

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD DOUGLAS,
Appellant/Cross-Respondent,
vs.
MELISSA DOUGLAS, N/K/A MELISSA
ROMANO,
Respondent/Cross-Appellant.

No. 84129-COA

FILED

NOV 17 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Richard Douglas appeals from a district court order concerning child custody and support. Melissa Douglas cross-appeals from the same judgment concerning child custody and denying attorney fees and costs. Eighth Judicial District Court, Family Court Division, Clark County; Stacy Michelle Rocheleau, Judge.

Richard and Melissa were divorced by way of a stipulated decree of divorce entered in 2014.¹ The decree provided that the parties would exercise joint legal custody over the parties' five children, and that Melissa would have primary physical custody with Richard exercising parenting time on Tuesday nights and alternating weekends. In November 2021, Richard filed a "Motion to Modify Custody; for Child Interview; for Therapy; to Enforce Visitation; for Permission to Obtain Passport; and to Modify Child Support," based on an altercation between Melissa and their eldest son, C.D., that occurred in September 2021.

¹We do not recount the facts except as necessary to our disposition.

In that motion, Richard argued, among other things, that when he arrived to pick up the children from Melissa's home, she and C.D. were having an argument where Melissa allegedly informed C.D. that he was not allowed to leave with Richard, and that if he did so, he would not be able to return home. Richard alleges that Melissa prohibited C.D. from collecting his belongings, and later shut off C.D.'s access to his cell phone and bank accounts. Richard alleges that, with few exceptions, C.D. has resided with him at his home since that incident. Richard also alleged that Melissa has a history of preventing him from exercising his parenting time with the other minor children during his weekday schedule. In light of these arguments, Richard moved the district court to award him primary physical custody of C.D. and to modify his child support obligations accordingly. Richard also requested an evidentiary hearing and for interviews of the minor children, among other things.

In her opposition to Richard's motion, Melissa alleged that she did not prohibit C.D. from returning home and indicated that C.D. decided to go with Richard to escape discipline from failing to timely complete schoolwork and sneaking out of the house to visit his girlfriend. Melissa argued that the children have thrived in her care, and that Richard has not presented a substantial change in circumstances sufficient to warrant a modification of the custody order. Moreover, Melissa alleged that C.D. did not live full time with Richard, as there was a two-week period where C.D. moved back into her home while Richard was on vacation. Melissa alleges that C.D. has stayed with her several times since the incident. Melissa also alleges that Richard has consistently refused to exercise his parenting time during the weekdays but avers that Richard made this decision himself, and that she did not prevent him from seeing the children. Finally, Melissa

moved the court for her attorney fees and costs, arguing that Richard's motion was frivolous.

Following Richard's reply, the district court held a non-evidentiary hearing in this matter. As relevant here, in the order following the hearing, the district court denied Richard's request to modify custody and for an evidentiary hearing, stating that Richard had failed to present a prima facie case for modification. Notably, the court also found that, since C.D. was almost 17 years old at the time of the hearing, "the Court has no problem granting [C.D.] teenage discretion," thus allowing C.D. to choose the parent with whom he would reside. The district court also denied Richard's request to interview the children and denied his request for modification of child support. Finally, the district court denied Melissa's request for attorney fees and costs. Richard and Melissa now appeal.

On appeal, Richard argues that the district court abused its discretion when it denied his motion to modify custody and support without holding an evidentiary hearing. Richard argues that he presented a prima facie case for modification by demonstrating that Melissa was actively interfering with his parenting time with the children, and because C.D. had lived with him since Melissa allegedly kicked him out of the house. Moreover, Richard argues that he has essentially been exercising primary physical custody of C.D. since September 2021, and that this arrangement is inequitable as he is still providing child support on C.D.'s behalf to Melissa.

Melissa, on the other hand, contends that the district court appropriately denied Richard's motion, but erred when it gave C.D. teenage discretion without clarifying that the parties must still substantially comply with the custodial agreement in the divorce decree, which awarded primary

physical custody to Melissa. Melissa also argues that the court abused its discretion when it declined to award her attorney fees and costs, as she prevailed on the custody issue in the underlying proceeding.

We review a district court's decision to deny a motion to modify custody, without an evidentiary hearing, for abuse of discretion. *Bautista v. Picone*, 134 Nev. 334, 338, 419 P.3d 157, 160 (2018). A district court abuses its discretion when its findings of fact are not supported by substantial evidence. *Id.* at 336, 419 at P.3d 159.

"[A] district court has the discretion to deny a motion to modify custody without holding a hearing unless the moving party demonstrates 'adequate cause' for holding a hearing." *Rooney v. Rooney*, 109 Nev. 540, 542, 853 P.2d 123, 124 (1993). "Adequate cause" arises when the movant demonstrates a prima facie case for modification. *Id.* at 543, 853 P.2d at 125. When determining whether a movant has made a prima facie case for modification, the district court may generally only consider "the properly alleged facts in the movant's verified pleadings, affidavits, or declarations" and "must accept the movant's specific allegations as true." *Myers v. Haskins*, 138 Nev., Adv. Op. 51, 513 P.3d 527, 529-30, 532 (Ct. App. 2022). Although the district court typically must not consider the nonmovant's factual allegations or offers of proof, the court "may look to the nonmovant's evidentiary support when it 'conclusively establishes' the falsity of the movant's allegations." *Id.* at 530.

"To demonstrate a prima facie case, a movant must show that '(1) the facts alleged in the affidavits are relevant to the [relief requested]; and (2) the evidence is not merely cumulative or impeaching.'" *Arcella v. Arcella*, 133 Nev. 868, 871, 407 P.3d 341, 345 (2017) (quoting *Rooney*, 109 Nev. at 543, 853 P.2d at 125). Additionally, to modify physical custody the

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 v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007)).

In his motion Richard alleged that Melissa attempted to prevent C.D. from leaving with him during his custodial time, and that, ever since that incident, C.D. has been primarily residing in his custody and care.² Richard also alleged that Melissa has consistently interfered with his ability to exercise his parenting time with C.D. and the other children. These allegations have not been raised before and are not cumulative or impeaching. *See Arcella*, 133 Nev. at 871, 407 P.3d at 345. Assuming the allegations in Richard’s motion are true, *see Myers*, 138 Nev., Adv. Op. 51, 513 P.3d at 532, these allegations could show that there has been a substantial change of circumstances affecting the welfare of the child and that the child’s best interests could be served by modification, *see Romano*, 138 Nev., Adv. Op. 1, 501 P.3d at 983; *see also Martin v. Martin*, 120 Nev.

²We note that the declaration provided with Richard’s motion was not signed under penalty of perjury. *See* NRS 53.045 (permitting an unsworn declaration signed by the declarant under penalty of perjury in lieu of an affidavit); EDCR 5.102(a) (“Unless the context indicates otherwise, ‘affidavit’ includes an affidavit, a sworn declaration, and an unsworn declaration under penalty of perjury.”). However, this point was not raised by the parties or the district court below, and the parties have likewise not noted this issue on appeal. Thus, we decline to address it. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”).


342, 343, 90 P.3d 981, 981-82 (2004) (recognizing that a “custodial parent’s substantial or pervasive interference with a noncustodial parent’s visitation could give rise to changed circumstances warranting a change in custody”), *abrogated on other grounds by Ellis*, 123 Nev. 145, 161 P.3d 239. We recognize Melissa’s challenges to the allegations may eventually be proven correct or found more credible, but at this stage of the proceedings, she has not conclusively refuted Richard’s claims as to the physical custody issue. Thus, we conclude that the district court abused its discretion in refusing to hold an evidentiary hearing on Richard’s motion to modify custody. *See Bautista*, 134 Nev. at 338, 419 P.3d at 160.

In addition to Richard’s arguments in support of modification of custody, both parties challenge the district court’s grant of teenage discretion to C.D. without either limiting C.D.’s exercise of that discretion or modifying the underlying custodial arrangement. The record indicates, and the parties suggest on appeal, that this failure has resulted in C.D. primarily residing with Richard since entry of the court’s order, and that he has only returned to Melissa’s house under certain circumstances for short periods of time. Thus, the net effect of the district court’s ruling appears to be that—despite the court’s refusal to modify custody—Richard is essentially exercising primary physical custody over C.D. (based on C.D.’s use of the teenage discretion provision) while still paying child support to Melissa as if Melissa had primary physical custody. And while Melissa retained primary physical custody of C.D. under the district court’s decision, the court’s grant of unrestricted teenage discretion to C.D. has resulted in her not being able to actually exercise primary physical custody over him. Under these circumstances, we must conclude that the district court’s award of teenage discretion constituted an abuse of discretion. *See NRS*

125C.010 (providing that a custody order awarding visitation must “ensure that the rights of the parties can be properly enforced and that the best interest of the child is achieved” and stating that a custody order is not sufficiently particular if it uses terms that are “susceptible to different interpretations by the parties”); *Ellis*, 123 Nev. at 149, 161 P.3d at 241 (reviewing the district court’s custody determinations for an abuse of discretion).

Accordingly, for the reasons stated above, we reverse and remand this matter to the district court for further proceedings consistent with this order.³

It is so ORDERED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

³In light of our reversal for an evidentiary hearing, we decline to address the parties’ arguments regarding child support and attorney fees, as the district court will need to readdress those issues on remand. Further, insofar as the parties raise additional 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. Stacy Michelle Rocheleau, District Judge, Family Court Division
Hanratty Law Group
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Eighth District Court Clerk