IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RONALD DAVID HARRIS,
Appellant,
vs.
JENNIFFER FIGUEROA,
Respondent.

No. 88930-COA

ORDER OF REVERSAL AND REMAND

Ronald David Harris appeals from a district court order denying his motion seeking parenting time and other contact with his minor children. Eighth Judicial District Court, Family Division, Clark County; Michele Mercer, Judge.

Harris and respondent Jenniffer Figueroa share four children and were divorced in 2017. Harris later pled guilty to sexually abusing his stepdaughter, Figueroa's daughter from another marriage, and has since been incarcerated in Tennessee. In April 2020, Figueroa initiated a custody action, requesting sole legal and sole physical custody of the parties' four children, and Harris filed an answer.

One month later, the former district court judge granted Figueroa sole legal and sole physical custody at the case management conference that Harris did not attend and without notice to the parties that a final ruling might be entered. On appeal from that decision Harris challenged only the award of sole legal custody, and this court reversed the district court's order in part. *Harris v. Figueroa*, No. 81746-COA, 2021 WL

25-25804

5176842, (Nev. Ct. App. Nov. 5, 2021) (Order Reversing in Part and Remanding).

On remand, after conducting a hearing solely on the issue of legal custody, the district court awarded Figueroa sole legal custody. This court affirmed that decision on appeal. *Harris v. Figueroa*, No. 85333-COA, 2023 WL 5967258 (Nev. Ct. App. Sept. 13, 2023) (Order of Affirmance).

Harris subsequently filed a "motion for visitation and contact with [his] children and other requests" seeking "some semblance of visitation," including weekly telephone calls with the children and an order to compel Figueroa to provide Harris with the children's street address and phone numbers to reach them supported by 12 exhibits and his sworn declaration. Harris asserted that Figueroa had not allowed contact between himself and the children for the last five years. He also requested that: the court order that Figueroa not review the mail he sent to the children, a behavior order be entered, a guardian ad litem be appointed, and for Figueroa to provide a chaperone other than herself to accompany the children to events involving his work or friends.

Figueroa filed an opposition, and Harris filed a combined motion for summary judgment or for a default judgment and a reply to Figueroa's opposition. The district court held a non-evidentiary hearing on the motions, which both Harris and Figueroa attended. The court treated Harris's motion as a motion to modify physical custody, even though Harris did not request a change from sole physical custody, and orally denied the motion, finding that the requests he made had previously been adjudicated by the district court and Nevada's appellate courts such that res judicata

barred consideration of them. Further, with respect to telephone calls with the children, the court found that ordering such relief would not be in the children's best interest. The court also denied Harris's request to call Figueroa as a witness, clarifying that the hearing was to determine whether an evidentiary hearing should be conducted, not to call and question witnesses.

Following the hearing to determine if an evidentiary hearing was warranted, the district court entered a written order denying Harris's motion. The court found that "much of this matter was already adjudicated by this Court" and affirmed on appeal. Further, the court found it was not in the children's best interest to disclose their home address to Harris and adequate cause was not shown to conduct an evidentiary hearing "especially based on the principles of Res Judicata" since "[a]ll these matters have been adjudicated by the Court and on appeal." Based on res judicata principles, the court denied Harris's requests for weekly phone calls, Figueroa not to vet his mail, a behavior order, a guardian ad litem, and a chaperone. This appeal followed.

To the extent that the district court treated Harris's motion as a motion for modification of custody, "[w]e review a district court's decision to deny a motion to modify physical custody without holding an evidentiary hearing for an abuse of discretion." *Myers v. Haskins*, 138 Nev. 553, 556, 513 P.3d 527, 531 (Ct. App. 2022). A district court abuses its discretion when its decision is clearly erroneous, *Bautista v. Picone*, 134 Nev. 334, 336, 419 P.3d 157, 159 (2018), or unsupported by substantial evidence, *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007).

On appeal, Harris first argues the district court abused its discretion by denying his motion for parenting time and contact with the children and that he was entitled to an evidentiary hearing on the motion. Figueroa disagrees.

When a movant seeks to modify physical custody, a district court must hold an evidentiary hearing if the movant demonstrates "adequate cause" for one. *Rooney v. Rooney*, 109 Nev. 540, 542, 853 P.2d 123, 124-25 (1993). "Adequate cause" arises if the movant demonstrates a prima facie case for modification. *Id.* at 543, 853 P.2d at 125. In order to modify custody, the movant must demonstrate 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 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 on other grounds by Killebrew v. State ex rel. Donohue*, 139 Nev., Adv. Op. 43, 535 P.3d 1167 (2023). "In determining whether a movant has demonstrated a prima facie case for modification of physical custody, the court must accept the movant's specific allegations as true." *Myers*, 138 Nev. at 556-57, 513 P.3d at 532. To avoid "repetitive, serial motions[,]" "any change in circumstances must generally have occurred since the last custody determination[.]" *Ellis*, 123 Nev. at 151, 161 P.3d at 243 (internal citation and quotations omitted).

Harris argues on appeal that the district court has never decided parenting time, the challenged order lacked findings, the court infringed on his parental rights, the denial of his request for parenting time violated Nevada's policy that children maintain frequent associations with

noncustodial parents, and that Figueroa's interference with his parenting time constitutes a changed circumstance. In response, Figueroa argues that there were no changed circumstances because Harris never had any parenting time to begin with and he remains incarcerated.

Having reviewed the parties' arguments and the record before us, we conclude that the district court abused its discretion when it denied Harris's motion seeking parenting time and other contact with his minor children without holding an evidentiary hearing. We specifically note that Harris was not seeking a modification of the sole physical custody order. Rather he was seeking contact with his children asserting that the current order acted as a termination of parental rights without a consideration of less restrictive alternatives.

Below, the district court largely relied on res judicata to deny Harris's motion seeking parenting time and other contact with his minor children, concluding that "much of this matter was already adjudicated by this Court" and affirmed on appeal. But this conclusion is belied by the record on appeal. Aside from the initial physical custody determination, which simply awarded Figueroa sole physical custody without addressing what, if any, contact Harris would have with the children or making any best interest findings to support the award, the district court has not otherwise addressed the parameters of the contact Harris, as the noncustodial parent, may be permitted to have with his children. Indeed, the motion seeking parenting time and other contact with his minor children at issue in this appeal represents Harris's first request to clarify the sole physical custody decree entered after the case management

conference. That decree did not restrict his contact with the children nor specify what contact he was entitled to receive even though he requested contact in his answer to Figueroa's petition for custody.

In contrast, sole legal custody has been litigated since the underlying action was initiated. Moreover, as noted above and contrary to the district court's determination, the Nevada appellate courts have not previously addressed the parties' physical custody arrangement, or a request to modify or clarify the same, as all of the prior appeals arising from the underlying case dealt only with legal custody issues. *Harris*, 2021 WL 5176842; *Harris*, 2023 WL 5967258. Thus, to the extent the district court relied on res judicata to deny the motion seeking parenting time and other contact with his minor children without holding an evidentiary hearing, it erred in doing so.

Having addressed the district court's misplaced reliance on res judicata principles to deny Harris's motion, we turn to the question of whether Harris demonstrated a prima facie case for modification such that there was adequate cause to hold an evidentiary hearing on his motion seeking parenting time and other contact with his minor children. *See Rooney*, 109 Nev. at 543, 853 P.2d at 125. We begin our examination of this issue by determining whether Harris has sufficiently alleged that changed circumstances exist for purposes of demonstrating adequate cause for an evidentiary hearing, not for the purpose of changing physical custody but for the purpose of determining the parameters of his contact with his children. We conclude that, under the circumstances presented here, and in light of our recent opinion in *Roe v. Roe*, 139 Nev., Adv. Op. 21, 535 P.3d

274, 281 (Ct. App. 2023), which sets forth the analysis district courts must apply and the specific findings the courts must make when awarding sole physical custody of a child to one parent, Harris has sufficiently alleged changed circumstances to support a determination that adequate cause exists for an evidentiary hearing on his motion seeking parenting time and other contact with his minor children.

In *Roe*, which was issued after the initial physical custody decision in this case, this court held that district courts must make specific written findings beyond the statutory best interest factors to support the entry of an order granting one parent sole physical custody. *Id.* at 288 (requiring, among other things, that courts make specific findings either that the noncustodial parent is unfit for the children to live with or that awarding primary physical custody to one parent, thereby allowing significant parenting time with the noncustodial parent, is not in the children's best interest). Further, *after making these express, written findings supporting sole physical custody*, *Roe* requires district courts to consider the least restrictive parenting time arrangement possible that is in the children's best interest and, if less restrictive alternatives to what the court adopts are proposed or considered, the court "must explain how the best interest of the child[ren] is served by the greater restriction[s]." *Id.*

Here, it is undisputed that the district court awarded sole physical custody to Figueroa in the custody decree. *See id.* at 287 (defining sole physical custody "as a custodial arrangement where the child resides with only one parent and the noncustodial parent's parenting time is restricted to no significant in-person parenting time"). However, in making

this award, the custody decree—which predates our *Roe* decision—fails to set forth *any* findings to support or explain its decision as to the level of contact Harris, as the noncustodial parent, is permitted to have with his children. Harris cannot directly challenge the sole physical custody award through this appeal as he failed to challenge that decision in his appeal from the custody decree. *See 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). But given that the district court did not address changed circumstances, nor recognize the absence of findings regarding the permitted level of contact for the noncustodial parent in the decree, the district court erred in finding an evidentiary hearing to determine the appropriate level of contact between Harris and his children was unnecessary.

Specifically, in Harris's motion seeking parenting time and other contact with his minor children, he alleges that he has had no contact with the children and Figueroa has interfered with his attempts at contact, which can constitute changed circumstances. *See Martin v. Martin*, 120 Nev. 342, 345, 90 P.3d 981, 983 (2004). Further, his assertion that his parental rights have effectively been terminated, when considered in light of the post-decree issuance of our *Roe* decision, also supports the conclusion of changed circumstances necessitating an evidentiary hearing on his motion. Thus, the district court erred in not addressing or finding changed circumstances. *See Ellis*, 123 Nev. at 151, 161 P.3d at 243 (providing that changes in circumstances must generally have occurred since the last custody determination); *see also Davis v. Ewalefo*, 131 Nev. 445, 452, 352

P.3d 1139, 1144 (2015) ("A parent cannot reasonably be expected to show that "a substantial change in circumstances" as to the child's best interest warrants modification of an existing child custody determination unless the determination at least minimally explains the circumstances that account for its limitations and terms.").

Turning to the best interest of the children, which must be considered in determining parenting time, Harris alleged in his motion, supported by a declaration, that he had not had any contact with his children despite still having his parental rights intact and previously having a good relationship with them, such that modification of the sole physical custody award to allow him to have contact with the children was in their best interest. But rather than accepting Harris's specific allegations as true, as our decision in *Myers*, 138 Nev. at 556-57, 513 P.3d at 532, generally requires when determining whether an evidentiary hearing is warranted on a motion to modify custody, the district court instead purported to make best interest findings to support its decision to deny the motion. It is not clear, however, what these findings could be based on as the court did not take any evidence and in fact recognized that it would not be appropriate for it to do so in determining whether to hold an evidentiary hearing on Harris's motion.[1] *See id.* at 557-58; 513 P.3d at 532

[1]To the extent that the record suggests the district court may, to some degree, have relied on res judicata principles to support these findings, as discussed above, the district court erred in relying on res judicata to deny Harris's motion for contact with his children under the circumstances presented here.

(stating that "a district court should not weigh the evidence or make credibility determinations before holding an evidentiary hearing"). Moreover, in opposing Harris's motion to modify, while Figueroa asserted some facts and a declaration to support her argument that allowing Harris contact with the children would not be in their best interest, the information provided did not conclusively establish Harris's claims were false such that an evidentiary hearing would be unnecessary. *See id.* at 558-59, 513 P.3d at 533 (recognizing "that nonmovants may allege facts and provide offers of proof that may address the allegations the movant has presented" and that the district court may consider the same in deciding whether to hold an evidentiary hearing on a motion to modify custody if they conclusively refute the moving party's allegations).

Given the foregoing analysis, we conclude that the district court abused its discretion in determining that Harris failed to demonstrate adequate cause for an evidentiary hearing on his motion seeking parenting time and other contact with his minor children and denying his motion on that basis. *See id.* at 556, 513 P.3d at 532. Accordingly, we reverse the district court's order denying Harris's motion and remand this matter for the district court to conduct an evidentiary hearing on Harris's motion.[2]

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[2]In reaching this result, we note again that Harris is not seeking to modify the sole physical custody designation in favor of Figueroa and we express no opinion with respect to the merits of Harris's motion and merely conclude that an evidentiary hearing is warranted under these facts. Moreover, we note that determining the form of the evidentiary hearing is within the district court's broad discretion. *See Arcella v. Arcella*, 133 Nev. 868, 872, 407 P.3d 341, 346 (2017) ("While these circumstances obligated

Harris also contends that the district court was biased against him as reflected by the fact that the court "had a predetermined outcome," closed its mind to his exhibits, and otherwise showed bias based on various other statements and actions taken during the course of the underlying proceedings. Although Harris does not expressly request that the underlying case be reassigned, obtaining such relief nonetheless seems to be the purpose behind his argument in this regard. Having reviewed the record and the parties' arguments on this point, we conclude relief is unwarranted based on this argument because Harris has not demonstrated that any alleged bias was based on knowledge acquired outside of the proceedings, and the challenged decision does not otherwise reflect "a deep-seated favoritism or antagonism that would make fair judgment impossible." *See Canarelli v. Eighth Jud. Dist. Ct.*, 138 Nev. 104, 107, 506 P.3d 334, 337 (2022) (internal quotation marks omitted) (explaining that, unless an alleged bias has its origins in an extrajudicial source, disqualification is unwarranted absent a showing that the judge formed an opinion based on facts introduced during official judicial proceedings, which reflects deep-seated favoritism or antagonism that would render fair judgment impossible); *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988) (providing that rulings made during official judicial proceedings generally "do not establish legally cognizable grounds

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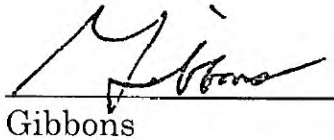
the district court to conduct an evidentiary hearing, the form of that hearing remains within the district court's discretion.").

for disqualification"); *see also Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009) (noting that the burden is on the party asserting bias to establish sufficient factual grounds for disqualification), *overruled on other grounds by Romano*, 138 Nev. at 6, 501 P.3d at 984.

Accordingly, based on the reasoning set forth above, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court to determine what contact, if any, Harris may have with his children pursuant to the guidelines established in *Roe*.[3]

_____, C.J.
Bulla



_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Michele Mercer, District Judge, Family Division
Ronald David Harris
Jenniffer Figueroa
Eighth District Court Clerk

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[3]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered these arguments and conclude they need not be addressed given our resolution of this matter.