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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1460

In re the Marriage of:
Anna Modeo, petitioner,
Respondent,

vs.

Anthony Keith Price,
Appellant.

Filed April 16, 2018
Affirmed
Randall, Judge[*]

Hennepin County District Court
File No. 27-FA-10-1949

Anna Modeo, Bloomington, Minnesota (pro se respondent)

Anthony Keith Price, Roseville, Minnesota (pro se appellant)

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Randall, Judge.

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

UNPUBLISHED OPINION

RANDALL, Judge

In this child-custody dispute, pro se appellant-father challenges the district court's denial of an evidentiary hearing on his motion to modify custody and parenting time, arguing that the district court 1) gave the parties inadequate time to review a brief focused assessment (BFA) before a review hearing, 2) failed to accept his proffered evidence as true, and erred in finding that there was not a prima facie case for modification, and 3) erred in finding that the parties' 15-year-old son did not have sufficient ability and maturity to express an independent and reliable custodial preference. We affirm.

FACTS

Appellant-father Anthony Keith Price and respondent-mother Anna Modeo share a 15-year-old son and a 13-year-old daughter, who has special needs and cognitive developmental delays. The parties divorced by stipulated judgment and decree entered on September 15, 2010. The issues of permanent custody and parenting time were reserved for a trial, which was held in January 2011. In the March 30, 2011 judgment awarding custody and parenting time, the district court granted sole legal and sole physical custody of the children to mother, subject to father's supervised parenting time. The court ordered that father could commence unsupervised parenting time as recommended by the court-appointed guardian ad litem. Father appealed the order, but his appeal was dismissed.

The parties later mediated and stipulated to a permanent, unsupervised parenting-time schedule for father. In the February 26, 2014 stipulated order, the court ordered unsupervised parenting time for father with both children every other weekend from Friday

after school until Monday morning, and on Wednesday evenings. In October 2015, the parties also stipulated to a decrease in father's child support obligation, which mother testified was based on the agreement that father would follow this parenting-time schedule on a permanent basis so that mother could work every other weekend.

In June 2017, at father and son's request, mother allowed son to stay with father from the time school ended in early June through August 21. On July 18, father filed a motion to modify custody and parenting time, seeking sole legal and sole physical custody of son, and requesting to open-enroll son in a different high school. Father proposed afternoon visits between mother and son. Father also requested to modify parenting time with daughter to afternoons only, arguing that he could not manage her special needs overnight. Father submitted affidavits from son and father, as well as exhibits, including excerpts of son's medical records. Father also requested ex parte temporary relief, which the district court denied, but the court set the matter on for an accelerated hearing.

Father filed a second request for ex parte relief on July 19, alleging that mother was demanding son's immediate return despite the parties' agreement otherwise. The district court ordered that son continue parenting time with father for the summer, pending the result of the accelerated hearing. At the July 26 accelerated hearing, father argued that son wants to live with him, and that mother is abusive toward son, and that son's mental health is made worse by living with mother. Mother maintained that father was trying to alienate son from her, and that son's preferences were not independent or reliable. Mother indicated that she had only seen son once in the last month and that son was not responding to her texts. The parties agreed that son is in ongoing therapy.

On July 27, pending a final decision on father's modification motion, the district court ordered that son remain with father for the summer but that son could communicate with mother at any time. Father's parenting time with daughter remained unchanged. In a separate written order, the district court appointed a neutral expert to conduct a BFA to review son's ability, age, and maturity to express an independent and reliable custodial preference, to determine what son's preference would be, and to consider what mother's parenting time would be if custody was changed. The court ordered that the BFA be provided to the parties no later than August 23 and scheduled a review hearing for August 24.

Both parties appeared at the review hearing; father appeared with counsel. The parties received the BFA report shortly before the hearing and had a brief amount of time to review it. The district court denied father's motion and request for an evidentiary hearing, finding no prima facie case of endangerment, and finding that son lacked the maturity and ability to express an independent and reliable custodial preference. The court's August 28, 2017 written order retained sole legal and sole physical custody for mother and unsupervised parenting time for father. The district court denied father's request to end overnights with daughter, and instead, ordered that father could utilize a personal care attendant (PCA) to assist with daughter's needs during his parenting time.

Father appeals and seeks a remand to the district court for an evidentiary hearing.

DECISION

I. Father's challenge to the inadequate time to review the BFA.

Father argues that the trial court committed reversible error by failing to provide the parties with sufficient time to review the BFA before the start of the August 24 hearing. Father suggests that the parties had "a few minutes" to review the BFA before the hearing before the district court immediately denied his modification motion. The record is unclear about how much time the parties were given to review the BFA other than calling it "brief." At the outset of the hearing, the district court noted that "the parties just received th[e BFA] today, which I realize it's not been a lot of time to kind of look through and digest it." But the court went on "to confirm that everybody's got it and has reviewed it." Father's lawyer responded, "We have received it, Your Honor, and we've briefly reviewed it, yes." Mother also indicated that she had had enough time to review the BFA.

Shortly thereafter, after explaining its rationale, the district court denied father's modification motion, denied his request for an evidentiary hearing, and found that son was not able to express an independent and reliable custodial preference. Father expressed his disagreement with the court's decision and stated, "[N]ow I don't have this report memorized; it's only been handed to us since right before we came in the room, but I read enough of it. . . ." Father then argued that the report did not accurately reflect son's wishes or what son told father that he told the evaluator.

The record shows that father mentioned the brief amount of time that he had to review the BFA at the district court but that he did not directly assert that the time allowed was inadequate. Father's lawyer affirmatively indicated to the court that father received

the BFA and reviewed it briefly before the hearing. Based on this record, the issue was not raised below. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that generally appellate courts address only those questions that were presented to and considered by the district court). Further, father fails to provide appropriate legal authority or analysis for this issue on appeal. Issues not briefed on appeal are not properly before the appellate court. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

Even if we elected to reach the merits of this issue, we could not conclude on this record that the district court erred. While the better practice may have been for the district court to give the parties additional time to review the BFA prior to the hearing, it was not plain error that the court failed to do so because the court asked both father and father's attorney about proceeding with the hearing. Both parties affirmed to the court that they received the BFA and had time to review it. Father had the opportunity to argue about the substance of the BFA and why the court should not rely on it.

II. The district court did not err in denying father's motion to modify custody and parenting time without an evidentiary hearing.

"Appellate review of custody modification . . . is limited to considering 'whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law.'" *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quoting *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996) (quoting *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985))). "Appellate courts set aside a district court's findings of fact only if clearly erroneous, giving deference to the district court's opportunity to evaluate witness credibility. Findings of fact are clearly erroneous

where an appellate court is left with the definite and firm conviction that a mistake has been made." *Id.* (quotation and citation omitted).

On appeal from an order denying a custody modification, without an evidentiary hearing,

> First, we review de novo whether the district court properly treated the allegations in the moving party's affidavits as true, disregarded the contrary allegations in the nonmoving party's affidavits, and considered only the explanatory allegations in the nonmoving party's affidavits. Second, we review for an abuse of discretion the district court's determination as to the existence of a prima facie case for the modification or restriction. Finally, we review de novo whether the district court properly determined the need for an evidentiary hearing.

Boland v. Murtha, 800 N.W.2d 179, 185 (Minn. App. 2011).

A. The district court accepted father's allegations as true but considered them within the context of other reliable information.

To make a prima facie case for modification, the moving party submits an affidavit asserting facts that, if true, would support modification. For the purposes of deciding whether to hold an evidentiary hearing, the district court must accept these assertions as true. *Geibe v. Geibe*, 571 N.W.2d 774, 777 (Minn. App. 1997). The district court must disregard contrary allegations in responsive affidavits, except to the extent that they explain or contextualize the moving party's affidavit. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007). The "court may consider evidence from sources other than the moving party's affidavits in making its determination." *Geibe*, 571 N.W.2d at 777; *see Axford v. Axford,* 402 N.W.2d 143, 145 (Minn. App. 1987) (finding no requirement for an evidentiary hearing where "appellant's affidavit was devoid of allegations supported by

any specific, credible evidence"); *Krogstad v. Krogstad*, 388 N.W.2d 376, 383 (Minn. App. 1986) (upholding denial of an evidentiary hearing where the court found that appellant failed to make a prima facie case in part based on a court services study).

Here, in denying father's motion to modify custody and parenting time without an evidentiary hearing, the district court stated on the record:

> I am required to assume that . . . the information you have given me is true. . . . I'm also allowed to look at other information in making that assessment. And what I conclude after reading through all of it is that you have not made a prima facie case to modify custody. So we wouldn't have to have an evidentiary hearing on the custody issues.

Father argues that that the district court erred by assuming that the evidence provided by father was not true, and by overlooking eight exhibits that father submitted with his motion. The record does not support father's argument. The record shows that the district court and father's lawyer assured father at the hearing that the court had carefully reviewed all of the documentation he submitted. The court's August 28, 2017 written order also explained that the court must presume that father's allegations are true but that "allegations must be considered along with other information available to the court," including father's affidavit, the child's affidavit, and the evaluator's report.

Our review of the record indicates that the district court undertook a thoughtful analysis of all of the documentation submitted, including father's and son's affidavits, and accepted father's allegations as true, but also considered them in light of the BFA and other evidence in the record, including son's complete medical records. The court was permitted to review this other documentation to conceptualize father's general allegations and put

them into context, and by doing so, the district court determined that father's allegations were unsubstantiated. The court's review of father's allegations was proper.

B. The district court did not abuse its discretion in finding no prima facie case of endangerment.

The district court must conduct an evidentiary hearing when the party seeking modification makes a prima facie case for modification. *Goldman*, 748 N.W.2d at 284; Minn. Stat. § 518.18(d) (2016). Under Minn. Stat. § 518.18(d), a prima facie case to modify custody based on endangerment requires the movant to show (1) a significant change of circumstances, (2) that modification is necessary and in the child's best interests, (3) that the child's present environment endangers his physical or emotional health or emotional development, and (4) that the benefit of modification outweighs the detriment to the child. *Goldman*, 748 N.W.2d at 284.

Father argues that the district court erred in finding that father did not allege facts which, if true, show endangerment, and that the court failed to consider all of the evidence that father provided. Father's affidavit alleged "danger" if mother retains sole legal and physical custody of son and alleged domestic abuse of son by mother, but did not give specific examples. Father alleged that son "has been abused enough to feel sad and depressed, to want to hurt himself," and that son has been suicidal living with mother. Father also suggested that son "does not have such feelings of self-harm when he is with [father]." Father acknowledges, and the record shows, that father made similar allegations against mother during the original custody and parenting time trial, which were found to

be uncorroborated. The district court noted at the review hearing that father's action was an attempt to re-litigate issues that were previously addressed.

Son stated in his affidavit that he wants to live with father and that he does not feel sad or bad or want to hurt himself when he lives with father. Son also indicated that mother has angry outbursts and that he feels safer with father. Father suggested that son was forced to spend time with his special needs sister and to be the head of mother's household.

Father's affidavit selectively cited to son's medical records from 2012 to 2017, complete versions of which were reviewed for the BFA. Father alleged that mother has not followed through with recommendations for son's mental health and well-being, including therapy, pharmacotherapy, and a psychological evaluation. Father argued that son was prescribed an antidepressant but that mother will not give it to him. Son also claimed that mother refused to give him the antidepressant. Father's affidavit also acknowledged that, as of May 2017, son was regularly seeing a therapist and that doctors reported an improved outlook and a relaxed concern for suicidality.

As we previously concluded, the record shows that the district court accepted father's and son's allegations as true, but considered them in light of the BFA and supporting documentation. The BFA opined that son expressed frustration at mother's rules and expectations, but said that son was matter-of-fact about returning to mother's home if he was required to do so. Further, while father and son made general allegations about mother's "verbal abuse," the BFA indicated that they only offered "vague descriptions of [mother's] short temper [and] frequent yelling" and that mother called father "disparaging names."

The BFA evaluator reviewed son's complete medical records and noted that son was prescribed an antidepressant, but explained that mother wanted to try therapy and exercise first because of the potential side effects. In speaking with the BFA evaluator, son denied current suicidal ideation or thoughts of self-harm, a finding supported by son's current therapist. The BFA concluded: "Nowhere in the records provided is it suggested that [mother] has been medically neglectful or verbally abusive to [son]."

The district court accepted father's allegations as true that son has received mental health services on and off since 2014, that some of his treatment has been inconsistent, but that son is now engaged in ongoing therapy. The court also acknowledged father's concern that mother does not follow through with son's treatment recommendations. But after reviewing the affidavits, BFA, and supporting documentation, the district court found that although son has "significant troubles with his mental health . . . these issues do not appear to be due to his home environment or any lack of medical attention by the mother and do not rise to the level of endangerment on her part." The court also considered the general allegations of abuse before concluding that son's affidavit was devoid of any suggestion of domestic abuse by mother. The district court's reasoning was sound and supported by the entire record. The district court did not abuse its discretion in holding that father failed to make a prima facie case for modification based on endangerment.

C. The district court did not err in denying an evidentiary hearing.

"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. Because we have concluded that the district court did not abuse its discretion in finding

that father failed to make a prima facie case of endangerment to justify custody modification, we also conclude the district court did not abuse its discretion in denying father's request for an evidentiary hearing. *See Nice–Petersen v. Nice–Petersen*, 310 N.W.2d 471, 472 (Minn.1981) (finding no abuse of discretion in denying an evidentiary hearing when affidavits failed to set forth a change of circumstances justifying modification); *Englund v. Englund*, 352 N.W.2d 800, 802 (Minn. App. 1984) (finding that no evidentiary hearing is required "where the affidavits do not contain sufficient justification for the modification").

In addition, father contends that son was integrated into his household, as provided under Minn. Stat. §§ 518.18(d)(iii). First, the record does not show that father raised this issue at the district court, and therefore it is not before us on appeal. Second, although mother allowed son to stay with father for the summer, there is no support in the record that mother consented to a permanent change of legal or physical custody. The district court found, and the record supports, that mother wanted to return to the preexisting custody and parenting time arrangement. If we were reach the merits of this issue, the record would show that father failed to allege facts, which, if true, would show integration so as to warrant an evidentiary hearing. *See, e.g.*, *Englund*, 352 N.W.2d at 803 (denying an evidentiary hearing where son's two-month residence with mother did not establish an "integration period," and there was no evidence that father consented to the integration).

Based on the court's careful consideration of the circumstances presented in this record, the district court did not err in denying father's motion to modify custody without holding an evidentiary hearing.

III. The record supports the district court's finding that son lacked the ability and maturity to express an independent and reliable custodial preference.

The "reasonable preference of the child" is a statutory best-interest factor that a district court weighs if the court determines that the child has "sufficient ability, age, and maturity to express an independent, reliable preference." Minn. Stat. § 518.17, subd. 1(a)(3) (2016). "A child's strong preference to change residence after a custody decree can constitute a change in circumstances." *Geibe*, 571 N.W.2d at 778. However, "preferences alone do not provide sufficient evidence of endangerment to mandate a hearing . . . and the court may deny a hearing where it is obvious from the record that a child's stated preference results from manipulation by the moving party." *Id.* (citation omitted).

Here, the record, particularly son's affidavit, shows that son expressed a preference to live with father and to attend a different high school. At the hearing, the district court noted that "if a 15-year-old is saying he wants to live with a parent, we do give a lot of consideration to that, you know, preference if it's an independent preference." However, after reviewing the BFA, the court concluded that son "does not have the sufficient ability and maturity to express an independent and reliable preference about where he wants to go to school or where he wants to live." Father argues that the district court abused its discretion in so ruling. Father stresses that son is mature, shaves daily, and maintains good grades, and that son wants to live with his father and to attend a different high school.

The BFA, upon which the district court relied, indicated that "[son's] opinions are complicated by his mental health, social challenges, possible developmental issues, and the protracted and high-level parental conflict, particularly the negative views expressed by

father." The BFA concluded, as did son's therapist, that while some 15-year-olds could make an independent and reliable custodial preference, son "does not have that maturity, and in fact, has been manipulated [by father] into stating this preference." The BFA also noted that son's request for a change in residence and school was largely orchestrated by father, and that son was "matter-of-fact" about returning to mother's home.

The district court found that the BFA's evaluation of son's preference was credible, and that while son enjoyed his summer with father, son was not "particularly bothered" or "disturbed" by returning to mother's home. The court also relied on the evaluator's finding that son's preference appears to be manipulated by father. The district court said that the 2014 parenting schedule and exchanges have been working, that there was no reason to change father's parenting time, and ordered that the prior parenting-time schedule resume.

We defer to the district court's credibility determinations, and the court's well-reasoned findings. On this record, the district court did not abuse its discretion in declining to rely on son's preference. At the same time, the record does support father's argument that there is a deep bond between father and son, that son is 15-years-old and will soon be an adult, and that son wants to spend more time with father.

In the past, the parties did not limit reasonable parenting time and are encouraged to continue that cooperation and provide for even more father-son parenting time if the circumstances dictate. In less than three years, the parties' son can choose where he wants to live. The parties should avoid anything that will cause unspoken and internal resentment on the part of the son or either parent.

Affirmed.