

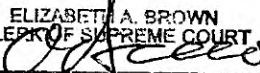
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DENISE NAVAL POOL,  
Appellant,  
vs.  
JOEL E. POOL,  
Respondent.

No. 85771-COA

FILED

SEP 13 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

Denise Naval Pool appeals from a district court order denying a motion to modify child custody. Eighth Judicial District Court, Family Division, Clark County; T. Arthur Ritchie, Jr., Judge.

Denise and respondent Joel E. Pool were married in October 2007. They had one minor son, L.P. Denise and Joel divorced in 2019 and agreed to share joint legal and physical custody of L.P.

In June 2020, Denise experienced a mental health breakdown and self-harmed in front of Joel and L.P. After the episode, Joel apparently received primary physical custody and sole legal custody of L.P. Denise was allowed supervised parenting time with L.P. and was also allowed to have phone calls and Facetime calls with the minor child. In June 2020, Joel filed a motion to modify custody seeking primary physical custody of L.P. In December 2020, Joel pursued a career opportunity in Ohio, where he was originally from, since he had lost his job in the food service industry in March 2020 during the beginning of the COVID-19 pandemic. Joel requested permission to relocate to Ohio with L.P., but the district court denied this request. The June 2020 motion to modify custody remained pending in the district court notwithstanding the denial of the motion to

relocate. Despite not having permission, Joel and L.P. moved to Ohio in December 2020.

In March 2021, the district court held an evidentiary hearing on Joel's June 2020 motion to modify custody. The district court heard testimony from Joel, Denise, Dr. Holland—a court appointed psychologist who evaluated Denise, and Denise's mother. Dr. Holland testified that Denise's parenting judgment was concerning, that Denise was an "emotional, parenting risk" to L.P., and that she suspected Denise would not participate in treatment. Dr. Holland also testified that Denise was not a physical risk to L.P. At the hearing, Denise testified that she intended to move to Ohio if Joel maintained physical custody of L.P. and continued to reside in Ohio.

Following the evidentiary hearing, the district court granted the parties joint legal custody but specified that Joel was to retain sole legal custody for L.P.'s medical and mental health needs in a June 2021 order. The district court also allowed Joel to retain primary physical custody of L.P. and allowed Joel and L.P. to continue to reside in Ohio. Under the modified custody order, Denise was given supervised parenting time in Ohio.

After the district court issued its order, Denise decided that she would not relocate to Ohio because of increased family obligations in Las Vegas. As a result, she filed a motion to modify custody in February 2022.<sup>1</sup>

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<sup>1</sup>Denise had previously filed a similar motion in December 2021, but the motion was denied because Denise had appealed the June 2021 order. Denise voluntarily withdrew her appeal and then filed the February 2022 motion.

Joel opposed Denise's motion and the district court denied the motion following an evidentiary hearing in May 2022.

In September 2022, Denise filed another motion to modify custody.<sup>2</sup> To support her motion, Denise included a letter from Dr. Holland written after the June 2022 order denying her previous motion to modify was entered. In that letter, Dr. Holland wrote that, despite her initial suspicion that Denise would not follow through with therapy, Denise has regularly been in treatment. Dr. Holland's letter recommends that the district court consult with Denise's treating psychologist about her contact with L.P. Denise also included a letter from her treating psychologist to further support her motion to modify custody.<sup>3</sup> In this letter, the treating psychologist stated that Denise had made "great strides in treatment" and is "emotionally stable." The treating psychologist also wrote that she had no concerns about Denise's "decision-making, thought processes, or ability to regulate her emotions." Joel opposed the motion. The district court summarily denied Denise's motion without conducting an evidentiary hearing in November 2022. Denise now appeals.

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<sup>2</sup>This motion sought to increase the amount of parenting time and the conditions under which she could exercise it. Denise did not request that she receive primary or joint physical custody; however, the district court described and treated this as a motion to modify child custody.

<sup>3</sup>It appears that Denise's treating psychologist had attempted to send this letter to the district court in conjunction with Denise's prior motion to modify custody, but the district court, for unknown reasons, never received the letter. As a result, Denise included it as an exhibit to her September 2022 motion to modify.

On appeal, Denise argues that, under this court's decision in *Myers*,<sup>4</sup> an evidentiary hearing should have been held on her motion to modify custody, and that the district court was required to make an adequate explanation when it denied her motion. Joel responds that Denise's appeal lacks merit and there is no adequate cause to reopen child custody.

We review a district court's decision to not hold an evidentiary hearing before denying a motion to modify custody 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 when its findings of fact are not supported by substantial evidence. *Romano v. Romano*, 138 Nev. 1, 5-6, 501 P.3d 980, 984 (2022).

"[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*, 138 Nev., Adv. Op. 51, 513 P.3d at 529-30, 532. 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.

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<sup>4</sup>*Myers v. Haskins*, 138 Nev., Adv. Op. 51, 513 P.3d 527 (Ct. App. 2022).

Further, a district court must make specific findings and explain its child custody decision. *Davis v. Ewalefo*, 131 Nev. 445, 452, 352 P.3d 1139, 1143 (2015); *see also Myers*, 138 Nev., Adv. Op. 51, 513 P.3d at 536 (applying *Davis* to a denial of a motion to modify custody without holding an evidentiary hearing or providing an adequate explanation).

“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*, 138 Nev. at 5, 501 P.3d at 983 (quoting *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007)).

Here, Denise raised two distinct claims for a modification of child custody in her motion. First, Denise provided a letter from Dr. Holland—the psychologist that initially evaluated her at the district court’s request prior to the March 2021 evidentiary hearing at which the district court awarded Joel primary physical custody with Denise having only supervised parenting time and allowed Joel and L.P. to relocate to Ohio. In this letter, Dr. Holland noted that, contrary to her initial suspicion that Denise would not follow through with therapy, Denise has regularly been in treatment. Dr. Holland went on to recommend that the district court consult with Denise’s treating psychologist about her contact with L.P.. This letter was written after the district court’s June 2022 order resolving Denise’s previous motion to modify custody and is therefore new information that is not merely cumulative or impeaching. *See Arcella*, 133



Nev. at 871, 407 P.3d at 345. Additionally, Denise provided a letter from her treating psychologist that, while apparently sent to the district court in conjunction with her previous motion, was not actually received by the district court before that motion was denied. In this letter, the treating psychologist stated that she had no concerns about Denise's ability to make decisions or regulate her emotions, noting that Denise "had made great strides in treatment" and is "emotionally stable."

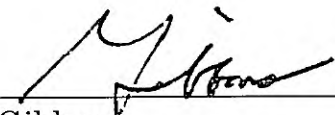
Second, Denise alleges that Joel has limited her communication with L.P. since the June 2022 order denying her previous motion to modify was entered. These allegations include that Joel refuses to move the time of Denise's calls with L.P. when L.P. is playing with friends, that Joel told L.P. to not ask Denise for anything, that Joel refuses to give L.P. gifts that Denise sends, and that Joel chastised and yelled at L.P. for receiving gifts from Denise. These allegations have not been raised before and—like the letters referenced in regard to Denise's first claim—are not cumulative or impeaching. *See Arcella*, 133 Nev. at 871, 407 P.3d at 345. Additionally, these allegations could show that there has been a substantial change of circumstances affecting the welfare of L.P. and that the child's best interest could be served by modification. *See Romano*, 138 Nev. at 5, 501 P.3d at 983.

Based on the reasons articulated above, we conclude that the district court abused its discretion in denying Denise's September 2022 motion to modify custody without holding an evidentiary hearing and in not


providing an adequate explanation based upon Denise's sworn allegations and supporting documentation.<sup>5</sup>

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>6</sup>

 C.J.  
Gibbons

 J.  
Bulla

 J.  
Westbrook

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<sup>5</sup>As we recognized in *Myers*, demonstrating a substantial change in circumstances requires the movant to “allege facts that have occurred since the last custody determination.” See *Myers*, 138 Nev., Adv. Op. 51, 513 P.3d at 533 n.10 (internal quotation marks omitted). The purpose of this prong of the test for modifying custody is to prevent the filing of repetitive, serial motions seeking to change custody. *Id.* Here, while Denise's September 2022 motion could, on the surface, appear to be a serial motion since it was filed a few months after her previous motion was denied, as discussed above, her September 2022 motion was based on alleged facts and supporting documents emerging after the denial of her previous motion, such that the September 2022 motion to modify custody cannot be considered an improper serial motion.

<sup>6</sup>Insofar as the parties have raised 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. T. Arthur Ritchie, Jr., District Judge, Family Division  
The Law Offices of Patrick Driscoll, LLC  
Joel E. Pool  
Eighth District Court Clerk