

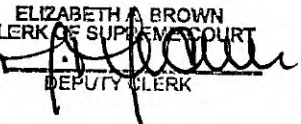
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PAMELA B. PAYNE,
Appellant,
vs.
DALE E. PAYNE,
Respondent.

No. 86478-COA

FILED

DEC 13 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Pamela B. Payne appeals from a district court order denying a motion to modify child custody and motion for child testimony. Second Judicial District Court, Family Division, Washoe County; Sandra A. Unsworth, Judge.

Pamela and Dale E. Payne divorced in Utah in 2018. As part of their stipulated divorce decree, they agreed to joint legal and joint physical custody of their minor child, A.P. (currently 12 years of age). Subsequently, the parties relocated to Reno, and the Utah decree was registered in February 2019. In 2019, Pamela also filed a motion to modify the decree and a separate motion for A.P. to attend therapy. The parties reached an agreement that modified the parenting time schedule but remained within a joint physical custody timeshare. The parties also agreed that A.P. would begin therapy. In October 2021, Pamela filed a motion where she detailed multiple concerns regarding A.P. and requested that A.P. continue therapy. The parties reached a second stipulation for A.P. to continue therapy.

Pamela then filed the underlying motion to modify child custody and child support in 2023. In her motion, Pamela alleged that A.P. was fearful of Dale and would get stomach issues before parenting time with

him; Dale would involve A.P. in conversations about the custody litigation; Dale read Pamela's October 2021 motion to A.P.; Dale made disparaging comments about Pamela and her family to A.P.; Dale was unsupportive of A.P.'s therapy; Dale would chastise A.P. for being overweight, leading A.P. to cry; Dale had informed his male friends that A.P. got her menstrual period; Dale did not abide by the provisions of the decree because he did not give Pamela advance notice of multiple address changes, did not notify her when he took A.P. out of state in October 2021, and failed to exchange A.P. with her on Christmas Day at the correct time; and Dale would prevent A.P. from contacting Pamela during his parenting time. Ultimately, Pamela argued that these allegations demonstrated that Dale was emotionally abusive to A.P. and that the level of conflict between the parties was high. Thus, Pamela sought primary physical custody and a modification of child support. Attached to Pamela's motion was a declaration, in which she detailed the alleged instances of Dale's behavior that warranted a modification of child custody. In his opposition, Dale argued that Pamela failed to present a prima facie case warranting modification of child custody because she recycled the same allegations she raised in her 2021 motion for A.P. to continue therapy. Dale also disputed the veracity of Pamela's allegations.

Subsequently, without a hearing, the district court issued an order denying Pamela's motion to modify custody and child support and motion for child testimony. The court noted that Pamela's allegations were identical to the allegations raised in her October 2021 motion for A.P. to continue therapy, which was filed approximately one year and three months before Pamela's motion to modify custody. The court further found that Pamela's allegations were stale and largely broad or conclusory.

Specifically, the court found that Pamela's declaration failed to provide specific facts or evidence in support of the allegations, such as the dates on which A.P. cried, dates on which Dale made disparaging statements, and dates on which A.P. would have stomach issues before parenting time with Dale. The court also noted that Pamela's allegations regarding Dale's violations of the decree were meritless as they did not actually violate any provisions of the decree. The court noted that the only new allegations contained in Pamela's motion were that Dale discussed A.P.'s menstrual period with his adult male friends; read the October 2021 motion to A.P. and discussed the litigation with her; and refused to allow A.P. to contact Pamela during Dale's parenting time. The court then found that Pamela's motion failed to provide specific dates of when these events occurred, and that they were not indicative of a substantial change in circumstances warranting modification of custody. Pamela now appeals.

On appeal, Pamela argues that the district court improperly denied her motion because the court did not accept her allegations as true and instead improperly weighed the evidence without holding an evidentiary hearing. She also contends that the court concluded that her factual allegations were stale, but all the incidents she described were after the last custody order was entered in August 2019. She further asserts that the court did not analyze the best interest factors. In his fast track response, Dale contends that the district court did not abuse its discretion because Pamela's allegations did not establish adequate cause for an evidentiary hearing and were vague, conclusory, and broad as they were identical to the allegations she raised in her October 2021 motion.

We review a district court's denial of a motion to modify child custody without holding an evidentiary hearing for an abuse of discretion.

Myers v. Haskins, 138 Nev., Adv. Op. 51, 513 P.3d 527, 531 (Ct. App. 2022). A district court abuses its discretion only when “no reasonable judge could reach a similar conclusion under the same circumstances.” *Id.* (quoting *In re Guardianship of Rubin*, 137 Nev. 288, 294, 491 P.3d 1, 6 (2021)). To modify 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. 1, 3, 501 P.3d 980, 982 (2022) (quoting *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007)), *abrogated in part by Killebrew v. State ex rel. Donohue*, 139 Nev., Adv. Op. 43, 535 P.3d 1167, 1171 (2023).

A district court has discretion to deny a motion to modify custody without conducting an evidentiary hearing unless the movant has demonstrated “adequate cause.” *Myers*, 138 Nev., Adv. Op. 51, 513 P.3d at 531. “Adequate cause” arises if the movant demonstrates a prima facie case for modification within the movant’s affidavit and pleadings. *Id.* at 531-32. “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) (alteration in original) (quoting *Rooney v. Rooney*, 109 Nev. 540, 543, 853 P.2d 123, 125 (1993)). In *Myers*, this court provided guidance concerning the proper application of the prima-facie-case prong of the adequate cause standard. 138 Nev., Adv. Op. 51, 513 P.3d 527. *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.

Here, the district court denied Pamela's request to modify physical custody without conducting an evidentiary hearing. Specifically, in its written order, the district court concluded that Pamela failed to present a prima facie case for modification because she did not demonstrate a substantial change in circumstances affecting the welfare of the minor child. We conclude that the district court abused its discretion in making this determination. Assuming the allegations in Pamela's motion are true, these allegations could show that there has been a substantial change of circumstances affecting the welfare of A.P. and that A.P.'s best interest could be served by modification. *See Romano*, 138 Nev. at 3, 501 P.3d at 982. Specifically, Pamela alleged facts suggesting that A.P.'s relationship had deteriorated with Dale manifesting in A.P. having stomach issues, conflict related to the ability of the parties to cooperate and coparent, and concerns with A.P.'s emotional needs. *See NRS 125C.0035(4)* (outlining the best interest factors).

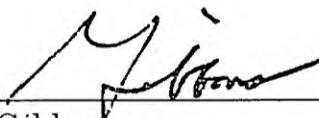
Although the district court found that most of the allegations Pamela raised were identical to the allegations she raised in her October 2021 motion for A.P. to continue therapy, this court recognized in *Myers* that a substantial change in circumstances requires the movant to "allege facts that have occurred *since the last custody determination.*" *See Myers*, 138 Nev., Adv. Op. 51, 513 P.3d at 533 n. 10 (emphasis added) (internal quotation marks omitted).¹ Pamela's October 2021 motion was not a

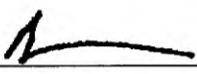
¹A child custody determination includes orders that provide "for the legal custody, physical custody or [parenting time] with respect to a child." NRS 125A.045(1).

request for a modification of custody, and the district court did not make a custody determination pursuant to the allegations Pamela alleged in her October 2021 motion. Accordingly, Pamela's allegations in her motion to modify custody were not cumulative or impeaching. *See Arcella*, 133 Nev. at 871, 407 P.3d at 345. Thus, we conclude that the district court abused its discretion in refusing to hold an evidentiary hearing on Pamela's motion to modify custody.

In reaching this result, we express no opinion with respect to the merits of Pamela's motion to modify custody. To the contrary, we recognize that Dale opposed Pamela's motion and that his challenges to Pamela'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 the district court denied Pamela's motion requesting A.P.'s testimony, the district court could not properly deny Pamela's motion without an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.²


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

²Insofar as the parties raise 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. Sandra A. Unsworth, District Judge, Family Division
Routsis Hardy-Cooper & Pulver
Bader & Ryan
Washoe District Court Clerk