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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1161**

In re the Marriage of:
Maria Rothen, petitioner,
Respondent,

vs.

Jason David Rothen,
Appellant.

**Filed February 19, 2019
Reversed and remanded
Cleary, Chief Judge**

Fillmore County District Court
File No. 23-FA-14-914

Maria Rothen, Lanesboro, Minnesota (pro se respondent)

Jason David Rothen, Rushford, Minnesota (pro se appellant)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and
Reilly, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

Appellant Jason David Rothen (father) challenges the district court's order denying
his motion to modify child custody without affording him an evidentiary hearing. We

conclude that he made a prima facie showing to modify custody based on endangerment and therefore reverse and remand for an evidentiary hearing.

FACTS

In November 2015, father and respondent Maria Rothen (mother) were divorced. Pursuant to a stipulation, mother was granted sole physical custody of the couple's four children: H.M.R., J.D.R., M.E.R., and J.J.R. The parties were granted joint legal custody, but in the event of a disagreement, mother was authorized to make decisions independently.

In early March 2018, H.M.R., 14 years old at the time, moved into father's house and, according to father, refused to continue living with mother and expressed a desire to move in with father. Shortly thereafter, father filed a motion for emergency temporary custody of H.M.R. In an accompanying affidavit, father alleged that mother physically and emotionally abuses the children and neglects their medical needs. Father also alleged that J.D.R. is failing his classes.

Father also filed affidavits from H.M.R. and M.E.R. These affidavits repeated many of the same allegations as father. H.M.R. accused mother of excessive drinking. She also alleges that, when mother drinks, she physically abuses the children, hitting J.D.R. with a vacuum cord and throwing M.E.R. against a wall. H.M.R. also averred that mother refused to take her to the doctor when she had strep throat. Finally, H.M.R. discussed the children's declining grades and asserted that she wanted to live with father. M.E.R.'s affidavit alleged that mother threw her against a wall, failed to take her to a dentist to treat her cavities,

refused to provide adequate clothing, and refused to feed her one night. M.E.R., 11 years old, also stated that she wanted to live with father.

Father then moved for sole physical and legal custody of the children based on endangerment. Father filed more affidavits repeating many of his previous reasons for modifying custody: abuse by mother; mother's excessive drinking; neglecting medical needs; the children's preference; and the children's declining grades. Mother denied some allegations, contextualized others, and requested that the district court deny father's motions. Each party accused the other of manipulating the children and turning them against the other parent.

The district court declined to order an evidentiary hearing as to J.D.R., M.E.R., and J.J.R., finding that father's affidavits failed to make a prima facie case showing "that circumstances have arisen since the prior order or that were unknown to the court at the time of the prior order, that a change has occurred in the circumstances of the child or the parties and the modification is necessary to serve the best interests of the minor children." However, the court did find that father had made a prima facie case for the modification of the custody of H.M.R., and ordered an evidentiary hearing solely as to her custody.

Prior to that evidentiary hearing, the parties reached an agreement as to the custody of H.M.R. Father was granted sole physical custody and the parties continued to share joint legal custody. The provision which authorized mother to make decisions independently in the event of a disagreement was removed. Father then filed this appeal,

challenging the district court's decision that an evidentiary hearing on custody modification for J.D.R., M.E.R., and J.J.R. was not warranted.

D E C I S I O N

When deciding whether to order an evidentiary hearing on child-custody modification, the district court must first take the facts in the moving party's affidavits as true, disregard the contrary allegations in the nonmoving party's affidavits, and consider the allegations in the nonmoving party's affidavits only to the extent they explain or contextualize the moving party's allegations. *Boland v. Murtha*, 800 N.W.2d 179, 183 (Minn. App. 2011). Next, the district court must determine whether the moving party has made a prima facie showing for the modification. *Id.* If the party establishes a prima facie case, then the district court must hold an evidentiary hearing. *Id.*

Father argues that the district court erred by failing to take his affidavits as true, and by considering mother's contrary allegations. We review de novo whether the district court has properly treated the allegations in the parties' affidavits. *Id.* at 185.

We conclude that the district court properly took father's affidavits as true and disregarded the contrary allegations in mother's affidavits. In its order, the district court acknowledged that it was required to take father's affidavits as true and stated that "the moving party's affidavit evidence, *taken as true*, failed to make a prima facie case." (Emphasis added.) Although the matter settled before a hearing was necessary, the district court did order an evidentiary hearing as to one of the children which indicates that it took father's allegations as true. Father does not explain why we should conclude that the

district court failed to take his allegations as true. Accordingly, we conclude that the district court properly treated the parties' allegations.

Next, father argues that the district court erred when it determined that father failed to make a prima facie showing for an endangerment-based motion to modify custody. Endangerment-based motions to modify custody are made under Minn. Stat. § 518.18(d)(iv) (2018). That statute "requires a [district] court to retain the custody arrangement that was established by the prior order unless the party seeking the modification makes a prima facie case for modification." *Amarreh v. Amarreh*, 918 N.W.2d 228, 230 (Minn. App. 2018) (quoting *In re Custody of M.J.H.*, 913 N.W.2d 437, 440 (Minn. 2018)). To make a prima facie case for an endangerment-based motion to modify custody, the moving party "must allege: (1) the circumstances of the children or custodian have changed; (2) modification would serve the children's best interests; (3) the children's present environment endangers their physical health, emotional health, or emotional development; and (4) the benefits of the change outweigh its detriments with respect to the children." *M.J.H.*, 913 N.W.2d at 440 (quotation omitted). "If the party establishes a prima facie case, the district court must then hold an evidentiary hearing to consider evidence on each factor." *Id.* But if the moving party's affidavits do not allege facts sufficient to allow a court to reach the required findings, the district court should deny the motion and no evidentiary hearing is needed. *Englund v. Englund*, 352 N.W.2d 800, 802 (Minn. App. 1984).

Here, the district court denied father an evidentiary hearing as to J.D.R., M.E.R., and J.J.R. because it found that father's affidavits failed to sufficiently allege that the circumstances of the children or the custodians have changed since the prior order and modification would be in the children's best interests. We review the district court's determination that father has not made a prima facie showing for an abuse of discretion. *Boland*, 800 N.W.2d at 185.

We first consider whether the district court abused its discretion when it determined that father's affidavits, taken as true, fail to establish a change in circumstances from the 2015 dissolution judgment establishing custody.¹ "What constitutes changed circumstances for custody-modification purposes is 'determined on a case-by-case basis.'" *Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000) (quoting *Lilleboe v. Lilleboe*, 453 N.W.2d 721, 723 (Minn. App. 1990)), *review denied* (Minn. Sept. 26, 2000). "The change in circumstances must be significant." *Spanier v. Spanier*, 852 N.W.2d 284, 288 (Minn. App. 2014) (quotation omitted). There must be a real change and not a continuation of ongoing problems. *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 690 (Minn. App. 1989), *review denied* (Minn. June 21, 1989).

We conclude that the district court abused its discretion when it found that father's affidavits failed to allege a change in circumstances. Father's affidavits allege several

¹ Father previously moved for a modification of custody in 2017, and the district court denied his motion. Because that order did not modify custody, it is not considered a "prior order" for purposes of child custody modification under Minn. Stat. § 518.18(d). *Spanier v. Spanier*, 852 N.W.2d 284, 288-89 (Minn. App. 2014).

instances of physical abuse, mental abuse, and neglect. Specifically, the affidavits allege that mother whipped J.D.R. with a vacuum cord, forced J.D.R. to stand outside in the winter without adequate clothing as a punishment, and grabbed M.E.R.'s neck and threw her against a wall. Father alleges mother has threatened J.D.R., saying she will cut off his head and that she swears at the children. Father provided several examples of times when mother allegedly neglected the children's medical needs, including failing to seek medical attention for the children's cavities, J.D.R.'s fractured finger, and H.M.R.'s strep throat. Father also alleges that J.D.R. is failing most of his classes and mother is not attempting to provide academic assistance. These allegations were not before the district court at the time of the previous order establishing custody. The affidavits also allege that mother's drinking habits have taken a turn for the worse, and M.E.R. and H.M.R. are scared as a result. There were allegations of mother's alcohol abuse before the district court when it entered its prior custody order. However, there is no indication that the children were scared of mother when she drinks until now.

While the district court must take these allegations as true and disregard any contrary allegations, it may consider mother's allegations that explain the circumstances surrounding the accusations. *Tarlan v. Sorenson*, 702 N.W.2d 915, 922 (Minn. App. 2005). Here, mother explains that she did not intentionally hit J.D.R. with the vacuum cord; her statement that she would cut off J.D.R.'s head was taken out of context; she sent J.D.R. outside briefly to separate him from M.E.R. when they were physically fighting; and she

had set an appointment to treat M.E.R.'s cavities but the appointment had to be rescheduled because the dentist had an emergency.

Despite mother's explanations, father has sufficiently alleged a change in circumstances. In *Larson v. Larson*, this court held that allegations of "mother's possibly escalating drug use and continuing changes of residence and male occupants" established a change in circumstances that warranted an evidentiary hearing. 400 N.W.2d 379, 381-82 (Minn. App. 1987). As in *Larson*, it appears that mother's drinking habits have evolved, and two of the children are now concerned about mother's habit. In *Tarlan*, this court concluded that a significant change in circumstances occurred when father began to regularly weigh his daughter at home, which caused concern over the daughter's emotional health. *Tarlan*, 702 N.W.2d at 923. Here, father discusses several instances where mother neglected the children's medical needs and allegedly threw a child into a wall. These circumstances raise concerns over the children's physical health. Additionally, father has alleged that the children's grades are declining in mother's care, raising concerns over the children's educational needs. These allegations were not before the district court at the time of the dissolution judgment and, if true, they would establish a change in circumstances.

Next, we consider whether the district court abused its discretion in determining that father's affidavits failed to allege that modification is necessary to serve the children's best interests. *M.J.H.*, 913 N.W.2d at 440. A child's best interests are determined according to the factors listed in Minn. Stat. § 518.17, subd. 1 (2018). One best-interest factor includes

consideration of the child's physical and emotional needs, and the effect of the proposed arrangements on the child's needs. Minn. Stat. § 518.17, subd. 1(a)(1). Other best interest-factors include consideration of domestic abuse that affects the child, the physical, mental, or chemical health of a parent that affects the child's safety or developmental needs, the willingness and ability of each parent to meet the child's ongoing developmental needs, and the reasonable preference of a child. Minn. Stat. § 518.17, subd. 1(a)(3), (4), (5), (7).

Father alleges mother's drinking habits are negatively affecting the children, mother is abusing the children, and mother is unwilling to care for the children's medical and educational needs, as seen by the children's neglected cavities and J.D.R.'s declining grades. Additionally, M.E.R. has stated that she would like to live with father. Father has stated that the children will be safe from abuse in his home, and he is willing to care for the children's medical and educational needs. Taken as true, these allegations preliminarily establish that modifying custody is in the best interests of the children.

The third prong of the analysis is endangerment.² *M.J.H.*, 913 N.W.2d at 440. "The existence of endangerment must be determined 'on the particular facts of each case.'" *Sharp*, 614 N.W.2d at 263 (quoting *Lilleboe*, 453 N.W.2d at 724). "The concept of endangerment is unusually imprecise" but, in child custody, "the legislature likely intended

² The district court did not rule on, and it appears that mother does not challenge, the endangerment or the benefits-of-change prongs. Father therefore has satisfied these prongs as a matter of law for the purposes of holding an evidentiary hearing. See *Amarreh*, 918 N.W.2d at 232 n.2 ("We note that the district court did not rule on, and mother does not challenge, the other factors required for an endangerment-based custody modification. Father therefore has satisfied these elements for the purposes of holding an evidentiary hearing as a matter of law." (citation omitted)).

to demand a showing of a significant degree of danger.” *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991) (quotation omitted). “Evidentiary hearings are strongly encouraged in the custody-modification context if there are allegations of present endangerment to a child’s health or emotional well-being.” *Tarlan*, 702 N.W.2d at 922. Endangerment requires an actual adverse effect on the children. *In re Weber*, 653 N.W.2d 804, 811 (Minn. App. 2002).

As noted above, father has alleged several instances of physical and verbal abuse which endanger the children’s well-being. *See id.* (“Allegations of physical and emotional abuse are indicators of endangerment, but only when the degree of danger is significant.”). Further, father has alleged neglect of the children’s medical needs which has caused them pain. And father has alleged mother neglected the children’s education and J.D.R. is failing seventh grade, indicating endangerment. *See id.* (stating behavioral problems and poor school performance are indicators of endangerment). Fear of a parent is also a sign of endangerment, and M.E.R. states in her affidavit that she is afraid of mother’s drinking habits. *Harkema v. Harkema*, 474 N.W.2d 10, 13-14 (Minn. App. 1991) (concluding father was entitled to an evidentiary hearing when affidavits alleged that the children were afraid of stepfather due to his yelling, throwing things, hitting walls, and driving like a maniac).

The final factor father must sufficiently allege is that the benefits of the change outweigh its detriments with respect to the children. *M.J.H.*, 913 N.W.2d at 440. “Minnesota law presumes that stability in custody is in a child’s best interests.” *Weber*, 653 N.W.2d at 811. In his affidavits, father claims that the children feel safe in his home,

but not in mother's home. He also claims that he can and will provide for the children's educational needs in a way that mother cannot or will not. Finally, he alleges that he is willing to care for the children's medical needs. Taken as true, these allegations establish that the benefit of change would outweigh the harms.

We conclude that the district court abused its discretion when it found that father failed to demonstrate a prima facie case for child custody modification based on endangerment. Accordingly, the district court erred in failing to order an evidentiary hearing on father's motion. *M.J.H.*, 913 N.W.2d at 440 ("If the party establishes a prima facie case, the district court must then hold an evidentiary hearing to consider evidence on each factor."). We therefore reverse the district court's denial of father's motion and remand for an evidentiary hearing.³

Reversed and remanded.

³ Father briefly argues that the district court judge is biased against him and asks that the judge be removed on remand. It appears father's accusations are based solely on the district court's denial of his motion. Because "adverse rulings are not a basis for imputing bias to a judge," father's argument fails. *Ag Servs. of Am., Inc. v. Schroeder*, 693 N.W.2d 227, 236-37 (Minn. App. 2005).