IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JANELLE NICOLE VEITH,
Appellant,
vs.
RYAN ANTHONY VEITH,
Respondent.

No. 79158-COA

FILED

APR 17 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Janelle Nicole Veith appeals from a post-divorce decree order denying a motion to modify custody. Eighth Judicial District Court, Family Court Division, Clark County; Denise L. Gentile, Judge.

In the proceedings below, the parties were divorced by way of a decree of divorce entered in 2017. Pursuant to the decree, the parties shared joint legal and joint physical custody of their minor children. In 2019, Janelle moved to modify custody, asserting that respondent Ryan Veith had not exercised his joint custodial time since the entry of the decree and therefore Janelle was effectively the primary physical custodian. Additionally, Janelle asserted that Ryan was struggling with alcohol addiction. Based on the foregoing, Janelle sought an award of primary physical custody. At the first hearing on the motion, the district court referred the children for interviews and gave Janelle temporary primary physical custody. At the second hearing, the district court noted that in the interviews, the children expressed an interest in spending more time with Ryan and that Ryan asserted he was now sober. The court then concluded that Janelle had not established a prima facie case for modification and denied her motion without an evidentiary hearing. This appeal followed.

On appeal, Janelle challenges the district court's denial of her motion without an evidentiary hearing. This court reviews a child custody decision for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). Although we review discretionary determinations deferentially, deference is not owed to legal error. *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142-43 (2015). A district court must hold an evidentiary hearing on a request to modify custody if the moving party demonstrates "adequate cause." *Rooney v. Rooney*, 109 Nev. 540, 542, 853 P.2d 123, 124 (1993). "Adequate cause arises where the moving party presents a prima facie case for modification." *Id.* at 543, 853 P.2d at 125 (internal quotation marks omitted). And to make a prima facie case, the moving party must show 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." *Id.*

Here, the district court denied Janelle's motion without an evidentiary hearing on the basis that she had not demonstrated a prima facie case for modification. But based on our review of the record, it is not clear that the district court properly considered or applied *Rooney*. The record demonstrates that Janelle alleged that Ryan was not caring for the children pursuant to the joint custody schedule provided for in the decree and he only had the children approximately 18 percent of the time over the past year. Additionally, she alleged that Ryan continued to suffer from alcohol addiction. Contrary to the district court's conclusion, these alleged facts, if found to be true at an evidentiary hearing, could demonstrate that custody modification is in the children's best interest. *See* NRS 125C.003(1)(a) (providing that joint physical custody is presumed not to be in the best interest of the children if the court finds by substantial evidence

that a parent is unable to adequately care for the children for at least 146 days per year); NRS 125C.0035(4)(f) (enumerating the parents' mental and physical health as one of the factors to be considered in determining the children's best interest). And nothing in the record indicates that this evidence would be merely cumulative or impeaching. *See Rooney*, 109 Nev. at 543, 853 P.2d at 125.

In response, Ryan concedes that he did not have the children pursuant to the schedule provided in decree, although he disputes the amount of time Janelle alleges that he had the children, and admits that he is an alcoholic, but asserts that he is now sober. He also contends that the district court considered Janelle's arguments, his argument that he is now sober, and the children's interviews, and determined that the allegations failed to demonstrate adequate cause. But Ryan, like the district court, fails to explain how Janelle's allegations are not relevant to a modification request, or are cumulative or impeaching. *See id.* And Ryan's assertion of a contrary position alone is not a basis to decline an evidentiary hearing.[1] *See Arcella v. Arcella*, 133 Nev. 868, 871-72, 407 P.3d 341, 345-46 (2017) (concluding that "the court abused its discretion by deciding solely upon contradictory sworn pleadings [and] arguments of counsel" that an evidentiary hearing was not warranted when appellant's alleged facts demonstrated adequate cause) (internal quotation marks omitted). Thus, under the circumstances here, we conclude that the district court abused its discretion in refusing to hold an evidentiary hearing on Janelle's motion to

[1]To the extent the district court also considered the children's interviews, the wishes of the children, if they are sufficient age and capacity to form an intelligent preference, is only one factor for the court's consideration in determining the best interest of the children. *See* NRS 125C.0035(4).

modify custody. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241; *Davis*, 131 Nev. at 450, 352 P.3d at 1142-43.

We therefore reverse and remand the issue for further proceedings on Janelle's motion, including an evidentiary hearing on that motion and analysis of whether it presents a basis for modification pursuant to *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009) (explaining that modification of a joint physical custody arrangement is appropriate if it is in the children's best interest).

It is so ORDERED.[2]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Denise L. Gentile, District Judge, Family Court Division
Hanratty Law Group
Kainen Law Group
The Cooley Law Firm
Eighth District Court Clerk

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[2]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.