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In Re the Marriage of: Angela M. Parslow, n/k/a Angi M. Trelstad, petitioner, Respondent, vs. Christopher R. Parslow, Appellant.

C0-99-1002

COURT OF APPEALS OF MINNESOTA

1999 Minn. App.

November 16, 1999, Filed

NOTICE: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

PRIOR HISTORY: Hubbard County District Court. File No. FX-94-428. Hon. Jay Mondry.

DISPOSITION: Affirmed in part, reversed in part and remanded.

COUNSEL: Angi M. Trelstad, Nevis, MN (pro se respondent).

Steven R. Peloquin, Peloquin & Minge, P.A., New York Mills, MN (for appellant).

JUDGES: Considered and decided by Halbrooks, Presiding Judge, Klaphake, Judge, and Anderson, Judge.

OPINION BY: ANDERSON

OPINION

UNPUBLISHED OPINION

ANDERSON, Judge

Appellant Christopher Parslow challenges the district court's denial of an evidentiary hearing on his motion for custody modification. Because appellant presented a prima facie case justifying an evidentiary hearing as to C.P. but not to A.P., we affirm in part and reverse in part and remand.

FACTS

According to the terms of their dissolution judgment and decree, appellant and respondent share joint legal and physical custody of their children. Because of appellant's work schedule, the children visit each parent in four-day blocks. Appellant seeks full custody of the two youngest children, C.P., now 14 years old and A.P., now 11 [*2] years old, because he believes that respondent is physically and emotionally abusing the children.

On December 2, 1998, respondent grabbed C.P. by the arms and slapped her for fighting with her older sister. Early in the morning of December 3, respondent woke C.P., who had gone to bed for the evening, and hit her in the face for fighting with her younger sister. After these incidents, appellant took full custody of C.P. and A.P. and reported the incident to the Hubbard County Social Services. The child protective specialist assigned to the case determined that respondent did in fact strike C.P. but did not recommend child protective services because C.P. was then residing with her father. A.P. resumed the alternating four-day custody arrangement in mid-January but C.P. continued to live with her father on a full-time basis.

On February 15, 1999, appellant filed a motion seeking full physical custody of C.P. and A.P. and requested an evidentiary hearing. Appellant claims that respondent emotionally neglected both girls and physically abused C.P. In support of his motion, appellant submitted an affidavit from C.P. stating that she would prefer to live with her father on a full-time [*3] basis because she was not "getting along" with her mother. Appellant claimed that his new work schedule and occasional help from his parents would allow him to care for the girls on a full-time basis.

The district court denied appellant's request for an evidentiary hearing after finding that there was no significant change in circumstances, that C.P.'s preference to live with her father did not deserve overwhelming consideration, that the physical abuse was an isolated incident that did not warrant custody modification, and that the advantages to changing custody did not outweigh the harm that would be caused by a change in environment.

DECISION

This court has typically used an abuse of discretion standard when reviewing a district court's decision to deny an evidentiary hearing. *Geibe v. Geibe, 571 N.W.2d 774, 777 (Minn. App. 1997).* [1] A party seeking modification of a custody order must submit affidavits that demonstrate the basis for the modification. *Minn. Stat. § 518.185* (1998). In determining whether to grant an evidentiary hearing, the district court must accept the facts in the moving party's affidavits as true. *Abbott v. Abbott, 481 N.W.2d 864, 868 (Minn. App. 1992).* [*4] Based on the affidavits, the district court determines whether the moving party has established a prima facie case by alleging facts that, if true, would provide sufficient grounds for a modification. *Geibe, 571 N.W.2d at 777*; *Nice-Peterson v. Nice-Peterson, 310 N.W.2d 471, 472 (Minn. 1981).* In order to establish a prima facie case for modification, the moving party must establish that (1) there is a change of circumstances; (2) it is in the best interest of child to modify custody; (3) the current environment endangers the child's physical or emotional well-being; and (4) the advantages to modifying custody outweigh the harm likely to be caused by the change in environment. *Minn. Stat. § 518.18(d)* (1998); *Abbott, 481 N.W.2d at 868*. Appellant challenges the district court's order finding that he did not present sufficient evidence to demonstrate a prima facie case for custody modification.

1 In the past, this court has also reviewed de novo a district court's denial of an evidentiary hearing. *Compare Ross v. Ross, 477 N.W.2d 753, 755-56 (Minn. App. 1991)* (applying de novo standard) *with Geibe, 571 N.W.2d at 777-78* (discussing *Ross* but applying abuse of discretion standard). *Ross* held that a de novo standard was applicable because, when deciding whether to hold an evidentiary hearing, the district court does not make findings of fact and, as a result, "there is no occasion * * * for deference to trial court assessment of conflicting evidence." *Ross, 477 N.W.2d at 755-56*. *Geibe* notes that post-*Ross* decisions of this court have used an abuse of discretion standard and also notes that *Ross* did not address the use of the an abuse of discretion standard in *Nice-Peterson v. Nice-Peterson, 310 N.W.2d 471 (Minn. 1981). Geibe, 571 N.W.2d at 778*. Although the supreme court has not explicitly resolved this discrepancy, it did apply an abuse of discretion standard in reviewing whether a district court properly denied a request for an evidentiary hearing in *Valentine v. Lutz, 512 N.W.2d 868, 872 (Minn. 1994).* Use of *Ross'* de novo standard here would be inconsistent with current case law.

[*5] **Modification of Custody: C.P.**

A. Change in Circumstances

The district court did not specifically focus on a change in circumstances as a separate element of the appellant's prima facie case. However, it is undisputed that respondent struck C.P. on two occasions. Having arguably established that a change in circumstances occurred, appellant needed to establish the next three elements of a prima facie case for modification.

B. Best Interest of the Child

The district court did not separately address each of the best-interest-of-the child- factors set forth in *Minn. Stat. § 518.17, subd. 1* (1998). Instead, the district court focused on what it determined to be the most dispositive issue, the reasonable preference of the child. "The choice of an older teenage child is an overwhelming consideration in determining the child's custody or in deciding whether he is endangered by preserving the custodial placement he opposes." *Ross, 477 N.W.2d at 756*. In this case, C.P. submitted an affidavit stating that she preferred to live with her father and that she was afraid that her mother might hit her again. The district court determined that C.P., then age [*6] 13 1/2, was not an older teenage child whose preferences should be given overwhelming consideration.

Minnesota caselaw supports giving consideration to the preferences of a 13 1/2 year old child. *See Steinke v. Steinke, 428 N.W.2d 579, 583-84 (Minn. App. 1988)* (holding that the district court erred in not giving significant weight to a ten year old child's strong preference to live with his mother); *Jones v. Jones, 242 Minn. 251, 264 64 N.W.2d 508, 516 (1954)* (noting that a 15 year old and a 14 year old were not too young to exercise judgment with respect to their custody, and that their desires were entitled to consideration); *State ex. rel. Feeley v. Williams, 176 Minn. 193, 197, 222 N.W. 927, 928 (1929)* (holding that the preference of a 12 1/2 year old should be given great weight in determining custody). The record does not support the district court's finding that C.P. is not of sufficient age and maturity to express a custodial preference. While C.P. may not be an older teenager whose custodial preference is entitled to "overwhelming consideration," the record shows C.P. has sufficient age and maturity to express a custodial [*7] preference.

Given C.P.'s preference for living with appellant, her apparent inability to get along with respondent and the associated physical altercation, the trial court abused its

discretion in determining that it was in C.P.'s best interest to deny an evidentiary hearing on custody modification.

C. Endangerment

Endangerment requires a showing of a "significant degree of danger." *Ross, 477 N.W.2d at 756*. The district court determined that the events of December 2 and 3 were essentially one event and not a pattern of abuse and that there was not a significant degree of endangerment.

We disagree with the district court's determination that appellant did not establish a significant degree of danger to warrant an evidentiary hearing. A single incident of borderline abuse or neglect does not constitute a sufficient degree of endangerment to justify custody modification. *Geibe, 571 N.W.2d at 779* (holding that there was not a significant level of endangerment when a mother slapped her daughter's buttocks after daughter used foul language, bit her, and hit her on the arms). But what constitutes endangerment is "based on the particular [*8] facts of each case." *Lilleboe v. Lilleboe, 453 N.W.2d 721, 724 (Minn. App. 1990)*. Unlike *Geibe*, this is not a single incident of provoked physical abuse. On December 2, respondent grabbed C.P. by the arms and slapped her. On December 3, respondent hit C.P. for a second time, this time on the face.

The circumstances surrounding the events of December 2 and 3 are more troubling than the number of incidents of physical abuse. On the morning of December 3, respondent was so enraged with C.P.'s behavior that she awakened her sleeping daughter and slapped her in the face for fighting with her sister. The record also shows respondent told her daughter that if she wanted to fight that she would have to fight with her.

Although social services determined that child protective services were not needed in this case, this opinion was based on the fact that C.P. was then living with her father. It is unclear from the report whether the conclusion would have been the same had C.P. resumed living with her mother under the previous custody arrangement.

D. Balance of Harms

There is a presumption in Minnesota law that stability of custody is in the child's [*9] best interest. *Pikula v. Pikula, 374 N.W.2d 705, 711-12 (Minn. 1985)*. In order to overcome this presumption, appellant must show that the value of changing custody outweighs the disruption caused by the change. *See Minn. Stat. § 518.18(d)* (1998). In concluding that C.P. was not in danger in her current custody arrangement, the district court effectively determined that there was no advantage to modifying custody in this case.

But the desire for stability is outweighed by the need for a safe environment for the child. Although the record at this stage of the proceedings is necessarily limited, there is sufficient evidence in the record to justify an evidentiary hearing. Consideration of custody modification issues will include, but is not limited to, the concerns asserted by appellant and the material and difficult challenges presented by appellant's work schedule and proposed custody plan.

Modification of Custody: A.P.

With respect to the youngest daughter, A.P., appellant does not allege any specific physical abuse. Appellant claims that A.P. is emotionally abused but he does not offer evidence to support this allegation. Furthermore, unlike [*10] her sister, A.P. has no stated preference to live with either parent. Because appellant failed to establish a prima facie case for modification concerning A.P. we hold that the district court did not abuse its discretion in denying an evidentiary hearing to review A.P.'s custody arrangement.

We conclude that because appellant presented sufficient evidence to establish a prima facie case for modification as to C.P., but not as to A.P., that the district court abused its discretion in denying an evidentiary hearing to review C.P.'s current custody arrangement and remand for an evidentiary hearing regarding C.P.'s custody. We express no opinion, however, on the proper resolution of appellant's modification motion.

Affirmed in part, reversed in part and remanded.