STATE OF MINNESOTA
IN COURT OF APPEALS
A10-701

In re the Matter of:

Gary Anthony Price, petitioner,
Appellant,

vs.

Jennifer Banaszewski,
Respondent.

Filed March 1, 2011
Affirmed
Kalitowski, Judge

Goodhue County District Court
File No. 25-F9-02-001842

John T. Burns, Jr., Burns Law Office, Burnsville, Minnesota (for appellant)

Thomas E. Gorman, Thomas E. Gorman Law Office, Red Wing, Minnesota (for respondent)

Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

KALITOWSKI, Judge

Appellant Gary Anthony Price and respondent Jennifer Banaszewski share joint physical and legal custody of their child, now nine years old, under a 2003 order. Appellant challenges the district court's denial of his motion to modify the custody order by granting him sole physical custody. We affirm.

D E C I S I O N

When a party moves to modify a child-custody order on the ground of endangerment, a district court shall not modify the order unless it finds, upon the basis of facts that have arisen since the prior order or that were unknown to the district court at the time of the prior order, that (1) a change has occurred in the circumstances of the child or the parties; (2) the modification is necessary to serve the child's best interests; (3) the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development; and (4) 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) (2010); *Goldman v. Greenwood*, 748 N.W.2d 279, 282-83 (Minn. 2008). The party seeking modification has the burden of proving these elements. *Goldman*, 748 N.W.2d at 286.

Review is limited to whether the district court abused its broad discretion in custody matters by making findings unsupported by the evidence or by improperly applying the law. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985); *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). We defer to the district court's opportunity to evaluate

witness credibility and will set aside the district court's findings of fact only if clearly erroneous. *Goldman*, 748 N.W.2d at 284; *see also Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (emphasizing that appellate courts do not reassess credibility determinations on appeal). Findings of fact are clearly erroneous if this court "is left with the definite and firm conviction that a mistake has been made." *Goldman*, 748 N.W.2d at 284.

Change of Circumstances

Appellant argues that the record does not support the district court's conclusion that no change in circumstances has occurred. Appellant contends the changed circumstances are the inability of the parties to cooperate and respondent's escalated use of alcohol.

What constitutes a change in circumstances for purposes of custody modification is determined on a case-by-case basis. *Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000). "A change in circumstances must be significant and must have occurred since the original custody order, rather than being a continuation of conditions that existed prior to the order." *Tarlan v. Sorensen*, 702 N.W.2d 915, 923 (Minn. App. 2005).

Here, regarding the alleged breakdown in the parties' ability to cooperate, the district court found that the parties' ability to cooperate had actually improved since the issuance of a no-contact order in 2007 and since the child's maternal grandmother began acting as an intermediary. This finding is supported by the testimony of both parties.

As to respondent's alcohol use, appellant's arguments are based on his assertions that respondent has been drinking during parenting time and that respondent's drinking has escalated since the 2003 custody order. In denying appellant's motion for modification, the district court noted that it was aware of respondent's alcohol use—including an arrest and conviction for driving while impaired (DWI)—during the 2003 custody proceedings. The district court also acknowledged that respondent was convicted of DWI for a December 2008 incident. But the only evidence that respondent has used alcohol after the 2008 DWI is the testimony of appellant and of the custody evaluator as to statements made by the child. Respondent denied consuming alcohol since the 2008 DWI, and the district court found her testimony credible, noting that respondent has completed a chemical-dependency evaluation, has been monitored for alcohol use, and has not received a probation violation for the consumption of alcohol. Furthermore, there is no evidence to support appellant's assertion that respondent's drinking escalated from the time of the 2003 custody order to the 2008 DWI. We conclude the district court did not abuse its discretion by finding that no change of circumstances has occurred with regard to respondent's alcohol use.

Best Interest of the Child

Even if there were a change in circumstances, we conclude that the other requirements for custody modification are not met. In determining whether modification of custody is in a child's best interests, the district court must consider "all relevant factors," including 13 statutory factors. Minn. Stat. §§ 518.17, subd. 1(a), .18(d) (2010). The district court must make detailed findings on each factor and explain how the factors

led to its conclusion, and the district court may not use one factor to the exclusion of all others. Minn. Stat. § 518.17, subd. 1(a). The law leaves "scant if any room for an appellate court to question the [district] court's balancing of the best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000).

Appellant contends that the district court should have followed the custody evaluator's recommendation to grant him sole physical custody of the child. But a district court has discretion to decline to follow all or portions of a custody evaluator's recommendations if the district court provides explicit reasons for doing so. *Rogge v. Rogge*, 509 N.W.2d 163, 166 (Minn. App. 1993), *review denied* (Minn. Jan. 28, 1994); *Rutanen v. Olson*, 475 N.W.2d 100, 104 (Minn. App. 1991). Here, the district court set forth explicit reasons for rejecting the custody evaluator's recommendation that appellant be granted sole physical custody, including that (1) the custody evaluator recommended modifying custody despite her own finding that there was no endangerment to the child; (2) the evaluator relied "heavily" on appellant's allegations and witnesses provided by appellant and interviewed by an investigator hired by appellant; (3) the evaluator did not personally interview these witnesses, two of whom had not been in contact with respondent for more than two years; and (4) the evaluator's recommendation to grant appellant sole physical custody conflicted with her testimony that granting either party sole custody "would lead to marginalization of the other parent."

Appellant also challenges several of the district court's findings related to the statutory best-interest factors. First, appellant challenges the district court's finding that the child "appears to be closer" to respondent. But the district court's finding is

supported by evidence of the close relationship between respondent and the child, including the writings and drawings of the child and the testimony of the child's maternal grandmother. Appellant's argument that other evidence supports a finding that the child has a closer relationship with him is without merit because this court does not reweigh the evidence. *See Sefkow*, 427 N.W.2d at 210.

Second, appellant challenges the finding that respondent has no untreated mental-health issues, citing the custody evaluator's testimony and respondent's testimony about a "panic attack." But the district court found that the custody evaluator's testimony about respondent's mental health was purely speculative. And although respondent told the custody evaluator that she experienced a panic attack that caused her to remove her alcohol-monitoring bracelet, no evidence was presented to support a conclusion that this occurrence indicates an untreated mental-health issue.

Third, appellant argues that respondent lacks the capacity to provide guidance to the child because of her "repeated poor judgment and reckless behavior." But the district court, as evidenced by its detailed findings, considered respondent's alcohol use, related criminal convictions, and compliance with her probation conditions. The district court also noted that appellant exhibits errors in judgment, such as being convicted of an alcohol-related offense in 2000, violating the custody order in July 2009 by consuming alcohol during parenting time, not being forthcoming to the district court about his alcohol use, and leaving the child in respondent's care while he went on a one-week vacation despite his assertions that respondent poses a danger to the child.

Fourth, appellant argues that the present custodial arrangement is unworkable because the parties cannot cooperate. But the district court found, citing the testimony of both parties, that "things have been going fairly smoothly since the No Contact Order was issued" and that the child is thriving under the present custody arrangement.

The district court made thorough findings as to the child's best interests. The challenged findings are supported by the record, and appellant concedes that it is in the child's best interests "to maintain a strong relationship with both parents." We therefore sustain the district court's well-supported and well-reasoned conclusion that the best interests of the child would not be served by modifying the custody order.

Endangerment

Appellant argues that the district court, in concluding that appellant failed to show endangerment of the child, applied an incorrect standard of endangerment. Appellant contends that the district court erroneously required him to show "actual present danger" to the child instead of "substantial evidence demonstrating the likely harm to [the child] in the future." We disagree.

To succeed on his motion for modification, appellant was required to show that the child's "present environment endangers the child's physical or emotional health or impairs the child's emotional development." *See* Minn. Stat. § 518.18(d)(iv). "The concept of endangerment is unusually imprecise, but a party must demonstrate a significant degree of danger to satisfy the endangerment element." *Goldman*, 748 N.W.2d at 284 (quotations omitted). Appellant is correct that endangerment can be prospective; that is, that endangerment can exist where a party's current actions or a

child's current environment pose a significant risk of harm to the child. *See Johnson-Smolak v. Fink*, 703 N.W.2d 588, 591 (Minn. App. 2005). But here, the district court rejected appellant's contentions that respondent currently engages in actions that put the child at risk of harm. In light of the facts found by the district court, appellant's argument is that endangerment exists because respondent *might* engage in *future* conduct that would pose a risk of harm to the child. The supreme court has rejected such an argument. *See Goldman*, 748 N.W.2d at 284 (stating that the endangerment element "is concerned with whether the child's *present environment* endangers the child[] . . . , not whether the child *may be endangered by future events*") (second emphasis added) (quotation and citation omitted). Thus, appellant's argument that the district court applied an incorrect standard of endangerment is without merit.

Balancing of Harms and Benefits

Appellant contends the district court abused its discretion in balancing the harms and benefits to the child of modifying custody. We disagree.

The district court made extensive findings about the effects that the requested change in custody would have on the child. The district court found that the child, who is thriving under the present custody arrangement, would be required to adjust to a new school and to being in childcare for several hours per day. The child would also have to adjust to being away from respondent, her maternal grandparents (with whom she has a close bond), and her friends. The district court noted that appellant has a history of changing residences and romantic relationships and that the child would have to adjust to further changes appellant might make. The district court also found that appellant plans

to change the child's religious affiliation. In concluding that "[t]he harm caused by all the changes [appellant] is requesting is not outweighed by the advantage of the change," the district court emphasized that there is no present danger to the child and placed weight on the testimony of the child's maternal grandmother that the child "would be devastated" by the proposed change in custody.

Appellant contends that there is evidence in favor of modification and that the testimony of the child's maternal grandmother should be discounted. But the weighing of evidence and the making of credibility determinations are the province of the district court. *Goldman*, 748 N.W.2d at 284; *Sefkow*, 427 N.W.2d at 210; *Vangsness*, 607 N.W.2d at 474. Because the record supports the district court's findings on the changes that would be forced upon the child and the possible effects of those changes, the district court did not abuse its discretion in determining that the likely harm to the child of a change in custody outweighs the likely benefit.

Affirmed.