IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PAUL J. BERTUCCINI III,
Appellant,
vs.
LISA ESPOSITO,
Respondent.

No. 84708-COA

FILED
JUN 16 2023
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Paul J. Bertuccini III appeals from a district court order denying his motion to modify physical custody. Eighth Judicial District Court, Family Division, Clark County; Amy Mastin, Judge.

Bertuccini and respondent Lisa Esposito have one minor child together, born in 2011. The parties divorced in 2014 and stipulated to a divorce decree in which they shared joint legal custody and Esposito had primary physical custody of the child. As relevant here, the district court modified Bertuccini's parenting time with the child in 2015 and 2016, amounting to Bertuccini exercising his timeshare with the child approximately ten days a month.

Later, in 2021, Bertuccini filed a motion seeking joint physical custody of the child. In that motion, Bertuccini argued, among other things, that the following allegations constituted a substantial change in circumstances affecting the welfare of the child sufficient to warrant a change in custody: (1) as the child is reaching the age of puberty and entering middle school, the child's mental and emotional needs have changed since the date of the last custody modification; (2) Esposito's and his own work schedules have changed, which has purportedly resulted in

Esposito having less time to spend with the child and allowing Bertuccini more time to spend with the child; (3) that he and Esposito continue to have difficulties with custody exchanges and coparenting, including discussions surrounding school choice and extracurricular activities; and (4) that Esposito is unfairly encouraging a negative relationship between the child, Bertuccini, and the child's step sister (Bertuccini's child from a previous relationship). Esposito opposed, offering factual allegations in opposition to Bertuccini's allegations, and contended that the mere passage of time is insufficient to constitute the substantial change in circumstances necessary to modify a custody order.

Following Bertuccini's reply and a non-evidentiary hearing, the district court entered a six-page order denying the motion to modify on the grounds that "the passage of time and/or the age of the child are not factors creating a substantial change of circumstances" and that Bertuccini therefore failed to make a prima facie case for modification that would require it to hold an evidentiary hearing. Bertuccini now appeals.

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). Based on our review of the documents before us, we conclude that the district court abused its discretion when it denied Bertuccini's motion to modify custody.

In this court's opinion in *Myers v. Haskins*, 138 Nev., Adv. Op. 51, 513 P.3d 527 (Ct. App. 2022), we provided guidance concerning the proper application of the prima-facie-case prong of the adequate cause standard for determining whether an evidentiary hearing is required to

resolve a motion to modify child custody.[1] 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.

Moreover, this court in *Myers* also held, consistent with *Davis v. Ewalefo*, 131 Nev. 445, 452, 352 P.3d 1139, 1143 (2015), that district courts must make specific findings and provide adequate explanations for their custody determinations when denying a motion to modify custody without holding an evidentiary hearing. *Myers*, 138 Nev., Adv. Op. 51, 513 P.3d at 536-37. Such findings (1) "aid appellate review by ensuring the court made its determination for appropriate reasons," and (2) "help parents understand why the motion was decided the way that it was because it may affect future motions to modify custody." *Id.* at 536.

Here, the district court found that the mere passage of time was insufficient to establish a substantial change in circumstances affecting the child's welfare. Nevertheless, the district court's order fails to identify or even address the other allegations contained within Bertuccini's motion. Indeed, as noted above, Bertuccini raised several other relevant issues related to the best interest of the child, including issues and claims related to the child's schooling and emotional needs; the parties' work schedules and the subsequent impact on their individual ability to care for the child;

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[1]We recognize that the district court did not have the benefit of *Myers* at the time it heard Bertuccini's motion. Nonetheless, the district court's order is inconsistent with *Myers* and our current caselaw, and we direct the district court to consider and apply the holdings in *Myers* upon remand.

the ability of the parties to cooperate and coparent; and the child's relationships with her step-sibling. And because the district court's order did not address these allegations, which are presumed to be true, *id.* at 532, we therefore conclude that the district court abused its discretion when denying Bertuccini's motion without adequate explanation.

Accordingly, we reverse the order denying Bertuccini's motion to modify custody and remand this matter for further findings. Additionally, we direct the district court to consider and apply this court's opinion in *Myers* in any further proceedings upon remand.

It is so ORDERED.[2]



_____, C.J.
Gibbons



_____, J.
Westbrook



_____, Sr.J.
Silver

cc: Hon. Amy Mastin, District Judge, Family Division
Lansford W. Levitt, Settlement Judge
Standish Law Group
Law Office of Daniel Marks
Eighth District Court Clerk

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[2]The Honorable Abbi Silver, Senior Justice, participated in the decision of this matter under a general order of assignment.