

NO. A10-1794

State of Minnesota
In Court of Appeals

Elizabeth Ann Boland, petitioner,

Appellant,

vs.

Thomas Francis Murtha IV,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

William D. Siegel (#0278890)
Douglas G. Sauter (#0095977)
400 Northtown Financial Plaza
200 Coon Rapids Boulevard
Minneapolis, MN 55433
(763) 780-8500

Attorneys for Appellant

Gary A. Debele (#0187458)
WALLING, BERG & DEBELE, P.A.
121 South Eighth Street
Suite 1100
Minneapolis, MN 55402
(612) 340-1150

Attorney for Respondent

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

LEGAL ISSUE..... 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENT 6

I. STANDARD OF REVIEW 6

II. IT WAS NOT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO DENY APPELLANT’S MOTION TO RESTRICT RESPONDENT’S PARENTING TIME BECAUSE APPELLANT FAILED TO ESTABLISH A PRIMA FACIE CASE..... 8

CONCLUSION 10

APPENDIX 14

TABLE OF AUTHORITIES

Minnesota Case Law

<u>Abbott v. Abbott,</u> 481 N.W.2d 864 (Minn. App. 1992).....	7
<u>Axford v. Axford,</u> 402 N.W.2d 143 (Minn. App. 1987).....	11
<u>Dabill v. Dabill,</u> 514 N.W.2d 590 (Minn. App. 1995).....	11
<u>Geibe v. Geibe,</u> 571 N.W.2d 774 (Minn. App. 1997).....	7, 8
<u>In re Marriage of Goldman,</u> 748, N.W.2d 279 (Minn. 2008).....	7, 8, 11
<u>Itasca Cty. Soc. Servs. ex rel. Hall v. David,</u> 379 N.W.2d 700 (Minn. App. 1986).....	7
<u>Lilleboe v. Lilleboe,</u> 453 N.W.2d 721 (Minn. App. 1990).....	9, 11
<u>Nice-Petersen v. Nice-Petersen,</u> 310 N.W.2d 471 (Minn. 1981)	7, 9
<u>Ross v. Ross,</u> 477 N.W.2d 753 (Minn. App. 1991).....	7
<u>Smith v. Smith,</u> 508 N.W.2d 222 (Minn. App. 1993).....	7, 9
<u>Szarzynski v. Szarzynski,</u> 732 N.W.2d 285 (Minn. App. 2007).....	9
<u>Vangsness v. Vangsness,</u> 607 N.W.2d 468 (Minn. App. 2000).....	12
<u>Valentine v. Lutz,</u> 512 N.W.2d 868 (Minn. 1994).....	7

Weiler v. Lutz,
501 N.W.2d 667 (Minn. App. 1993)..... 7

Minnesota Statutes

Minn. Stat. § 518.175, Subd. 5..... 1, 6

LEGAL ISSUES

- I. WAS IT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO DENY APPELLANT'S MOTION TO RESTRICT RESPONDENT'S PARENTING TIME AND TO DENY HER AN EVIDENTIARY HEARING?**

The District Court found that Appellant did not establish a prima facie case and denied Appellant's motion to restrict Respondent's parenting time.

Apposite Authority:

Minn. Stat. § 518.175, Subd. 5

STATEMENT OF THE CASE

Appellant filed a motion dated May 25, 2010 to appoint a parenting time expeditor, to order the parenting time expeditor to conduct a parenting time investigation, to order the parties to pay for the parenting time expeditor, to order the parenting time expeditor to resolve specific scheduling disputes outlined in Appellant's motion, to restrict Respondent's parenting time, to order Respondent to engage in therapy, and to order an evidentiary hearing.

Respondent filed a responsive motion objecting to all of these requests and the Court took the matter under advisement and issued Findings of Fact, Conclusions of Law and Order dated August 11, 2010 denying Appellant's request to Restrict Respondent's parenting time. Appellant has appealed from that portion of the order denying an evidentiary hearing on the request to restrict the Respondent's parenting time.

STATEMENT OF THE FACTS

The parties were married on October 31, 1998, and divorced pursuant to a judgment and decree entered on January 11, 2005. Findings of Fact Conclusions of Law and Order, filed April 6, 2009, page 2 (Order 2009 in Respondent's Appendix). They have one joint child together, Katherine Margaret Murtha (Katie), who was born on October 25, 2000. *Id.* From the time the original divorce decree was entered, the parties have shared joint legal custody of Katie, with Appellant having primary physical custody.

The parties appeared before the Court on March 2, 2009 with cross motions addressing child custody, parenting time, and various child support and related financial issues. *Id.* at 2. At that hearing, it was decided that both Appellant and Respondent would submit additional written information on the custody and parenting time issues before the Court and that the Court would then issue a written decision based on those submissions. *Id.*

The Court issued an Order filed on April 6, 2009 that found that "Katie and her father have not been able to spend enough time together to develop a truly intimate relationship" and that the limitations placed on parenting time by the Appellant "have inhibited the growth of a parental relationship between Respondent and Katie, and have prevented a meaningful relationship between Katie and Respondent's extended family." *Id.* at 4, 6. The Order further modified the parenting time provision from the original decree, set a holiday and vacation schedule, and clarified some of the joint legal decision making provisions that had caused disputes between the parties. The April 6, 2009 Order

was never appealed by either party. Findings of Fact Conclusions of Law and Order, filed August 11, 2010, page 2 (Order 2010 in Appellant's Appendix).

Prior to the April 6, 2009 Order, the parties' divorce decree contained parenting time provisions that did not include any type of fixed schedule and basically allowed Appellant to dictate the access times and circumstances. Order 2009, 2. For example, Appellant would never allow any overnight visits, despite Respondent always living a significant distances away from Appellant and Katie. *Id.* Appellant was also unilaterally making educational, health care, and religious upbringing decisions, despite the parties having joint legal custody.

In her second effort to restrict the Respondent's parenting time filed in 2010, which is the subject of this appeal, the Appellant alleged that Katie is endangered as a result of parenting time spent with Respondent. As these allegations in this second attempt to restrict the Respondent's parenting time are largely identical to the allegations raised in 2009, the Respondent has included affidavits addressing these allegations from both proceedings in his Appendix to this brief. As stated in those affidavits, and as summarized in his memorandum of law, the Respondent denies those allegations.

The district court found that "those allegations are informed by [Appellant's] history, demonstrated over a period of years of significantly overreacting to rather common emotional upsets by the child, and overanalyzing those upsets. Those overreactions may also be consistent with [Appellant's] acknowledged diagnosis with a stress disorder of sufficient severity that she receives Social Security disability benefits." Order 2010, at 8. The district court also found that Appellant "presents as being hyper-

vigilant about Katie's asthma, and rather extraordinarily over-reactive about certain not unusual issues arising during parenting time." Id. at 4-5.

Despite the Appellant's Statement of Facts on page 10 of Appellant' Brief stating, "Appellant-Mother had made a prima facie showing of physical and emotional endangerment," the district never made such a finding and in fact found the opposite. The district court ultimately concluded that Appellant had "failed to make a prima facie showing of serious endangerment such as to necessitate an evidentiary hearing on her motion to restrict Respondent's parenting time." Order 2010, 9.

ARGUMENT

I. STANDARD OF REVIEW

The Appellant has blatantly misstated the standard of review that is to be applied by this Court in reviewing a district court's decision to deny a motion to modify parenting time and a decision to deny an evidentiary hearing in such a proceeding. The Appellant will be filing a separate motion with this Court for an award of attorneys' fees and costs, with this misstatement of basic law being one of the bases for that request. A motion to modify a previously entered parenting time order is governed by Minn. Stat. § 518.175, Subd. 5. That statutory provision provides as follows:

Modification of parenting plan or order for parenting time. If modification would serve the best interests of the child, the Court shall modify the decision making provisions of a parenting plan or an order granting or denying parenting time, if the modification would not change the child's primary residence. Except as provided in Section 631.52, 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 is chronically and has unreasonably failed to compile with Court ordered parenting time.

If a parent makes specific allegations that parenting time by the other parent places the parent or child in danger of harm, the Court shall hold a hearing at the earliest possible time to determine the need to modify the order granting parenting time. Consistent with Subdivision 1a, the Court may require a third party, including the local social services agency, to supervise the parenting time or may restrict a parent's parenting time if necessary to protect the other parent or child from harm. If there is an existing order for protection governing the parties, the Court shall consider the use of an independent, neutral exchange or location for parenting time.

The appellate courts of this state have had numerous opportunities to comment on how this statutory standard of review is to be implemented. This Court itself summarized the line of cases coming from the Minnesota Supreme Court that addressed how to

conduct a review of a district court's denial of an evidentiary hearing in the context of either a motion to modify parenting time or custody:

[T]he Minnesota Supreme Court concluded that "the trial court did not abuse its discretion in denying the motion on affidavits and in refusing to schedule an evidentiary hearing." Nice-Petersen, 310 N.W.2d at 472. Subsequent decisions by this court have applied an abuse of discretion standard to a district court's dismissal of a modification petition without an evidentiary hearing, relying on the court's general broad discretion in custody matters. See, e.g., Itasca Cty. Soc. Servs. ex rel. Hall v. David, 379 N.W.2d 700, 703 (Minn. App. 1986).

Geibe v. Geibe, 571 N.W.2d 774, 777 (Minn. App. 1997)(quoting Nice-Petersen v. Nice-Petersen, 310 N.W.2d 471 (Minn. 1981).

Appellant relies on Ross v. Ross, 477 N.W.2d 753, 756 (Minn. App. 1991) to argue that the standard of review for this matter should be de novo. This Court has commented on that case and limited its provisions addressing standard of review in modification proceedings:

Ross, however, does not address the supreme court's language in Nice-Petersen, and this court's subsequent opinions have applied an abuse of discretion standard. See, e.g., Smith v. Smith, 508 N.W.2d 222, 227 (Minn. App. 1993); Weiler v. Lutz, 501 N.W.2d 667, 671 (Minn. App. 1993), aff'd, Valentine v. Lutz, 512 N.W.2d 868, 872 (Minn. 1994); Abbott v. Abbott, 481 N.W.2d 864, 868 (Minn. App. 1992). Moreover, the supreme court applied an abuse of discretion standard in affirming this court's Weiler decision. Valentine, 512 N.W.2d at 872. Because Nice-Petersen and Valentine indicate that the supreme court intends that an abuse of discretion standard apply, we apply that standard here.

Geibe at 778.

In addressing the standard of appellate review for the denial of an evidentiary hearing the Minnesota Supreme Court most recently in In re Marriage of Goldman, 748, N.W.2d 279, 284 (Minn. 2008) stated that "[a]ppellate review of custody modification

and removal cases is limited to considering whether the trial court abused its discretion.” Under the Appellant’s tortured discussion of standard of review, the district courts would be required to blindly assume the statements in the moving party’s affidavit are true, not consider any of the context of prior decisions or the court’s own assessment of credibility and plausibility of contentions, and always order an evidentiary hearing in the face of either a custody or parenting time modification motion. Then after all that time and expense, the trial court would make a decision that could be second-guessed by the appellate courts under a de novo standard of review without any deference given to the trial court judge who conducted the hearing. It is clear beyond dispute that the standard of review is abuse of discretion and not de novo review.

II. IT WAS NOT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO DENY APPELLANT’S MOTION TO RESTRICT RESPONDENT’S PARENTING TIME BECAUSE APPELLANT FAILED TO ESTABLISH A PRIMA FACIE CASE.

The trial court correctly stated its task at the outset of its decision here under review:

The party seeking modification of a custody order must submit affidavits setting forth the facts which demonstrate the conditions justifying modification. The district court then reviews the moving party’s affidavits, *taking the alleged facts to be true*, and determines whether a prima facie case has been made. Smith v. Smith, 508 N.W.2d 222,226 (Minn. App. 1993)(Emphasis added) citing Nice-Peterson v. Nice- Peterson, 310 N.W.2d 471, 472 (Minn. 1981). If the moving party has not made a prima facie case, the district court should deny the motion for an evidentiary hearing.

Order 2010, 7.

“If the moving party fails to make a prima facie case of endangerment, the district court is required to deny the motion. Nice-Peterson v. Nice- Peterson, 310 N.W.2d 471, 472 (Minn. 1981); Szarzynski v. Szarzynski, 732 N.W.2d 285 (Minn. App. 2007).”
Order 2010, 8.

Appellant’s present motion to restrict Respondent’s parenting time left the district court to decide whether there were any new circumstances or issues that had arisen since the last order was entered on April 6, 2009 that would in any way suggest that parenting time was likely to endanger Katie’s physical or emotional health or impair her emotional development. As the district court explained in its Findings of Fact, Conclusions of Law and Order, the record was quite clear that such was not the case and that there was no basis to modify the current parenting time provisions.

In fact, virtually all of the issues that have been raised by the Appellant in her 2010 pleadings were raised the last time the Court reviewed this issue that gave rise to its April 6, 2009 Order. Such concerns as Respondent not emotionally connecting with his daughter, not listening to his daughter, dirty or inappropriate conditions at Respondent’s home, Katie’s allergies and Respondent’s lack of attentiveness to those allergies, inconvenience to Appellant’s schedule and interference with extracurricular activities, and general arguments that Katie does not want to spend time with her father were all raised and addressed in voluminous detail in the spring of 2009. See affidavits in Respondent’s Appendix. Respondent has also painstakingly responded, as have various other relatives, to the allegations made by Appellant, her two neighbors, and her hired therapist. Under the clear statutory standard accepting Appellant’s allegations as true,

Appellant's motion was properly denied for failing to establish a prima facie case of endangerment.

Appellant argues that the district court abused its discretion by failing to accept the allegations in Appellant's affidavit as true. However, the district court specifically addressed this standard and emphasized it as quoted above. Irrespective of accepting a matter as true, the district court still has the duty, and indeed, obligation, to assess the statements of the parties and other persons in affidavits as to their plausibility and veracity in the context of prior decisions in the case and the court's general assessment of credibility based on its history of dealing with the parties. That duty and obligation exists whether the court is reviewing the motion solely on written affidavits or takes testimony. As stated above in the section of this brief addressing standard of review, under the Appellant's argument, the district court has no discretion to make such assessments, but must immediately schedule an evidentiary hearing based on the allegations of the moving party and assuming them to be true. As an example of the proper approach taken by the district court in this matter, the district court gave little weight to the therapist's affidavit due to an incomplete assessment. Id. at 8. Taken as a whole, the district court applied the correct standard and found against Appellant.

Endangerment is decided on a case-by-case basis. Lilleboe v. Lilleboe, 453 N.W.2d 721, 724 (Minn. App. 1990). It requires a showing of a "significant degree of danger." Geibe, 571 N.W.2d at 778. Generally, the child's expressed "preferences alone do not provide sufficient evidence of endangerment to mandate a hearing." Id.

To satisfy the endangerment element of a prima facie case, the moving party “must demonstrate a significant degree of danger.” In re Marriage of Goldman, 748 N.W.2d 279, 285 (Minn. 2008). The conduct that the moving party alleges endangers the child must create an actual adverse effect on the child. Dabill v. Dabill, 514 N.W.2d 590, 595-96 (Minn. App. 1995). When the moving party’s affidavit is devoid of allegations that are supported by specific, credible evidence, endangerment is not shown. Axford v. Axford, 402 N.W.2d 143, 145 (Minn. App. 1987).

Appellant does not allege actual physical harm to Katie. The emotional harm alleged by Appellant is for the most part nonspecific and does not credibly lead to the conclusion of endangerment. The trial court judge went through each specific allegation and concern raised by the Appellant in painstaking detail. Given that the concerns and allegations raised by the Appellant in 2010 were nearly identical to those underlying the 2009 motions and order, the trial court in effect went through the concerns and allegations two times and reached the same conclusion in both instances: there was no prima facie basis to restrict the Respondent’s parenting time in the fashion requested by the Appellant, there was no preliminary showing sufficient to justify further consideration of concerns and allegations through an evidentiary hearing, and that the Respondent and child were entitled to a full and normalized father/daughter relationship, despite the mother’s own personal issues.

Assuming Appellant’s allegations to be true, the district court found they do not demonstrate a significant degree of danger to Katie. Considered as a whole, the district court’s order shows that it found incredible the conclusions presented by Appellant that

the facts being alleged were endangering Katie. The district court did not abuse its discretion in denying Appellant's motion to modify parenting time.

CONCLUSION

The law "leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." Vangsness v. Vangsness, 607 N.W.2d 468, 477 (Minn. App. 2000). The district court previously found that Appellant's restrictions on Respondent's parenting time has harmed the parent child relationship Katie has with her father. Appellant continues to work to alienate Katie from her father with her current allegations that actually reveal Appellant's personal bitterness against Respondent and have nothing to do with the best interests of the child. Even if true, those allegations do not seriously endanger Katie. Because the district court did not abuse its discretion in denying the Appellant an evidentiary hearing, the Respondent respectfully requests that the decision of the district court be affirmed.

Dated: January 5, 2011

Respectfully submitted,

WALLING, BERG & DEBELE, P.A.

A handwritten signature in cursive script, appearing to read "Gary A. Debele".

Gary A. Debele (#187458)
121 South Eighth Street
Suite 1100
Minneapolis, MN 55402
(612) 335-4288
Attorney for Respondent