IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL W. GIDDENS,
Appellant,
vs.
NICKIE R. GIDDENS,
Respondent.

No. 72533

ORDER OF REVERSAL AND REMAND

Michael W. Giddens appeals from a district court post-divorce-decree order denying his motion to modify child custody. Eighth Judicial District Court, Clark County; Mathew Harter, Judge.

The underlying divorce decree awarded respondent Nickie R. Giddens primary physical custody of the parties' two minor children subject to Michael's parenting time rights. Michael later moved to modify the divorce decree, seeking joint physical custody of the parties' children. In particular, Michael asserted, among other things, that Nickie should not have primary physical custody because the parties' work schedules had changed since entry of the divorce decree, such that Nickie could not care for the children during extended periods when he was otherwise available.

Citing *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007), the district court subsequently concluded that, to prevail on his motion, Michael was required to establish that "the *welfare of the children* ha[d] been *substantially changed* (*i.e.*, put at risk)." The district court further determined that it could not consider Nickie's work schedule in evaluating

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Michael's motion and that he otherwise failed to meet the test set forth above. As a result, the district held that Michael did not establish adequate cause for a hearing under *Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123 (1993), and denied his motion without waiting for Nickie to even file an opposition or for her time to do so to expire, reasoning that its swift action promoted the efficient administration of justice.

Michael then sought reconsideration, arguing, as relevant here, that the district court prematurely denied his motion to modify custody; that the court should not have evaluated his motion under *Ellis*; and that, even if *Ellis* governed his motion, the court misapplied its standard. The district court denied Michael's motion for reconsideration, however, reiterating its earlier position that he failed to set forth adequate cause for a hearing on the custody modification issue. This appeal followed.

On appeal, Michael initially argues that the district court should not have applied *Ellis* in reviewing his motion because the parties agreed to their custody arrangement and he only sought to modify their respective timeshares. But Michael's argument fails because *Ellis* governs requests to modify primary physical custody arrangements. *See* 123 Nev. at 150, 161 P.3d at 242; *see also Bluestein v Bluestein*, 131 Nev. 106, 111, 345 P.3d 1044, 1047 (2015) (explaining that, notwithstanding any agreement between the parties, when one party moves to modify a custodial arrangement, the district court must apply Nevada law in evaluating that request). Thus, to prevail on his motion Michael was required to establish, under *Ellis*, that there was a substantial change in circumstances affecting

his children's welfare and that modification was in their best interest. *See* 123 Nev. at 150, 161 P.3d at 242.

But Michael further argues that, even if *Ellis* was applicable, the district court misapplied *Ellis*'s changed-circumstances prong because it required him to show that the children had been put at risk and refused to consider the parties' work schedules in its analysis of that prong. We agree on both points. In particular, *Ellis* and its progeny do not require a showing that the circumstances at issue create a risk to the children's welfare; indeed, the supreme court has recognized that the requisite change in circumstances can arise in more mundane situations such as when a party relocates. *See Hayes v. Gallacher*, 115 Nev. 1, 7, 972 P.2d 1138, 1141 (1999) (recognizing that a party's relocation can constitute a substantial change in circumstances warranting a reexamination of custody based on the child's best interest).

And while there is authority indicating that the parties' work schedules cannot form the sole basis for the district court's changed-circumstances determination, these courts also recognize that work schedules are an appropriate consideration in a changed-circumstances analysis if they affect the children's well-being or the parties fail to make adequate arrangements for the children's care in their absence. *See In re Marriage of Loyd*, 131 Cal. Rptr. 2d 80, 84-85 (Ct. App. 2003) ("[A] parent may not be deprived of custody based upon his or her work schedule if adequate arrangements are made for the child's care in the parent's absence."); *Silva v. Silva*, 136 P.3d 371, 377 (Idaho Ct. App. 2006) (recognizing that a parent's work schedule is only relevant to a custody

determination if it affects the well-being of the children). Thus, to the extent the district court determined that *Ellis*'s changed-circumstances prong required that the children be put at risk, and because the court refused to even consider the impact of the parties' work schedules as part of its analysis, the court's application of *Ellis*'s changed-circumstances prong was erroneous.[1] *See Bluestein*, 131 Nev. at 111, 345 P.3d at 1048 (providing that legal questions in a custody matter are reviewed de novo).

Based on the foregoing, we conclude that the district court abused its discretion in denying Michael's motion to modify custody. *See Ellis*, 123 Nev. at 153, 161 P.3d at 244 (reviewing an order modifying custody for an abuse of discretion). As a result, we reverse and remand that decision. On remand, the district should allow full briefing of Michael's motion to modify custody and, at a minimum, hold a preliminary hearing on the matter to determine whether a full evidentiary hearing is

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[1]While the order denying Michael's motion cited both *In re Marriage of Loyd* and *Silva*, the district court made no findings with regard to whether Nickie's work schedule affected the children's well-being or whether she made adequate arrangements for their care in her absence. The court simply declared that it could not even consider Nickie's work schedule in evaluating Michael's motion—a determination that runs contrary to the holdings of these cases. And while the district court attempted to support its holding with a cite to *Rivero v. Rivero*, 125 Nev. 410, 427, 216 P.3d 213, 225 (2009), and its discussion of how to calculate the parties' respective timeshares, *Rivero* does not support the district court's determination that parental work schedules cannot be considered in deciding a motion to modify custody.

warranted.[2] *See Rooney*, 109 Nev. at 542-43, 853 P.2d at 124-25 (requiring an evidentiary hearing on a motion to modify custody where the moving

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[2]In addition to the arguments detailed above, Michael also asserts that the district court improperly resolved his motion to modify custody without waiting for Nickie to file an opposition or for her time to do so to expire and that the court improperly failed to hold oral argument on this motion. But given our resolution of this matter, we need not separately address the propriety of these actions with regard to this case.

Nonetheless, we note that, under recently adopted EDCR 5.207, only "uncontested, stipulated, or resolved matter[s]" may be summarily resolved without a hearing by a family court in the Eighth Judicial District. *See* EDCR 5.207 (providing that, [u]nless a hearing is required by statute or by the court, any uncontested, stipulated, or resolved matter may be submitted to the court for consideration without a hearing"); *see also Ramsey v. City of N. Las Vegas*, 133 Nev. ___, ___, 392 P.3d 614, 619 (2017) (recognizing that Nevada follows the maximum "*expressio unius est exclusio alterius,*" which means that "the expression of one thing is the exclusion of another"). This rule was not in effect at the time Michael's motion was filed, *see In re Proposed Amendments to Part V of the Rules of Practice for the Eighth Judicial Dist. Court*, ADKT 0512 (Order Amending the Rules of Practice for the Eighth Judicial District Court Part V, December 28, 2016) (effective January 27, 2017), and thus it does not apply to this matter, but we caution the district court that, in cases subject to this rule, the application of the summary disposition approach under circumstances similar to those presented in this matter would constitute a reversible abuse of discretion.

party establishes adequate cause).

It is so ORDERED.[3]

Silver, C.J.

Tao, J.

Gibbons, J.

cc: Hon. Mathew Harter, District Judge
Robert E. Gaston, Settlement Judge
Hofland & Tomsheck
Prokopius & Beasley
Eighth District Court Clerk

[3]Having reviewed the parties' remaining arguments, we conclude that they either lack merit or need not be addressed in light of our disposition of this appeal.