IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILLIAM SHAWN WALLACE,
Appellant,
vs.
AMMIE ANN WALLACE,
Respondent.

No. 83591-COA

ORDER OF AFFIRMANCE

William Shawn Wallace appeals from a district court order denying his motion to modify physical child custody. Eighth Judicial District Court, Clark County; Vincent Ochoa, Judge.

William and Ammie Wallace married in 2009 and had three children together: W.W. (now 11 years old), M.W. (now nine years old), and Q.W. (now seven years old). The parties separated in 2017 and began living apart. The parties agreed that Ammie would have primary physical custody but that William would have parenting time Monday through Friday, from 3:30 p.m. (or after school if school is in session) through 6:30 p.m., and then they would alternate weekends.

Then, due to the COVID-19 pandemic, the children began distance learning at home. William rented a home near Ammie and both William and Ammie worked from home. Both parties agree that, at least by August 2020, they began exercising a custody timeshare that differed from the one to which they had previously agreed. While Ammie characterized this as a "flexible timeshare," William characterized this new timeshare as joint physical custody with a "2/3/2 timeshare."[1]

[1]He claimed the parties agreed that he would have the children from Tuesday evening until Thursday at bedtime, and the parties would

At some point during the summer of 2020, Ammie visited her mother in Texas for two months after her mother developed health issues. During that time, the children stayed with William. After Ammie returned, her boyfriend moved in with her. According to William, this upset the children. Ammie then expressed to William a desire to marry her boyfriend, and the parties filed a joint petition for divorce in September 2020, which the court accepted and entered. In the divorce decree, the parties agreed to—and the court ordered—the custody arrangement the parties first agreed to upon separation: Ammie would have primary physical custody and William would have "custody of the children Monday through Friday, from 3:30 p.m. (or after school if school is in session), through 6:30 p.m." The parties would then alternate weekends with the children, defined as lasting from Friday at 6:30 p.m. to Sunday at 6:30 p.m.

Despite this language in the divorce decree, the parties did not exercise their stipulated parenting time schedule. Instead, they continued to exercise the custody schedule they had been practicing prior to filing for divorce that was much closer to joint physical custody. They continued this schedule until the children returned to in-person learning in spring of 2021.

At some point in 2020, William underwent hip surgery. The children stayed primarily with Ammie during William's recovery. However, according to William, Ammie would yell at the children, telling them she was not prepared to have them for additional time. William asserted below that Ammie refused to let the children visit him during that time period and that the "children called [me] nearly every evening upset and asking to come to [my] house." William alleged that he picked up the children, against

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alternate Fridays and weekends. "If one party had the children for the weekend, the other party would have them for Friday."

Ammie's wishes, and that when he eventually returned with the children days later, Ammie informed him that "they were now going to start following the decree in the 'most minute detail.'" When he started returning the children at 6:30 p.m. each day, he claimed "the children began begging [him] to fight for more time with them and were crying nearly every evening he was forced to take them back to Ammie."

William alleged that the parties only changed their custody schedule to the one ordered in the decree once the parties returned to in-person schooling. William then informed Ammie that he would be seeking a modification of the custody agreement. William formally moved the district court to modify custody in June 2021.

In his motion and accompanying declaration, William informed the district court of the aforementioned facts. He argued that the parties exercised joint physical custody, and that the best interest of the children required modifying physical custody. Ammie opposed the motion. She argued that the court should deny William's motion without holding an evidentiary hearing because he failed to demonstrate—or even assert—any substantial change in circumstances affecting the welfare of the children. According to Ammie, William could not make such a showing because the children were thriving "physically, developmentally, emotionally, and academically" while in her care. William replied to Ammie's opposition, arguing, in relevant part, that Ammie agreed they had been exercising a joint physical custody arrangement.

The district court then held a 20-minute non-evidentiary hearing on William's motion. At the hearing, William primarily argued that he and Ammie had been exercising de facto joint physical custody, which schedule had been working. Because custodial stability is important, he

continued, the court should order the parties to follow the schedule they had been practicing both before the divorce decree and after for several months. Ammie, on the other hand, again argued that the court should deny the motion without an evidentiary hearing because William failed to allege any substantial change in circumstances. Without making any oral findings, the district court told the parties it would "take the case under advisement." It then stated that it would

> try to get a decision out in the next seven days. I may call one of the attorneys to – if there's an order, to do the order with findings. . . . Depending on how I decide the case. Is that okay with both sides?

Neither party objected. The court then issued a minute order summarily denying William's motion without holding an evidentiary hearing or stating the factual and legal basis for its ruling. In the minute order, the court instructed Ammie's attorney to prepare the order, which was to include "detailed findings including the facts of the case and an analysis of the relevant law." The court further specified that the "proposed order shall be submitted in PDF and Word format."

The district court subsequently signed and entered the Findings of Fact, Conclusions of Law, and Order proposed by Ammie. In the order, the court found that Ammie had exercised primary physical custody under *Rivero*[2] given that she exercised custody approximately 70% of the time. The court also found that "[i]n his affidavit and points and authorities, William does not allege that there has been a substantial change in circumstances affecting the welfare of the children." According

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[2]*Rivero v. Rivero*, 125 Nev. 410, 426, 216 P.3d 213, 224 (2009), *overruled in relevant part by Romano v. Romano*, 138 Nev., Adv. Op. 1, 501 P.3d 980, 984 (2022).

to the court, William only asserted that he was entitled to custody because the parties did not follow the divorce decree's terms but acknowledged they did prior to filing his motion. The court further found that William had not satisfied *Rooney*[3] in that he had not established adequate cause for an evidentiary hearing. Specifically, the court concluded that William's allegations "are not relevant to the grounds for modification as they do not satisfy both elements of *Ellis v. Carucci*,[4] and the evidence is merely cumulative or impeaching." William did not file a motion for reconsideration. This appeal followed.[5]

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[3]*Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123 (1993).

[4]123 Nev. 145, 161 P.3d 239 (2007).

[5]Given our disposition, we need not consider William's claim that the district court erred in delegating the task of preparing its written order and detailed findings without any further guidance from the court. Indeed, as noted below, the district court did not abuse its discretion in refusing to modify custody, and as discussed later within this footnote, William has otherwise failed to show that this alleged error prejudiced his substantial rights. *See Miller v. Burk*, 124 Nev. 579, 588-89 & n.26, 188 P.3d 1112, 1118-19 & n.26 (2008) (explaining that this court need not address issues that are unnecessary to resolve the case). Even so, William waived this claim because he failed to timely object when the district court gave him an opportunity to do so. *See Levy v. Levy*, 96 Nev. 902, 904, 620 P.2d 860, 861 (1980) ("A point not urged in the trial court . . . will be deemed waived and need not be considered on appeal."). Even reviewing the claim, it did not amount to plain error because William concedes that the alleged error is not clear under current law and general practice permits this. *See Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986); *Williams v. Zellhoefer*, 89 Nev. 579, 580, 517 P.2d 789, 789 (1983); *see also* EDCR 5.505 (permitting parties to propose orders—including findings of fact). Moreover, William failed to show how the district court's preparation of the order would have changed the result, nor would it have given our disposition. *See McClendon v. Collins*, 132 Nev. 327, 333, 372 P.3d 492, 495-96 (2016) (explaining that in order to establish prejudice "*the movant* must show the error affects the

William argues that the district court abused its discretion when it denied his motion to modify physical custody without holding an evidentiary hearing. According to William, the district court improperly determined that the parties exercised a primary physical custody arrangement. William argues that if the court properly considered the parties' de facto custody arrangement under *Rivero*, the court would have found they had been exercising joint physical custody. Thus, he claims, to modify joint custody, he only had to show that modification was in the children's best interest. And, he claims, Nevada's preference for joint custody and the statutory best interest factors showed that joint physical custody was in the children's best interest.

On appeal, we review a district court's denial of a motion to modify custody without holding an evidentiary hearing for an abuse of discretion. *See Bautista v. Picone*, 134 Nev. 334, 338, 419 P.3d 157, 160 (2018). A district court abuses its discretion only when "no reasonable judge could reach a similar conclusion under the same circumstances." *Matter of Guardianship of Rubin*, 137 Nev., Adv. Op. 27, 491 P.3d 1, 6 (2021) (internal quotations omitted) (quoting *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014)).

A district court has discretion to deny a motion to modify physical custody without conducting an evidentiary hearing unless the movant has demonstrated "adequate cause." *Rooney*, 109 Nev. at 542, 853 P.2d at 124. "Adequate cause" arises if the movant demonstrates a prima facie case for modification within the movant's affidavit and pleadings. *Id.* at 543, 853 P.2d at 125. And to modify physical custody in Nevada, the

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party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached" (emphasis added)); *cf.* NRCP 61.

movant must show that "(1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification." *Romano v. Romano*, 138 Nev., Adv. Op. 1, 501 P.3d 980, 983 (2022) (quoting *Ellis*, 123 Nev. at 150, 161 P.3d at 242).

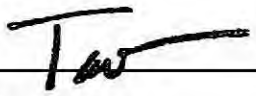
Here, William never argued that the parties' reversion to the divorce decree's original terms constituted a substantial change in circumstances. William thus waived the argument. *See Levy*, 96 Nev. at 904, 620 P.2d at 861. And although he argued that *Rivero* required the district court to determine if he had de facto joint physical custody and that he need not prove a substantial change of circumstances if he shared joint physical custody, that aspect of *Rivero* has been overruled by *Romano v. Romano*, 138 Nev., Adv. Op. 1, 501 P.3d 980 (2022). As clarified in *Romano*, the district court is not required to first determine what type of physical custody arrangement exists before considering whether to modify the arrangement. 138 Nev., Adv. Op. 1, 501 P.3d at 983-84. We also note that the district court found that Ammie had primary physical custody, and therefore, the result would not have been any different even if *Romano* had been decided prior to the order under appeal. Thus, William's argument fails.

Additionally, William has not cogently argued how the parties' temporary deviation from the controlling decree constituted a substantial change in circumstances. Thus, we need not consider his claim. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Further, William does not provide specific facts establishing a

prima facie case, and he fails to cite authority or cogently explain how "exercising significantly more time" than contemplated by the decree establishes substantially changed circumstances. We therefore decline to consider William's argument that he demonstrated a substantial change in circumstances affecting the welfare of the children. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Vincent Ochoa, District Judge
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