STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1886

In re the Marriage of: Erin Pollard, petitioner,
Respondent,

vs.

David Pollard,
Appellant.

Filed November 26, 2012
Affirmed
Rodenberg, Judge

St. Louis County District Court
File No. 69FX04600594

Cheryl M. Prince, Heather N. Kjos, Hanft Fride, P.A., Duluth, Minnesota (for respondent)

Elizabeth A. Storaasli, Dryer Storaasli Knutson & Pommerville, Ltd., Duluth, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Bjorkman, Judge; and Rodenberg, Judge.

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

RODENBERG, Judge

In this parenting-time dispute, appellant argues that (1) the district court erred by determining that his motion to modify parenting time requested a substantial modification of the parties' parenting-time schedule and by improperly applying the endangerment

standard rather than the best-interests standard in resolving the motion; (2) in any event, the district court abused its discretion by finding that the minor child's expressed preference was insufficient to make a prima facie showing of endangerment; (3) the district court should have addressed the best-interests factors in Minn. Stat. § 518.17 (2010); and (4) the district court should have granted appellant's motion to interview the child in camera and/or appoint a guardian ad litem. We affirm.

FACTS

This appeal arises from the denial of a motion to amend a stipulated parenting-time schedule. The schedule was established by a marriage-settlement agreement which was carried forward into a judgment and decree. That judgment and decree was later modified by a subsequent agreement and court order.

Appellant and respondent were divorced in 2005 when the district court adopted their marriage-settlement agreement. The parties had one minor child, who was then 23 months old. The minor child is presently nine years old.

The parties' settlement agreement and the resulting judgment and decree awarded the parties joint legal custody of the minor child, and awarded respondent sole physical custody. Appellant was awarded parenting time on an alternating two-week schedule. In the first week, appellant has parenting time "from Friday after work and after the child has completed any preschool or other such activities to Sunday at 5:00 p.m." In the second week, appellant was awarded parenting time "[f]rom Wednesday from after work and after the child has completed any preschool or other such activities to Friday

morning." The decree also awarded appellant extended parenting time during the summer and provided for birthday and holiday parenting time.

In 2007, by agreement of the parties, the district court amended the summer parenting-time schedule, providing that the parties have alternating-week parenting time during that period. Sometime later, the parties informally agreed to allow appellant a few hours of parenting time on Wednesday evenings of the first week of the non-summer parenting-time schedule. However, this informal arrangement has not been adopted or ratified by any order in the district court file.

Appellant brought the motion at issue in this appeal on June 29, 2011. His motion requested amendment of the parenting-time schedule to grant him alternating-week parenting time during the school year. As part of the motion, appellant requested that the court interview the minor child in camera or appoint a guardian ad litem.

The district court found that appellant was requesting a substantial change in the parenting-time schedule, such that a change could only be made following a showing of endangerment and that appellant had not made the prima facie showing of endangerment necessary to warrant an evidentiary hearing. The district court denied appellant's motion to modify the parenting-time schedule. The district court also denied appellant's motion to interview the minor child in camera or to appoint a guardian ad litem.

This appeal follows.

D E C I S I O N

Appellant argues that his motion was improperly denied because the district court applied an incorrect standard to his motion. In the alternative, appellant argues that he made the requisite showing entitling him to an evidentiary hearing on his motion. Appellant also argues that the district court should have interviewed the minor child in camera or appointed a guardian ad litem.

I.

Appellant first challenges the district court's determination that it was required to apply the endangerment standard rather than the best-interests standard on his motion to modify.

The standard applicable to a requested change in parenting time is a question of law that this court reviews de novo. *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009).

Normally, the district court must modify an order granting or denying parenting time if it is in the best interests of the child. Minn. Stat. § 518.175, subd. 5 (2010). However, if the modification would "substantial[ly]" modify or "restrict" parenting time, the court may only grant the modification if parenting time with the nonmoving parent is likely to endanger the child's physical or emotional health, and if the restriction is in the child's best interests. *Id.*; *Lutzi v. Lutzi*, 485 N.W.2d 311, 315 (Minn. App. 1992) (treating substantial modifications of a parenting-time schedule as a "restrict[ion]" within the meaning of Minn. Stat. § 518.175, subd. 5); *see also* 2001 Minn. Laws ch. 51, §§ 8, at

145–48; 11 (neutralizing the language in Minn. Stat. §§ 518.175, .18 (2000) by removing distinctions in the statutory language between custodial and noncustodial parents).

A modification that simply reduces one party's parenting time is not necessarily a substantial modification nor is it a restriction. *Danielson v. Danielson*, 393 N.W.2d 405, 407 (Minn. App. 1986). To determine whether a requested modification is substantial or is a restriction, a district court should consider (1) the reason for the proposed change, and (2) the amount of the reduction. *Anderson v. Archer*, 510 N.W.2d 1, 4 (Minn. App. 1993). The magnitude of the proposed change is measured against a baseline set by the most recent "permanent and final order setting parenting time." *Dahl*, 765 N.W.2d at 123.

Typically, if a proposed change is made for the purpose of accommodating a change of circumstances, such as one parent's change of residence, it is less likely to be viewed as a substantial modification. *Cf. Anderson*, 510 N.W.2d at 4–5 (holding that the modification was not substantial because appellant's return to Minnesota meant that a strict reading of the stipulated parenting-time schedule was now reducing respondent's parenting time); *Danielson*, 393 N.W.2d at 406, 407 (holding that, due to relocation of the children to Montana, consolidation and change in the parenting-time schedule were not governed by the endangerment standard). *But see Clark v. Clark*, 346 N.W.2d 383, 385–86 (Minn. App. 1984) (holding that a gradual reduction in visitation from 14 weeks to 5 1/2 weeks per year during a 4-year period was a restriction, despite the removal of the child from Minnesota), *review denied* (Minn. June 12, 1984).

Here, the motion to change parenting time is founded upon the minor child's expressed desire to spend more time with appellant. There is no allegation that either parent has moved or that some other unforeseen change of circumstances has occurred. There have been gradual changes in the child's circumstances as she has gotten older, entered school, and the like. There have been no occurrences or developments which are alleged to have placed the child in any danger or at any untoward risk.

The most recent court-ordered parenting-time schedule provides the child with four overnights with her father every 14 days during the school year. It provides the child with 10 overnights with her mother every 14 days during the school year. The most recent court order does not include the Wednesday night dinners.

Appellant's request for an alternating-week parenting-time schedule would result in the child spending seven overnights with each parent every 14 days. If granted, the proposed schedule would almost double appellant's school-year parenting time and would reduce respondent's school-year parenting time by nearly a third. This would be a substantial modification. As noted by the district court, when the proposed modification is viewed from the perspective of the minor child, who has lived with the present schedule for most of her life, it is particularly substantial and would upend the long-established rhythm of her life.

The district court did not err in finding that the proposed modification would be substantial. Because the proposed modification is substantial, the district court did not err in applying the endangerment standard. *See* Minn. Stat. § 518.175, subd. 5; *Lutzi*, 485 N.W.2d at 315.

II.

When a proposed modification would substantially modify or restrict parenting time, the district court must follow a procedure "paralleling" that established in *Nice-Peterson v. Nice-Peterson*, 310 N.W.2d 471, 472 (Minn. 1981). *Lutzi*, 485 N.W.2d at 315–16 (applying the *Nice-Peterson* procedure in a case where a substantial modification of parenting time was sought). Under this procedure, the moving party must first support the motion with affidavits setting forth the facts supporting the motion. *Nice-Peterson*, 310 N.W.2d at 472. If the affidavits establish a prima facie case for granting the motion, then the district court should schedule an evidentiary hearing. *Id.* However, if the affidavits fail to establish a prima facie case for granting the motion, the district court must deny the motion. *Id.*

The district court's determination that the affidavits fail to establish a prima facie case for modification or restriction is reviewed for an abuse of discretion. *Boland v. Murtha*, 800 N.W.2d 179, 186 (Minn. App. 2011). However, "the district court must bear in mind that '[t]he concept of endangerment is unusually imprecise,' and '[a]ny threat of harm to a child might arguably constitute endangerment,' but 'the legislature likely intended to demand a showing of a significant degree of danger.'" *Id.* at 186 (quoting *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991)(quotations omitted)).

Appellant argues that a child's reasonable expression of preference is by itself sufficient to make a prima facie case for endangerment and that the district court abused its discretion by finding otherwise. However, in *Geibe v. Geibe*, this court stated that "a [child]'s choice by itself is generally not sufficient evidence of endangerment to require

an evidentiary hearing." 571 N.W.2d 774, 779 (Minn. App. 1997); *see also In re Weber*, 653 N.W.2d 804, 811 (Minn. App. 2002) (citing *Geibe*, 571 N.W.2d at 778–79).

Ross, upon which appellant relies, is easily distinguishable. It addressed a case where a 17-year-old teenager had already voluntarily moved from one parent's home to the other's and had suffered emotional distress at the home he left that had negatively affected school performance. *See* 477 N.W.2d at 754, 756 (noting also that the fact that the child was an older teenager was a "critical factor" and an "overwhelming consideration"). *Ross* is not dispositive where the minor child is seven or eight years old. *See Smith v. Smith*, 508 N.W.2d 222, 227 (Minn. App. 1993) (distinguishing *Ross* because the minor children were only seven and eight years old at the time of the hearing). Nor is *Ross* dispositive where the *sole* reason advanced for the modification is the child's preference. *See Weber*, 653 N.W.2d at 811 (distinguishing *Ross* from a case where a child's preference alone was advanced to establish endangerment, and noting that *Ross* should be understood as turning on many facts that were specific to that case) (citing *Geibe*, 571 N.W.2d at 779).

The sole reason advanced by appellant for arguing that the minor child is endangered by the present parenting-time schedule is that the minor child has expressed a desire to spend more time with him. The child here was eight years old when appellant brought the motion. The situation presented in this case is dissimilar to that in *Ross*. *Geibe*'s admonition that preference alone does not necessarily constitute endangerment applies here. *See* 571 N.W.2d at 779.

The district court did not abuse its discretion in holding that appellant failed to make a prima facie showing of endangerment and was consequently not entitled to an evidentiary hearing.

III.

Appellant complains that the district court did not address the best-interest factors laid out in Minn. Stat. § 518.17, subd. 1(a), but instead only made a conclusory determination that the proposed modification was not in the minor child's best interests.

Where the district court decides that a moving party has not made the prima facie showing necessary to obtain an evidentiary hearing, the district court need not make detailed findings on the best-interests factors. *Abbott v. Abbott*, 481 N.W.2d 864, 867–68 (Minn. App. 1992). Therefore, the district court was not required here to make findings on the best-interests factors, and its declination to make specific findings is not reversible error.

IV.

Minnesota law permits a district court to interview a child in chambers to determine the child's reasonable preferences as to custody issues if the court deems the child to be of sufficient age to express such a preference. Minn. Stat. § 518.166 (2010). It is within the district court's discretion to interview or decline to interview the minor child, and the decision is reviewed only for an abuse of discretion. *Knott v. Knott*, 418 N.W.2d 505, 509 (Minn. App. 1986).

Where the affidavits before the district court adequately recite the minor child's preferences, the district court does not abuse its discretion by relying on the preferences

expressed in the affidavits rather than interviewing the minor child. *Madgett v. Madgett*, 360 N.W.2d 411, 413 (Minn. App. 1985) (declining to conclude "that the trial court's refusal to place these children in a position of choosing between two loving parents, to possibly establish their father's prima facie case, was an abuse of discretion").

Here, the parties' affidavits address the minor child's expression of preference at great length. The district court, in the memorandum accompanying its order, acknowledged the minor child's stated desire as expressed in the affidavits. The district court did not abuse its discretion by declining to interview the minor child in camera or appoint a guardian ad litem.

Affirmed.