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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1093**

In re the Custody of: C.A.M., Cody A. Myers, petitioner,
Respondent,

vs.

Jessica D. Cook, n/k/a Jessica D. Hartger,
Appellant,

County of Dakota,
Intervenor.

**Filed April 27, 2020
Affirmed
Reyes, Judge**

Dakota County District Court
File No. 19AV-FA-15-2677

Tori M. Appelhof, Appelhof, Pfeifer & Hart, P.A., Oakdale, Minnesota (for respondent)

Jessica Danielle Hartger, Eden Prairie, Minnesota (pro se appellant)

James C. Backstrom, Dakota County Attorney, James W. Donehower, Assistant County Attorney, West St. Paul, Minnesota (for intervenor)

Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Bryan,
Judge.

UNPUBLISHED OPINION

REYES, Judge

In this custody dispute, appellant-mother argues that the district court abused its discretion by (1) determining that mother failed to establish a prima facie case to modify custody under Minn. Stat. § 518 (2018) and (2) awarding father conduct-based attorney fees. We affirm.

FACTS

Mother Jessica D. Hartger and father Cody A. Myers have one minor child, C.A.M., born in 2014. In April 2016, the district court entered stipulated findings of fact and concluded that granting parents joint physical custody and joint legal custody over child served his best interests.

Parents share a complicated and litigious history. In March 2018, father filed an order for protection (OFP) against mother on behalf of child, resulting in the district court temporarily awarding sole legal custody and sole physical custody to father. Father had also filed a motion for sole physical and sole legal custody, to which mother responded by filing her own motion for sole physical and sole legal custody. In April 2018, the parents resumed joint physical custody and joint legal custody of child. The district court held an evidentiary hearing in June 2018 to consider whether to modify custody and appointed a guardian ad litem to investigate the best interests of child. On July 10, 2018, father consumed benzodiazepine and alcohol, which led to child being left unattended for at least ten minutes. As a result, the state charged father with gross-misdemeanor child neglect. The next day, mother filed an emergency motion to modify custody. Several weeks later,

mother and father agreed to dismiss their motions to modify custody. On August 2, 2018, the district court accepted a stipulated agreement between the parties preserving the original custody arrangement and dismissing without prejudice any still undecided motion filed after March 1, 2018.

In May 2019, three months after father pleaded guilty to, and received a stay of adjudication for, the July 2018 neglect charge, mother filed a new motion to obtain sole legal custody and sole physical custody. The district court denied mother's motion without holding an evidentiary hearing, determining that she failed to meet her burden of showing a prima facie case of endangerment. Father then moved for \$3,000 in conduct-based attorney fees under Minn. R. Gen. Prac. 119. The district court awarded father \$1,000 in conduct-based attorney fees. This appeal follows.¹

D E C I S I O N

I. The district court properly denied mother's motion to modify custody.

The standard for reviewing a district court's dismissal of a motion to modify custody without holding an evidentiary hearing involves three steps. *See Boland v. Murtha*, 800 N.W.2d 179, 180 (Minn. App. 2011). First, we review de novo whether the district court properly assessed the parties' allegations. *Id.* Second, we review whether the district court abused its discretion by determining that the moving party failed to make a prima facie case for modification. *Id.* Third, we review de novo the district court's determination of whether to hold a full evidentiary hearing. *Id.* We analyze each step in turn.

¹ Mother petitioned for accelerated review, which the Minnesota Supreme Court denied on January 21, 2020.

A. The district court properly assessed the parties' allegations.

Mother appears to argue that the district court did not appropriately assess her allegations. We have carefully reviewed mother's allegations and conclude that the district court appropriately used father's affidavits to explain and put into context mother's allegations, as we will examine in more detail below. *See id.* at 183.

B. The district court properly placed the burden of proving a prima facie case for modification on mother.

Next, mother argues that the district court abused its discretion (1) by failing to place on father the burden of proving that continuing the custody arrangement served the best interests of the child because (a) father pleaded guilty to child neglect and (b) father perjured himself and (2) by failing to place on father the burden of proving a prima facie case because (a) mother intended to move out of state and (b) father committed domestic abuse. We address each in turn.

1. Neglect

Mother equates father's child-neglect guilty plea with a child-neglect conviction. Mother then argues that, because Minn. Stat. § 609.02, subd. 5 (2018), defines "conviction" to include "a plea of guilty," father had the burden of proving that continuing the custody arrangement served the best interests of the child under Minn. Stat. § 631.52, subds. 1-2 (2018). Mother's argument fails. Minn. Stat. § 631.52, subd. 1, applies to a conviction of a qualifying crime, including neglect under Minn. Stat. § 609.378 (2018). Minn. Stat. § 631.52, subd. 2 (13). A conviction includes a district court "accept[ing] and record[ing] . . . a plea of guilty." Minn. Stat. § 609.02, subd. 5. A guilty plea is considered

“recorded” for purposes of this definition “when a court adjudicates a defendant guilty on the record.” *State v. Nodes*, 863 N.W.2d 77, 81 (Minn. 2015). Although father pleaded guilty to neglect, he received a stay of adjudication. As this court has held, “a defendant who has received a stay of adjudication has not been adjudicated guilty.” *State v. Greenough*, 915 N.W.2d 915, 919 (Minn. App. 2018). Accordingly, because a stay of adjudication is not a conviction, father does not have a conviction for child neglect and section 631.52, subdivision 1, did not shift the burden of proof onto father.

Mother also appears to argue that father violated a condition of his stay of adjudication by visiting bars. However, mother bases her argument on unsubstantiated allegations, which we will not review for the first time on appeal. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts “neither reconcile conflicting evidence nor decide issues of witness credibility”).

2. Perjury

Mother argues that father falsely reported child abuse and harassment, committing perjury under Minn. Stat. § 631.52, subd. 2, and therefore bears the burden of proving that continuing joint custody serves the best interests of the child. The record does not support mother’s claim. Father obtained a harassment restraining order (HRO) and a domestic abuse no-contact order (DANCO) against mother. The district court never found any indication of perjury.

3. Moving out of state

Mother appears to contend that, even though she never formally made a motion to move out of state, the district court should have liberally interpreted her pro-se argument

and that it failed to properly apply the standard for establishing a prima facie case under Minn. Stat. § 518.18 (2018). Mother’s argument is unavailing.

Counsel represented mother when she filed her motion to modify custody with supporting documents. Mother did not formally move to change her residence and did not mention this apparent intention in her motion, the supporting affidavit, or during the June 2019 motion hearing. At most, she made a few allusions and references to moving out of state embedded in materials supporting the motion. We conclude that the district court did not clearly err by not considering this apparent desire because mother did not clearly express it. We may not consider issues that a litigant fails to clearly present to, and that are not considered by, the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Cf. Antonson v. Ekvall*, 186 N.W.2d 187, 189 (Minn. 1971) (holding claim not before district court when “the pleadings were general enough to have possibly made out a claim on that theory, [but] there was no language in the complaint that would alert anyone to a claim” based on that theory).

4. Domestic abuse

Mother argues that father should have had the burden of disproving a prima facie case under Minn. Stat. § 518.175, subd. 3(c) (2018), because he abused her. Moreover, mother argues that, under Minn. Stat. § 518.17, subd. 1(b)(9) (2018), the district court must use a rebuttable presumption that joint legal custody or joint physical custody does not serve the best interests of the child because domestic abuse, as defined in Minn. Stat. § 518B.01 (2018), “has occurred between the parents.” Mother’s arguments are misguided.

Because the district court never found that mother requested an out-of-state move, Minn. Stat. § 518.175, subd. 3(c), does not apply. Moreover, the record contains no proof that father assaulted or harmed mother. Mother makes several unsubstantiated allegations of domestic abuse by father.² She attaches father's criminal convictions from 2017 to 2019 but does not show how the convictions relate to domestic abuse. Mother refers to her OFP petition against father, which she withdrew at the hearing before the district court decided whether to grant it. The state charged both parties with disorderly conduct in October 2017 for an altercation during which mother claims that father physically restrained her, but which led to mother, not father, receiving a domestic-abuse citation.

Instead, the record contains proof, as opposed to allegations, of mother's domestic abuse against father. Father obtained an HRO against mother in September 2016 and a DANCO against mother in June 2017. In March 2018, father filed an OFP against mother on behalf of child, resulting in the district court temporarily awarding sole custody to father. Mother's burden-shifting arguments fail.

C. The district court did not abuse its discretion by concluding that mother failed to establish a prima facie case for modification.

Mother contends that father's July 2018 child-neglect charge provides a sufficient indication of endangerment to establish a prima facie case for modification. We are not persuaded.

² Mother alleges father (1) physically restrained her, preventing her from obtaining the child in October 2017; (2) falsified abuse claims to withhold the child in February 2018; and (3) engaged in conduct that led mother to file three OFPs against him from 2016 to 2019.

To establish a prima facie case for custody modification under Minn. Stat. § 518.18(d), the moving party must allege that “(1) the circumstances of the child[] or custodian have changed; (2) modification would serve the child[]’s best interests; (3) the child[]’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 child[.]” *In re Custody of M.J.H.*, 913 N.W.2d 437, 440 (Minn. 2018) (quotation omitted). The parties only dispute endangerment, the third element.

A lack of endangerment is fatal to a motion to modify custody. *Niemi v. Schachtschneider*, 435 N.W.2d 117, 119 (Minn. App. 1989). “Endangerment requires a showing of a ‘significant degree of danger.’” *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997) (citation omitted).

Mother cites to *Lilleboe v. Lilleboe* for the proposition that pleading guilty to child neglect establishes grounds to grant a motion to modify custody. 453 N.W.2d. 721, 724 (Minn. App. 1990). But in *Lilleboe*, we simply held that allegations of abuse *may* be sufficient to endanger a child’s wellbeing. *Id.* By contrast, “[a]n alleged single incident of borderline abuse or neglect has been held *not* to constitute sufficient endangerment to warrant a custody modification.” *Geibe*, 571 N.W.2d at 779 (emphasis added). The district court recognized that father’s single neglect charge did not result in a conviction. Moreover, the record shows that it represented an isolated incident that occurred almost a year before mother’s motion, and it does not provide any indication that the underlying factors that led to father’s neglect charge continue at present. Instead, the record shows, as

the district court noted, that father has made progress to become a more stable person and a more fit parent, and he is successfully going through treatment.

Moreover, mother alleges the existence of two Child Protective Services investigations of father, but the record lacks proof of the existence of these investigations or their outcomes. Mother has not established a “significant degree of danger.” *Geibe*, 571 N.W.2d at 778. Because mother has not established endangerment, she cannot establish a prima facie claim for modification.

D. The district court properly denied mother an evidentiary hearing.

“A district court is required under section 518.18(d) to conduct an evidentiary hearing only if the party seeking to modify a custody order makes a prima facie case for modification.” *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). Here, because the district court properly determined that mother failed to make a prima facie case for modification, it did not need to conduct an evidentiary hearing.

II. The district court did not abuse its discretion by awarding father attorney fees.

Mother appears to argue that the district court (1) abused its discretion by concluding that she unreasonably contributed to the length and expense of the proceeding and (2) clearly erred by characterizing her motion to modify custody as retaliatory.³ We disagree that the district court abused its discretion.

We review the district court’s award of conduct-based attorney fees for an abuse of discretion. *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001), *review denied*

³ It appears that mother also requests attorney fees, but her request is not properly before us because she never made a rule 127 motion. *See* Minn. R. Civ. App. P. 139.05, subd. 1.

(Minn. Aug. 20, 2002). “[A] district court abuses its discretion if it acts against logic and the facts on record, or if it enters fact findings that are unsupported by the record, or if it misapplies the law” *In re Adoption of T.A.M.*, 791 N.W.2d 573, 578 (Minn. App. 2010) (internal quotation and citations omitted).

The district court may award, “in its discretion, additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding.” Minn. Stat. § 518.14, subd. 1 (2018). “Bad faith . . . is not required for an award of conduct-based attorney fees under Minn. Stat. § 518.14, subd. 1.” *Baertsch v. Baertsch*, 886 N.W.2d 235, 238 (Minn. App. 2016). The party moving for conduct-based attorney fees has the burden to show unreasonable conduct. *Id.* (citation omitted). The district court may award conduct-based fees “regardless of the payor’s ability to contribute to a fee award.” *Geske*, 624 N.W.2d at 818.

Here, the district court justified awarding father attorney fees by pointing out that mother brought a new motion to modify custody “relying on the same facts and circumstances that existed 11 months ago,” when mother brought an earlier motion to modify custody. The district court also noted that “[t]here are no new allegations of endangerment . . . merely a rehashing of what has already been dismissed as a basis for modification by mother.” The record supports this finding. Mother’s pre-withdrawal motions describe father’s alleged dishonesty, lack of mental stability, substance abuse, criminal charges, inadequate childcare, lack of oversight, domestic abuse, and presumably,

child neglect.⁴ Mother's May 2019 motion raises essentially the same issues, including child neglect, which mother voluntarily dismissed in August 2018.

We conclude that the record supports the district court's finding that mother's motion unreasonably increased the expense of litigation. *See T.A.M.*, 791 N.W.2d at 578. And because we conclude that the district court appropriately granted attorney fees on this basis, we need not opine on whether the district court clearly erred by categorizing mother's renewed motion as retaliatory.

Affirmed.

⁴ We cannot compare mother's May 2019 motion to modify custody with the claims mother made in her July 2018 emergency motion for custody because the record does not contain the latter. But mother submitted an affidavit and responsive motion to grant permanent sole legal and sole physical custody in March 2018, which asserts essentially the same claims as her May 2019 motion, except for the child-neglect issue. We can assume that mother's July 2018 emergency motion asserts child neglect because father's child-neglect charge prompted mother's filing of the motion "within hours" of the charge.