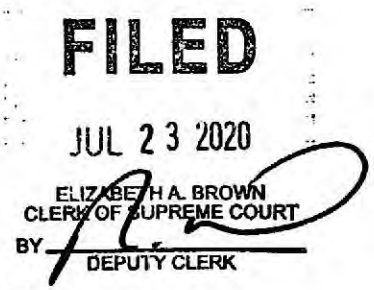
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN DANIEL ADRIANZEN,
Appellant,
vs.
PAIGE ELIZABETH PETIT,
Respondent.

No. 78966-COA



ORDER OF REVERSAL AND REMAND

Kevin Daniel Adrianzen appeals a district court order denying his countermotion to modify primary physical custody and child support. Eighth Judicial District Court, Family Court Division, Clark County; T. Arthur Ritchie, Jr., Judge.

Adrianzen and Paige Elizabeth Petit married in April 2013. Their child was born in September 2013. Adrianzen filed a complaint for divorce in November 2013 and moved for primary physical custody of the child. Petit answered the complaint and argued that she should have sole legal and physical custody. In August 2014, following a bench trial, the district court issued the decree of divorce, which gave the parties joint legal custody, but gave Petit primary physical custody.[1] The decree, however, did not contain best interest findings as required by NRS 125.480.[2]

[1]We do not recount the facts except as necessary to our disposition.

[2]"NRS 125.480 was repealed in 2015, [*see*] 2015 Nev. Stat., ch. 445, § 19, at 2591, and reenacted in substance at NRS 125C.0035, [*see*] 2015 Nev. Stat., ch. 445, § 8, at 2583-85." *Nguyen v. Boynes*, 133 Nev. 229, 236 n.4, 396 P.3d 774, 781 n.4 (2017). Other than the decree of divorce, all relevant motions were filed after 2015, and therefore we reference NRS 125C.0035.

In July 2018, Petit moved to modify the timeshare schedule, arguing that her relationship with Shawn Prisco, her new fiancé with whom she had two children, constituted a change in circumstances that warranted modification of the timeshare, and that the modification was in the child's best interest.[3] Petit specified that she wanted to create a "nuclear family" with Prisco, and therefore wanted the court to cut Adrianzen's parenting time in half and increase her own weekend parenting time.

Adrianzen opposed Petit's motion to modify the timeshare and filed a countermotion to modify primary physical custody to joint custody and to modify child support accordingly. In a supporting affidavit, Adrianzen contended that there was a change of circumstances affecting the child and that the child's best interests would be served by modification of physical custody because (1) Petit's fiancé Prisco, whom Petit shared an apartment, had recent drug and alcohol convictions; (2) Prisco and Petit had three children and lived in an inadequate two-bedroom apartment; (3) Petit blocked his phone number, making communication regarding the child difficult; (4) Petit had moved multiple times without informing him as to her new address, making exchanges of the child more difficult; (5) Petit had enrolled the child in kindergarten without consulting with him as to which school he should attend; (6) Petit had unilaterally scheduled and taken the child to doctor and dentist appointments without notifying him ahead of time thereby preventing him from participating; and (7) the child had health issues, including numerous cavities and scabies, which implies parental neglect.

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[3]We note that Petit cited NRS 125C.0035(4) (providing the best interest factors), but did not analyze how modification of the timeshare would serve the child's best interest under these factors.

In a supplement to his motion to modify primary physical custody to joint,[4] Adrianzen added, again with a supporting affidavit, that Prisco had been arrested for (1) driving under the influence and possessing a concealed knife in California in 2016; (2) possession of drug paraphernalia—including a pipe which allegedly is used for smoking methamphetamine—and resisting arrest in May 2017; and (3) driving under the influence of THC and Xanax and driving on a revoked license in April 2018.[5] Adrianzen included as an exhibit a Facebook post that Prisco's mother posted in 2016, at the time Prisco was living with the child:

> I am Shawn Prisco's mother. My son is a drug addict spiraling out of control. Shawn lies, steals, cheats, and does whatever he can to feed his addiction. I'm reaching out to all that know Shawn and am asking to all not support his addiction . . . . Shawn has an open door to return to Rehab for the help he needs. We have recently learned that Shawn is going to be a father, but not if he continues on this path of destruction.

Adrianzen argued that, based on these circumstances, it was in the child's best interest to modify primary physical custody to joint physical custody.

The district court held a non-evidentiary hearing on the parties' motions to modify custody in September 2018.[6] In a detailed minute order, the district court observed that Adrianzen argued that Prisco had a serious drug problem, and when Adrianzen picked up the child for parenting time, the child had a black eye. The child allegedly told Adrianzen that Prisco had

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[4]Petit apparently did not object to Adrianzen's supplemental pleading.

[5]Adrianzen provided exhibits containing docket sheets from the courts that issued each of Prisco's convictions. Prisco's charge for driving on a revoked license, however, was apparently dismissed.

[6]We note that this transcript was not filed in the record on appeal.

placed tape on his face and pulled his cheeks. The district court further noted that "[Petit] stated that they [(i.e., her and Prisco)] cohabitate and plan to get married." The district court then concluded that there was no adequate cause to re-litigate custody, and the conduct of Prisco did not cause any neglect on the part of Petit. The district court therefore denied an evidentiary hearing, Adrianzen's motion to modify primary physical custody, and Petit's motion to modify the timeshare. Despite this ruling, the minute order also stated that Adrianzen would have 60 days for discovery to find additional information regarding Adrianzen's concerns, but did not specify what information might be found.[7]

A written order was issued in February 2019, which reiterated the contents of the minute order and also noted that Prisco and Petit live together with the child. No explanation was included concerning discovery; the order only noted "there shall be a limited window of sixty (60 days) for [Adrianzen] to conduct discovery," and "if [he] acquires additional information, he shall prepare an affidavit and re-notice the matter." The written order reiterated that the conduct of Prisco did not cause any neglect on the part of Petit. The order did not cite to *Rooney v. Rooney*, 109 Nev. 540, 542-43, 853 P.2d 124-25 (1993) (providing the standard the district court

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[7]At the subsequent hearing for Adrianzen's motion to reconsider the district court's denial of his motion to modify primary physical custody, the district court explained, "I could've just left it at that [(i.e., denying modification of primary physical custody)]. But I didn't. I said we're gonna [sic] allow discovery for 60 days to see if you can develop these facts because there are some legitimate issues that you raise about joint legal custody, certainly." It is unclear why the district court referenced these issues only as to modification of legal custody, rather than modification of physical custody, although some of the allegations did implicate legal custody, which the parties already shared jointly and was not part of the motion or countermotion.

should apply to determine whether it should hold an evidentiary hearing to modify physical custody), nor to *Ellis v. Carucci*, 123 Nev. 145, 147, 161 P.3d 239, 240 (2017) (providing the standard for modifying primary physical custody).

Following the written order, Adrianzen filed a timely motion for the district court to reconsider its decision to deny modification of primary physical custody and to set an evidentiary hearing. In this motion, which was supported by an affidavit, Adrianzen alleged that the child had a bruise on his face, and that Petit admitted that Prisco had caused the bruise. He also alleged that the child suffered injuries in a car collision with Petit driving, and Petit did not inform him. With these new facts—along with the same facts previously alleged—Adrianzen argued that reconsideration was warranted under EDCR 5.512(a).[8] Adrianzen further argued that the district court did not make best interest findings when it denied modification of the custody arrangement, and that with the factual allegations presented, he had shown adequate cause under *Rooney*, 109 Nev. at 540, 853 P.2d at 123, to hold an evidentiary hearing on whether to modify custody.

The district court held a non-evidentiary hearing on the motion for reconsideration in April 2019. At the hearing, Adrianzen contended that he presented adequate cause to hold an evidentiary hearing on whether to modify custody. Adrianzen reiterated that, in addition to the child's health issues and his poor performance in school, there were two instances where

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[8]The Eighth Judicial District Court rules were amended effective January 1, 2020. *See In re Proposed Amendments to the Rules of Practice for the Eighth Judicial Dist. Court*, ADKT 0545 (Order Amending the Rules of Practice for the Eighth Judicial District Court, Nov. 27, 2019). EDCR 5.512(a) was renumbered and is now EDCR 5.513(a). However, because the underlying motion and countermotion commenced prior to those amendments, we apply the former version of the rule here.

the child had bruises, and both times the child said it was because of Prisco tripping him or placing tape on his face and pulling his cheeks. The district court noted that it gave Adrianzen additional time for discovery because Adrianzen's information was "secondhand" from the child, and that his allegations about the child's home life with Petit and Prisco went to joint legal custody. At the hearing, Petit noted that she still lived with Prisco. Without discussing the affidavits containing domestic abuse allegations committed by Prisco against the child, and the applicability of any possible related exceptions to the rule against hearsay, as well as the drug and alcohol offenses by Prisco, or any of the other numerous allegations, but only the child's cavities, the district court stated, "I would say it's a close call as it relates to whether to relitigate the issue of custody. But just because he says it, doesn't mean it's true." The district court explained that, to change custody, it would require "a [domestic violence] incident" that "results in arrest," or "a drug charge," or "they get evicted for not paying" their mortgage or rent. Thus, it orally denied Adrianzen's motion to reconsider.

The district court issued a written order noting the "minor child alleges that [Petit]'s boyfriend abuses him." The district court, however, still denied Adrianzen's motion to reconsider its denial of his motion to modify primary physical custody without an evidentiary hearing. The order stated that Adrianzen's allegations "do[ ] not require re-litigating custody." No analysis was performed pursuant to *Rooney*, 109 Nev. at 542-43, 853 P.2d at 124-25, *Ellis*, 123 Nev. at 147, 161 P.3d at 240, or the applicability of NRS 125C.0035(4)(j)-(k) or the other best interest factors.[9]

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[9]Because the district court considered the merits of Adrianzen's motion for reconsideration, this court may review the arguments Adrianzen asserted in his motion. *See Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007) (holding that appellate courts may consider arguments asserted in a

On appeal, Adrianzen contends that the district court abused its discretion by denying his motion to modify primary physical custody to joint physical custody without conducting an evidentiary hearing. We agree.[10]

The district court has broad discretion in determining child custody matters. *Davis v. Ewalefo*, 131 Nev. 446, 450, 352 P.3d 1139, 1142 (2015). "Although this court reviews a district court's discretionary determinations deferentially, *deference is not owed to legal error*, or to findings so conclusory they may mask legal error." *Id.* (emphasis added) (internal citations omitted).

The "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, 871, 407 P.3d 341, 345 (2017) (quoting *Rooney v. Rooney*, 109 Nev. 540, 542, 853 P.2d 123, 124 (1993)). To establish adequate cause, the movant must present a prima facie case that modification of custody is in the child's best interest by showing "(1) the facts alleged in the affidavits are relevant" to the custody modification, and "(2) the evidence is not merely cumulative or impeaching." *Rooney*, 109 Nev. at 543, 853 P.2d at 125. The standard set forth in *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007), guides whether modification of primary physical custody is warranted. *Arcella*, 133 Nev. at 871 n.2, 407 P.3d at 345 n.2. "A modification of primary physical custody is warranted only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the modification would serve the child's best interest." *Ellis*,

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motion for reconsideration if the district court chose to entertain the motion on its merits and it is properly part of the appellate record).

[10]Petit did not appeal the denial of her motion to modify the timeshare to increase her parenting time.

123 Nev. at 153, 161 P.3d at 244. "[W]hen making . . . custody determination[s], the sole consideration . . . is the best interest of the child." *Id.* at 152, 161 P.3d at 243 (internal quotation marks and citation omitted).

We conclude that Adrianzen presented sufficient factual allegations that would warrant an evidentiary hearing on whether to modify physical custody. Adrianzen presented factual allegations, supported by affidavit, suggesting parental neglect and domestic abuse by showing that the child (1) had numerous cavities; (2) had scabies;[11] (3) was bruised through domestic abuse; (4) was living with Prisco, a serious drug and alcohol abuser with at least three drug and alcohol related convictions, and Prisco exercised control over the child; (5) was performing poorly in school; (6) was taken to medical appointments and enrolled in school without Adrianzen's knowledge or consultation; and (7) was involved in a car accident with Petit driving, and treated afterwards without Adrianzen's knowledge. In addition, Adrianzen alleged that Petit had made communication with Adrianzen regarding the child difficult by blocking his phone number, only placed her last name on legal documents pertaining to the child, and moved the child to multiple homes without his knowledge, making exchanges difficult.[12]

In *Ellis*, the Nevada Supreme Court concluded that a four-month slide in the child's academic performance constituted a substantial change of circumstances warranting modification of primary physical custody. 123

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[11]"Scabies involves a sub-dural infestation of mites and causes intense itching to the point where the scratching results in scabs and sores." *Ciccone v. Sapp*, 238 Fed. App'x 487, 488 (11th Cir. 2007).

[12]We note that Adrianzen's motions and oral argument included numerous allegations that went beyond legal custody, which was already jointly shared. We have not addressed all of them herein, but they should be considered at an evidentiary hearing upon remand because they implicate virtually every best interest factor identified in NRS 125C.0035(4)(c)-(k).

Nev. at 153, 161 P.3d at 244. Here, like in *Ellis*, the child was allegedly performing poorly in school, but, in addition to the circumstances in *Ellis*, the child here also allegedly suffered from (1) domestic abuse, scabies; (2) numerous cavities suggesting parental neglect; and (3) living with a person who may have a serious drug and alcohol abuse problem, as evidenced by convictions for at least three drug and alcohol offenses. *See* NRS 125C.0035(4)(j)-(k) (providing factors in determining the child's best interest including whether the child has suffered abuse, neglect, or domestic violence). Thus, applying *Rooney*, 109 Nev. at 543, 853 P.2d at 125, an evidentiary hearing was proper because (1) the allegations alleged by Adrianzen were relevant to modifying primary physical custody because they were relevant to changed circumstances affecting the welfare of the child, as well as the child's best interests; and (2) the evidence was not cumulative, as it occurred after the decree of divorce and had not been raised in a prior motion to modify custody.

Moreover, the district court did not correctly apply the *Rooney* standard in its order denying Adrianzen's motion to modify primary physical custody. Instead, the district court mentioned adequate cause, but nevertheless concluded the evidence was irrelevant because "the actions of [Petit]'s fiancé have not caused any neglect on the part of [Petit]." The governing standard—both for granting an evidentiary hearing to modify custody and for granting a motion to modify primary physical custody—is broader than what the district court stated. *See Ellis*, 123 Nev. at 153, 161 P.3d at 244; *Rooney*, 109 Nev. at 542-43, 853 P.2d at 124-25. Further, the district court's apparent conclusion that Prisco, not Petit, caused the harm to the child, and therefore it was not legally significant, would mean that, if taken to the logical extreme—if a child molester moved into the home—that

fact would be irrelevant to modifying child custody unless the custodial parent directly caused harm to the child.[13]

Thus, because the district court incorrectly applied the legal standard, and disregarded facts crucial to ascertaining whether an evidentiary hearing for modification of primary physical custody was warranted, we conclude that the district court abused its discretion in denying Adrianzen's motion to modify primary physical custody without first conducting an evidentiary hearing.[14]

Accordingly, we

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[13]*See* NRS 200.508(1) ("A person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect" is guilty of a felony); NRS 200.508(2) ("A person who is responsible for the safety or welfare of a child pursuant to NRS 432B.130 and who permits or allows that child to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect" is guilty of a felony); *see also* NRS Chapter 432B—Protection of Children from Abuse and Neglect.

[14]We note that Petit also argued that changed circumstances warranted modification of the timeshare schedule, which may have been an additional reason for the district court to hold an evidentiary hearing.

ORDER the judgment of the district court REVERSED AND REMAND[15] this matter to the district court for an evidentiary hearing consistent with this order.[16]

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[15]The dissent—without citation to relevant authority or to the record—concludes that existing precedent does not "requir[e] a district court to waste time conducting an evidentiary hearing . . . on motions that it intends at the outset to deny." Our reading of *Rooney*, however, fails to show any language that would allow a district court to predetermine a motion to modify custody while disregarding factual allegations supported by affidavit. *See* 109 Nev. at 540-43, 853 P.2d at 123-25 (setting forth the standard for denying a motion to modify custody without an evidentiary hearing). To the contrary, and as explained above, *Rooney* requires the district court to hold an evidentiary hearing when the movant shows adequate cause, which is established when the movant presents a prima facie case for modification. *Id.* at 542-43, 853 P.2d at 124-25. Here, as explained above, Adrianzen presented sufficient factual allegations by affidavit to establish a prima facie case to modify primary physical custody, and even the district court noted that it was a "close call." Thus, the court was required to hold an evidentiary hearing before denying his motion to modify primary physical custody. Moreover, "deference is not owed to legal error." *Davis,* 131 Nev. at 450, 352 P.3d at 1142. The district court misapplied *Rooney*, and therefore its decision is not entitled to "broad deference." Thus, the dissent has not cogently argued that the district court's decision is entitled to deference particularly considering that the factual allegations pertain to the safety of the child.

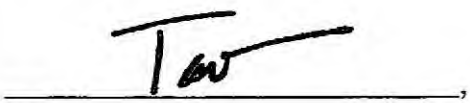
[16]Insofar as the parties raise arguments that are not specifically addressed in this order, including Adrianzen's argument that the lack of best interest findings in the decree of divorce impedes his ability to show a change of circumstances, we have considered the same and conclude they either do not present a basis for relief or need not be reached given the disposition of this appeal. We note that Petit's argument, alleging that Adrianzen's motion for reconsideration was untimely pursuant to EDCR 5.512(a), is without merit. EDCR 5.512(a), in relevant part, provides that a motion for reconsideration must be filed "within 14 calendar days after service of notice of the entry of the order." Here, the notice of the entry of the order was served on February 14, 2019, and Adrianzen timely filed his motion for reconsideration on February 28, 2019.

_____, C.J.
Gibbons

_____, J.
Bulla

TAO, J., dissenting:

The district court denied the motion for modification. The majority does not conclude that the district court erred in denying the motion on its merits, nor could it reach such a conclusion in view of the "broad deference" that we must give to such decisions and considering the utter absence of any factual findings by the district court regarding the contested allegations that the parties vehemently dispute. Rather, the majority concludes that the district court erred when it denied the motion without first conducting an evidentiary hearing. Unlike the majority, I do not read existing precedent as requiring a district court to waste time conducting an evidentiary hearing, and then making detailed factual findings afterwards, on motions that it intends at the outset to deny and that it possesses "broad discretion" to deny. I therefore respectfully dissent.



_____, J.
Tao

cc: Hon. T. Arthur Ritchie, Jr., District Judge, Family Court Division
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