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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2112**

In re the Marriage of:
Jody Marie Miller, petitioner,
Respondent,

vs.

Thomas Stephen Miller,
Appellant.

**Filed July 20, 2010
Affirmed
Halbrooks, Judge**

Murray County District Court
File No. 51-FA-07-339

Julia Craig, Charles H. Thomas, Southern Minnesota Regional Legal Services, Mankato, Minnesota (for respondent)

William J. Wetering, Hedeem, Hughes & Wetering, Worthington, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant Thomas S. Miller challenges the district court's order denying his motion for custody modification without an evidentiary hearing. Because we conclude that the district court acted within its discretion, we affirm.

FACTS

The marriage of appellant and respondent Jody Marie Miller was dissolved in 2008, and they were awarded joint legal and physical custody of their children, E.T.M. and E.D.M. In August 2009, appellant moved to modify custody, seeking full legal and physical custody of both children. In support of his motion, appellant did not provide an affidavit but did attach police reports that described an incident between E.T.M. and respondent's then-boyfriend, Gabita Weyo.¹ The incident is described in the police reports as follows.

On July 24, 2009, E.T.M. was asleep in his bedroom. He awakened when he heard someone enter his room. He looked up and saw Weyo, naked, standing in his room. Weyo lay on the bed with E.T.M. and "wrapped his legs and arms around him and started trying to kiss him." E.T.M. pushed Weyo away and went into his brother's room, but Weyo followed him and lay down with him once again. E.T.M. went back to his own bedroom and was again followed by Weyo. Finally, E.T.M. went downstairs and tried to call respondent's cellular phone, but she did not answer. E.T.M. then called appellant, who picked him up and contacted police. In a subsequent interview, Weyo told police that he was sleepwalking and did not remember the incident. E.T.M. told police that he was "freaked out" but not scared and that Weyo was "stumbling as if he were sleepwalking or high." Respondent informed police that earlier in the evening she and

¹ Respondent argues that appellant's motion must fail because he did not submit an affidavit as required by statute. But because this was not raised to the district court, we conclude that respondent has waived this issue. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Weyo had a drink at a bar and then he had another at respondent's home. Weyo was 20 years old.

Respondent submitted an affidavit in response to appellant's motion that states that she and Weyo had been dating for approximately one-and-one-half years and began living together in May 2009. According to respondent, prior to the incident she "had no reason to be concerned about [her] children's safety when [Weyo] was present." Respondent never saw Weyo acting inappropriately around her children, and her children never said anything about inappropriate behavior by Weyo. Respondent stated that, after learning what had happened between Weyo and E.T.M., she cooperated with police and ended her romantic relationship with Weyo. Respondent also spoke with E.T.M., telling him that what Weyo did was wrong and that E.T.M. did the right thing by talking to police. Respondent also offered to take E.T.M. to a therapist, an offer he declined. According to respondent, E.T.M. "doesn't seem to be experiencing any emotional fall out [and is not] acting differently than normal."

The district court denied appellant's motion without holding an evidentiary hearing. In its memorandum, the district court stated, "This motion is based on a single incident which occurred without [respondent]'s knowledge. She has apparently taken action to prevent a similar occurrence in the future. Based on these facts, this Court does not believe the endangerment standard has been met." This appeal follows.

DECISION

"Appellate review of custody modification . . . cases is limited to considering whether the [district] court abused its discretion by making findings unsupported by the

evidence or by improperly applying the law.” *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted). To obtain an evidentiary hearing, a party seeking a modification of child custody must submit an affidavit that establishes that (1) the child’s or parties’ circumstances have changed, (2) the child’s best interests are served by a modification, (3) the child’s present environment endangers the child’s physical health or emotional health or development, and (4) as to the child, the benefits of the change outweigh the likely detriments. *Id.*; *see also* Minn. Stat. § 518.18(d) (2008).

The district court should not hold an evidentiary hearing on a custody-modification motion unless the accompanying affidavits set forth sufficient facts that, if true, demonstrate a prima facie case for modification. *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981). To justify a modification of custody, the change in circumstances must endanger the physical or emotional health or development of the child. *In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002). Endangerment also requires a showing that the current environment of the children is endangered and that the degree of danger is significant. *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991). The district court may also consider allegations by others that do not conflict with the moving party’s allegations. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007).

While we are mindful of appellant’s concern for his children and do not minimize the incident, we conclude that the district court did not abuse its discretion by determining that appellant did not establish a prima facie case of endangerment. The police reports reflect that respondent’s then-boyfriend engaged in a single act of sexually

assaultive behavior. And respondent's affidavit reflects that she shares appellant's concerns about this incident and has taken several steps in response. While acknowledging that Weyo's actions may have been intentional, respondent's affidavit affirms that he never acted inappropriately around her children in the past. Nevertheless, respondent stated that she is "determined to protect [her] children from any possible sexual abuse." She immediately ended her romantic relationship with Weyo after he was released from jail; and Weyo is subject to a no-contact order prohibiting him from having any contact with E.T.M. Additionally, after the assault took place, respondent promised her children that she would "never again let a man move in with [them] or stay overnight at [their] house." She also assured E.T.M. that what happened was wrong and that he did the right thing by contacting his parents. Respondent noted that she, too, is worried about how the incident might affect E.T.M. and has offered to take him to see the therapist who talked with him during the dissolution process. Based on this record, the district court acted within its discretion by denying appellant's custody-modification motion.

Affirmed.