


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SCOTT PHILLIP KELSEY,
Appellant,
vs.
NANCY MICHELLE KELSEY,
Respondent.

No. 85223-COA

FILED

MAR 16 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Scott Phillip Kelsey appeals from a district court post-divorce decree order denying his motion to modify custody. Eighth Judicial District Court, Family Division, Clark County; Rebecca Burton, Judge.

Scott and respondent Nancy Michelle Kelsey were divorced by way of a decree of divorce. As relevant here, the parties exercised joint legal custody of their minor child while Nancy maintained primary physical custody of the child, subject to Scott's parenting time. Scott eventually filed a motion to, among other things, modify this custodial arrangement to sole legal and physical custody in his favor. Nancy opposed that motion; however, her opposition does not appear in the record before this court. Following a nonevidentiary hearing on Scott's motion, the district court entered an order denying the motion in which it determined that each of Scott's allegations were insufficient to demonstrate that a custodial

modification was appropriate or that an evidentiary hearing was required to resolve the motion. This appeal followed.

On appeal, Scott argues that the district court could not properly deny his motion to modify custody without first conducting an evidentiary hearing. We agree. To obtain an evidentiary hearing on a motion to modify custody, the moving party must demonstrate that there is “adequate cause” for such a hearing by presenting a prima facie case for modification. *Rooney v. Rooney*, 109 Nev. 540, 542-43, 853 P.2d 123, 124-125 (1993). A prima facie case is established by showing that “the facts alleged in the affidavits [supporting the motion] are relevant to the grounds for modification” and that (2) “the evidence is not merely cumulative or impeaching.” *Id.* at 543, 853 P.2d at 125. This court reviews the district court’s decision to deny a motion to modify custody without first conducting an evidentiary hearing for an abuse of discretion. *Bautista v. Picone*, 134 Nev. 334, 338, 419 P.3d 157, 160 (2018).

As discussed above, the district court denied Scott’s motion to modify custody without conducting an evidentiary hearing. Based on our review of the challenged order and the transcript from the relevant hearing, it is unclear whether the district court applied the correct legal standard in reaching this result, as the district court did not reference the adequate cause standard or address whether Scott’s allegations presented a prima facie case for modification by, among other things, raising issues relevant to a substantial change in circumstances affecting the welfare of the child and the best interests factors. *See Romano v. Romano*, 138 Nev., Adv. Op. 1, 501 P.3d 980, 983 (2022) (setting forth the grounds for modifying

custody); *Rooney*, 109 Nev. at 542, 853 P.2d at 124; *see also Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 617-18 (1992) (providing that the district court must apply the correct legal standard in making a custody determination). Instead, the district court separately concluded that each of Scott's allegations were insufficient to show that a custodial modification was appropriate or that an evidentiary hearing was needed on the issue. However, to the extent that this approach may be construed to reflect a consideration of the adequate cause standard, the district court incorrectly treated several of Scott's allegations as insufficient to present a prima facie case for modification.

In our recent opinion in *Myers v. Haskins*, 138 Nev., Adv. Op. 51, 513 P.3d 527 (Ct. App. 2022), this court provided guidance concerning the proper application of the prima-facie-case prong of the adequate cause standard. As relevant here, *Myers* explained that 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" when determining whether a movant has established a prima facie case for modification requiring an evidentiary hearing. *Id.* at 529-30, 532. In *Myers*, we also observed that an admissible report from Child Protective Services (CPS) may be helpful in resolving a custody dispute on the merits, but cautioned that the helpfulness of such a report turns on the quality of the investigation and credibility of the investigator, which are issues best left to an evidentiary hearing where the parties may "challenge or support the accuracy of the report and its conclusions." *See id.* at 535. While we recognize that the district court did

not have the benefit of *Myers* at the time it heard Scott's motion and issued its oral ruling, the court's bases for rejecting several of Scott's allegations, which were eventually set forth in its post-*Myers* order denying the motion, are inconsistent with *Myers*.

Specifically, Scott alleged that Nancy required the child to attend school after he tested positive for COVID-19 and failed to take the child to the emergency room or a doctor's office on another occasion when the child was ill with a high fever. Scott also alleged that Nancy knowingly permitted the child to drive her vehicle unsupervised and without a Nevada driver's license or learner's permit on multiple occasions. The district court determined that an evidentiary hearing was not required based on these allegations, reasoning that there was no credible evidence to support Scott's allegations concerning Nancy's handling of the child's illnesses and that no action was required with respect to Nancy permitting the child to drive her vehicle because child protective services (CPS) investigated the incidents and discussed them with Nancy and the child, who "conced[ed] that he knew better."¹

¹Scott contacted CPS with respect to the allegations in his motion to modify custody, which prompted CPS to conduct an investigation. In resolving Scott's motion, the district court's order referenced the report that CPS prepared in connection with its investigation, which apparently indicated that CPS could not substantiate Scott's allegations. Importantly, while the district court looked to CPS's report in resolving Scott's allegation concerning the child's use of Nancy's vehicle, the court correctly accepted Scott's allegation as true even though CPS could not substantiate it. *See id.* at 532-33. And, yet, the district court still determined that an evidentiary hearing was not necessary based on the limited actions taken by CPS.

However, generally, credibility is not an appropriate consideration in evaluating whether an evidentiary hearing is required on a motion to modify custody, as the district court is required to accept the allegations therein as true. *See id.* at 529-30, 532. And while CPS apparently determined that no action was needed in relation to the child driving Nancy's vehicle beyond a discussion with Nancy and the child, the district court could not properly rely on this conclusion as a basis to deny Scott an evidentiary hearing, as doing so denied him an opportunity to "challenge the accuracy of [CPS's] report and its conclusions." *See id.* at 535 (explaining that, before the district court resolves a motion to modify custody based on a CPS report, an evidentiary hearing is needed to evaluate the quality of the underlying investigation and the credibility of the investigator).

Rather than evaluating the merits of Scott's individual allegations as it did below, the district court was required to accept those allegations as true and determine whether they presented a prima facie case for modification by raising issues relevant to the grounds for modification that are not cumulative or impeaching. *See Rooney* 109 Nev. at 543, 853 P.2d at 125; *see also Myers*, 138 Nev., Adv. Op. 51, 513 P.3d at 529-30, 532. Here, taking Scott's allegations concerning Nancy's handling of the child's illnesses and decision to permit the child to drive her vehicle as true, they raise issues relevant to the grounds for modification—specifically, the allegations are relevant to the questions of whether there has been a substantial change in circumstances affecting the welfare of the child and whether a modification would be in the child's best interest. *See*

Rooney 109 Nev. at 543, 853 P.2d at 125; *see also Romano*, 138 Nev., Adv. Op. 1, 501 P.3d at 983. And because nothing in the district court's order or the transcript from the relevant hearing suggests that these allegations were cumulative or impeaching, we conclude that Scott presented a prima facie case for modification, meaning that the adequate cause standard was satisfied. *See Rooney*, 109 Nev. at 543, 853 P.2d at 125. As a result, the district court abused its discretion by denying Scott's motion to modify custody without first holding an evidentiary hearing. *See Bautista*, 134 Nev. at 338, 419 P.3d at 160.

Accordingly, we reverse the order denying Scott's motion to modify custody, and remand this matter for an evidentiary hearing on the motion.² On remand, the form of the evidentiary hearing remains within the district court's broad discretion. *See Myers*, 138 Nev., Adv. Op. 51, 513 P.3d at 537 (recognizing the district court's broad discretion to determine the form of an evidentiary hearing on a motion to modify custody).

²In reaching this result, we express no opinion with respect to the merits of Scott's motion to modify custody. To the contrary, we recognize that Nancy opposed Scott's motion and that her challenges to Scott's allegations may eventually be proven correct or found more credible. But given that no evidence has been taken at this stage of the proceeding and that there is otherwise no indication that Nancy conclusively demonstrated that Scott's allegations are false, *see Myers*, 138 Nev., Adv. Op. 51, 513 P.3d at 533 (explaining that, although the district court must generally accept the allegations in a motion to modify custody as true, it "need not blind [itself] to evidence a nonmovant presents if it conclusively establish[es] the movant's claims are false" (second alteration in original) (internal quotation marks omitted)), the district court could not properly deny his motion without an evidentiary hearing.

It is so ORDERED.³


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

³Although Scott presented additional allegations in his motion to modify custody, which the district court also deemed insufficient to justify an evidentiary hearing, because we conclude Scott demonstrated he was entitled to an evidentiary hearing based on the allegations addressed above and reverse the challenged order in its entirety, we need not separately address the district court's conclusions as to Scott's remaining allegations. Thus, nothing in this order precludes Scott from also presenting his remaining allegations for consideration at the evidentiary hearing. Consequently, we remind the district court that, although issues previously considered by the court cannot be relied on to show a substantial change in circumstances affecting the welfare of the child, they nonetheless may properly be considered in evaluating the child's best interest. *See Nance v. Ferraro*, 134 Nev. 152, 163, 418 P.3d 679, 688 (Ct. App. 2018) (explaining that district courts are not precluded "from reviewing the facts and evidence underpinning their prior rulings in deciding whether the modification of a prior custody order is in the child's best interest").

cc: Chief Judge, Eighth Judicial District Court
Presiding Judge, Eighth Judicial District Court, Family Division
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