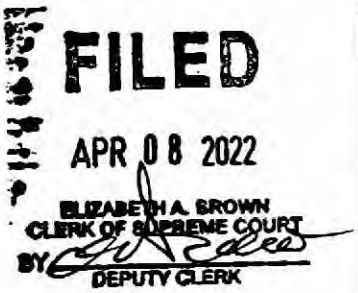
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LYUDMYLA A. ABID, A/K/A LYUDMYLA PYANKOVSKA,
Appellant,
vs.
SEAN R. ABID,
Respondent.

No. 82781-COA



ORDER OF REVERSAL AND REMAND

Lyudmyla A. Abid appeals from a district court order denying her motion to modify child custody. Eighth Judicial District Court, Family Court Division, Clark County; Nadin Cutter, Judge.[1]

The parties were divorced by way of a stipulated decree of divorce entered in 2010. Pursuant to the terms of the stipulated decree, the parties shared joint legal and joint physical custody of their minor child. As relevant here, after an evidentiary hearing in 2016, the district court modified custody, awarding the parties joint legal custody and awarding respondent Sean Abid primary physical custody. Lyudmyla appealed and the Nevada Supreme Court affirmed the district court's order in *Abid v. Abid*, 133 Nev. 770, 406 P.3d 476 (2017).

In September 2019, Lyudmyla filed a motion to modify physical custody, asserting that since being awarded primary physical custody, Sean

[1]We note that this case has been assigned to several departments in the district court, but at issue in this appeal are the order denying a motion to modify child custody issued by the Honorable Vincent Ochoa and the subsequent order likewise denying Lyudmyla's request for modification and her request to reconsider Judge Ochoa's order, issued by the Honorable Nadin Cutter.

began undermining Lyudmyla's relationship with the child, began trying to alienate Lyudmyla from the child, and had not properly cared for the child. Lyudmyla's motion was heard in November 2019 and the district court denied the motion, but ordered the child to enter therapy and to attend a child interview at the Family Medication Center (FMC). The court did not enter its final, written order denying her motion until November 2020 and in it the court concluded that Lyudmyla's allegations, even if true, did not establish a prima facie case for a change in circumstances or that it would be in the child's best interest to modify custody, such that Lyudmyla failed to demonstrate adequate cause for an evidentiary hearing on her motion pursuant to *Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123 (1993). Additionally, the district court's order found that Sean adequately refuted all of Lyudmyla's allegations in his opposition, that the child was doing well in school, that the child appeared to be thriving in Sean's care, and that the CPS records Lyudmyla cited in support of her position that Sean was not caring for the child had all been unsubstantiated.

In October 2020, before the court entered its order from the November 2019 hearing, Lyudmyla filed another motion requesting that the district court enter findings from the FMC child interview and to modify custody based on the child's best interest—including that the child expressed a desire to have equal time with both parents, that Sean began enrolling the child in activities during Lyudmyla's time without discussing it with her first, that Sean failed to enroll the child in therapy pursuant to the court's order, and that Sean voluntarily gave Lyudmyla additional time with the child when it was not convenient for him to care for the child. Also in October 2020, Lyudmyla filed a motion to amend her motion to modify physical custody based on the report from the FMC child interview. Then, in November 2020, after the district court entered the final order from the November 2019 hearing, Lyudmyla filed an objection to the proposed order

and a motion for reconsideration, arguing that the district court failed to make findings relating to the FMC child interview, failed to address her argument that the child still had not been enrolled in therapy, and failed to grant her an evidentiary hearing regarding the CPS records.

In the court's order resolving these motions, the district court concluded that the November 2020 order made sufficient findings of fact demonstrating that Lyudmyla failed to establish a prima facie case for a change in custody and that specific findings with respect to the FMC child interview were properly omitted from that order. The court further found that specific findings of fact regarding the child interview need not be included in a final order and that the child here, at 12 years old, based on a totality of the circumstances, was too young to give weight to his preference as to physical custody. The court went on to find that although the district court took the matter of the child interview and therapy under advisement in the November 2020 order, the court taking these matters under advisement did not constitute a custody changing event. The court also noted that it appeared Lyudmyla was attempting to relitigate issues that were previously resolved by the prior custody order and affirmed by the Nevada Supreme Court on appeal. Accordingly, the district court denied Lyudmyla's motion to amend her motion to modify physical custody based on the findings from the FMC child interview and to modify custody based on the child's wishes. This appeal followed.

On appeal, Lyudmyla challenges the district court's orders denying her motions to modify custody without an evidentiary hearing. This court reviews a child custody decision for an abuse of discretion, but "the district court must have reached its conclusions for the appropriate reasons." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-42 (2007). In reviewing child custody determinations, this court will affirm the district court's factual findings if they are supported by substantial evidence. *Id.* at

149, 161 P.3d at 242. "Although this court reviews a district court's discretionary determinations deferentially, deference is not owed to legal error, or to findings so conclusory they may mask legal error." *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (internal citations omitted). When making a custody determination, the sole consideration is the best interest of the child. NRS 125C.0035(1); *Davis*, 131 Nev. at 451, 352 P.3d at 1143.

Modifying a primary physical custody arrangement is appropriate only when the district court finds that there has been a substantial change in circumstances affecting the welfare of the child and that modification would be in the best interest of the child. *Romano v. Romano*, 138 Nev., Adv. Op. 1, 501 P.3d 980, 983 (2022); *Ellis*, 123 Nev. at 150, 161 P.3d at 242. And 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, in the November 2020 order, the district court denied Lyudmyla's motion to modify custody 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 Lyudmyla alleged that Sean was not properly caring for the child, that he was not exercising all of his custodial time as provided by the order awarding him primary physical custody, and that since obtaining primary physical custody, Sean was

interfering with Lyudmyla's parenting time, amongst other things. Contrary to the district court's conclusion, these alleged facts are relevant to the grounds for modification and, if found to be true at an evidentiary hearing, could demonstrate that a custody modification was warranted. *See Romano*, 138 Nev., Adv. Op. 1, 501 P.3d at 983; *Rooney*, 109 Nev. at 543, 853 P.2d at 125; *see also* NRS 125C.0035 (providing factors the district court must consider in determining the best interest of the child). 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.

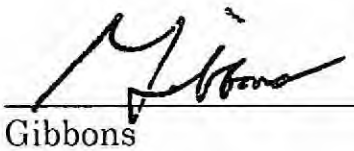
Moreover, the district court found that Sean refuted Lyudmyla's arguments and made findings as to the exhibits provided, such that it appears the district court considered Lyudmyla's arguments on their merits. While this court defers to the district court's factual findings, *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42, such factual findings must be determined by the district court based on evidence presented. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014) (noting that arguments of counsel are not evidence and do not establish the facts of the case). Because the district court failed to conduct an evidentiary hearing and admit evidence upon which to make such findings, we are compelled to reverse and remand this matter for further proceedings. *See Davis*, 131 Nev. at 450, 352 P.3d at 1142.

As to the district court's subsequent order denying Lyudmyla's motion to reconsider the November 2020 order and her additional motions to modify custody based on events that transpired since the court's hearing in November 2019, we likewise conclude that reversal is warranted. Based on our review of the record, it appears that the district court only considered the veracity of the November 2020 order, rather than Lyudmyla's arguments that, based on events since the November 2019 hearing, she was entitled to modification or, at least, additional findings relating to those

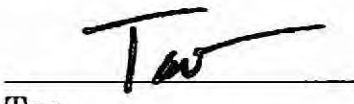
events from which she could appeal. Because the district court does not appear to have considered and did not address Lyudmyla's arguments in this regard, we reverse and remand for further proceedings. *See Davis*, 131 Nev. at 450, 352 P.3d at 1142.

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[2]



_____, C.J.
Gibbons



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[2]We do not address Lyudmyla's arguments challenging the district court's determinations leading to the custody modification as those issues either were or could have been previously addressed by the Nevada Supreme Court in *Abid*, 133 Nev. 770, 406 P.3d 476. *See Hsu v. Cty. of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007) (explaining that pursuant to the law of the case doctrine, "the law or ruling of a first appeal must be followed in all subsequent proceedings" and cannot be revisited in a later appeal); *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n. 3, 252 P.3d 668, 672 n.3 (2011) (noting that issues not raised on appeal are deemed waived); *see also Recontrust Co. v. Zhang*, 130 Nev. 1, 9, 317 P.3d 814, 819 (2014) (recognizing that generally an issue cannot be raised in a second appeal if it could have been raised in the first appeal, but was not).

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.

cc: Hon. Nadin Cutter, District Judge, Family Court Division
Hon. Vincent Ochoa, District Judge, Family Court Division
Lyudmyla A. Abid
Jones & LoBello
Eighth District Court Clerk