

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRETT ROSSELLI,  
Appellant,  
vs.  
CASSANDRA ROSSELLI, N/K/A  
CASSANDRA DILORETO,  
Respondent.

No. 80389-COA

FILED

JUL 21 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *Elizabeth A. Brown*  
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

Brett Rosselli appeals from a district court order denying a motion to modify custody, visitation, and support. Second Judicial District Court, Family Court Division, Washoe County; Bridget E. Robb, Judge.

Brett and Cassandra Rosselli were divorced in March of 2011. Since then, the child custody arrangement between the parties has been heavily litigated.<sup>1</sup> Notably, however, Cassandra has maintained primary physical custody of the parties' minor children since the divorce, and Brett has exercised parenting time, although his schedule has varied. Brett also had supervised parenting time for approximately four years, which the district court lifted in an order in 2017.<sup>2</sup> In that order, the district court

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

<sup>2</sup>We note that the district court deemed Brett a vexatious litigant because he filed many voluminous and unmeritorious motions while he represented himself, thereby unfairly increasing Cassandra's attorney fees, which she was unable to recover due to Brett's bankruptcy. As a result of Brett's vexatiousness, the district court imposed certain restrictions, including prohibiting Brett from filing motions that exceeded six pages. Thus, we recognize that the record is somewhat limited in this case, but this does not affect our resolution of this appeal.

also ruled that Cassandra would continue to exercise primary physical custody.

In 2019, Brett filed a motion to modify custody, visitation, and support, arguing that there was a significant change in circumstances as the children were older, their school schedules and extracurricular activities were different, he relocated to be near them, and he had been exercising unsupervised parenting time without incident for approximately two years. In particular, Brett argued that while the court's 2017 order allowed him parenting time during the week every Thursday from after school to 7:30 p.m., changes to the children's school schedules and extracurricular activities significantly restricted his parenting time, such that he was unable to spend quality time with the children during these visits. Cassandra opposed the motion, claiming that the children were thriving under the current arrangement due to her having primary physical custody, and the district court acknowledged in its order that the parties agreed that the children were doing well under the current custodial arrangement. The court denied Brett's motion without a hearing, concluding that Brett did not present a prima facie case for custody modification pursuant to *Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123 (1993).

On appeal, Brett argues that the district court abused its discretion in denying his motion without conducting a hearing in violation of Washoe District Family Court Rule (WDFCR) 44,<sup>3</sup> as well as *Rooney*, and that the court misapplied the factors regarding modification. This court reviews a child custody decision, including one regarding the parties' time share, for an abuse of discretion *Wallace v. Wallace*, 112 Nev. 1015, 1019,

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<sup>3</sup>WDFCR 44 was amended effective January 1, 2020. Thus, we cite the prior version of the rule herein.

922 P.2d 541, 543 (1996). But deference is not owed to legal error. *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015).

WDFCR 44(4)(b) provided that all “[c]ontested motions affecting child custody, including temporary custody, modification of custody and/or request to move out of state with children, *shall be set for hearing.*” (Emphasis added.) Here, Brett moved to modify custody, including changing the parties’ time share, asserting that the children’s school schedules and extracurricular activities had changed, such that he was unable to exercise quality time with the children during his parenting time, and that since he began exercising unsupervised parenting time in 2017 there had been no incidents, such that he was entitled to additional time with the children. Because Brett moved to modify custody and Cassandra opposed, the district court was required to hold a hearing on Brett’s contested motion. WDFCR 44(4)(b). And because the district court failed to hold such a hearing, we necessarily reverse and remand the matter for the district court to hear oral argument on the motion as required by WDFCR 44(4)(b).<sup>4</sup> *See Wallace*, 112 Nev. at 1019, 922 P.2d at 543; *Davis*, 131 Nev. at 450, 352 P.3d at 1142.

Given our conclusion that a hearing was required under WDFCR 44, which is a hearing separate and apart from whether a hearing

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<sup>4</sup>As noted above, we recognize that WDFCR 44 was amended effective January 1, 2020, and no longer requires oral argument on contested motions such as the one here. Nevertheless, because the version of WDFCR 44(4)(b) that was in effect at the time the district court made its decision required hearings on contested custody motions, we conclude that the court was required to hold such a hearing. We recognize that such a hearing may cause the parties to incur additional attorney fees and costs; nevertheless, we have a great deal of confidence that the court will be able to conduct a directed and efficient hearing.

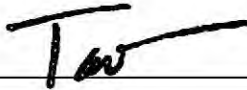
is warranted under *Rooney*, we make no comment as to whether an evidentiary hearing will ultimately be required under *Rooney* to determine whether to modify the parties' custodial status or to adjust the parenting time schedule. But we note that Brett's arguments regarding the changes in the children's school schedules and extracurricular activities—and how that may affect the quality of Brett's parenting time—whether Brett has exercised his unsupervised parenting time without incident, and any other changes in circumstances may be facts “relevant to the grounds for modification.” *Rooney*, 109 Nev. at 543, 853 P.2d at 125. Such arguments should necessarily be considered by the district court during oral argument at the WDFCR 44 hearing in determining whether an evidentiary hearing under *Rooney* is warranted. See *Ellis v. Carucci*, 123 Nev. 145, 151, 161 P.3d 239, 243 (2007) (explaining that when considering whether a change in circumstances has occurred, changes in the child's circumstances or the family unit as a whole should be considered, and that any change generally must have occurred since the last custody determination); *Wallace*, 112 Nev. at 1019, 922 P.2d at 543 (explaining that decisions regarding the parties' time share is a custody determination).

Therefore, without deciding whether a modification in custody status, or the parties' time share is ultimately appropriate, we conclude that the district court was required to conduct a hearing pursuant to WDFCR 44 in order to properly consider Brett's motion and ultimately determine whether an evidentiary hearing under *Rooney* was warranted. WDFCR 44; *Wallace*, 112 Nev. at 1019, 922 P.2d at 543. Accordingly, we



ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>5</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Bridget E. Robb, District Judge, Family Court Division  
Bittner Legal LLC  
Barber Law Group, Inc.  
Kathleen T. Breckenridge  
Washoe District Court Clerk

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<sup>5</sup>In light of our resolution of this matter, we need not reach Brett's remaining arguments on appeal.