


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRITTANY NICOLE ZAMBOANGA,
Appellant/Cross-Respondent,
vs.
JOEY ALBERT CABANAG ORTIZ,
Respondent/Cross-Appellant.

No. 86050-GO-A
FILED

JAN 19 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal and cross-appeal from a district court order denying a motion and countermotion to modify custody of minor children. Eighth Judicial District Court, Family Division, Clark County; Michele Mercer, Judge.

Brittany Nicole Zamboanga (Brittany) and Joey Albert Cabanag Ortiz (Joey) were married in February 2008. They have three minor children together: J.O. (15), R.O. (13), and C.O. (9).¹ Shortly after they married, the parties moved to Colorado, where their relationship deteriorated. Brittany filed for divorce in June 2016, and the divorce was finalized in October 2016.

The parties' original custody arrangement granted them joint legal and physical custody. However, the parties stipulated to a new arrangement entered in October 2021, where Brittany and Joey would continue to share joint legal custody of all three children, but Joey would have sole legal custody regarding schooling, medical, and extracurricular activity decisions. Joey would also have primary physical custody of J.O. and R.O., while the parties would share joint physical custody of C.O. The

¹The parenthetical numbers reflect the children's ages at the time of the final district court hearing (December 2022).

parties agreed to evenly split medical, school, and extracurricular activity costs.

In September 2022, Brittany filed a motion to modify child custody, seeking sole legal and primary physical custody of all three children. In a statement supported by declaration, Brittany argued that a change in custody was in the children's best interest because Joey created a living environment that was not supportive of the children's mental health and wellbeing. She argued that, since the filing of the October 2021 arrangement, there had been several substantial changes in circumstances affecting the children. Brittany alleged, among other things, that Joey: gave J.O. alcohol and forced J.O. to do pushups; failed to adequately address J.O.'s mental health issues after J.O. expressed suicidal ideations; and called their daughter R.O. "fat" and placed R.O. on a restrictive diet. She additionally argued that Joey changed his own physical appearance in disturbing ways; would scream and yell at the children and break things in the home; "paint[ed] the wrong picture" for the children's wellbeing and mental health; was not emotionally present for the children; created an environment where the children felt they "walk[ed] on eggshells" around him; and was admitted to the VA hospital for observation following a depressive episode in 2022. Brittany further alleged that J.O. feared Joey and did not want to live with him.

Joey filed an opposition to Brittany's motion, as well as a countermotion to modify his physical custody of C.O. from joint to primary. In a statement supported by affidavit, Joey denied Brittany's allegations and alleged, among other things, that Brittany: refused to pay her half of the medical expenses; had exercised less than five percent of her allotted parenting time since the filing of the October 2021 custody agreement; assaulted Joey's girlfriend; allowed J.O.—who did not have a license—to

drive her car unsupervised with another minor child inside; and endeavored to unilaterally disenroll all three children from their current schools. Joey also alleged that, after the parties were divorced, Brittany abandoned the children and moved to Florida for three months between July and September 2020, during which time she was unreachable. When Brittany returned, Joey also contended that she entered a relationship with an ex-felon who physically abused her in front of the children. As to Joey's relationship, Joey contended that Brittany was hostile towards his new girlfriend and physically assaulted his girlfriend on one occasion. Finally, Joey argued that modifying C.O.'s physical custody to make him the primary custodial parent was in C.O.'s best interest because he would be able to provide C.O. with a more stable environment than Brittany and was also more willing than Brittany to nurture the noncustodial parent relationship.

In reply to Joey's opposition, and in opposition to Joey's counter-motion, Brittany argued, in a statement supported by declaration, that she never abandoned the children and instead temporarily left Nevada to find work in Florida. Brittany maintained that she was no longer in a relationship with the man Joey alleged was an abusive ex-felon and never left J.O. unaccompanied in a car while unlicensed. Further, Brittany stated that she was justified in not paying her share of extracurricular activity and medical costs because she lacked financial resources, while Joey made over \$200,000 per year. Brittany reiterated that Joey allowed J.O. to drink underage, which demonstrated Joey's "poor parental decision making." Joey filed a supplement to his opposition that contained a link to three

videos purporting to show J.O. smoking marijuana in Brittany's house, as well as a package of marijuana "laying out in the open."²

The district court held a hearing on all pending motions in November 2022. Both Brittany and Joey were represented by counsel and reiterated the arguments in their respective briefings. Following arguments, the court ordered that all three children be interviewed by the Family Mediation Center (FMC), and that Brittany and Joey attend FMC mediation to facilitate a potential custody agreement. The court ordered a return proceeding for December 2022 to determine the next step in the process and indicated that this hearing would focus on the FMC child interview report and mediation, as opposed to the children's custody status. Finally, the district court instructed that the parties were to abide by the current custody arrangement, and that Brittany was to return J.O., who at that time was living solely with Brittany in violation of the October 2021 arrangement, to Joey.

At the December 2022 return hearing, the district court overruled the FMC child interview report and heard argument from both parties' counsel.³ The court noted that, per the child interview report, there appeared to be conflict between J.O. and Joey, that J.O. indicated he would like to live with Brittany, and that R.O. and C.O. indicated a willingness to live with both parents. During the interview, J.O. apparently stated that Joey forced him to drink alcohol; did not help J.O. seek counseling when J.O. was suffering from suicidal ideations; and punched, hit, and kicked J.O.

²It is unclear whether the district court reviewed these videos, and the court did not reference these videos in issuing its custody determination.

³Although never explicitly stated, it appears that Brittany and Joey did not mediate a custody agreement with FMC. In fact, it is unclear whether Brittany and Joey attempted to mediate with FMC at all.

Between the two hearings, J.O. started therapy, and Joey indicated a willingness to participate in therapy as well.

Brittany argued that there was sufficient information demonstrating a substantial change of circumstances to warrant an evidentiary hearing for all three children. As to J.O., Brittany specifically pointed to the suicidal ideations, as well as J.O.'s stated preference to live with Brittany. As to R.O. and C.O., Brittany noted the incident where Joey called R.O. "fat" and placed R.O. on a restrictive diet, and highlighted Joey's "definite alcohol abuse," physical abuse, and anger management issues. According to Brittany, the children felt safe, comfortable, and happy in her care, while they feared Joey. Brittany also noted that the children expressed in the interview that they did not know that they were moving to Las Vegas with Joey in September 2020, and merely thought they were going to visit him.

Joey responded that J.O. lied in the child interview report, and that the entire report "boiled down to preference." Joey categorically denied the physical abuse allegations and argued that there was insufficient evidence for the court to hold evidentiary hearings regarding R.O. and C.O. However, Joey conceded that there may be sufficient evidence with respect to J.O. In arguing his countermotion, Joey asserted that, based on his allegations against Brittany, there was sufficient evidence to warrant an evidentiary hearing regarding C.O. Namely, that Brittany abandoned C.O. for three months when she went to Florida, attempted to remove C.O. from her current school, and consistently did not exercise her allotted parenting time.

After hearing the parties' arguments, the district court placed both parties under oath but then, inexplicably, questioned only Joey. The court first asked Joey to describe his reaction to the child interview report.

Joey maintained that the report did not indicate the entire truth, and that he did not kidnap his children when he relocated to Las Vegas in September 2020. Regarding J.O., Joey alleged that he had not spoken with J.O. about the allegations in the report, but that he planned to discuss them and also be involved with J.O.'s therapy.

The district court then stated that it was going to deny both Brittany's motion and Joey's countermotion. The court stated that there was not "sufficient reason to conduct an evidentiary hearing," as neither party had made a "prima facie case." Although the court felt "concern[ed]" about Joey's relationship with J.O., the court was hopeful that Joey would embrace the opportunity for counseling, to work on his communication with J.O. The district court also asserted that it appeared Brittany and Joey were cooperating more than they had in the past.

The district court asked Brittany to prepare the order. Upon Brittany's request that the court make specific findings of fact and conclusions of law for appellate purposes, the court stated that, pursuant to *Romano*, it "[did not] believe that there[] [had] been a substantial change in circumstances affecting the welfare of the children."⁴ Consequently, the court concluded that "the first prong of *Romano* having not been met . . . there is [not] adequate cause . . . to conduct an evidentiary hearing under *Rooney*."⁵ The district court's order denying the motions left Brittany and Joey sharing joint legal custody of all three children, with Joey having sole legal custody regarding the children's schooling, medical, and

⁴*Romano v. Romano*, 138 Nev. 1, 501 P.3d 980 (2022), *abrogated in part on other grounds by Killebrew v. State ex rel. Donohue*, 139 Nev., Adv. Op. 43, 535 P.3d 1167, 1172 (2023).

⁵*Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123 (1993).

extracurricular activity decisions. Further, Joey retained primary physical custody of J.O. and R.O., while the parties continued to share joint physical custody of C.O. It is from this order that both parties appeal.

On appeal, Brittany argues that the district court violated her constitutional right to due process because the December 2022 return hearing was not properly noticed as a custody hearing. She also argues that the court abused its discretion when it issued a final custody determination without holding an evidentiary hearing. On cross-appeal, Joey argues that the court abused its discretion when it summarily denied his motion to change the physical custody of C.O. without holding an evidentiary hearing. We conclude that this case warrants a reversal because the district court (1) violated Brittany's right to due process because the December hearing exceeded the scope of the notice and did not afford Brittany an opportunity to present evidence, and (2) abused its discretion when it issued a custody order without holding a proper evidentiary hearing because both Brittany and Joey demonstrated prima facie cases for modification.

The district court violated Brittany's due process rights

Brittany argues that the district court violated her procedural due process rights when it issued a custody decision without providing her an opportunity to present evidence and cross examine witnesses. Joey argues that Brittany mischaracterizes the court's error because the December return hearing was never meant to be an evidentiary hearing. Joey does not argue that his due process rights were violated, so we need not consider the issue. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (noting that courts follow the "principle of party presentation" on appeal, which requires litigants to frame the issues); *cf. Desert Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 95 Nev. 640, 643-44, 600 P.2d 1189, 1191 (1979) (noting that "an appellate court may [s]ua sponte raise a

constitutional issue for the first time”). We conclude that the district court violated Brittany’s procedural and substantive due process rights when it decided the custody issue on grounds not noticed and without a proper hearing.

The Fourteenth Amendment of the United States Constitution and Article 1, Section 8(5) of the Nevada Constitution guarantee due process of law. *Gordon v. Geiger*, 133 Nev. 542, 545, 402 P.3d 671, 674 (2017). Due process protects certain substantial and fundamental rights and demands that parties receive “notice and an opportunity to be heard” before those rights are affected. *Sw. Gas Corp. v. Pub. Utils. Comm’n of Nev.*, 138 Nev. 37, 46, 504 P.3d 503, 511 (2022) (internal quotation marks omitted).

A permanent change to parenting time, such as a modification to custody, impacts the fundamental liberty interest parents have in the custody of their children. *See Blanco v. Blanco*, 129 Nev. 723, 731, 311 P.3d 1170, 1175 (2013) (“[C]hild custody decisions implicate due process rights because parents have a fundamental liberty interest in the care, custody, and control of their children.”). A denial of an evidentiary hearing, much like a permanent change to parenting time, constitutes a profound decision on the merits that impacts this liberty interest. *See Myers v. Haskins*, 138 Nev., Adv. Op. 51, 513 P.3d 527, 536 (Ct. App. 2022) (concluding that a “district court must provide an adequate explanation when it denies a motion to modify custody without holding an evidentiary hearing given that such a denial has the same practical implications for a movant as a denial on the merits”).

Thus, before impacting fundamental custodial rights, district courts must give the parents proper notice. *See Gordon*, 133 Nev. at 546, 402 P.3d at 674-65; *Blanco*, 129 Nev. at 731, 311 P.3d at 1175. To be proper,

notice “must be provided at the appropriate stage” of the proceedings so that the parties “can provide meaningful input in the adjudication of their rights.” *Sw. Gas*, 138 Nev. at 46, 504 P.3d at 511 (internal quotation marks omitted). General notice that the court will hold a hearing is insufficient; rather, to comply with due process requirements in child custody proceedings, the district court must give the parents “prior specific notice” that it may make the custody determination that it ultimately does make. *Dagher v. Dagher*, 103 Nev. 26, 28, 731 P.2d 1329, 1330 (1987).

Here, the district court violated Brittany’s constitutionally protected right to procedural due process when it issued its final custody determination at the return hearing based on grounds not properly noticed or questioned. The court’s action also affected Brittany’s substantive liberty interests in the custody, care, and control of her children. At the November 2022 nonevidentiary hearing, the court ordered that all three children be interviewed by FMC, that the parties attempt FMC mediation, and that the parties “return for further proceedings” in December 2022. The court’s written order did not state that the court might issue its final custody determination at this return hearing or explain that the district court would be considering whether there had been a substantial change in circumstances, which was the stated basis for the district court’s denials. Further, nothing in the order indicated that that the return hearing would be evidentiary in nature.

Likewise, nothing in the district court’s oral findings and conclusions at the November 2022 hearing conveyed specific notice that the December return hearing would consider issues beyond the child interview report and mediation, or that the court might make its final custody determination at the return hearing. The court simply stated, “I am ordering the children be interviewed. I will order . . . the parties go to FMC

[for mediation]. I have a . . . return hearing set for December[.]” The district court never stated whether the return hearing would be evidentiary and did not disclose the hearing’s ultimate purpose. Thus, although the parties had general notice that they were to return for further proceedings in December 2022, the notice was not specific and was therefore insufficient to satisfy the rigorous demands that due process requires.

Additionally, although neither the district court’s written order nor its oral findings and conclusions indicated that the December 2022 return hearing would be evidentiary in nature, Joey was nevertheless able to personally explain his case under oath at the hearing. The court did not afford Brittany the same opportunity, despite Joey’s concession that Brittany had demonstrated a valid case for custody modification as to 15-year-old J.O. This one-sided hearing further violated Brittany’s procedural due process rights and substantive liberty interest in the custody of her children because she was not able to fully present her case. *See Moser v. Moser*, 108 Nev. 572, 576, 836 P.2d 63, 66 (1992) (noting that, “[l]itigants in a custody battle have the right to a full and fair hearing” regarding the child’s ultimate disposition).

Accordingly, we conclude that the district court violated Brittany’s due process rights when it issued a final custodial order impacting the fundamental right to her custodial interests in her children without proper notice and conducted a one-sided hearing in which only Joey was permitted to testify.

The district court abused its discretion when it issued a final custody order without holding an evidentiary hearing

Brittany argues that the district court abused its discretion when it summarily concluded that there had been no substantial change in circumstances sufficient to warrant an evidentiary hearing before it denied her motion to modify custody. In response, Joey concedes that while an

evidentiary hearing was probably necessary for J.O., the court did not abuse its discretion as to R.O. and C.O. because Brittany failed to present a prima facie case. On cross-appeal, however, Joey argues that the court abused its discretion when it declined to hold an evidentiary hearing as to C.O. because —although Brittany had not alleged a prima facie case regarding C.O.—he had. We conclude that the district court abused its discretion when it declined to hold an evidentiary hearing as to all three children.

We review a district court's child custody determinations deferentially and will not disturb them absent a clear abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (1999); see also *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (explaining that district courts have broad discretion in making child custody determinations). In reviewing a district court's child custody determinations, we focus on whether the district court "reached its conclusions for the appropriate [legal] reasons" and whether its factual findings were "supported by substantial evidence." *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42; see also *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.3d 328, 330 (1993) (stating that we "must be satisfied that the [district] court's determination was made for the appropriate reasons"). Deference is not, however, owed to findings "so conclusory they mask legal error." *Davis*, 131 Nev. at 450, 352 P.3d at 1142. Crucially, we have routinely vacated custody orders where the findings of fact consist of "mere conclusory statements." *Id.* at 452, 352 P.3d at 1143 (quoting *Dixon v. Dixon*, 312 S.E.2d 669, 672 (N.C. App. 1984)).

"A district court must hold an evidentiary hearing on a request to modify custodial orders if the moving party demonstrates 'adequate cause.'" *Arcella v. Arcella*, 133 Nev. 868, 872, 407 P.3d 341, 346 (2017) (quoting *Rooney v. Rooney*, 109 Nev. 540, 542, 853 P.2d 123, 124 (1993)).

“Adequate cause” arises if the movant demonstrates a prima facie case for modification. *Rooney*, 109 Nev. at 543, 853 P.2d at 125. Namely, 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*, 123 Nev. at 150, 161 P.3d at 242), *abrogated in part by Killebrew. State ex rel. Donohue*, 139 Nev., Adv. Op. 43, 535 P.3d 1167 (2023).

“[A] district court should not weigh the evidence . . . before holding an evidentiary hearing,” but evidentiary hearings are warranted only when a movant can demonstrate a prima facie case. *Myers*, 513 P.3d at 532. In determining whether a movant has demonstrated a prima facie case for modification, the district court must typically accept the movant’s specific allegations as true, without regard to the opposing party’s competing allegations. *See id.* However, district courts are not required to consider a movant’s “general, vague, broad, or conclusory allegations,” and “need not consider facts alleged or exhibits filed that are not supported by verified pleadings, declarations, or affidavits.” *Id.* at 534. As long as the parties assert “something more than . . . naked allegation[s], it is error to resolve the apparent factual dispute[s] without granting . . . an evidentiary hearing.” *Vaillancourt v. Warden*, 90 Nev. 431, 432, 529 P.2d 204, 205 (1974). We have, however, recognized a narrow exception to this general rule. Namely, a district court may consider a nonmovant’s evidence outside of an evidentiary hearing if that evidence “conclusively establishes [that] the movant’s claims are false.” *Myers*, 513 P.3d at 533 (internal quotation marks omitted). However, if a district court denies a motion to modify custody without holding an evidentiary hearing, the district court must provide an adequate explanation for its decision. *Id.* at 536 (explaining that

a denial of a motion to modify custody without holding an evidentiary hearing has the same practical implications for a movant as a denial on the merits”).

Regarding witness credibility, district courts must not “pass upon the credibility of witnesses” and should “disregard” contradictory evidence when determining whether a party has demonstrated a prima facie case for modification. *Barelli v. Barelli*, 113 Nev. 873, 879-80, 944 P.2d 246, 249-50 (1997) (quoting *Griffin v. Rockwell Int’l, Inc.*, 96 Nev. 910, 911, 620 P.2d 862, 863 (1980)); see also *Fernandez v. Admirand*, 108 Nev. 963, 968, 843 P.2d 354, 358 (1992) (noting “the credibility of the witnesses and the weight of the evidence are immaterial to the presentation of a prima facie case”).

Here, the district court abused its discretion when it issued a custody order without first holding a proper evidentiary hearing because both Brittany and Joey independently demonstrated prima facie cases for modification, raising allegations that there had been a substantial change in circumstances, and that a custody modification would be in the best interest of the children.⁶ In statements supported by declaration, Brittany alleged that Joey: gave J.O. alcohol and forced J.O. to do pushups; failed to adequately address J.O.’s mental health issues after J.O. expressed suicidal ideations; called R.O. “fat” and placed R.O. on a restrictive diet; created an

⁶Despite taking brief testimony from Joey and issuing a determination based on sworn pleadings, the district court’s limited and one-sided hearing did not constitute a proper evidentiary hearing pursuant to *Moser* because Brittany had no opportunity to respond to Joey’s allegations. See *Moser*, 108 Nev. at 577, 836 P.2d at 66 (explaining that “the elements that serve as a precondition to a change of custody award must be supported by factual evidence” and that “the party threatened with the loss of parental rights must be given the opportunity to disprove the evidence presented”).

environment which was not conducive to the children's wellbeing and mental health; changed his own physical appearance in disturbing ways; would scream and yell at the children and break things in the home; and was admitted to the VA hospital for observation following a depressive episode. She additionally alleged that J.O. feared Joey and did not want to live with him. *See Roberson v. Roberson*, No. 85635-COA, 2023 WL 7869084 at *4 (Nev. Ct. App. Nov. 15, 2023) (Order Affirming in Part, Reversing in Part and Remanding) (noting that a minor child's wish to live with a particular parent may constitute a substantial change in circumstance that warrants an evidentiary hearing).

Impacting all three children, Brittany alleged that Joey changed his physical appearance in unsettling and frightening ways; "paint[ed] the wrong picture" for the children's wellbeing and mental health; struggled with his own severe mental health issues that required him to undergo observation at the VA hospital; was not emotionally present with any of the children; would "scream[] and yell[] at everyone in the home;" would "break[] and punch[] things;" and created a home environment where J.O., R.O., and C.O. felt that they "walk[ed] on eggshells" around him. Under the lenient standard to establish a prima facie case, these more-than-naked allegations were enough to warrant an evidentiary hearing. *Vaillancourt*, 90 Nev. at 432, 529 P.2d at 205.

On cross-appeal, Joey's allegations against Brittany were similarly satisfactory to warrant an evidentiary hearing as to C.O. Specifically, Joey alleged that Brittany: began a relationship with an ex-felon who physically abused her in front of the children; maintained a hostile relationship with Joey's new girlfriend and physically assaulted Joey's girlfriend on one occasion; attempted to unilaterally disenroll C.O. from C.O.'s current school; and often skipped her parenting times.

Finally, neither party's allegations could conclusively establish the falsity of the other's. Thus, the district court was not permitted to consider either the parties' credibility or the parties' competing allegations when analyzing whether either party had demonstrated a prima facie case sufficient to warrant an evidentiary hearing. *See Barelli*, 113 Nev. at 879-80, 944 P.2d at 249-50; *Myers*, 513 P.3d at 533. Brittany's and Joey's situation is currently—and was at the time of the hearing—one of competing justifications and dueling allegations. However, the district court entered a custody order that summarily denied both Brittany's motion and Joey's countermotion that contained virtually no engagement with the specific circumstances of their case.

Without an evidentiary hearing, the district court's "findings" that there were no substantial changes in circumstance are conclusory and may mask legal error. *See Davis*, 131 Nev. at 450, 352 P.3d at 1142; *Rivero*, 125 Nev. at 430, 216 P.3d at 227 (explaining that specific findings and an adequate explanation of the court's reasons for its custody determination are "crucial to enforce or modify a custody order and for appellate review").

Considering the foregoing, Brittany and Joey each established a prima facie case for modification sufficient to warrant an evidentiary hearing, and the district court's conclusory findings did not adequately explain its custody determination and were therefore insufficient. *See Myers*, 513 P.3d at 536. Far from being "bare naked allegations," both Brittany and Joey presented concrete details that supported a finding that substantial changes occurred in the children's circumstances; an evidentiary hearing was therefore required to resolve the factual disputes and determine whether a modification was in the best interest of the children. *Vaillancourt*, 90 Nev. at 432, 529 P.2d at 205.

Consequently, we conclude that the district court abused its discretion when it declined to hold an evidentiary hearing when it denied Brittany's motion and Joey's countermotion and issued its final custody determination order.

Accordingly, we

ORDER the custody determination REVERSED and REMAND for an evidentiary hearing to determine whether the children's best interests would be served by modification.⁷


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Michele Mercer, District Judge, Family Division
Christopher M. Cannon
Kelleher & Kelleher, LLC
Eighth District Court Clerk

⁷Insofar as Brittany and Joey have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they need not be addressed or do not present a basis for relief.