STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0885

Brandon Matthew Peck,
Respondent,

County of Itasca,
Respondent,

vs.

Jennifer Hron,
Appellant.

March 4, 2008
Affirmed
Shumaker, Judge

Itasca County District Court
File No. 31-F7-02-050938

Chad B. Sterle, 102 N.E. Third Street, Suite 120, Grand Rapids, MN 55744 (for respondent Peck)

John J. Muhar, Itasca County Attorney, Michael J. Haig, Assistant County Attorney, 123 N.E. Fourth Street, Grand Rapids, MN 55744 (for respondent County of Itasca)

Ellen E. Tholen, 702 Second Avenue, P.O. Box 210, Bovey, MN 55709 (for appellant)

Considered and decided by Toussaint, Chief Judge; Klaphake, Judge; and Shumaker, Judge.

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

SHUMAKER, Judge

In this appeal from the district court's denial without an evidentiary hearing of appellant's motion for custody modification, appellant argues that her affidavits offered in support of her motion firmly establish a prima facie case for modification. Because the district court did not abuse its discretion in determining that appellant failed to set forth a prima facie case to warrant an evidentiary hearing, we affirm.

FACTS

Appellant Jennifer Hron gave birth to T.R.P. in 1995. In 2003, the district court adjudged respondent Brandon Peck to be T.R.P.'s father. The parties never married. In the paternity action, the court awarded sole physical and legal custody of T.R.P. to Hron, subject to supervised parenting time by Peck.

Hron was charged with criminal sexual conduct involving multiple instances of sexual relations with her 15-year-old nephew. As a result, the County of Itasca filed a CHIPS petition on T.R.P.'s behalf in September 2004. After a contested hearing, the court found by clear and convincing evidence that Hron had engaged in sexual relations with her minor nephew, had smoked marijuana with him, and had given alcohol to him and other minors. The court awarded temporary custody of T.R.P. to Peck and ordered that Hron complete sex-offender and chemical-dependency evaluations.

On October 7, 2005, while her criminal trial was pending, the issue of the permanent placement of T.R.P. came before the court. On that date, Hron stipulated, with advice of counsel, that the permanent legal and physical custody of T.R.P. would be

transferred to Peck, subject to the grant of supervised parenting time to Hron. The court order also provided that, if Hron completed an approved sex-offender program, she could move to amend the custody order to allow unsupervised parenting time with T.R.P.

On December 20, 2006, Hron moved for an evidentiary hearing and a change of custody, or, in the alternative, for an evidentiary hearing to modify her parenting time. Prior to this motion, she had been acquitted of the criminal charges. Concluding that Hron failed to make a prima facie showing that T.R.P.'s environment endangers him and that it would be in his best interests to change custody, the court denied Hron's motion on March 28, 2007. She appeals from that order.

D E C I S I O N

Hron appeals from the district court's March 28, 2007 order, which denied her motion for a change in custody pursuant to Minn. Stat. § 518.18 (2006), or alternatively for an evidentiary hearing to modify her visitation rights. Custody may be modified if the existing custodial arrangement endangers the child. Minn. Stat. § 518.18(d)(iv). A district court does have discretion in determining whether a moving party has made a prima facie case to modify custody. *Geibe v. Geibe*, 571 N.W.2d 774, 780 (Minn. App. 1997) (holding district court did not abuse discretion in ruling moving party failed to make prima facie case to modify custody). The party seeking custody modification must submit an affidavit in support of his or her motion. Minn. Stat. § 518.185 (2006).

To obtain an evidentiary hearing on a motion to modify custody based on endangerment, the moving party's affidavit must allege the following four elements to establish a prima facie case for modification: (1) a change in the circumstances of the

child or custodial parent; (2) the modification would serve the child's best interests; (3) the child's present environment endangers his or her physical or emotional health or development; and (4) the harm to the child likely to be caused by the change of environment is outweighed by the advantage of change. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 291-92 (Minn. App. 2007); *see also* Minn. Stat. § 518.18(d)(iv).

In deciding whether a party has made out a prima facie case to modify custody, "the court must accept the facts in the moving party's affidavits as true, and the allegations do not need independent substantiation." *Geibe*, 571 N.W.2d at 777. Whether a party makes a prima facie case to modify custody is dispositive of whether an evidentiary hearing will occur on the motion. *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981) (stating if moving party fails to make a prima facie case, the district court is "require[d] . . . to deny [the] motion"). But an evidentiary hearing is not required if an affidavit does not provide sufficient grounds for modification, *id.*, or if it is "devoid of allegations supported by any specific, credible evidence." *Axford v. Axford*, 402 N.W.2d 143, 145 (Minn. App. 1987).

Change in Circumstances

What constitutes changed circumstances for custody-modification purposes is "determined on a case-by-case basis." *Lilleboe v. Lilleboe*, 453 N.W.2d 721, 723 (Minn. App. 1990). "The change of 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). To warrant modification, "the change in circumstances must be significant," "must have occurred since the original custody

order," and "must endanger the child's physical or emotional health or development." *In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002). Similarly, the existence of endangerment must be determined on the facts of each case and "demand[s] a showing of a significant degree of danger." *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991).

Hron argues that she made out a prima face case for modification by showing endangerment caused by change in T.R.P.'s circumstances, and that the district court's finding that she presented no evidence of a change in circumstances warranting custody modification was an abuse of its discretion. She contends that there were numerous changes including: (1) Peck's lack of interest in developing a bond with T.R.P.; (2) Peck's alleged physical and emotional abuse of T.R.P.; (3) Peck's failure to provide T.R.P. with appropriate mental health services; (4) Hron no longer needs sex-offender treatment; (5) Hron's acquittal of the criminal sexual conduct charges; and (6) evidence relied upon by the district court in the custody matter was suppressed in the criminal case. After reviewing the record, we hold that facts, sufficiently supported by evidence, show endangerment to T.R.P.

Hron's affidavit contained allegations regarding Peck's lack of interest in T.R.P., but those allegations were based solely on her opinion of Peck's parenting of T.R.P. She included such nonspecific statements as "[T.R.P.'s] development is being impaired by his father's parenting as well as his lack of parenting. I do not believe [T.R.P.] has a stable home with his father." She also argues that T.R.P. is being raised primarily by his grandfather and suggests that T.R.P. lives with his grandfather. But she does not point to any evidence, beyond her speculation, supporting that allegation, and the record contains

a report by T.R.P.'s therapist, made in April 2006, that shows just the opposite. The report states that T.R.P. and Peck live together in a rental house outside of town. The court is not required to grant an evidentiary hearing when the allegations do not show specific instances of misconduct. *Axford*, 402 N.W.2d at 145. Thus, the record does not support a conclusion that Peck's parenting interests or skills are sufficiently deficient to merit an evidentiary hearing.

Hron next alleges physical and mental abuse of T.R.P., and notes an incident during which Peck allowed friends to handcuff the child and write the word "stupid" on his forehead. While reprehensible, this incident occurred before the permanent custody order was in place and was reported to county authorities. The county investigated the incident and determined that the incident amounted to horseplay. This isolated event cannot be considered a change in circumstances that endangered T.R.P., and the district court did not abuse its discretion by declining to find it to be sufficient to warrant an evidentiary hearing. *See Weber*, 653 N.W.2d at 809 (requiring that the changed circumstance must occur after the original custody order was in place).

Hron also contends that Peck has not provided T.R.P. with appropriate mental health services. But the record shows that T.R.P. attended art therapy for approximately 18 months, from the autumn of 2004, when Peck was granted custody of T.R.P., until April 2006. After T.R.P.'s final treatment, the therapist reported that he does not show behavioral problems at school, gets A's and B's, but does have some trouble sharing his insecurities. By enrolling T.R.P. in art therapy, Peck showed a concern for addressing T.R.P.'s anxiety issues. And "[l]egal custody means the right to determine the child's

upbringing, including education, health care, and religious training." Minn. Stat. § 518.003, subd. 3(a) (2006). Peck, as the parent with legal custody of T.R.P., has the right to determine what mental health services are appropriate, when those services are suitable, and for how long those services should continue. Hron does not point to any evidence showing adverse effects upon T.R.P. from the cessation of art therapy that would cause him to be in emotional danger. The district court did not abuse its discretion in declining to find Peck's removal of T.R.P. from art therapy to be a change in circumstance warranting an evidentiary hearing.

Hron also argues that a changed circumstance occurred because, in her view, she does not need to complete sex-offender treatment since she was acquitted at her criminal trial. However, the district court's order to complete sex-offender treatment was predicated on the district court's finding that the credible evidence was sufficient to constitute domestic child abuse. The CHIPS proceeding was not a determination of whether Hron was criminally liable for sexual misconduct, but a determination of whether the current environment in which T.R.P. was living was in his best interests. *See* Minn. Stat. § 260C.001, subd. 2 (2006) (explaining "paramount consideration" of the Juvenile Court Act is health, safety, and best interests of the child in need of protection). Furthermore, to make a prima facie case, the requisite change in circumstances must occur in the circumstances of the child or custodial parent, namely T.R.P. or Peck, under Minn. Stat. § 518.18(d)(iv). For purposes of Hron's motion, her own change of circumstances as the noncustodial parent is not sufficient to constitute a prima facie case of T.R.P's endangerment. *Szarzynski*, 732 N.W.2d at 291-92.

Hron's final two allegations of changed circumstances also stem from her criminal acquittal: the acquittal itself and certain evidence relied upon by the district court in determining custody that was suppressed in the criminal case. As noted above, the fact that Hron was acquitted of her criminal charges is not indicative of a change of circumstance for T.R.P. or Peck under Minn. Stat. § 518.18(d)(iv). The district court in the custody matter made findings of fact that were supported by the record. *See In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002) (holding a district court's finding of fact will be upheld unless clearly erroneous). The district court relied on evidence it deemed credible in the custody proceeding; it was correct to deny a hearing on this alleged change in circumstance. That a different legal standard regarding that evidence was employed in the criminal trial does not render the court's finding clearly erroneous

Hron's evidentiary claim was previously raised in her motion for a new trial in the spring of 2005. The district court denied her motion and included an analysis of her claim in its July 2005 order and accompanying memorandum. In its March 28 order, the district court said "[t]he Court had previously denied Ms. Hron's motion for a new trial in File 31-JV-04-2138. Her present motion, in effect, seeks the same relief as to that file." The court also took "judicial notice of its Findings, Conclusions, and Order in child protection file JV-04-2138." In file JV-04-2138, the basis for the court's July 2005 order, the court addressed the evidentiary issues Hron now raises again, specifically the criminal court's suppression of statements Hron made to the police and the testimony of a social worker. It was not an abuse of discretion for the court to decline to consider a matter

previously raised, analyzed, and decided, particularly when the current argument raises nothing new or different from the previous contention.

Best Interests

The district court did not expressly address T.R.P.'s best interests in its March 28, 2007 order because Hron did not focus her argument on best interests in her affidavits. While Hron suggests that this court be guided by the best interests of T.R.P., it was not an abuse of discretion for the district court to fail to specifically address this factor when that issue was not contested.

Endangerment

To establish danger to a child's welfare, the parent's conduct must create an actual adverse effect on the child. *Dabill v. Dabill*, 514 N.W.2d 590, 595-96 (Minn. App. 1994). A district court may deny an evidentiary hearing where the affidavit submitted in support of a modification of custody is devoid of allegations that are supported by specific, credible evidence. *Weber*, 653 N.W.2d at 811. "And lack of endangerment is fatal to a motion to modify custody." *Szarzynski*, 732 N.W.2d at 292.

Hron alleged in her affidavits various changes in circumstances, analyzed above, which allegedly endangered T.R.P.'s welfare. The court concluded that Hron "failed to make a prima facie showing that the child's present environment endangers the child physically or emotionally," and, thus, there was no reason for an evidentiary hearing. In light of Hron's arguments, which are almost entirely speculative and which fail to point to any real endangerment, the court did not abuse its discretion in concluding that an evidentiary hearing was not warranted.

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 constancy in custody is in a child's best interests. *Id.* Here, the district court concluded that "the harm likely caused by a change of environment would be outweighed by the advantage to the child." Hron has not shown that T.R.P. would benefit from leaving the stability of Peck's custody to return to her. The record shows that generally Peck and T.R.P. have had a stable home life since the custody change in 2004. At this point, T.R.P. has been in Peck's custody for more than three years and has shown clear adjustment to his environment.

Because Hron did not meet the requirements of making a prima facie case that modification of custody is necessary to negate a change of circumstances that has endangered T.R.P., we find that the denial of Hron's motion for an evidentiary hearing to modify custody was appropriate.

Affirmed.