IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHERYL HELINA-BERGERON,
Appellant,
vs.
JUSTIN PHILIP BERGERON,
Respondent.

No. 78354-COA

ORDER REVERSING, VACATING, AND REMANDING

Cheryl Helina-Bergeron appeals a district court order denying a motion to modify child custody. Eighth Judicial District Court, Family Court Division, Clark County; Mathew Harter, Judge.

Cheryl Helina-Bergeron entered into a post-divorce parenting agreement with respondent Justin Bergeron pertaining to their two children, which was adopted by a Washington State court in 2015. The parenting agreement and order provided Cheryl primary physical custody upon its creation, but it stipulated that the parties would share joint physical custody if Justin lived within ten miles of Cheryl in Woodland Hills, California. From December 2014 through January 2015, and prior to entering the agreement, Cheryl was the victim of cyber-attacks, but she did not know the identity of the perpetrator. She moved to Woodland Hills with the children shortly thereafter. Justin was identified as the culprit of the cyber-attacks in 2016, and in 2017, he pleaded guilty to committing computer trespass and cyber stalking against Cheryl, both of which were classified as gross misdemeanors and domestic violence. Justin received probation, which included a no contact provision between him and Cheryl.

Both parties relocated to Las Vegas by the summer of 2018. Justin then filed a motion to enforce the joint physical custody portion of the parenting agreement and order, and Cheryl moved for primary physical

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custody and sanctions. The district court, relying on *Mizrachi v. Mizrachi*, 132 Nev. 666, 385 P.3d 982 (Ct. App. 2016), denied Cheryl's motion and impliedly granted Justin's motion, all without an evidentiary hearing. The district court found that Cheryl's motion to modify custody was barred because: (1) she chose to enter into the parenting agreement that allowed for joint custody if the parties lived near each other, and (2) the acts of domestic violence preceded the parenting agreement. The district court further concluded that no evidentiary hearing was necessary because Cheryl had not shown adequate cause to modify the 2015 order.

On appeal, Cheryl contends that the district court erred by misapplying *Mizrachi*. Additionally, she argues that the district court abused its discretion by: (1) denying her modification motion without first holding an evidentiary hearing, (2) not sanctioning Justin and his attorney, (3) finding no domestic violence was committed by Justin, and (4) requiring her to pay the supervised exchange costs. Finally, she requested that the case should be assigned to a different judge on remand due to judicial bias.

The district court erred by misapplying Mizrachi

"Appellate issues involving a purely legal question are reviewed de novo." *Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010). "Public policy favors parenting agreements." *Mizrachi*, 132 Nev. at 671, 385 P.3d at 985. Additionally, as long as the agreement is valid and final, courts "will generally recognize the preclusive effects of such agreements." *Id.* (quoting *Rennels v. Rennels*, 127 Nev. 564, 569, 257 P.3d 396, 399 (2011)). Also, the terms of parenting agreements control "until a party moves to modify those terms." *Id.* at 671, 385 P.3d at 985. Once a party asks the court to review those terms, Nevada law applies. *Bluestein v. Bluestein*, 131 Nev. 106, 111, 345 P.3d 1044, 1047 (2015).

On appeal, Cheryl argues that the district court erred by concluding that *Mizrachi* precluded a motion to modify the 2015 order. We agree. *Mizrachi* does not restrict a court's ability to modify custody orders. Indeed, once a party seeks court review of a custody order, the district court must apply Nevada law even if the custody order stemmed from an underlying parenting agreement. *Id.* at 111, 345 P.3d at 1047-48. Therefore, the district court erred in concluding it did not have the authority to modify the Washington State court's order and that it had to enforce the parenting plan absent severe circumstances.[1]

The district court abused its discretion by failing to hold an evidentiary hearing

A district court may decline to grant an evidentiary hearing if the moving party fails to show "adequate cause" to hold a hearing and must hold a hearing if the party established adequate cause for the hearing. *Rooney v. Rooney*, 109 Nev. 540, 542-43, 853 P.2d 123, 124-25 (1993). A movant establishes "adequate cause" when the movant presents a prima facie case for modification. *Id.* at 543, 853 P.2d at 125. "To constitute a prima facie case it must be shown that: (1) the facts alleged in the affidavits are relevant to the grounds for modification; and (2) the evidence is not merely cumulative or impeaching." *Id.* Moreover, a movant may rely on evidence of domestic violence if the movant or the court was unaware of the domestic violence when a prior custody decision was created. *Castle v. Simmons*, 120 Nev. 98, 105, 86 P.3d 1042, 1047 (2004); *see also Nance v. Ferraro*, 134 Nev.

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[1]The district court did order a Brief Focused Assessment to address whether there were valid domestic violence concerns that would justify not enforcing the parenting agreement. Nevertheless, the court was required to apply Nevada law and determine the best interest of the children once the motion to modify was filed. *See Bluestein*, 131 Nev. at 111, 345 P.3d at 1047-48.

152, 160 n.9, 418 P.3d 679, 686 n.9 (Ct. App. 2018) ("[To] show custody modification is in the child's best interests . . . a moving party could present preexisting evidence of domestic violence so long as it was unknown to the parties or the court when the prior order was entered." (citing *Castle*, 120 Nev. at 105, 86 P.3d at 1047; *Mosley v. Figliuzzi*, 113 Nev. 51, 58-59, 930 P.2d 1110, 1115-116 (1997)).

Cheryl contends the district court abused its discretion by finding that she had not presented adequate cause for an evidentiary hearing. We agree.

Cheryl brought four allegations to show the need for an evidentiary hearing: (1) she had been the de facto primary physical custodian of both children for several years, (2) Justin was convicted of two domestic violence offenses in 2017[2] and he was not identified as the perpetrator of those crimes until after the parenting agreement and order had been filed, (3) Justin interferes with her communication with the children, and (4) Justin engaged in a physical altercation with one of their children.

Either of the first two claims alone established adequate cause for an evidentiary hearing; if true, they could lead to a modification of

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[2]Cheryl also argues that the district court abused its discretion by making a specific finding that domestic violence did not occur between the parties. We need not address whether the district court made a specific finding in light of our disposition. However, it appears the district court fundamentally misunderstood a portion of the Brief Focused Assessment. The doctor stated there was no domestic violence between Justin and one of the children. But the district court misinterpreted the statement to mean there was no domestic violence between Justin and Cheryl. Furthermore, the record shows the dates of the acts of domestic violence as 2014-2015, but Justin was first identified as the perpetrator in 2016 and then convicted of the crimes in 2017. The district court appeared to focus only on the dates the domestic violence occurred.

custody, and they were not merely cumulative or impeaching. *Rooney*, 109 Nev. at 542-43, 853 P.2d at 124-25; *see* NRS 125C.0035(5) (stating there is a rebuttable presumption against giving a domestic abuser sole or joint physical custody because it is not in the child's best interest, and requiring the district court to make specific findings that its custody arrangement protects a domestic violence victim and the children); *see also Rivero*, 125 Nev. at 430, 216 P.3d at 227 (providing that if one parent has the children less than 40 percent of the year, the other parent has de facto primary physical custody); *Bluestein*, 131 Nev. at 111, 345 P.3d at 1048 (explaining that all modifications must be done in the child's best interest); *Nance*, 134 Nev. at 160 n.9, 418 P.3d at 686 n.9. These two grounds clearly constitute adequate legal cause, and they were supported by undisputed evidence. Therefore, the district court abused its discretion by denying Cheryl's motion without first holding an evidentiary hearing.

Sanctions

Cheryl argues that the district court abused its discretion by not awarding attorney fees to her as a sanction against Justin's attorney. She asserts that Justin's attorney committed professional misconduct and requested attorney fees because of his actions. A court's decision whether to award attorney fees as a sanction is reviewed for an abuse of discretion. *See Berkson v. Lepome*, 126 Nev. 492, 504, 245 P.3d 560, 568 (2010). Here, the district court denied all requests for attorney fees and found that "there are clear faults by both sides." However, the court did not explicitly rule on Cheryl's sanctions motion nor did it address the allegations regarding counsel's alleged improper behavior.

It is not clear from the district court's order if it denied Cheryl's motion for sanctions when it denied the request for attorney fees, as there were multiple requests from each party. Therefore, we vacate the denial of

attorney fees to Cheryl as it relates to the motion for sanctions. The district court should address the sanctions issue in the first instance and make findings.[3] "An appellate court is not particularly well-suited to make factual determinations in the first instance." *Ryan's Express Transp. Servs. Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) (citing *Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983)). The district court should revisit the issue after the evidentiary hearing to determine if sanctions or attorney fees are warranted.[4] Accordingly, we

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[3]Cheryl also argues that the district court judge was biased and the case should be assigned to a different judge on remand. "A judge is presumed to be unbiased." *Rivero*, 125 Nev. at 439, 216 P.3d at 233. "[D]isqualification for personal bias requires 'an extreme showing of bias [that] would permit manipulation of the court and significantly impede the judicial process and the administration of justice.'" *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1254-55, 148 P.3d 694, 701 (2006) (alteration in original) (quoting *Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 632, 636, 940 P.2d 127, 129 (1997)). Further, "judicial rulings alone almost never constitute a basis for a bias or partiality motion." *Whitehead v. Nev. Comm'n on Judicial Discipline*, 110 Nev. 380, 427, 873 P.2d 946, 975 (1994) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994) (emphasis omitted)). Based on our review of the record, Cheryl's claim is insufficient, as she has not overcome the presumption that judges are unbiased.

[4]Additionally, Cheryl argues that the district court abused its discretion when assigning her the supervised exchange costs as she is a victim of domestic violence perpetrated by Justin. In light of our disposition we do not address whether the court abused its discretion in doing so but that portion of the district court order is vacated. The district court will need to revisit the issue of costs related to supervised exchanges after it holds the evidentiary hearing and makes specific findings about the domestic violence, its potential effect on the children's best interest, and protecting abuse victims. *See* NRS 125C.0035(5). Further, the district court will need to determine what effect the no contact order from the criminal case and any protection orders have on the child exchanges.

ORDER the district court's order REVERSED IN PART, VACATED IN PART, AND REMAND this matter to the district court for proceedings consistent with this order.[5]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Mathew Harter, District Judge
Fine Carman Price
Kelleher & Kelleher, LLC
Mario D. Valencia
Eighth District Court Clerk

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[5]In light of our resolution of this matter, we lift the stay imposed by our April 1, 2019, order. Nevertheless, because we reverse the district court's custody determination, on remand the parties will resume the custody arrangement that was in place prior to the parties seeking relief in the district court. The parties will continue the arrangement until the district court holds an evidentiary hearing and enters an order resolving the underlying custody dispute. This directive shall not preclude the parties from reaching an agreement to modify this custody arrangement or restrict the district court's ability to enter a temporary emergency custody order if the circumstances require.