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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0102**

In re the Marriage of:
Wanda Ann LeBlanc-Fricke
f/k/a Wanda Ann LeBlanc-Gasner, petitioner,
Respondent,

vs.

David Edward LeBlanc-Gasner,
Appellant.

**Filed August 5, 2008
Reversed and remanded
Willis, Judge**

Washington County District Court
File No. 82-F6-01-004273

Cynthia J. Miller, 1700 West Highway 36, 450 Rosedale Towers, Roseville, MN 55113
(for respondent)

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Considered and decided by Halbrooks, Presiding Judge; Willis, Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

WILLIS, Judge

Appellant challenges the district court's denial of his motion to modify child custody. Because we conclude that the district court abused its discretion by denying the motion without an evidentiary hearing, we reverse and remand.

FACTS

Appellant father David Edward LeBlanc-Gasner and respondent mother Wanda Ann LeBlanc-Fricke, f/k/a Wanda Ann LeBlanc-Gasner, were married in 1987. The parties have three children, sons who are now 17 and 14 years old and a daughter who is now ten years old. When the parties' marriage was dissolved in April 2002, they were awarded joint legal custody and mother was awarded sole physical custody, subject to father's right to "reasonable and liberal parenting time," including but not limited to (1) three weekdays per week from 2:30 p.m. to 6:00 p.m.; (2) alternate weekends from Friday at 6:00 p.m. to Sunday at 6:00 p.m.; (3) alternating or shared holidays; and (4) two uninterrupted weeks of vacation each year.

In August 2007, father moved the district court for an order modifying custody on the ground that the children were endangered in the physical custody of mother. Father requested that the district court award him sole physical custody of the three children and that his home be declared to be the children's primary residence, or, in the alternative, that an evidentiary hearing be held on the issue of physical custody and that a guardian ad litem be appointed for the children. In support of his motion, father submitted an affidavit alleging, among other things, that (1) the two sons have stated that they want to

leave mother's home and live with him; (2) the two sons have reported that mother abuses them physically and emotionally and that she orally "berates" them; (3) the two sons are doing poorly in school; (4) mother has lost all ability to effectively parent the two sons; (5) the daughter is "close to her older brothers" and should live wherever they live; (6) the daughter has reported that mother does not feed her breakfast in the morning; (7) the children have been unable to eat lunch at school on occasion because mother has failed to put money in the children's school-lunch accounts; (8) mother keeps the children out late on school nights; and (9) mother's home is unsanitary and unfit for children.

Mother submitted a responsive affidavit in which she denied or offered explanations regarding the allegations in father's affidavit. Mother alleged that father's sole purpose in asking for a modification of custody was to obtain a reduction in his child-support obligation. She alleged that father has been in arrears on his child-support obligation continuously since the parties separated and that the then-current amount of arrears was \$7,900, plus an additional \$3,000 for his share of medical expenses. In addition, mother alleged that (1) father constantly pressures the children to live with him full time; (2) the two sons' poor performance in school is attributable to father's failure to tutor them and hold them accountable; (3) the older son has behavioral and psychological problems caused by attention-deficit-hyperactivity disorder, which father refuses to acknowledge; and (4) her lectures to the children regarding their poor performance in school, behavioral problems, and refusal to help out with chores around the house do not amount to abuse. Many of mother's family members and friends submitted supporting

affidavits as well. Finally, father submitted a second affidavit denying mother's allegations.

At oral argument on father's motion, the district court found that father has failed to demonstrate a prima facie case of endangerment to support a change of custody. The district court denied father's motion without an evidentiary hearing, and father appeals.

D E C I S I O N

Father argues that the allegations set forth in his affidavit establish a prima facie case that living in mother's home endangers the children, and, therefore, he is entitled to an evidentiary hearing. This court reviews a district court's denial of a motion to modify custody without an evidentiary hearing for an abuse of discretion. *Geibe v. Geibe*, 571 N.W.2d 774, 777-78 (Minn. App. 1997).

Among the grounds for modifying custody is a showing that the existing custodial arrangement endangers a 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." Minn. Stat. § 518.18(d)(iv) (2006). The district court must determine whether the petitioner has established a prima facie case by alleging facts that, if true, would provide sufficient grounds for a modification. *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981). For purposes of this determination, the district court must accept the facts in the moving party's affidavit as true; however, it may also consider allegations in the affidavits of others that are not contrary to the moving party's allegations but which put the moving party's allegations in an appropriate context. *Geibe*, 571 N.W.2d at 777. If the moving

party's affidavit asserts facts sufficient to support a custody modification, a district court must hold an evidentiary hearing to determine the truth of the allegations, and evidentiary hearings are strongly encouraged when there are allegations that a child's physical or emotional well-being is endangered. *Id.*

To warrant an evidentiary hearing, the moving party must make a prima facie showing that (1) a change has occurred in the circumstances of the child or custodial parent; (2) the child's present environment endangers his physical or emotional health or emotional development; (3) the modification of custody would serve the child's best interests; and (4) the harm caused by a change in custody would be outweighed by the benefits of the change. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 291-92 (Minn. App. 2007); *Geibe*, 571 N.W.2d at 778. If a district court concludes that the movant has not made such a prima facie showing, it is not required to hold an evidentiary hearing or to make particularized findings. *Axford v. Axford*, 402 N.W.2d 143, 145 (Minn. App. 1987).

Change in circumstances

To make a prima facie showing of a change in circumstances, the alleged change must have occurred since the original custody order. *In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002). The changed circumstances "must be a real change and not a continuation of ongoing problems." *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 690 (Minn. App. 1989), *review denied* (Minn. June 21, 1989).

Father argues that his allegations that the two sons have expressed a preference to live with him are sufficient to show a change in circumstances. Indeed, a child's

preference may be sufficient to show a change in circumstances. *See id.* And it may provide a sufficient reason for a district court to order an evidentiary hearing. *Eckman v. Eckman*, 410 N.W.2d 385, 389 (Minn. App. 1987). But a district court may deny an evidentiary hearing if it is obvious from the record that a child's stated preference is the result of manipulation by the moving party. *Geibe*, 571 N.W.2d at 778.

Here, mother's responsive affidavit alleges that father has pressured the children to live with him. But the district court made no finding of manipulation, and, as a result, it is unclear how the allegations regarding the sons' preference affected the district court's decision. In addition, questions regarding whether a child's stated preference is the result of manipulation are more appropriately answered "at the evidentiary hearing stage rather than in determining whether a prima facie case has been made." *Id.* Father's allegations regarding the sons' stated preference are sufficient to make a prima facie showing of a change in circumstances.

Endangerment

Whether a child is endangered as a result of a custodial arrangement must be determined on the facts of each case. *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991). To make a prima facie showing of endangerment, the moving party must demonstrate "a significant degree of danger." *Id.*

Father argues that his allegations of physical and emotional abuse are adequate to make a prima facie showing of endangerment. This court has stated that "[e]motional abuse alone may constitute sufficient endangerment, and when an allegation of such abuse is supported by some evidence, an evidentiary hearing is appropriate." *Tarlan v.*

Sorenson, 702 N.W.2d 915, 923 (Minn. App. 2005); *see also Geibe*, 571 N.W.2d at 779 (“[P]hysical abuse obviously endangers a child . . .”). Father’s allegations of physical and emotional abuse point to evidence of specific instances. Although mother’s affidavit tends to put certain of father’s allegations in a context that suggests that she has not engaged in abusive conduct, her response to other allegations is simply to deny them. For example, mother denies father’s allegations that she has slapped and hit the children and that she has called the two sons “evil,” “the devil,” and “stupid.” When mother’s only response is to deny an allegation, a court must accept the allegation as true for purposes of determining whether father has made a prima facie case for custody modification. *See Geibe*, 571 N.W.2d at 777. We conclude that father’s allegations are sufficient to make a prima facie showing of endangerment.

Best interests

To warrant an evidentiary hearing on a motion to modify custody there must be a prima facie showing that the modification is necessary to serve the best interests of the child. *See* Minn. Stat. § 518.18(d) (2006). A child’s best interests are determined by applying the factors listed in Minn. Stat. § 518.17, subd. 1(a) (2006), which include consideration of the parties’ wishes regarding custody, the child’s reasonable preference, the intimacy of the relationship between the child and his parents, the relationship between the child and any siblings, who is the child’s primary caretaker, the length of time that the child has lived in a stable environment, the desire to maintain continuity of care, and the mental and physical health of everyone involved.

Father argues that because he has alleged that the children are endangered by being subjected to physical and emotional abuse in mother's home, it follows that he has made a prima facie showing that modifying custody is necessary to serve the children's best interests. In *Tarlan*, this court noted that one of the best-interests factors is the "mental and physical well-being of all individuals involved." 702 N.W.2d at 924. (quoting Minn. Stat. § 518.17, subd. 1(9)). This court stated that if a child's emotional well-being is endangered by the current custodial arrangement, the child's best interests "are clearly not being met." *Id.* Accordingly, this court concluded that allegations in the moving party's affidavit tending to show such endangerment were "sufficient to make a prima facie case" that would warrant an evidentiary hearing to determine whether modification of custody is in the child's best interests. *Id.*

Here, father's allegations of abuse tend to show that the children are being endangered by the current custodial arrangement, and, therefore, if the allegations are true, the children's best interests clearly are not being met. Mother maintains, however, that father's affidavit does not show that a change in custody would be in the children's best interests because the affidavit fails to specifically address how living at father's home would be better for the children. In fact, she claims, living at father's home would be worse for the children, as shown by her allegations regarding the detrimental environment and conditions at father's home. But determining the truth of each parties' allegations about the other and whether it is in the children's best interests to live at father's home or at mother's home are issues more appropriately resolved at an evidentiary hearing. At such a hearing, the district court can make credibility

determinations regarding the parties' allegations and weigh the best-interests factors in making a decision.

Balance of harms

Minnesota law presumes that stability in custody is in a child's best interests. *Weber*, 653 N.W.2d at 811. Thus, to be entitled to an evidentiary hearing on a motion to modify custody, a movant must make a prima facie showing that the advantage of modifying custody outweighs the harm likely to be caused by the change. *Id.* Father argues that in light of his allegations that the children are being subjected to abuse, "[a]ny change to [his] home would be a benefit and outweigh the stress of change." Essentially, father argues that the prima facie showing on the balance of harms is implicit in the prima facie showing on the other elements. This court has acknowledged that "the balance of harms[] may sometimes be implicit in the other factors." *Geibe*, 571 N.W.2d at 778. Here, as we have already determined, the allegations in father's affidavit make the required prima facie showings regarding a change in circumstances, endangerment, and the best interests of the children. Accordingly, we conclude that, here, a prima facie showing on the balance of harms is implicit in the other factors.

In determining that father failed to demonstrate a prima facie case for modification the district court did not specifically identify which of the four required showings had not been met. And although the district court was not required to make particularized findings in concluding that father failed to establish such a prima facie case, it is nevertheless required to make sufficient findings to permit meaningful appellate review. Otherwise, we are unable to determine whether or not the district court's decision

represented a sound exercise of its discretion. Father's affidavit makes serious allegations of physical and emotional abuse, which the district court was required to accept as true for purposes of determining whether an evidentiary hearing was warranted, but the district court's order offers no explanation for its determination that those allegations failed to demonstrate a prima facie case for modification. Although we express no opinion on the merits of father's request for custody modification, we conclude that father established such a prima facie case, and, therefore, the district court abused its discretion by denying an evidentiary hearing.

Lastly, father argues that the district court improperly considered mother's responsive affidavit to rebut the allegations of his affidavit. In light of our decision, we need not address this argument.

Reversed and remanded.