minn. Stat. § 518.18 (d).

The court must take the moving party's allegations as true for purposes of determining whether the allegations establish a prima facie case. *Weber*, 653 N.W.2d at 809. But the district court "may take note of statements in [the non-moving party's submissions] that explain the circumstances surrounding the [moving party's] accusations." *Id.* at 810 (quoting *Geibe*, 571 N.W.2d at 779).

Changed circumstances sufficient for custody modification "must be significant and must have occurred since the original custody order." *Weber*, 653 N.W.2d at 809. There is no specific rule for what amounts to changed circumstances; factors constituting changed circumstances are found on a case-by-case basis. *Lilleboe v. Lilleboe*, 453 N.W.2d 721, 723 (Minn. App. 1990.)

Appellant argues that changed circumstances are established by, among other things, respondent's intent to move the child to Montana. A significant move can constitute changed circumstances. *Pfeiffer v. Pfeiffer*, 364 N.W.2d 866, 868 (Minn. App. 1985) (finding change in circumstances where mother relocated over 200 miles away from community in which mother, father, and child had resided). The proposed move to Montana would be a significant move for the child. It is a move to a distant state that will

result in many significant changes in the child's life. Here, the proposed move demonstrates changed circumstances sufficient to establish the first element of appellant's prima facie case for custody modification.

When considering the second element, the "child's best interests are determined according to the factors listed in Minn. Stat. § 517.17." *Weber*, 653 N.W.2d at 810. Under Minn. Stat. § 517.17, subd. 1(a) (2006), the "best interests of the child" means all relevant factors including the following factors: (1) the wishes of the child's parents; (2) "the reasonable preference of the child"; (3) "the child's primary caretaker"; (4) "the intimacy of the relationship between each parent and the child"; (5) "the interaction and interrelationship of the child" with parents, siblings, and other persons "who may significantly affect the child's best interests"; (6) "the child's adjustment to home, school, and community"; (7) "the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity"; (8) "the permanence, as a family unit, of the existing or proposed custodial home"; (9) "the mental and physical health of all individuals involved"; (10) the capacity and disposition of each parent to give the child "love, affection, and guidance" and to continue to raise and educate the child "in the child's culture and religion or creed, if any"; (11) "the child's cultural background"; (12) "the effect on the child of the actions of an abuser, if related to domestic abuse" between the parents or between a parent and another individual; and (13) except in cases where a finding of domestic abuse has been made, "the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child."

Appellant alleges that custody modification was in the child's best interests because appellant and child have a loving relationship, the child expressed a preference to live with appellant, the child was connected to appellant's family network and community in Minnesota, appellant's community encouraged and fostered the child's knowledge of Native American heritage and culture, and appellant would support the child's education. Appellant further alleges that moving to Montana with respondent would be harmful to the child because it would be "horribly isolating and lonely" for the child, respondent met her fiancé on the internet, and there are "potential safety concerns" due to a lack of information about the proposed home in Montana. Appellant is also concerned about the stability of respondent's new relationship. Finally, appellant alleges that respondent did not properly attend to the child's education.

These allegations, taken as true and without reference to contradictory information, were sufficient to show that custody modification was in the child's best interests and thus establish the second element of a prima facie case.

As to the third element, endangerment is an "unusually imprecise" standard that "must be based on the particular facts of each case." *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991); *Lilleboe*, 453 N.W.2d at 724. Although "[a]ny threat of harm to a child might arguably constitute endangerment," "the legislature likely intended to demand a showing of a significant degree of danger." *Ross*, 477 N.W.2d at 756. A trial court should therefore determine whether alleged endangerment is "serious." *See id.*

Allegations of endangerment have been sufficient to warrant custody modification when a parent left children with others for a long period and failed to offer them

emotional support, where verbal and emotional abuse were present, and where an older teenage child suffered emotional distress related to his mother's anger, resulting in school performance problems. *Taflin v. Taflin*, 366 N.W.2d 315, 320 (Minn. App. 1985) (holding that voluntary relinquishment of children constituted endangerment and failure to offer emotional support); *Harkema v. Harkema*, 474 N.W.2d 10, 14 (Minn. App. 1991) (recognizing that physical or emotional abuse endangers child's well-being); *Ross*, 477 N.W.2d at 756 (finding prima facie case of custody modification established where child suffered emotional distress resulting in poor school performance).

The allegations in this case do not show the significant degree of danger required to establish endangerment. Here, appellant relies primarily on his allegation that the child expressed a preference to remain in Minnesota with appellant. While we take appellant's allegations as true for these purposes, we may take note of statements made by other parties that explain the circumstances. Here, the guardian ad litem stated that the child's preference changed frequently and predictably depending on which parent he was with at the time. Under such circumstances, no preference is established.

Appellant next alleges that the child has performed poorly in school and that there has been frequent and willful denial of parenting time by respondent. While appellant is correct that poor school performance can be indicative of emotional endangerment, here the child's school performance was not alleged to be indicative of emotional abuse or harm. *See Lilleboe*, 453 N.W.2d at 724 (recognizing that poor school performance can indicate danger to child's well-being and development). Rather, a variety of causes for the child's poor school performance were alleged and acknowledged by appellant,

including appellant's actions in keeping the child out of school for a significant period of time. Appellant's allegations of denial of parenting time also do not allege serious endangerment because they are conclusory, include no specific instances of denial, and include no allegation of serious harm to the child. Because the allegations do not rise to the level of serious endangerment, appellant has failed to establish the third element of a prima facie case.

Regarding the final element of a prima facie case for custody modification, appellant alleges that a change would bring benefits, but does not address how the child would be harmed by removal from his mother, who has been his custodian for many years. Because appellant did not address the harm that would come from removing the child from his mother, it cannot be said that he made allegations that establish that the benefits would outweigh that harm. Appellant therefore failed to establish the final element of a prima facie case as well. Because appellant failed to establish the third and fourth elements of a prima facie case for modification of custody, the district court did not abuse its discretion when it denied appellant's motion without an evidentiary hearing.

II.

Appellant argues that the district court erred when it made findings under the removal statute rather than the custody-modification statute. Appellant claims that findings under the modification statute were required and that findings under the removal statute indicate that the district court applied the wrong standard to his motion.

Minnesota law does not require a district court to make findings under Minn. Stat. § 518.18 when it denies a motion for modification of custody without an evidentiary

hearing. Appellant argues that the statute itself requires findings, but no language in the statute sets forth a requirement for findings in these circumstances. Appellant also argues that a decision of this court, *Abbott v. Abbott*, 481 N.W.2d 864 (Minn. App. 1992), requires findings under Minn. Stat. § 518.18 when a district court denies a motion for modification. But *Abbott* does not establish that rule. In *Abbott*, this court set forth a rule that a district court "need not make specific findings on the statutory factors themselves" when denying a custody-modification motion without an evidentiary hearing for failure to make a prima facie case. 481 N.W.2d at 868. The district court "need only state that such is the case." *Id.* This court then stated in a footnote: "To show that it has applied the correct test, the trial court should at least state that the moving party has failed to make its prima facie case." *Id.* at 868 n.2. Appellant acknowledges that the footnote is dicta but argues that it means that a district court needs to find explicitly that a prima facie case was not made when denying a motion without an evidentiary hearing. The footnote does not set forth that requirement; it recommends, rather than requires, that the district court make such findings.

Appellant next argues that the district court's findings under the removal statute, Minn. Stat. § 518.175, subd. 3 (2006), and lack of findings under the custody-modification statute indicate that the wrong legal standard was applied to his motion. Appellant is incorrect. The district court's findings indicate that it applied the removal statute to respondent's removal motion, not that the removal statute was applied to appellant's custody-modification motion. It was appropriate for the district court to make findings under the removal statute because its order granted respondent's motion to

remove the child to Montana. Therefore, the district court did not abuse its discretion by making findings under the removal statute and not under the custody-modification statute.

III.

Appellant's final argument is that the district court failed to follow precedent that required it to take his allegations as true when determining whether he made a prima facie case sufficient for custody modification. Appellant is correct that when determining whether a party has made a prima facie case for custody modification, the district court must accept the facts alleged by the moving party as true and disregard any contrary evidence. *See Weber*, 653 N.W.2d at 809.

Appellant claims that failure to take his allegations as true is shown in the district court's findings that (1) most of the child's issues with school attendance were due to the conduct of appellant, (2) appellant had a "checkered" employment history and failed to support the child financially, and (3) appellant has a criminal history. Appellant argues that the finding that the child's school issues were his fault is contrary to his allegations, that his allegations do not establish a spotty employment history and a failure to support the child, and that findings related to his criminal history are contrary to his allegation that his criminal activities had not affected the child.

If the district court relied on these facts to determine that appellant had not made a prima facie case sufficient for custody modification, appellant would be correct that the district court improperly failed to accept his allegations as true. But the district court did not make these findings in support of its denial of appellant's custody-modification

motion. As appellant argues, the district court made *no* findings related to his custody-modification motion. The findings complained of were made in support of respondent's removal motion. Because the findings were not made relative to appellant's custody-modification motion, the district court did not abuse its discretion by failing to take appellant's facts as true.

Affirmed.