STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1414

Amy Lisa Haag,
Respondent,

vs.

Jonathan Richard Jacklitch,
Appellant.

Filed February 12, 2008
Affirmed
Ross, Judge

Stearns County District Court
File No. F0-94-50895

Thomas E. Kramer, Kramer Law Office, 925 South First Street, P.O. Box 638, St. Cloud, MN 56302 (for respondent)

Thomas W. Lies, Pennington & Lies, P.A., 1111 North First Street, P.O. Box 1756, St. Cloud, MN 56302-1756 (for appellant)

Considered and decided by Dietzen, Presiding Judge; Lansing, Judge; and Ross, Judge.

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

ROSS, Judge

Jonathan Jacklitch appeals the district court's denial of his motion to modify custody of the parties' minor child, K.J., without an evidentiary hearing. Because

Jacklitch did not make a prima facie showing to support his motion for endangerment-based modification of custody, we affirm.

FACTS

Appellant Jonathan Jacklitch and respondent Amy Haag have a minor child together. The child, K.J., was born in 1993. Haag applied for assistance from Stearns County for child support in 1994. The county requested the district court to declare Jacklitch to be K.J.'s father, to grant Haag sole legal and physical custody, and to order Jacklitch to pay child support. The court granted the county's requests in a 1996 judgment, but it also ordered that Jacklitch have reasonable visitation privileges upon reasonable notice to Haag.

In April 2007, Jacklitch moved to modify custody, seeking joint legal custody and sole physical custody of K.J. He submitted two affidavits with his motion, one sworn by him and one by his parents, Randal and Ann Houske Jacklitch. Randal and Ann Jacklitch's joint affidavit alleged that K.J. did not want to live with Haag and that Haag was evicted from subsidized housing, inconsistently allowed visitation time with the Jacklitches, and did not attend all of K.J.'s extra-curricular activities. Jonathan Jacklitch's affidavit asserted various facts in support of his motion: that Haag unilaterally switched his parenting time from every weekend to every other weekend; that Haag was not attentive to K.J.; that K.J. wanted to live with him; that Haag had not picked K.J. up from school when K.J. was not feeling well; that he had taken K.J. to all of her orthodontia appointments and most dentist and doctor appointments; that Haag had quit her job; that K.J. had to care for her younger siblings; that Haag enrolled K.J. in boxing

when K.J. had a grand-mal seizure in the past; and that Jacklitch did all of the driving during parenting time transitions.

Haag filed a responsive affidavit. She alleged that Jacklitch had not spent every weekend with K.J., that she does attend many of K.J.'s extracurricular activities, that she supports K.J.'s educational needs, and that she refused to pick K.J. up from school only because she believed that K.J. was trying to avoid school. Haag stated that she had taken K.J. to various medical appointments, that Jacklitch is not a responsible parent, that Jacklitch coerced K.J. to state a preference by repeatedly telling her that she is going to live with him, that Jacklitch has a history of cutting himself and that K.J. has also started to cut herself, that K.J. has not been required to take care of Haag's other minor children, and that K.J.'s grand-mal seizure occurred six years earlier. She asked the court to deny the motion for modification and to award Haag her attorney fees.

The court heard argument on Jacklitch's motion to modify on May 7, 2007. Legal custody was not in dispute at that hearing. Jacklitch argued that a modification was necessary because a substantial change in circumstances had occurred and K.J. was endangered in her mother's care. Jacklitch contended that K.J.'s environment endangered her physical or emotional health and impaired her emotional development. He argued that Haag's eviction, her refusal to let K.J. walk one-and-a-half blocks to school, and Haag's alleged refusal to pick K.J. up from school when she was injured, show that K.J. was endangered in Haag's care. Haag countered that the information Jacklitch presented was insufficient under the requirements of the statute to show

endangerment. She also alleged that Jacklitch was manipulating K.J. to state a preference to live with him.

The court agreed with Haag's contentions. In an order of May 11, 2007, it denied Jacklitch's motion, finding that Jacklitch did not make a prima facie showing of a change in circumstances that endangered K.J.'s physical or emotional health or development. The court decided that K.J.'s stated change in residential preference alone did not require an evidentiary hearing, and it also found that K.J.'s stated preference resulted from manipulation. It denied Jacklitch's motion for an evidentiary hearing and for modification of custody, but it did order that transportation duties be divided. The court denied Haag's request for attorney fees.

Jacklitch then moved for a new trial and for the court to order a parenting-time schedule. Jacklitch filed affidavits from himself, from K.J., and from K.J.'s school counselor, Mary Michaud. Jacklitch's new affidavit made essentially the same assertions as his April 2007 affidavit, adding that after he filed his motion to modify, Haag had refused for three consecutive weekends to allow him to see K.J. K.J.'s affidavit stated that she was afraid when she was at her mother's house, that Haag is still in contact with a former boyfriend with a criminal record, and that Jacklitch had not coerced her statement of preference to live with him. Mary Michaud's affidavit stated that K.J. spoke with her regularly about "family issues" and consistently complained to Michaud about living with Haag. Michaud stated that K.J. had reported an incident between K.J. and Haag that Michaud felt amounted to emotional abuse.

The court heard argument on Jacklitch's motion for a new trial and for a parenting-time schedule. Jacklitch argued that new facts supported his motion to modify custody, citing Michaud's affidavit. He alleged that the day after Haag was served with Jacklitch's original motion, she engaged in emotional abuse by taking away all of K.J.'s possessions, telling K.J.'s siblings that K.J. was no longer their sister, giving K.J. a long list of chores, and telling her that she could not eat her food. Jacklitch contended that this was newly discovered material evidence that could not have reasonably been discovered before the first hearing. He also asserted that Haag was denying him parenting time with K.J. On these bases, Jacklitch again contended that K.J. was endangered, and he requested an evidentiary hearing.

Haag disputed that Michaud's affidavit represented newly discovered evidence. She pointed out that Jacklitch regularly communicated with Michaud throughout the school year, and she noted that the incident of alleged emotional abuse occurred on April 18, 2007—well before the May 7 hearing. Finally, Haag admitted that she had curtailed K.J.'s time with Jacklitch, but she defended her decision based on Jacklitch's alleged manipulation of K.J.

In an order dated July 17, 2007, the court granted Jacklitch's motion for a parenting-time schedule and established the terms of the schedule in its order. But the court denied Jacklitch's request for a new trial because it found that the information in Michaud's affidavit was not new evidence because it could have been discovered earlier with reasonable diligence. Jacklitch appeals from the May 11 and July 17 orders.

D E C I S I O N

I

We first address Jacklitch's motion to modify custody based on endangerment. *See* Minn. Stat. § 518.18(d)(iv) (2006) (authorizing custody modification for endangerment). To prevail on a motion for endangerment-based modification, the moving party must first make a prima facie case for modification. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 291–92 (Minn. App. 2007). Whether a party has made a prima facie case to modify custody is dispositive of whether an evidentiary hearing will occur on the motion to modify custody. *Id.* at 292. Jacklitch was required to establish four elements to make a prima facie case for endangerment-based modification: (1) that the circumstances surrounding K.J. or Haag had changed; (2) that the modification would be in K.J.'s best interests; (3) that K.J.'s physical or emotional health or emotional development is endangered by her present environment; and (4) that the harm associated with the proposed change in custody would be outweighed by the benefits of the change. *See Id.* at 291–92 (listing elements). At that preliminary stage, the district court must accept as true the moving party's allegations and disregard contrary allegations. *Id.* at 292. But the court may consider allegations by others that are not contrary to the allegations of the moving party to put the moving party's allegations in context. *Id.* If the moving party does not allege facts that would provide sufficient grounds for modification, the district court need not conduct an evidentiary hearing. *In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002). We review the district court's decision to deny

Jacklitch's motion to modify without an evidentiary hearing for an abuse of discretion. *Id.*

Change in Circumstances

To modify custody based on endangerment, the district court must find that a change of circumstances has endangered the child's physical or emotional health or development. Minn. Stat. § 518.18(d)(iv). The change must have occurred after the challenged custody order. *Weber*, 653 N.W.2d at 809. A child's preference to live with a different parent may constitute a change in circumstances, but it does not, by itself, require the court to hold an evidentiary hearing. *Id.* at 809–10.

Jacklitch argues that the district court clearly erred when it determined that Jacklitch manipulated K.J. to state a preference to reside with him and that this determination was not appropriately made before conducting an evidentiary hearing. We agree with Jacklitch that the record lacks the evidence of apparent manipulation. In *Weber*, this court noted that a child who asserted a residential preference had used exactly the same words and phrases as his father, and the child told his guardian ad litem that his father helped him to "set my mom up." 653 N.W.2d at 808. These facts supported the district court's determination that the child's stated preference resulted from manipulation. *Id.* at 810. This matter is distinguished from *Weber*. Haag points us to no evidence in the record to support the determination that Jacklitch manipulated K.J. to state her preference to live with him.

But Jacklitch still did not make a prima facie showing to support his motion. The moving party must establish that the change in circumstances is significant and has

endangered the child's physical or emotional health or development. *Id*. at 809. Based on the district court's supported findings on the remaining factors, the lack of sufficient support for its finding of manipulation as the reason for K.J.'s stated preference does not warrant reversal.

Best Interests of the Child

The district court did not consider K.J.'s best interests because Jacklitch failed to directly address the best-interests factors in his affidavit. *See Weber*, 653 N.W.2d at 810 (noting the district court relied on the guardian ad litem's assessment of the child's best interests because the father failed to directly address the child's best interests in his affidavits). On appeal, Jacklitch contends that the court should have inferred that modifying custody was in K.J.'s best interests, but he does not establish the reason that mandates this inference and none is clear to us. The district court's conclusion does not reflect an abuse of discretion.

Endangerment

Jacklitch contests the district court's determination that the child was not endangered. To constitute endangerment, a parent's conduct must be shown to result in an actual, adverse effect on the child. *Weber*, 653 N.W.2d at 811. A district court may deny an evidentiary hearing where the affidavit submitted in support of an endangerment-based modification of custody is devoid of allegations that are supported by specific, credible evidence. *Id.* Jacklitch had maintained that K.J. was endangered because: (1) Haag had unilaterally switched Jacklitch's parenting time with K.J.; (2) Haag was not attentive to K.J.; (3) K.J. had to care for her younger siblings; (4) Jacklitch took K.J. to

all of her orthodontia and other medical appointments; and (5) Haag had enrolled K.J. in boxing despite the fact that she had a grand mal seizure several years before. The district court considered each assertion.

The district court adequately addressed Jacklitch's argument that Haag had unilaterally switched his parenting time and that he does all of the driving to transfer the child to and from his home. The court noted that there was no specific parenting time schedule in place at the time that Haag made unilateral decisions about visitation and that Haag had not persistently and willfully denied or interfered with Jacklitch's parenting time. This court observes that the affidavits provided by the Jacklitches concerning Haag's unilateral and sometimes unpredictable changes in planned visits with the child's father or paternal grandparents suggest a practice that would tend to be disruptive to everyone involved, except Haag. Although we agree that this alone does not establish endangerment, it readily supports the district court's imposition of a parenting schedule. And the court addressed a related concern by ordering the parties to divide the driving duties. But Jacklitch did not meet his burden to show that Haag's decisions regarding K.J.'s visitation with him endangered K.J.

The district court considered Jacklitch's allegations that Haag was not attentive to K.J., failed to attend K.J.'s extracurricular activities, refused to allow K.J. to walk to school, has yelled at K.J., was "unreachable" once when Jacklitch attempted to pick K.J. up from school, and did not believe that K.J. had actually injured herself at school. The court considered Haag's clarification that she does attend K.J.'s volleyball games but did not attend parent-teacher conferences because K.J. asked her if Jacklitch could attend

instead. Haag noted that the only time she disagreed with K.J. regarding school was when K.J. made a habit of calling home and saying that she was sick, and Haag believed K.J. was doing so to avoid school. Jacklitch alleged in his affidavit that K.J. was having a difficult time living with her mother and wanted to live with him. The record supports the conclusion that K.J. had a basis to prefer to live with Jacklitch, but Jacklitch does not establish that this difficulty requires a finding of emotional or physical danger to K.J. On the record before it, the district court's determination that Jacklitch's allegations were insufficient to show any actual, adverse effect on K.J. was not an abuse of discretion.

The district court also found Jacklitch's allegations that K.J. often babysat her younger siblings did not show an actual, adverse effect on K.J. because requiring an older child of suitable age to help care for a younger sibling is not evidence of endangerment. Similarly, the court dismissed Jacklitch's allegations that K.J. is endangered because he has taken K.J. to all of her orthodontia appointments and that he had to bring her to the dentist after Haag missed several appointments. The court determined that there was no evidence that any missed appointments affected K.J.'s dental health or established that Haag was endangering K.J. On this record, these determinations are sufficiently supported.

Jacklitch also alleged that K.J. was endangered because Haag had enrolled her in boxing, despite the fact that K.J. had a prior unexplained grand-mal seizure. Haag explained that the seizure had occurred six years earlier. Again, the district court determined that this evidence did not show endangerment. It also concluded that Jacklitch's allegations that Haag had previously displayed an angry temper did not

demonstrate danger to K.J. The district court found that these allegations were not persuasive, and there is support for that determination.

The district court carefully assessed all of the allegations made by Jacklitch and by his parents. We recognize that Jacklitch's concerns appear to be genuine and that the affidavits, if accurate, reflect poorly on the level of parental cooperation Haag has demonstrated. But we hold that the district court did not abuse its discretion when it determined that Jacklitch did not show that K.J. was endangered in Haag's home.

Balance of Harms

The final factor the moving party must establish is that the advantage of modifying custody outweighs the harm likely to be caused by the change. *Weber*, 653 N.W.2d at 811. Minnesota law presumes that stability in custody is in a child's best interests. *Geibe v. Geibe*, 571 N.W.2d 774, 780 (Minn. App. 1997). Jacklitch made no showing that K.J. would benefit from leaving the stability of her mother's home to reside with him. Accordingly, the district court did not clearly err by finding that Jacklitch failed to show that the advantage of modifying custody is outweighed by the harm it would cause.

Because Jacklitch did not make a prima facie case showing that modification of custody is necessary to correct a change of circumstances that has endangered K.J., the district court did not abuse its discretion by denying the motion without an evidentiary hearing.

II

We turn to Jacklitch's challenge to the district court's denial of his motion for a new trial. This court reviews a district court's denial of a new-trial motion for an abuse

of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). Proceedings for orders that determine post-decree motions for modification of child custody based upon allegations of changed circumstances are not trials but "special proceedings" under Minn. R. Civ. App. P. 103.3(g). *Angelos v. Angelos*, 367 N.W.2d 518, 520 (Minn. 1985). A custody-modification proceeding is a "special proceeding" and a new trial is not authorized in that proceeding. *Huso v. Huso*, 465 N.W.2d 719, 720-21 (Minn. App. 1991). Therefore, the district court did not abuse its discretion by not granting Jacklitch's motion for a new trial, which is not authorized.

Were we to construe Jacklitch's motion for a new trial as an authorized request based on newly discovered evidence, we would still conclude that the district court did not abuse any discretion it may have had regarding the motion. Jacklitch pointed to Michaud's affidavit as newly discovered evidence. The district court found that the frequency of communication between Jacklitch and Michaud made it probable that Jacklitch could have discovered the April 18 incident of alleged emotional abuse before the May 7 hearing. Jacklitch contends that the issue does not turn on when the incident occurred but when, through reasonable diligence, he would become aware of it. Jacklitch is correct. The district court essentially made a factual determination that Jacklitch knew of the report to Michaud before Jacklitch asserted that he learned of it, but the basis for the district court's credibility assessment necessary for this finding is not apparent or explained. The district court also indicated that the alleged single incident of emotional abuse is insufficient to show endangerment to warrant a modification of custody. The record does not require a different conclusion. The district court had already considered

concerns about Haag's alleged anger, and the counselor's information adds only slightly to the facts already presented to portray alleged deficiencies in Haag's parenting. Because the district court did not abuse its discretion when it determined that Jacklitch was not entitled to relief, we affirm.

Affirmed.