

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILLIAM EUGENE DIMONACO,  
Appellant,  
vs.  
ADRIANA DAVINA FERRANDO,  
Respondent.

No. 80576-COA

**FILED**

APR 28 2022

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

William Eugene Dimonaco appeals from a post-custody decree amended order concerning after-school care. Eighth Judicial District Court, Family Court Division, Clark County; Charles J. Hoskin, Judge.

The underlying custody decree awarded Dimonaco and respondent Adriana Davina Ferrando joint legal and physical custody of their minor child. A dispute later arose between the parties concerning after-school care for the child on Dimonaco's parenting time days. In particular, Ferrando moved for an order permitting her to provide after-school care until Dimonaco got off work on his parenting time days, asserting that it would be in the child's best interest to receive after-school care, including assistance with homework, from her, a parent, rather than an after-school care program offered by the children's school, which Dimonaco had proposed. In his subsequent opposition, Dimonaco indicated that he had enrolled the child in the after-school care program and asserted that it was in the child's best interest to continue attending the program on his parenting time days. Specifically, Dimonaco argued that the program provided educational services and opportunities for socialization, and further asserted that allowing Ferrando to provide after-school care on his

parenting time days would confuse the child, disrupt the child's sense of belonging in Dimonaco's home, and require additional child exchanges despite the high level of conflict between the parties. Moreover, Dimonaco's opposition included a countermotion, which, in connection with his argument that the child should be permitted to attend the after-school care program on his parenting time days, requested relief from a provision in the parties' divorce decree that authorized Ferrando to care for the child on one of Dimonaco's parenting time days while he was at work. Following a motion hearing, the district court entered an order that provided for the child to receive after-school care from Ferrando, rather than any third-party caregiver, on Dimonaco's parenting time days.

Dimonaco then brought a motion for relief from the court's order under NRCP 52 and 59 in which he sought an evidentiary hearing and an amended order. For support, Dimonaco argued, among other things, that the district court's order lacked findings with respect to the best interest factors and that the court could not make such findings because it did not take any evidence. Ferrando opposed the motion. After another motion hearing, the district court entered an amended order, which denied Dimonaco's request for an evidentiary hearing and preserved the court's original ruling on the after-school care issue. For support, the district court reasoned that Dimonaco never established adequate cause for an evidentiary hearing, and further set forth findings with respect to the best interest factors, which the court concluded weighed in Ferrando's favor. This appeal followed.

The district court has broad discretion to determine questions of child custody, and we will not disturb the court's custodial determinations absent a clear abuse of discretion. *Sims v. Sims*, 109 Nev. 1146, 1148, 865

P.2d 328, 330 (1993). Nevertheless, the district court's findings must be supported by substantial evidence, which is "evidence that a reasonable person may accept as adequate to sustain a judgment." *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009) (internal quotation marks omitted), *overruled in part on other grounds by Romano v. Romano*, 138 Nev., Adv. Op. 1, 501 P.3d 980, 982 (2022).

On appeal, the parties dispute whether the district court could properly grant Ferrando's motion concerning after-school care without first conducting an evidentiary hearing. The supreme court addressed a similar issue in *Arcella v. Arcella*, 133 Nev. 868, 871-72, 407 P.3d 341, 345-46 (2017), which involved an order granting a motion concerning school selection. There, the supreme court initially stated that "[a] district court must hold an evidentiary hearing on a request to modify custodial orders if the moving party demonstrates 'adequate cause.'" *Id.* at 871, 407 P.3d at 345 (citing *Rooney v. Rooney*, 109 Nev. 540, 542, 853 P.2d 123, 124 (1993)). And after determining that the moving party established adequate cause for an evidentiary hearing on his motion, the supreme court concluded that the district court abused its discretion when it granted the motion based on the parties' "contradictory sworn pleadings [and] arguments of counsel" rather than conducting an evidentiary hearing. *Id.* at 871-72, 407 P.3d at 345-46 (alteration in original).

In the present case, Ferrando established adequate cause for an evidentiary hearing on her motion regarding after-school care by asserting that Dimonaco planned for the child to attend an after-school care program provided by the child's school during his parenting time, explaining that the parties disagreed as to whether it was in the child's best interest to attend the program or receive after-school care from Ferrando,

and essentially alleging that this was tantamount to “parking” the child in daycare. *See id.* at 871, 407 P.3d at 345 (providing that adequate cause is established when the moving party “presents a prima facie case’ that the requested relief is in the child’s best interest” by showing that “(1) the facts alleged in the affidavits are relevant to the [relief requested]; and (2) the evidence is not merely cumulative or impeaching” (alteration in original) (quoting *Rooney*, 109 Nev. at 543, 853 P.2d at 125)). From there, the parties’ motion practice presented questions of fact with respect to whether the child’s after-school care program provided educational services that would be beneficial to the child and whether permitting Ferrando to provide after-school care for the child on Dimonaco’s parenting time days would expose the child to conflict between the parties due to the additional child exchanges that the arrangement would require. Resolution of these issues necessarily required an evaluation of the services provided by the after-school care program, whether the child needed those services, and the level of conflict between the parties.

However, rather than conduct an evidentiary hearing on the after-school care issue, the district court resolved the parties’ disputes based on their contradictory sworn and unsworn motion practice, exhibits attached thereto, and the arguments of counsel. And although Ferrando argues that the after-school care issue is a minor custodial matter that should not require an evidentiary hearing, we disagree under the facts of this case.

The district court’s best interest determination must be based on substantial evidence. *See Rivero*, 125 Nev. at 423, 428, 216 P.3d at 223, 226 (explaining that the best interests of the child is the sole consideration in custody matters and that the district court’s best interests findings must



be supported by substantial evidence). Yet here, the district court based its decision, in part, on exhibits attached to the motion practice before it that had never been admitted, and the arguments of the parties' counsel; neither of which are evidence. See EDCR 5.205(g) (providing that exhibits attached to motions do not constitute substantial evidence unless admitted); *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). And while the district court may look to the parties' affidavits or declarations when evaluating motions, see EDCR 2.21(a) (authorizing the district court to hear motions based upon affidavits and unsworn declarations under penalty of perjury, and to set a future hearing to resolve disputed factual questions presented therein), the affidavits and declarations in the present case simply swore to the truth of the contradictory factual allegations set forth in the parties' motion practice, which only vaguely discussed the nature of the after-school care program and the level of conflict between the parties, and did not specifically address the child's needs. As a result, the district court lacked sufficient evidence upon which to make a best interest determination.<sup>1</sup> See *Rivero*, 125 Nev. at 428, 216 P.3d at 226.

Given the foregoing, the district court abused its discretion by granting Ferrando's motion without first conducting an evidentiary hearing. See *Arcella*, 133 Nev. at 872, 407 P.3d at 346 (reviewing the

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<sup>1</sup>Consequently, we are not persuaded by Ferrando's assertion that Dimonaco's challenge to the district court's decision not to conduct an evidentiary hearing is barred by the invited error doctrine and other waiver principles based on his failure to request an evidentiary hearing until after the district court entered its initial order resolving the after-school care issue.

district court's decision to grant a motion concerning school choice without first conducting an evidentiary hearing for an abuse of discretion); *see also 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). Accordingly, we reverse the amended order and remand for the district court to conduct an evidentiary hearing on the after-school care issue.<sup>2</sup>

It is so ORDERED.<sup>3</sup>

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

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

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

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<sup>2</sup>Because our disposition of this appeal requires the district court to conduct an evidentiary hearing on the parties' dispute over who should provide after-school care on Dimonaco's parenting time days, the district court will also need to evaluate whether to preserve the provision in the divorce decree that authorized Ferrando to provide care for the child while Dimonaco is at work on one of his parenting time days. Accordingly, we need not address the district court's denial of Dimonaco's countermotion concerning that provision. We note, however, that on remand, the district court has broad discretion to tailor the scope of an evidentiary hearing to the magnitude of the issue before it. *See Arcella*, 113 Nev. at 872, 407 P.3d at 346 (recognizing the district court's discretion with respect to the form of an evidentiary hearing); *Sims*, 109 Nev. at 1148, 865 P.2d at 330 ("The trial court enjoys broad discretionary powers in determining questions of child custody.").

<sup>3</sup>Having reviewed the parties' remaining arguments, we conclude that they either do not present a basis for relief or need not be reached given our disposition of this appeal.

cc: Hon. Charles J. Hoskin, District Judge, Family Court Division  
Robert E. Gaston, Settlement Judge  
Ford & Friedman, LLC  
Fine Carman Price  
Eighth District Court Clerk