STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0969

In re the Marriage of:
Kathryn M. Goodyear f/k/a Kathryn M. PeKarna, petitioner,
Appellant,

vs.

Matthew Dewitt PeKarna,
Respondent.

Filed December 30, 2013
Affirmed as modified
Bjorkman, Judge

Carver County District Court
File No. 10-FA-03-335

John G. Westrick, Nathan T. Griffin, Westrick & McDowall-Nix, P.L.L.P., St. Paul, Minnesota (for appellant)

Peter J. Horejsi, Peter J. Horejsi, PLLC, Bloomington, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Minge, Judge.*

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

BJORKMAN, Judge

In this child-custody and -support dispute, appellant argues that the district court (1) abused its discretion by modifying child support effective to a date before respondent

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

requested modification; (2) abused its discretion by denying her custody-modification motion; and (3) should have made specific findings on the issue of the children's Roth IRA college-fund accounts. Because the law does not permit retroactive modification of child support to a period of time before a modification motion is filed, the district court abused its discretion by doing so. But because we conclude that the district court's determinations are otherwise sound, we affirm as modified.

FACTS

In 2005, the marriage between appellant Kathryn Goodyear (mother) and respondent Matthew PeKarna (father) was dissolved. The dissolution judgment granted father sole legal and physical custody of the parties' two children, and mother was ordered to pay child support, one-half of the children's unreimbursed medical expenses, and one-half of their school tuition and expenses. The parties' daughter turned 18 in February 2013. Their son is 17 years old. Father and the children currently reside in Minnesota; mother lives in Texas.

Mother's child-support obligation was initially set in the dissolution judgment based on her reported net monthly income of $7,227 as a self-employed consultant. The judgment obligated her to inform father of any change in her employment. Father requested current tax returns from mother several times with no response. In October 2012, mother disclosed for the first time that she began working at Optum, a division of United Healthcare Group, in 2010 and earned over $140,000 in wages that year. On January 28, 2013, father brought a motion to modify mother's child-support obligation based on her newly disclosed income.

In response, mother moved to modify custody of their son (the child), arguing that transferring custody to her would be in the child's best interests and in accord with his preferences, and requesting a neutral interview of the child. She also alleged that father depleted the money in the children's Roth IRA accounts, and requested an order appointing an independent administrator for the accounts and requiring father to repay the missing funds.[1]

The district court granted father's motion, making mother's new monthly child-support obligation of $1,631 effective as of January 1, 2010, and denied mother's motion without an evidentiary hearing. Mother requested permission to seek reconsideration of the provision in the dissolution judgment that required father to obtain health insurance for the children. The district court denied mother's request because she did not raise the issue in her original motion.[2] This appeal follows.

D E C I S I O N

I. The district court abused its discretion by making mother's new child-support obligation retroactive to a date prior to service of father's modification motion.

A district court may modify a child-support award in its discretion; we will only disturb the award if the court made findings unsupported by the evidence or improperly applied the law. *Hagen v. Schirmers*, 783 N.W.2d 212, 215 (Minn. App. 2010).

[1] Mother also argued that father should not be awarded $14,065 in extraordinary expenses. But there is no evidence in the record that father actually received such an award. Mother waived this claim at oral argument on appeal.

[2] An order denying permission to move for reconsideration is not appealable, and is not within the scope of review of the underlying order. *Baker v. Amtrak Nat'l R.R. Passenger Corp.*, 588 N.W.2d 749, 755 (Minn. App. 1999).

Modification may be made retroactive "with respect to any period during which the petitioning party has pending a motion for modification but only from the date of service of notice of the motion on the responding party." Minn. Stat. § 518A.39, subd. 2(e) (2012); *Leifur v. Leifur*, 820 N.W.2d 40, 43 (Minn. App. 2012) (holding that district court had no authority to make maintenance modification retroactive to a date before the date that husband served notice of motion even though parties had agreed to an earlier retroactive date in mediation).

Mother argues that the district court improperly applied the law by making her new child-support obligation retroactive to 2010—well before father served his modification motion. Father asserts that mother's failure to timely disclose her employment constitutes fraud on the court and that principles of equity and the court's inherent authority permit retroactive modification of her support obligation to 2010. We disagree. Under an older version of the statute, modification could be made retroactive to an earlier date if "the party seeking modification was precluded from serving a motion by reason of . . . a material misrepresentation of another party . . . and that the party seeking modification, when no longer precluded, promptly served a motion." *Gully v. Gully*, 599 N.W.2d 814, 821 (Minn. 1999) (quoting Minn. Stat. § 518.64, subd. 2(d)(1) (1998)). But in 2005, the legislature removed this exception to the prohibition on pre-motion retroactivity. 2005 Minn. Laws ch. 164, § 10, at 1894-95.

We note the district court's concern that mother did not comply with its judgment requiring her to timely disclose changes in her employment status or income. But the modification statute is clear. The court had no legal authority to make the modification

retroactive beyond January 28, 2013. And we observe that parties and the district courts have other available tools to address a party's noncompliance with a court order. *See* Minn. Stat. §§ 518.145, subd. 2(2)-(3) (permitting the district court to reopen an existing family law ruling and relieve a party from a judgment because of newly discovered evidence or fraud, misrepresentation, or misconduct by an adverse party), 518A.38, subd. 6 (stating that section 518.145 applies to child-support awards), 518A.71 (providing rules for contempt in cases where support payments are ordered) (2012).

In sum, the district court committed legal error by retroactively modifying the child-support award to 2010. Accordingly, we modify the district court's order so that mother's new child-support obligation is retroactive to the date father served his motion, January 28, 2013.

II. The district court did not abuse its discretion by denying mother's motion to modify custody.

Under the portion of the custody modification statute relevant to this appeal, a party seeking to modify custody must establish that (1) a change in the circumstances of the child or custodian has occurred since the disposition of the court's last order; (2) modification would serve the child's best interest; (3) the child's present environment endangers his or her physical or emotional health or development; and (4) the harm to the child caused by the change of environment is outweighed by the benefits of the change. Minn. Stat. § 518.18(d)(iv) (2012). In order to obtain an evidentiary hearing on a motion to modify custody, the moving party must make allegations that, if true, would allow the district court to modify custody. *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472

(Minn. 1981); *see also Boland v. Martha*, 800 N.W.2d 179, 182-85 (Minn. App. 2011) (describing the process for modifying custody). This prima facie showing serves to promote continuity and stability in a child's relationships. *Madgett v. Madgett*, 360 N.W.2d 411, 413 (Minn. App. 1985). A child's reasonable preference regarding custody is one factor for the district court to consider, Minn. Stat. § 518.17, subd. 1(2) (2012), and a court has discretion to interview the child to ascertain his preference. Minn. Stat. § 518.166 (2012); *Madgett*, 360 N.W.2d at 413.

We review custody-modification decisions for an abuse of discretion. *Frauenshuh v. Giese*, 599 N.W.2d 153, 156 (Minn. 1999). A district court abuses its discretion when it makes findings that are unsupported by the evidence or improperly applies the law. *Id.* Findings of fact are reviewed for clear error and the record is viewed in the light most favorable to the findings. *Id.*

The district court denied mother's motion to modify custody because she did not make allegations that, if true, would establish a prima facie case of endangerment or that a transfer of custody would otherwise be in the child's best interests. The district court did not make specific findings regarding mother's request for appointment of a neutral party to interview the child. Mother argues that she would have established a prima facie case for modification if the child had been interviewed about his custody preference. She also challenges the district court's failure to make particularized findings. We are not persuaded.

In support of her motion, mother submitted her affidavit alleging that father is "rarely there for [the child]," that the child is "uncomfortable living alone with [father],"

and that father is often gone during the night leaving the child alone to care for himself. These allegations alone do not reveal serious danger of harm to the child's physical or emotional health or development. *See In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002). Mother cites *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991), for the proposition that a child's preferences are sufficient to change custody. We disagree. *Ross* does not change the requirement that a party seeking to modify custody of a child based on endangerment must make a prima facie showing of endangerment. *Id.* (stating that modification requires a showing of endangerment, which means showing a "significant degree of danger"); *see also Geibe v. Geibe*, 571 N.W.2d 774, 779 (Minn. App. 1997) ("[A] teenager's choice by itself is generally not sufficient evidence of endangerment to require an evidentiary hearing."). And even if mother's legal argument had merit, there is no direct evidence that the child wants a change in custody; mother's affidavit merely states that she is requesting a change in custody "[p]ursuant to [the child's] wishes."[3]

Because mother does not allege or present evidence that the child's current circumstances endanger his physical or emotional well-being, she has not established a prima facie case for custody modification. In the absence of a prima facie showing, the district court did not abuse its discretion by declining to interview the child. And because

[3] The record shows that the child wanted to remain in Minnesota, not move to Texas, where mother lives. At oral argument to this court, mother asserted that she would move to Minnesota, and was seeking custody here. The record does not show that mother made this representation in the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (stating that, on appeal, a party cannot argue an issue that was presented to the district court on a theory that was not presented to the district court).

mother did not establish a prima facie case, the district court was not required to make particularized findings in denying her motion. *See Abbott v. Abbott*, 481 N.W.2d 864, 867 (Minn. App. 1992).

III. The district court did not err in denying mother's motion to appoint an independent person to administer the Roth IRA college funds without making specific findings.

At the time of the dissolution, the district court ordered father to maintain the children's college funds in Roth IRA accounts. The value of these funds has decreased over the years. Mother's notice of motion in the district court asserted that father dissipated the money, and requested appointment of an independent trust administrator and an order requiring father to repay the money. But mother neither briefed these arguments in the district court nor presented the issues in oral argument to the court. Because no argument was presented, and the district court did not address issues related to the college funds, we will not consider them on appeal. *Thiele*, 425 N.W.2d at 582 ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." (quotation omitted)).

In conclusion, we affirm the district court's denial of the motion to modify custody. We also affirm the new child-support award but modify the district court's order to make mother's new obligation retroactive to the date father served his motion, January 28, 2013.

Affirmed as modified.