

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUSTIN MAURICE,
Appellant,
vs.
SARAH MAURICE,
Respondent.

No. 83009-COA

FILED

JAN 24 2022

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

ORDER OF REVERSAL AND REMAND

Justin Maurice appeals from a district court order denying a motion to modify child custody and awarding attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; Bryce C. Duckworth, Judge.

Justin and Sarah Maurice were divorced by way of a stipulated decree of divorce entered in 2015.¹ Pursuant to the terms of the decree, the parties were awarded joint legal custody of their two minor children, and Sarah was awarded primary physical custody with Justin having parenting time with the children on alternating weekends. In 2020, Justin moved to modify physical custody, arguing that several relevant developments justified modifying custody to joint physical custody, including a change in his employment and work schedule, a change in Sarah's work schedule, Justin's availability as caregiver to the children while Sarah is at work, the passage of more than five years since the divorce, the children's bond with their stepsiblings, and that modification was in the children's best interests.

Justin also alleged that he was primarily assisting the children with school during the COVID-19 pandemic, arguing that the parties had been exercising a different timeshare as compared to what was provided in

¹We recount the facts only as necessary for our disposition.

the stipulated divorce decree. Further, Justin also argued that the children voiced a preference for spending more time with him, instead of being attended to by third parties while Sarah was at work. Such an arrangement of third parties watching the children, he argued, was unnecessary given the change in his work schedule, which would permit him to care for the children. Sarah opposed the motion and made a countermotion for attorney fees.

The district court summarily denied Justin's motion to modify custody, finding that a change in work schedule did not constitute a substantial change in circumstances required to modify primary physical custody. Justin then filed a motion for reconsideration, arguing that the district court failed to recognize a substantial change in circumstances, despite all the arguments Justin raised.² Sarah contended that Justin failed to establish a substantial change in circumstances and requested attorney fees for having to oppose the motion for reconsideration. At the hearing on the motion for reconsideration, the district court denied the motion and awarded \$1,500 in attorney fees to Sarah. We consider two of Justin's arguments on appeal: (1) whether a change in work schedule is considered a substantial change in circumstance sufficient for the purpose of granting a

²Because the district court considered the merits of Justin's motion for reconsideration, this court may review the arguments Justin asserted in his motion. *See Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007) (holding that appellate courts may consider arguments asserted in a motion for reconsideration if the district court chose to entertain the motion on its merits and it is properly part of the appellate record), *disapproved of on other grounds by AA Primo Builders LLC v. Washington*, 126 Nev. 578, 245 P.3d 1190 (2010).

hearing to consider modification of custody, and (2) whether an evidentiary hearing should have been conducted to address whether modifying custody was warranted in this case.³

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). Additionally, this court reviews the failure to conduct an evidentiary hearing for an abuse of discretion. *See Nev. Power Co. v. Fluor Ill.*, 108 Nev. 638, 646, 837 P.2d 1354, 1360 (1992) (concluding that the district court abused its discretion in failing to hold an evidentiary hearing to determine disputed questions of fact). 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). To modify primary physical custody, the party seeking modification must demonstrate that there has been a substantial change in circumstances affecting the welfare of the child or children and that modification is in the children's best interests. *Romano v. Romano*, 138 Nev., Adv. Op. 1, ___ P.3d ___, ___ (2022). "[T]he party seeking a modification of custody bears the burden of satisfying both prongs." *Ellis*, 123 Nev. at 151, 161 P.3d at 242-43. Further, when considering whether modification is in the children's best interests, the district court must make specific findings as to the best interests of the children pursuant to NRS 125C.0035(4). *See Davis*, 131 Nev. at 451, 352 P.3d at 1143.

³Insofar 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.

Importantly, as relevant here, the district court did not conduct an evidentiary hearing in deciding the motion to modify custody. An evidentiary hearing is required where the moving party has demonstrated “adequate cause” for such a hearing. *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 Justin’s request for modification of custody without an evidentiary hearing, concluding that Justin failed to demonstrate adequate cause for a hearing because a change in work schedule is not a change in circumstance necessary to modify custody. We disagree for two reasons. First, a change in a parent’s work schedule can be considered a change in circumstance if it affects the welfare of the children. *See Silva v. Silva*, 136 P.3d 371, 377 (Idaho Ct. App. 2006) (recognizing that a parent’s work schedule is relevant to a custody determination if it affects the well-being of the children).⁴ Therefore, we agree with Justin that the

⁴Our view is consistent with how both the Nevada Supreme Court and this court have considered this issue in past dispositions. *See Godifay v. Asgedom*, No. 64289, 2015 WL 9597499 (Nev. Dec. 30, 2015) (Order of Reversal and Remand) (citing to *Silva v. Silva*, 136 P.3d 371, 377 (Idaho Ct. App. 2006), in explaining that a parent’s work schedule is a relevant consideration in determining custody if that schedule affects the well-being of the children)); *Giddens v. Giddens*, No. 72533, 2018 WL 2130845, at *2 (Nev. Ct. App. Apr. 30, 2018) (Order of Reversal and Remand) (holding that a district court abused its discretion in failing to consider the impact of the parents’ work schedules on the children as related to a change in

district court abused its discretion in denying a motion to modify custody based primarily on the finding that a change in work schedule does not equate to a substantial change in circumstance. At a minimum, the district court should have set the matter for an evidentiary hearing to determine if changes to the parents' work schedules in this case constituted a change in circumstances warranting a modification to custody, and then consider the best interest of the children if substantial change of circumstances is met.

Second, although the district court concluded in its order denying reconsideration that *Rooney* applied, it issued no specific findings as to how Justin failed to demonstrate adequate cause for an evidentiary hearing. 109 Nev. at 543, 853 P.2d at 125. Nothing in the record indicates that Justin's alleged facts would be "merely cumulative or impeaching." *Id.* Even if the district court was hesitant to rely primarily on the changes to the parents' work schedules in determining whether Justin presented adequate cause for an evidentiary hearing, the court should have considered all of the relevant facts before making this determination, as well as giving them consideration when ultimately determining whether a modification to custody was appropriate.⁵ *See id.* Therefore, we agree that the district court

circumstances). While NRAP 36(c)(3) bars parties—with exceptions as noted in NRAP 36(c)(2)—from citing "an unpublished disposition issued by the Supreme Court" before January 1, 2016, by its plain language, NRAP 36(c)(3) does not preclude this court from citing to the supreme court's orders and its own orders. We see no reason why the analysis in *Godifay* and *Giddens* should not be considered. Thus, the district court should have considered the changes in the parties' work schedules in addressing whether there was a substantial change in circumstances.

⁵For example, one of the relevant facts Justin raised is that the eldest child, who is fourteen years of age, voiced a preference for wanting to spend more time with Justin. This fact could be construed as both a substantial


abused its discretion in not setting the matter for an evidentiary hearing before deciding whether to modify custody as Justin demonstrated adequate cause for such a hearing in resolving his motion.

Therefore, we

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for proceedings consistent with this order.⁶


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Bryce C. Duckworth, District Judge, Family Court Division
Israel Kunin, Settlement Judge
Hofland & Tomscheck
Jacobson Law Office, Ltd.
Eighth District Court Clerk

change in circumstance affecting the welfare of the child as well as a best interest factor when considering whether modification of custody was in the children's best interest. This fact supported setting the matter for an evidentiary hearing. In addition, the impact of the COVID-19 pandemic on the family's schedules and the parents' ability to actively participate in remote schooling, as well as the support of other family members, including the relationships between the children and their stepsiblings, are also relevant to modification of custody and nothing in the record indicates that these facts would be merely cumulative or impeaching pursuant to *Rooney*. 109 Nev. at 543, 853 P.2d at 125.

⁶Because we are reversing and remanding this matter to the district court to set an evidentiary hearing and make requisite findings on Justin's motion to modify custody, we necessarily vacate the award of attorney fees. We note, however, that any fee award made pursuant to EDCR 7.60 requires the district court to articulate the factual basis for such an award.