STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0752

In re the Custody of T.F.
Shawn Kostrzewski, petitioner,
Respondent,

vs.

Amy L. Frisinger, n/k/a Amy L. Budeau,
Appellant.

Filed December 3, 2012
Affirmed in part, reversed in part, and remanded
Chutich, Judge

Clay County District Court
File No. 14-FX-01-000471

Michael L. Jorgenson, Charlson & Jorgenson, P.A., Thief River Falls, Minnesota (for respondent)

Amy Budeau, Grand Junction, Colorado (pro se appellant)

Considered and decided by Hudson, Presiding Judge; Stauber, Judge; and Chutich, Judge.

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

CHUTICH, Judge

In this child-custody dispute, pro se appellant-mother, Amy Budeau, argues that the district court abused its discretion when it (1) denied her motion to hold respondent-father, Shawn Kostrzewski, in contempt of court; (2) denied her request to modify child

custody without first holding an evidentiary hearing; (3) issued an order modifying parenting time; and (4) imposed preconditions on her filing of future motions. We affirm the district court's findings that Kostrzewski's actions did not amount to contempt, and that Budeau failed to make a prima facie case for custody modification. We also affirm the clarification of the parenting-time order. Because certain procedural requirements were not followed, however, we reverse and remand the district court's order imposing limitations on Budeau's ability to file future motions.

FACTS

Budeau and Kostrzewski have one minor child together, T.F., who was born in November 1999. The parties reached agreement regarding custody of T.F. in August 2001, and the district court approved the agreement, granting Budeau physical custody, subject to Kostrzewski's parenting-time rights. In the years that followed, Budeau repeatedly failed to provide Kostrzewski his court-ordered parenting time. District court intervention was frequently necessary and Budeau's actions resulted in her twice being held in contempt of court.

In 2008, the district court found that the environment provided by Budeau endangered T.F.'s emotional health or impaired her emotional development such that the harm potentially caused by a change in custody was outweighed by the advantage of a change to the child. The district court awarded Kostrzewski sole physical custody of T.F., and reserved the issue of Budeau's parenting time. Budeau appealed this custody modification, and this court affirmed the district court's order. *See Kostrzewski v. Frisinger*, No. A08-2063 (Minn. App. 2009).

While her appeal of the 2008 custody modification was still pending, Budeau petitioned the district court to grant her parenting time. The district court denied Budeau's requests. In October 2009, although no court order had been issued, Kostrzewski consented to allow visits between Budeau and T.F. The child traveled from Minnesota to Budeau's residence in Colorado. Budeau failed to return T.F. to Kostrzewski in Minnesota as prearranged, claiming T.F. was sick. The district court was again required to intervene, and T.F. was returned to Minnesota. Thereafter, Budeau continued to interact and to communicate with the child in ways that frustrated Kostrzewski's custody and the court's orders.

In April 2011, Budeau filed a motion to modify custody. The district court denied her motion in August 2011, but did grant Budeau a specific parenting-time schedule (the 2011 Budeau parenting-time order). Two months later, Budeau, now pro se, brought a new motion to modify custody, together with a request to hold Kostrzewski in contempt of court. Budeau alleged that Kostrzewski was intentionally failing to get T.F. to the airport on a timely basis, interfering with her phone and Skype contact with T.F., and otherwise frustrating her parenting time. Budeau alleged that T.F.'s time with Kostrzewski endangered the child's emotional health and development, and that custody should therefore be modified.

In an order issued February 28, 2012 (the February 2012 order), the district court found that Kostrzewski had not intentionally frustrated Budeau's parenting time, and, accordingly, denied her motion to hold Kostrzewski in contempt of court. It did, however, grant Budeau two days of compensatory parenting time, and ordered both

parents to have T.F. to the airport two and a half hours before any scheduled flight. Additionally, the district court found that Budeau failed to make a prima facie case for a change of custody, and, without holding an evidentiary hearing, denied her motion to modify custody. The district court also modified slightly the phone and Skype provisions of the 2011 Budeau parenting-time order, and specifically ruled that Budeau "may not file another motion for change of custody with the [c]ourt for at least one year, without first seeking and receiving formal permission of the [c]ourt to file such a motion." Budeau appeals this February 2012 order.

In May 2012, after filing this appeal, Budeau sent the district court a letter seeking clarification of the February 2012 order addressing when she may see T.F. when Budeau is visiting the Fargo/Moorhead area. On June 5, 2012, the district court issued an order in response. Budeau also appeals this June 5, 2012 order.

D E C I S I O N

I. Contempt

Budeau first asserts that the district court erred in declining to hold Kostrzewski in contempt. As a threshold matter, she contends that the district court "erred in not looking at all the statements brought forth in the motion for contempt." Budeau also contends that the district court's finding of fact that Kostrzewski did not intentionally violate the 2011 Budeau parenting-time order was not supported by the record. We disagree with both contentions.

In reviewing a district court's decision whether to hold a party in contempt, we review factual findings for clear error, and the district court's "decision to invoke its

contempt powers is subject to reversal only . . . [for] an abuse of discretion." *Mower Cnty. Human Servs. v. Swancutt*, 551 N.W.2d 219, 222 (Minn. 1996). Evidentiary rulings are within the district court's discretion, and will generally be upheld absent an abuse of discretion. *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001).

The record shows that the district court fully considered Budeau's affidavit and legitimately disregarded those portions that were based on inadmissible hearsay. *See* Minn. R. Evid. 602 (stating that testimony must be based on personal knowledge), 802 (noting that, generally, hearsay is inadmissible). The record also supports the district court's finding that Kostrzewski did not intentionally violate the 2011 Budeau parenting-time order by purposefully interfering with T.F.'s phone communications or travel. The 2011 order allowed phone and Skype contact between Budeau and T.F. every other day. Kostrzewski's affidavit asserted that Budeau attempted to call or contact T.F. multiple times every day, and explained that he was not purposefully making the child unavailable.

Regarding the missed or delayed flights, Kostrzewski explained that unanticipated delays occurred at the airport, and the district court found that the flight problems were the result of the airline's staffing issues. Budeau does not point to any evidence in the record suggesting that the district court's factual findings were clearly erroneous. The district court carefully considered the parties' affidavits, and simply found Kostrzewski's claims regarding communications and flights to be more credible. *See* Minn. R. Civ. P.

52.01 ("[D]ue regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses.").

Moreover, because the purpose of a civil contempt order is to ensure *future* compliance with a court's order, not to punish for a past failure, the district court acted well within its discretion in denying Budeau's request. *See Meyer v. Meyer*, 492 N.W.2d 272, 273–74 (Minn. App. 1992) ("Civil contempt proceedings are designed to induce future performance of a valid court order, not to punish for past failure to perform."). Instead, the record shows that the district court treated Budeau fairly, especially considering her lengthy and contentious history with the court. The district court addressed each specific matter set forth in the contempt motion, modified the 2011 Budeau parenting-time order to address these concerns, and even awarded Budeau two compensatory parenting days. Therefore, we affirm the district court's refusal to hold Kostrzewski in contempt.

II. Custody Modification

Budeau next contends that the district court abused its discretion when, without first granting an evidentiary hearing, it denied her motion to modify custody. She argues that, if taken as true, the allegations in her affidavit alone were sufficient to establish a prima facie case that Kostrzewski's physical custody endangers T.F.'s physical and emotional health or impairs her development. Her claim is unavailing.

Minnesota law sets a high standard for custody-modification motions brought "within two years after disposition of [a] prior [modification] motion on its merits." Minn. Stat. § 518.18(b) (2010). In fact, the law prohibits parties from filing a subsequent

custody-modification motion in that time period unless "the court finds that there is persistent and willful denial or interference with parenting time, or has reason to believe that the child's present environment may endanger the child's physical or emotional health or impair the child's emotional development." *Id*. (c) (2010).

Because Budeau filed her October 2011 custody-modification motion only two months after the district court decided her previous motion, she must show by a preponderance of the evidence, based on facts that arose *since* the previous order or that were unknown to the court at that time, that Kostrzewski willfully interfered with her parenting time or that T.F. is presently endangered. *See id.* (d) (2010) (stating that the district court shall not modify custody unless warranted "upon the basis of facts . . . that have arisen since the prior order or that were unknown to the court at the time of the prior order").

We review an order denying a motion to modify custody without an evidentiary hearing in three steps. First, we review de novo whether the district court treated the parties' affidavits properly. *Boland v. Murtha*, 800 N.W.2d 179, 185 (Minn. App. 2011). The district court must accept the facts in the moving party's affidavits as true, disregard the contrary allegations in the nonmoving party's affidavits, and consider the nonmoving party's allegations only if they explain or contextualize the allegations contained in the moving party's affidavits. *Id*.; *see also Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007).

Second, we review the district court's determination whether the moving party established a prima facie case for modification for an abuse of discretion. *Murtha*, 800

N.W.2d at 185. A prima facie case for an endangerment-based modification of custody requires the moving party to demonstrate four elements:

> (1) a change in the circumstances of the child or custodian; (2) that a modification would serve the best interests of the child; (3) that the child's present environment endangers her physical or emotional health or emotional development; and (4) that the harm to the child likely to be caused by the change of environment is outweighed by the advantage of change.

Geibe v. Geibe, 571 N.W.2d 774, 778 (Minn. App. 1997). Endangerment requires a showing of a "significant degree of danger," *Ross v. Ross*, 477 N.W.2d 753,756 (Minn. App. 1991), and the danger may be purely to emotional development, *see Eckman v. Eckman*, 410 N.W.2d 385, 389 (Minn. App. 1987).

"Finally, we review de novo whether the district court properly determined the need for an evidentiary hearing." *Boland*, 800 N.W.2d at 185. "Whether a party makes a prima facie case to modify custody is dispositive of whether an evidentiary hearing will occur on the motion." *Szarzynski*, 732 N.W.2d at 292 (citing *Morey v. Peppin*, 375 N.W.2d 19, 25 (Minn. 1985) and *Nice–Petersen v. Nice–Petersen*, 310 N.W.2d 471, 472 (Minn. 1981)).

Applying these principles here, we conclude that the district court properly denied Budeau's motion to modify custody without granting her an evidentiary hearing. The record shows that the district court examined and weighed the submitted affidavits in

accordance with the procedures established by caselaw.[1] Even taking the new facts alleged in Budeau's affidavit as true, nothing implied that T.F. was in a "significant degree of danger" by remaining with Kostrzewski. *See Ross*, 477 N.W.2d at 756.

Further, the district court did not abuse its discretion in concluding that Budeau's allegations regarding the missed flight and phone calls did not "sufficiently allege that the [c]hild's circumstances have changed in such a way as to seriously endanger [the child's] physical or emotional health to warrant an evidentiary hearing on [Budeau's] motion to modify custody." Because the district court properly concluded that a prima facie case was lacking, it appropriately denied the motion without an evidentiary hearing. *See Boland*, 800 N.W.2d at 186.

III. The Order Clarifying Budeau's Parenting Time

Budeau alleges that the district court's June 5, 2012 order erroneously amended the February 2012 order without a proper motion before the court or without testimony from either party.

Generally, "the filing of a timely and proper appeal suspends the trial court's authority to make any order that affects the order or judgment appealed from, although the trial court retains jurisdiction as to matters independent of, supplemental to, or collateral to the order or judgment appealed from." Minn. R. Civ. App. P. 108.01, subd. 2. An order by the district court does not, however, "affect" an order on appeal, for purposes of Minn. R. Civ. App. P. 108.01, subd. 2, if the new order "does not require the

[1] Budeau's contention that the district court erred in declining to consider previously submitted letters and e-mails is meritless. Minn. Stat. § 518.185 (2010) specifically requires the submission of affidavits.

district court to consider the merits of the issue on appeal." *Perry v. Perry*, 749 N.W.2d 399, 403 (Minn. App. 2008). A clarification of a judgment or order is not a challenge to its validity or merits, and "does not constitute an amendment of it or the findings upon which it is based." *Stieler v. Stieler*, 244 Minn. 312, 319–20, 70 N.W.2d 127, 132 (1955). Instead, "a clarification serves only to express more accurately the thought which, at all times, the judgment was intended to convey." *Id*. at 320, 70 N.W.2d at 132. Accordingly, it is "well within the province," of a judge to clarify previous orders, "particularly where the interests of justice require that the parties be definitely apprised as to the full meaning of the court's determination." *Id*.

The record shows that Budeau, by a May 2012 letter to the district court, sought clarification of a paragraph of the February 2012 order regarding in-town visitation. The letter did not challenge the validity of the provision or its merits. In the June 5, 2012 order, the district court responded to her request and confirmed that Budeau's interpretation of the in-town visitation provision was incorrect and clarified what the provision conveyed. The district court stated that "the provision for visits in the Fargo-Moorhead area is meant to add visitation during the school year during periods when [Budeau] otherwise would have no visitation with the child." Under these circumstances, where Budeau sought and received guidance about a provision of the February 2012 order that granted her additional time to see T.F., we conclude that the June 2012 order was a clarification independent of the matter on appeal and was therefore well within the district court's discretion.

IV. Limitation on Future Custody Modification Motions

Without citing any authority and without finding that Budeau is a frivolous litigant under Minn. R. Gen. Pract. 9, the district court ordered that Budeau must, for one year, obtain the court's permission before filing future motions. Budeau challenges this limitation, arguing that the district court failed to satisfy Minn. R. Gen. Pract. 9, which addresses frivolous litigation.

Minn. R. Gen. Pract. 9.01 provides that a district court may, on its own motion, impose preconditions on a party's ability to file new motions, so long as the requirements in rules 9.01–9.07 are satisfied. These requirements include that any orders imposing preconditions on filing new motions be entered "with an express determination that no less severe sanction will sufficiently protect the rights of other litigants, the public, or the courts." Minn. R. Gen. Pract. 9.02(c).

In *Szarzynski*, the district court, "[w]ithout citing any authority," ruled a father to be a "nuisance litigant" and required him to obtain the court's permission before filing future motions. 732 N.W.2d at 294. The father challenged the ruling, contending that it failed to satisfy Minn. R. Gen. Pract. 9. *Id*. We noted that, while the district court found the father to be a nuisance litigant, it did so without reference to rules 9.01–.07; without addressing the definition of a frivolous litigant under rule 9.06(b); and without finding that a less severe sanction would not be sufficient. *Id*. at 294–95. Because it appeared that the district court did not consider the procedural requirements of rules 9.01–.07, we reversed and remanded for the district court to address whether rules 9.01–9.07 were actually satisfied. *Id*. at 295.

As in *Szarzynski*, the district court here did not cite authority for the precondition or limitation it imposed, made no express determination that lesser sanctions would not suffice, and did not otherwise refer to rule 9. Given Budeau's history in this matter, the limitations placed on her by the district court may very well be warranted and justified. Because the procedural safeguards of rule 9 were not satisfied, however, we must reverse this part of the district court's order and remand for proceedings consistent with this decision. We leave it within the district court's discretion whether to reopen the record on remand.

Affirmed in part, reversed in part, and remanded.