IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARK EDWARD SUMMIT,
Appellant,
vs.
MARGARET MARIE SUMMIT,
Respondent.

No. 77804-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Mark Edward Summit appeals from a district court post-divorce decree order concerning child custody and the distribution of proceeds from the sale of the parties' martial residence. Eighth Judicial District Court, Family Court Division, Clark County; William S. Potter, Judge.

In November 2016, the district court entered a post-decree order to resolve disputes between Mark and respondent Margaret Marie Summit concerning child custody and the distribution of the proceeds from the sale of the parties' marital residence. Mark appealed that decision, and we reversed in part with instructions for the district court to apply the appropriate standards and make necessary findings in resolving Mark's request to modify the parties' custodial arrangement, which provided Margaret with primary physical custody, and for the court to address whether Mark was entitled to a portion of Margaret's proceeds from the sale of the marital residence based on his assertions that he made a mortgage payment on her behalf and that she caused the marital residence to depreciate. *Summit v. Summit*, Docket No. 71912 (Order Affirming in Part, Reversing in Part and Remanding, August 17, 2017).

On remand, the case had been administratively reassigned to another district court judge. Nevertheless, the original judge entered an order in September 2017 to address the issues identified by this court in resolving the appeal in Docket No. 71912, and in so doing, the district court denied Mark's requests for relief. Mark then appealed. Because the original judge who entered the September 2017 did not have jurisdiction at the time he entered the order as the case had been reassigned, we vacated it and remanded for further proceedings. *Summit v. Summit*, Docket No. 74205 (Order Vacating Judgment and Remanding, October 5, 2018).[1]

On remand from the appeal in Docket No. 74205, Mark filed a document styled as a "brief on remand" in which he again reiterated his prior arguments and provided an update regarding new custody issues. Meanwhile, the underlying proceeding was temporarily reassigned back to the original judge for the limited purpose of resolving the issues identified in Docket Nos. 71912 and 74205.

In December 2018, the original judge considered Mark's request to modify custody only as it was presented prior to the appeal in Docket No. 71912 and found that Mark failed to establish that the parties had a de facto joint physical custody arrangement or that a substantial change in circumstances warranted modifying custody. Thus, the original judge concluded that an evidentiary hearing was unwarranted and denied Mark's request to modify custody. The judge also determined that he lacked jurisdiction to consider any new issues raised in Mark's post-remand filings

---

[1]Even though we vacated the order, this court briefly addressed the September 2017 order, and noted that on remand consideration should be given to addressing all of Mark's reasons for modifying custody, including those presented in a motion he filed following the remand in Docket No. 71912.

based on the limited nature of the temporary reassignment that followed the appeal in Docket No. 74205. Finally, the judge also denied Mark's request for a portion of Margaret's share of the marital residence proceeds, finding that Mark did not prove Margaret caused the marital residence to depreciate prior to its sale and that the mortgage payment issue was resolved in the underlying divorce decree, which was never appealed. Thus, the judge reasoned that the issue was never properly before this court on appeal and therefore should not have been remanded for further proceedings. This appeal followed.

With respect to the custody determination in the December 2018 order, Mark primarily argues that, because he established that the parties had de facto joint physical custody and that there had been a substantial change in circumstances, the district court should have either granted his request to modify custody or ordered an evidentiary hearing.

Initially, the general guideline in Nevada for custodial designations is that parents exercise a joint physical custody arrangement when each parent has physical custody of the child at least 40 percent of the time. *See Bluestein v. Bluestein*, 131 Nev. 106, 112, 345 P.3d 1044, 1048 (2015) (explaining that the discussion in *Rivero v. Rivero*, 125 Nev. 410, 425-26, 216 P.3d 213, 224 (2009), regarding what constitutes a joint physical custody arrangement was only a guideline). But the supreme court has emphasized that the "40-percent guideline should not be so rigidly applied that it would preclude joint physical custody when . . . such a custodial designation is in the child's best interest." *Id.* at 113, 345 P.3d at 1049. Here, the calendar on which Mark relied to establish that the parties had a joint physical custody arrangement did not show that he had physical custody of the children at least 40 percent of the time during the relevant period. And Mark has not otherwise argued that it would nevertheless be in the children's best interest to treat the parties' existing custodial

arrangement as a joint physical custody arrangement. Thus, we conclude that the district court did not abuse its discretion in concluding that Margaret had primary physical custody of the parties' children. *Id.* (recognizing that the district court has broad discretion in determining whether a time-share arrangement should be designated as primary or joint physical custody). Accordingly, we affirm this determination.

With respect to whether an evidentiary hearing was nonetheless warranted to evaluate Mark's request to modify custody, a review of the record reveals that Mark supported his allegation that Margaret committed an act of domestic violence by providing the district court with an affidavit from one of his neighbors. In that affidavit, the neighbor attested that he witnessed Margaret back into Mark with her vehicle and then do so a second time after Mark made it known that he was standing behind the vehicle. Because the affidavit raises the possibility that Margaret was aware that Mark was behind her vehicle when she backed into him the second time, it supports an inference that she deliberately backed into Mark and thereby committed an act of domestic violence. And the commission of an act of domestic violence would likely demonstrate that there has been a substantial change in circumstances allowing modification and that modification is in the children's best interests, particularly when considered in the context of Mark's remaining arguments regarding Margaret's allegedly erratic behavior. *See* NRS 33.018 (providing that domestic violence includes an act of battery against a former spouse);[2] NRS 125C.230 (setting forth a rebuttable presumption that a child's best interests are not served by a perpetrator of domestic

[2]Although the Nevada Legislature amended NRS 33.018, effective July 1, 2019, 2019 Nev. Stat., ch. 308, § 1, at 1805, that amendment does not affect the disposition of this appeal, as it became effective after entry of the December 2018 order.

violence exercising physical custody and defining the term "domestic violence" as the commission of any act set forth in NRS 33.018).

In response to Mark's argument on this point, Margaret presents a waiver argument, asserting that Mark failed to address *Rooney v. Rooney*, 109 Nev. 540, 542-43, 853 P.2d 123, 124-25 (1993), which explains that a district court lacks discretion to deny a motion to modify custody without conducting an evidentiary hearing if the moving party establishes adequate cause for such a hearing. While Mark does not specifically address *Rooney* on appeal, he nevertheless raised the issue before this court by arguing that an evidentiary hearing was warranted based in part on his allegation that Margaret committed an act of domestic violence. And while Mark did not expressly request an evidentiary hearing when the district court first heard this matter, the court nonetheless addressed the issue and made clear, both at the hearing and in its order, that it believed conducting an evidentiary hearing would be futile.

Under the circumstances presented here, and in light of the rebuttable presumption set forth in NRS 125C.230, we conclude that the district court abused its discretion in refusing to hold an evidentiary hearing on Mark's motion to modify custody. Regardless of the fact that Mark did not immediately file a police report with respect to the incident in question, the allegations set forth in the affidavit from Mark's neighbor were sufficient to establish adequate cause for an evidentiary hearing. *See Rooney*, 109 Nev. at 543, 853 P.2d at 125 (explaining that adequate cause exists when the moving party establishes a prima facie case for modification and that the moving party may rely on affidavits if "the facts alleged in the affidavits are relevant to the grounds for modification" and "the evidence is not merely cumulative or impeaching"). We therefore reverse this determination and remand the issue for further proceedings on Mark's motion to modify, including for an evidentiary hearing on that motion and

an analysis of whether it presents a basis for modification pursuant to the standard set forth in *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007), for modifying primary physical custody arrangements.

Mark next argues that the district court incorrectly determined that he failed to prove that Margaret caused the marital residence to depreciate, citing an email from the parties' realtor that he attached to his underlying motion. But while the realtor stated in the email that the parties reduced the price of their home several times in an effort to sell it, the realtor did not state a causal connection between any of the price reductions and something that either of the parties did or did not do. Moreover, in opposing Mark's request, Margaret submitted a subsequent email from the parties' realtor in which the realtor specifically stated that she did not intend her prior email to place blame on either of the parties for the difficulties they had in selling their home. And while the realtor also indicated in this second email that the parties further reduced the price of their home after finding a buyer, the realtor explained that those reductions were based on compromises between the parties. Thus, given the foregoing, we discern no basis for relief and we affirm the district court's denial of Mark's request for a portion of Margaret's marital residence proceeds insofar as that request was based on the depreciation issue.

Lastly, with respect to Mark's request for a portion of Margaret's marital residence proceeds, we turn to the mortgage payment issue, which the district court resolved by concluding that the issue was addressed in the divorce decree and that, because the decree was never appealed, the issue was never properly before this court in Docket Nos. 71912 and 74205 or properly before the district court on remand. However, it was part of this court's order and should have been addressed on remand. *See Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) (discussing the law-of-the-case doctrine); *see also Hubbard v. United*

States, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (noting that stare decisis "applies *a fortiori* to enjoin lower courts to follow the decision of a higher court").

Moreover, the district court's conclusion that it previously resolved this issue in the divorce decree is incorrect. While the district court resolved a dispute concerning certain mortgage payments in the divorce decree, Mark listed another, post-decree mortgage payment that he made on Margaret's behalf as a "financial issue" for the court's consideration in the motion practice that gave rise to this series of appeals,[3] such that he could properly present the issue to this court, as he did in Docket No. 71912 and beyond. And because it remains unclear whether Margaret provided Mark with a credit against his child support arrears for this post-decree mortgage payment as she stated she was willing to do in her underlying motion practice, we reverse the district court's November 2018 order insofar as it denied Mark's request for a portion of Margaret's marital residence proceeds based on the post-decree mortgage payment and remand for further proceedings on this issue.

Thus, we affirm the portion of the district court's December 2018 order denying Mark's request for a portion of Margaret's marital residence proceeds based on the depreciation issue and the portion determining that the parties' current custody arrangement provided Margaret with primary physical custody. But we reverse the December 2018 order insofar as it denied Mark's initial request to modify custody and his request for a portion of Margaret's marital residence proceeds based on

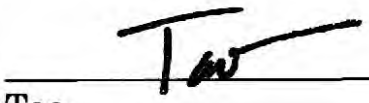
---

[3]Indeed, in its September 2017 order, the district court correctly identified this post-decree mortgage payment as the payment to which we were referring in Docket No. 71912, but the court inexplicably changed course in its December 2018 order as discussed above.

the mortgage payment issue,[4] and we remand this matter to the current department for further proceedings consistent with this order.

It is so ORDERED.[5]

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

---

[4]On remand from our previous decisions, the district court addressed only those issues identified in the orders resolving the appeals in Docket Nos. 71912 and 74205. But in both circumstances, Mark filed an additional motion or brief regarding updated custody issues that the district court neglected to address, leaving Mark with the choice of either appealing its decisions and leaving the newer requests unresolved or waiting for the more recent motions to be addressed and likely losing the chance to appeal the resolution of his original motion. Part of this appears to result from the fact that the underlying case had been reassigned to another department and the temporary reassignment order entered following the remand in Docket No. 74205 only authorized the court to address the issues identified in our orders resolving the prior appeals, resulting in the piecemeal litigation of the parties' case in a manner that is inconsistent with the general rule of one family, one judge. *See* NRS 3.025; EDCR 5.103. On remand, we encourage the district court to leave the matter with the department to which it is currently assigned so that a single judge can simultaneously resolve all of the parties' disputes, including the issues identified in this decision, the issues presented in any unresolved filings submitted after the prior appeals, and any issues arising since the present appeal was filed.

[5]To the extent the parties' arguments are not specifically addressed in this order, we have considered them and they either do not present a basis for relief, are not properly before this court, or need not be reached given our disposition of this appeal.

cc: Presiding Judge, Family Court Division
Hon. William S. Potter, District Judge, Family Court Division
Mark Edward Summit
Roberts Stoffel Family Law Group
Eighth District Court Clerk