

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1670**

In the Matter of the Welfare of the Children of:
N. S. and C. H., Parents.

**Filed May 1, 2023
Affirmed
Wheelock, Judge**

Washington County District Court
File No. 82-JV-19-573

N.S., Newport, Minnesota (pro se appellant mother)

Kevin Magnuson, Washington County Attorney, Erin Johnson, Assistant County Attorney,
Stillwater, Minnesota (for respondent Washington County Child Protection)

C.S., White Bear Lake, Minnesota (pro se respondent grandmother)

C.H., Arden Hills, Minnesota (pro se respondent father)

Considered and decided by Wheelock, Presiding Judge; Ross, Judge; and
Rodenberg, Judge.*

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant consented to the permanent transfer of legal and physical custody of her children to their maternal grandparent and later moved the district court to transfer custody back to her. On appeal from the district court's denial of appellant's motion, she argues

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

that the district court committed reversible error by failing to (1) properly apply Minn. Stat. § 260C.521, subd. 2(a) (2022), which provides for modification of an order transferring permanent legal and physical custody to a relative, and (2) determine that the record supports modification. We affirm.

FACTS

Appellant N.S. is the mother of R.S. and J.S. Respondent C.H. is the noncustodial adjudicated father of the children. Respondent Washington County Child Protection, a division of Washington County Community Services, has been involved with the family on several occasions beginning in March 2014. The county filed four child-in-need-of-protective-services (CHIPS) petitions on behalf of the children between July 2014 and July 2019 based on N.S.'s chemical-dependency and mental-health issues.

In July 2019, the county filed a petition to involuntarily terminate N.S.'s parental rights. In August 2019, N.S. filed a voluntary petition to transfer permanent legal and physical custody of the children to respondent C.S. and C.S.'s partner. C.S. is N.S.'s mother and the children's maternal grandmother. One month later, the district court filed an order accepting N.S.'s petition and transferring custody to C.S. and her partner. The district court deferred execution of the order pending the custodians' receipt of Northstar Kinship Assistance.¹ Upon the court's acceptance of the voluntary transfer of custody, the county withdrew its petition to terminate N.S.'s parental rights. During the

¹ Northstar Kinship Assistance is a state program that provides financial assistance and other benefits to children in foster care who find permanency with a relative through a transfer of permanent legal and physical custody.

deferred-execution period, the Northstar Kinship Placement Agreement was updated to reflect that C.S. would be the sole custodian of the children. The district court entered a final order transferring permanent physical and legal custody to C.S. in April 2021.

In September 2022, N.S. filed a motion and supporting affidavit seeking legal and physical custody of the children. Because N.S. had not served her notice and motion on all parties and had not scheduled a hearing on the motion, the district court filed an order denying N.S.’s request for a motion hearing. N.S. filed a second motion and supporting affidavit for custody of the children in October 2022. She requested that the court “transfer permanent legal and physical custody” to her or, in the alternative, “transfer legal custody and start the reunification process by allowing unsupervised visits and overnights” that would equate to 50% parenting time during the school year and transfer physical custody to her at the end of the school year. C.S. filed a response requesting that the district court deny N.S.’s motion to modify custody of the children. The district court also received affidavits from family members and C.S.’s coworker in support of C.S.

The district court held a nonevidentiary hearing on the motion in October 2022. The district court determined that N.S. did not make a prima facie case of endangerment under Minn. Stat. § 518.18(d)(iv) (2022) and filed an order denying N.S.’s motion to modify custody.

N.S. appeals.

DECISION

N.S. argues that the district court “failed to consider that a change has occurred in the circumstances of the child or the parties and that the [custody] modification is necessary

to serve the best interests of the children.” N.S. alleges that a change in circumstances exists because N.S. has “corrected every issue that resulted in the voluntary transfer of custody” to C.S. N.S. further argues that the current custody arrangement endangers the children’s emotional health and impairs their development because C.S. “does not allow the children to have a healthy relationship with their biological mother.” N.S. made these same arguments in the district court in support of her motion. The district court interpreted N.S.’s motion to modify custody to be brought under an endangerment theory based on the allegations in N.S.’s pro se filings. Although we commend N.S. for the positive changes she has made and recognize her desire to be more involved with her children and to be their legal and physical custodian, we disagree that N.S. has made the requisite showing that the children are endangered by the current custody arrangement.

A district court may modify an order transferring permanent legal and physical custody to a relative if it applies the standards in Minn. Stat. §§ 518.18, .185 (2022). Minn. Stat. § 260C.521, subd. 2(a) (2022). Section 518.18(d) provides:

[T]he court shall not modify a prior custody order . . . unless it finds, 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, that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child.

Section 518.18(d) continues, providing that the district court “shall retain the custody arrangement . . . established by the prior order unless . . . (iv) the child’s present environment endangers the child’s physical or emotional health or impairs the child’s

emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.” Minn. Stat. § 518.18(d)(iv).²

“Under section 518.18, the district court must first determine whether the party seeking to modify the custody arrangement . . . has made a prima facie case for modification.” *Crowley v. Meyer*, 897 N.W.2d 288, 293 (Minn. 2017).

When a movant seeks to modify custody,

the district court must first determine whether the party seeking to modify the custody arrangement has made a prima facie case by alleging facts that, if true, would provide sufficient grounds for modification. Specifically, the movant must make a prima facie showing that: (1) the circumstances of the child or the parties have changed; (2) modification would serve the child’s best interests; and (3) one of the five specific additional grounds for modification as set out in Minn. Stat. §§ 518.18(d)(i)-(v) exists. . . . If the movant establishes a prima facie case, the district court must hold an evidentiary hearing on the motion, during which the parties may present evidence on each factor.

Woolsey v. Woolsey, 975 N.W.2d 502, 507-08 (Minn. 2022) (citations omitted); *see Amarreh v. Amarreh*, 918 N.W.2d 228, 231 (Minn. App. 2018) (stating that “[a]t the prima-facie-case stage of the proceeding, [the movant] need not *establish* anything,” but rather “need only make allegations which, if true, would allow the district court to grant the relief [the movant] seeks”), *rev. denied* (Minn. Oct. 24, 2018). If the movant does not make a prima facie case, the district court is required to deny the motion without an evidentiary hearing. *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981);

² We note that section 518.18, subdivision (d)(i), (ii), (iii), and (v), provides alternative bases upon which the court can grant a custody-modification motion. N.S. does not argue that these subsections apply to her case, and we do not consider their applicability here.

see Szarzynski v. Szarzynski, 732 N.W.2d 285, 292 (Minn. App. 2007) (“Whether a party makes a prima facie case to modify custody is dispositive of whether an evidentiary hearing will occur on the motion.”).

We perform a three-step review of a district court’s decision to deny a motion to modify custody without an evidentiary hearing. First, we review de novo whether the district court accepted as true the allegations in the movant’s submissions. Second, we review for an abuse of discretion the district court’s determination that the moving party’s allegations failed to make a prima facie case for the relief sought. Third, we review de novo whether the district court properly declined to hold an evidentiary hearing. *Amarreh*, 918 N.W.2d at 230-31 (quoting *Boland v. Murtha*, 800 N.W.2d 179, 185 (Minn. App. 2011)); *see Szarzynski*, 732 N.W.2d at 292 (noting that allegations that are conclusory, vague, or devoid of support in the record are insufficient to make a prima facie case); *cf. Miller v. Miller*, 953 N.W.2d 489, 494 (Minn. 2021) (stating, in the context of a motion to intervene, that “the court must accept the allegations in the pleadings as true, unless they are frivolous on their face”).

Thus, the question at issue in our review of the district court’s denial of the custody-modification motion is whether N.S.’s allegations, taken as true, would have allowed the district court to grant the relief N.S. seeks. If so, the district court was required to hold an evidentiary hearing to address *whether* the allegations are, in fact, true. If not, the district court was required to deny the motion.

I. The district court properly treated the allegations in N.S.’s affidavit as true.

We review de novo whether the district court treated the allegations in N.S.’s affidavit as true, disregarded the contrary allegations in C.S.’s affidavit, and considered only the explanatory allegations in C.S.’s affidavit. *Id.* The district court summarized the allegations from N.S.’s affidavit in its order as follows:

- [N.S.] has been off prescription and illegal drugs for the past two years;
- [N.S.] has a job and a consistent work schedule that would allow her to be present in the children’s everyday lives;
- [N.S.] has the ability to meet the children’s basic needs;
- [C.S.] does not support [N.S.’s] relationship with the children;
- [C.S.] allowed a man to live in her home when [N.S.] was 15 years old who used prescription drugs and gave them to [N.S.] when she was a teenager;
- [C.S.] lost custody of [N.S.] when she was a child;
- [C.S.] filed a false police report regarding her son (currently age 33) when he was 16 years old; and
- [C.S.] failed to provide [N.S.] with proper medical care when she was a child.

Although C.S. disputed several of N.S.’s allegations in her own affidavit, the district court did not credit C.S.’s contrary allegations or mention them in the order. The district court accepted N.S.’s allegations as true; however, it noted that “the allegations that the children are endangered are based entirely on events that happened when [N.S.] was a child which

were known to [N.S.] when she voluntarily signed a petition to transfer custody of the children to [C.S.].”

The district court also explained that it considered the allegations in C.S.’s affidavit regarding the amount of parenting time N.S. exercised because they were not contrary to N.S.’s allegations and provided context for N.S.’s alternative request for parenting time. *See Szarzynski*, 732 N.W.2d at 292 (“[T]he district court may consider allegations by others that are not contrary to the allegations of the moving party and which may put the moving party’s allegations in an appropriate context.”). N.S. did not allege any facts about the amount of parenting time she exercised prior to filing her motion to modify custody. C.S. alleged in her affidavit that N.S. had not exercised parenting time between the end of February and early October 2022. The district court considered this allegation because “it puts [N.S.’s] alternative request for an immediate order of more than 50% parenting time in the appropriate context.”

Our review of the record and the district court’s order leads us to conclude that the district court appropriately considered the parties’ affidavits. The district court treated the facts alleged in N.S.’s affidavit as true, disregarded the contrary allegations in C.S.’s affidavit, and only considered the explanatory allegations in C.S.’s affidavit to provide context for N.S.’s parenting-time request. We discern no error in the district court’s decision at this step of the analysis.³

³ N.S. also takes issue with the nonparty affidavits submitted on C.S.’s behalf; however, there is no evidence in the record that the district court relied on the nonparty affidavits when making its custody decision.

II. The district court did not abuse its discretion in determining that N.S. failed to make a prima facie case for modification.

We next review whether the district court abused its discretion in determining that N.S. failed to make a prima facie case for modification. *Boland*, 800 N.W.2d at 185. “A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or delivering a decision that is against logic and the facts on record.” *Bender v. Bernhard*, 971 N.W.2d 257, 262 (Minn. 2022) (quotation omitted). The party seeking custody modification based on endangerment has the burden of alleging a prima facie case under section 518.18 by alleging that “(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.” *Crowley*, 897 N.W.2d at 293. Because we conclude that N.S. fails to sufficiently allege that there has been a change in circumstances of the children or custodian or that the children’s present environment endangers them, we do not address all four allegations necessary for a prima facie case. *See Nice-Petersen*, 310 N.W.2d at 472 (concluding modification motion failed to make a prima facie case because it failed to sufficiently allege a change in circumstances that endangered the child).

A. Changed Circumstances

To obtain a modification of custody, it is the moving party’s burden to establish that a “significant change of circumstances” has occurred since the issuance of the custody order. *Id.* Furthermore, the change of circumstances “must endanger the child’s physical

or emotional health or the child's development." *Id.*; accord *Weber v. W.P.W.*, 653 N.W.2d 804, 809 (Minn. App. 2002). At this stage of the proceeding, the question is whether the movant's allegations, assuming they are true, show that there has been a change in circumstances since custody was last awarded or modified and that the change in circumstances endangers the children.

Here, the district court determined that "[t]he allegations in [N.S.'s] affidavit are approximately 15 years old and consist of events that happened to [N.S.] when she was a child. These allegations do not constitute a change in circumstances because they did not occur since the prior order and they do not relate to the children." The district court is correct in its determinations that N.S.'s allegations regarding C.S.'s parenting of N.S. do not allege a change in circumstances that occurred since the district court issued the original custody order regarding the children and, more importantly, that the alleged circumstances do not relate to the children.

N.S. argues on appeal that she did assert a change in circumstances by alleging that she had corrected the conditions that led to the original custody order—her issues with chemical dependency and mental health. N.S.'s efforts to refrain from substance abuse and to find stable employment and housing are admirable. However, Minnesota courts have established in *Nice-Petersen* and its progeny that there must be a relationship between the allegations of changed circumstances and the alleged endangerment to support a prima facie case for modification. See, e.g., *Nice-Petersen*, 310 N.W.2d at 472 ("[T]he significant change in circumstances must endanger the child's physical or emotional health or the child's development."); *Lilleboe v. Lilleboe*, 453 N.W.2d 721, 723 (Minn. App.

1990) (stating that a district court may deny modification if the parties' affidavits "do not satisfactorily establish, on a preliminary basis, that there has occurred a significant change in circumstances which endangers the child's physical or emotional health or emotional development"); *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 691 (Minn. App. 1989) (stating that the court must find that the change of circumstances endangers the children in addition to finding that appellant established a change of circumstances), *rev. denied* (Minn. June 21, 1989); *Itasca Cnty. Servs. ex rel. Hall v. David*, 379 N.W.2d 700, 703 (Minn. App. 1986) (concluding that appellant's affidavit, which established that appellant had adequate resources to care for his child and that he would be deprived of his visitation rights if the child's custodial parent moved out of state with the child, failed to allege a significant change of circumstances that endangers the child). In other words, the kind of changed circumstances that justify a modification of custody based on endangerment of the children are those that demonstrate the children are endangered in their current placement, not those that illustrate the movant's improved wellbeing and parenting capability. Therefore, the change in circumstances that N.S. alleges does not require reversal of the district court's order because the alleged change does not endanger the children.

B. Endangerment

To obtain a modification of custody, "a party must demonstrate a significant degree of danger to satisfy the endangerment element of section 518.18(d)(iv)." *Goldman v. Greenwood*, 748 N.W.2d 279, 285 (Minn. 2008) (quotation omitted).

Here, the district court correctly determined that "[t]he allegations in [N.S.'s] affidavit regarding events that happened in [N.S.'s] childhood do not demonstrate that the

children are presently endangered in their [current] environment.” N.S. makes a conclusory statement in her brief that “[t]he children’s present environment does not allow the children to have a healthy relationship with their biological mother. This endangers the children’s emotional health and is impairing their development.” Beyond this statement, N.S. does not explain how the allegations in her affidavit would support a finding of endangerment.

N.S.’s primary argument on appeal appears to be that she did allege that the children are endangered because she alleged that C.S. has not allowed her to visit the children since the motion hearing in district court on October 28, 2022. This allegation is about C.S.’s decision to stop allowing N.S. to visit the children *after* the conclusion of the district court’s hearing on N.S.’s motion to modify custody, and it was therefore never presented to the district court. Because the district court was not able to consider this allegation and it is outside of the record on appeal, we may not consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (“An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.”). Even if the allegation about N.S.’s reduced visitation with the children had been presented to the district court, caselaw instructs us that “while deprivation of parenting time may be considered in addressing motions to modify custody, it is not an independently sufficient basis to modify custody.” *Szarzynski*, 732 N.W.2d at 293 (emphasis omitted).

Thus, we conclude that the district court did not abuse its discretion in determining that N.S. failed to make a prima facie case for modification because she failed to sufficiently allege both a change in circumstances and endangerment.

III. The district court properly denied the motion without an evidentiary hearing.

Finally, we review de novo whether the district court properly determined the need for an evidentiary hearing. *Boland*, 800 N.W.2d at 185. As previously stated, a district court must dismiss the motion without an evidentiary hearing if the moving party fails to make a prima facie case for modification. *See Nice-Petersen*, 310 N.W.2d at 472 (“It is our view that a reasonable construction of the statute would be to require the trial court to deny a motion for modification of a custody order unless the accompanying affidavits set forth sufficient justification, if the facts alleged therein are true, for the modification.”). Thus, our conclusion that the district court did not abuse its discretion when it determined that N.S. failed to make a prima facie case for modification disposes of this issue, and we conclude the district court properly denied the motion without an evidentiary hearing.

Affirmed.