IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TASHINA C. SMITH,
Appellant,
vs.
DEMYRION A. OWENS,
Respondent.

No. 75779-COA



*ORDER OF REVERSAL AND REMAND*

Tashina C. Smith appeals a district court order denying a modification of custody and modifying child support. Eighth Judicial District Court, Family Division, Clark County; Bill Henderson, Judge.

Tashina and respondent Demyrion A. Owens have one minor child together, S.O.[1] Tashina and Demyrion shared custody of S.O. and Demyrion was required to pay child support. Demyrion moved to reduce his child support obligation due to a change in employment. Tashina opposed Demyrion's motion to modify and filed a countermotion for sole legal and physical custody of S.O. Demyrion did not file a reply or an opposition. Following a motion hearing, but without taking any evidence or making any findings, the district court reduced Demyrion's child support to zero and denied Tashina's countermotion to modify custody.

On appeal, Tashina argues that the district court erred by not conducting an evidentiary hearing regarding the custody and child support motions. We conclude that the district court abused its discretion by failing to hold an evidentiary hearing regarding child custody and the district court committed plain error by failing to make the required findings before modifying child support.

[1]We do not recount the facts except as necessary to our disposition.



19-08685

"A district court must hold an evidentiary hearing on a request to modify custodial orders if the moving party demonstrates adequate cause." *Arcella v. Arcella*, 133 Nev. ___, ___, 407 P.3d 341, 345 (2017) (internal quotation marks omitted). "'Adequate cause arises where the moving party presents a prima facie case' that the requested relief is in the child's best interest." *Id.* (quoting *Rooney v. Rooney*, 109 Nev. 540, 543, 853 P.2d 123, 125 (1993)). "To constitute a prima facie case it must be shown that: (1) the facts alleged in the affidavits are relevant to the grounds for modification; and (2) the evidence is not merely cumulative or impeaching." *Rooney*, 109 Nev. at 543, 853 P.2d at 125. The district court must also "look at the actual physical custody timeshare that the parties [are] exercising to determine what custody arrangement is in effect." *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009).

Here, Tashina alleged in her affidavit that (1) Demyrion had not exercised his custodial rights for over 15 months, (2) he failed to pay child support, school, and medical expenses, and (3) he had not maintained regular contact with S.O. This evidence was not merely cumulative or impeaching. Indeed, Demyrion admitted at the hearing he had not seen S.O. in over 17 months. Because Tashina showed adequate cause, the district court abused its discretion by not conducting an evidentiary hearing before determining whether to modify custody.[2]

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[2]We also note that the district court committed plain error by determining custody without making any findings regarding the best interest factors. *Cf. Williams v. Zellhoefer*, 89 Nev. 579, 580, 517 P.2d 789 (1973) (holding that an issue not raised by the parties on appeal may be addressed by this court for plain error if "the error is so unmistakable that it reveals itself by a casual inspection of the record." (quoting *Allison v. Hagan*, 12 Nev. 38, 42 (1877)). A district court's "order must tie the child's

Regarding child support, "NRS 125B.070(1) sets forth the formula to determine the amount of support a parent owes a child." *Wallace v. Wallace*, 112 Nev. 1015, 1020, 922 P.2d 541, 544 (1996). "NRS 125B.080(6) provides that if a court awards child support which is greater or less than the formula establishes, it must set forth findings of fact providing the amount of support established under the formula and the basis for the deviation from the formula." *Id.* Additionally, a "new child support order must be supported by factual findings that a change in support is in the child's best interest and the modification . . . must comply with the requirements of NRS 125B.070 and NRS 125B.080." *Rivero v. Rivero,* 125 Nev. 410, 433, 216 P.3d 213, 229 (2009).

Although not argued by the parties, this court may address issues sua sponte in order to prevent plain error by the district court. *See Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) (stating that this court may address plain error such as when a district court fails to apply a statute that is clearly controlling). Here, the district court committed plain error by not making any findings regarding the statutory formula, or the application of *Wright v. Osburn*, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998) in a joint custody case, and by not making specific findings as to whether the modification of support was in the child's best interest. *See Rivero,* 125 Nev. at 433, 216 P.2d at 229 (holding that an order modifying child support must be "supported by factual findings that

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best interest, as informed by specific, relevant findings respecting the [statutory best interest factors] and any other relevant factors, to the custody determination made." *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). This error is an alternative ground for reversal of the district court's custody order.

a change in support is in the child's best interest"). Therefore, the order modifying child support must be reversed and the case remanded to the district court.[3] [4] Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND for proceedings consistent with this order.

_____, A.C.J.
Douglas

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Bill Henderson, District Judge, Family Division
Michael J. Warhola, LLC
Demyrion A. Owens
Eighth District Court Clerk

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[3]The record reveals there may be disputed questions of fact regarding Demyrion's income. Therefore, an evidentiary hearing on child support may be necessary. *See Nev. Power Co. v. Fluor Ill.*, 108 Nev. 638, 645-46, 837 P.2d 1354, 1360 (1992) (holding that an evidentiary hearing may be necessary in order to determine disputed questions of fact).

[4]The district court should also decide the custody motion before deciding the amount of child support as the application of the child support formula will vary depending upon the court's physical custody determination.