

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAVIER RAMIREZ RIVAS,
Appellant,
vs.
MAYRA E. ARREGUIN,
Respondent.

No. 82508-COA

FILED

JAN 24 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Javier Ramirez Rivas appeals from a district court post-divorce decree order denying his motion to modify custody. First Judicial District Court, Carson City; James Todd Russell, Judge.

The protracted custody proceedings underlying this appeal eventually resulted in the district court awarding respondent Mayra E. Arreguin primary physical custody of the parties' two minor children subject to Rivas's limited parenting time rights, and the court later modified that arrangement by making Rivas's limited parenting time rights subject to the children's discretion. Most recently, Rivas moved to, among other things, modify the parties' custodial arrangement to joint physical custody, arguing that the children's attendance at school and academic performance had declined during the COVID-19 pandemic. The district court denied that motion, however, reasoning that preserving the existing custodial arrangement was in the children's best interest. This appeal followed.

This court reviews child custody decisions for an abuse of discretion. *See Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007).

In evaluating a motion to modify custody, the district court must consider whether “(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 the modification.” *See Romano v. Romano*, 138 Nev., Adv. Op. 1, ___ P.3d ___, ___ (2022). Further, when evaluating whether a modification to custody is in the child’s best interest, a district court order “must tie the child’s best interest, as informed by specific, relevant findings respecting the [best interest factors] and any other relevant factors, to the custody determination made.” *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015); *see also* NRS 125C.0035(4) (providing that “[i]n determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things: [twelve enumerated factors]”).

On appeal, Rivas argues that the district court violated his constitutional rights when it denied his motion to modify custody because it failed to follow the supreme court’s decision in *Ellis*, which applied the two-part test set forth above¹ and affirmed a district court order granting a motion to modify custody. In so doing, the *Ellis* court reasoned, in part, that testimony concerning a decline in a child’s academic performance constituted substantial evidence supporting the district court’s

¹Although *Ellis* required that the two-part test be used to evaluate motions to modify primary physical custody arrangements, the supreme court has since clarified that the test applies to motions to modify both primary and joint physical custody arrangements. *See Romano v. Romano*, 138 Nev., Adv. Op. 1, ___ P.3d ___, ___ (2022).

determination that there had been a substantial change in circumstances affecting the welfare of the child. 123 Nev. at 150-53, 161 P.3d at 242-44. This court cannot fully evaluate Rivas's argument, however, because the district court's order is unclear and lacks necessary findings.

Indeed, the district court's order did not specifically address whether there had been a substantial change in circumstances affecting the welfare of the children, and its order can be read both ways on this point insofar as the court expressed concerns regarding the children's academic performance, yet also indicated that it believed that their situation was not unique under the circumstances of the COVID-19 pandemic. Thus, on remand, the district court will either need to make this determination or clarify its findings in accordance with *Ellis* and *Romano*.


Moreover, if the court finds that there has been a change in circumstances warranting modification, the district court will need to address the second part of the two-part test and evaluate whether a custody modification is in the children's best interest. Here, while the district court's order summarized statements made by the parties, their children, and the children's court appointed special advocate regarding matters that are relevant to some of the best interest factors, and further indicated that preserving the existing custodial arrangement was in the children's best interest, the order failed to include specific findings concerning why the existing custodial arrangement was in the children's best interest, nor did the court make any findings tying the circumstances of this case to the best interest factors. See NRS 125C.0035(4); *Davis*, 131 Nev. at 451, 352 P.3d at 1143. Absent such findings, "this court cannot say with assurance that

the custody determination was made for appropriate legal reasons” when considering the district court’s limited analyses. *See Davis*, 131 Nev. at 452, 352 P.3d at 1143. Given that the district court’s order is unclear and lacks necessary findings, we are constrained to conclude that it abused its discretion by denying Rivas’s motion to modify custody. *See id.*; *Lewis v. Lewis*, 132 Nev. 453, 460, 373 P.3d 878, 882 (2016) (concluding that the district court abused its discretion when it failed to make specific findings concerning all of the best interest factors when it resolved a motion to modify custody). Consequently, we necessarily reverse and remand this matter for the district court to make specific findings concerning whether there has been a substantial change in circumstances affecting the welfare of the children, and, if so, for the court to tie the circumstances of this case to each of the best interest factors in determining whether a custody modification was warranted.² *See Lewis*, 132 Nev. at 453-55, 352 P.3d at

²In doing so, we express no opinion concerning the merits of Rivas’s motion to modify custody. Further, we recognize that the limited analysis in the district court’s order may reflect that its decision to deny Rivas’s motion was based on a determination that he failed to establish adequate cause for an evidentiary hearing and that it was therefore unnecessary to entertain his motion at an evidentiary hearing. *See Rooney v. Rooney*, 109 Nev. 540, 542-43, 853 P.2d 123, 124-25 (1993) (explaining that the district court has discretion to deny a motion to modify custody without conducting an evidentiary hearing if the moving party fails to establish adequate cause for such a hearing). However, the district court’s order suggests that it applied the two-part test from *Ellis*, as now clarified in *Romano*, as it concluded that preserving the existing custodial arrangement was in the children’s best interest, rather than applying *Rooney*’s standard for evaluating whether a party seeking a custodial modification has established

1144-46 (reversing a custody determination based, in part, on insufficient findings in the district court's order).

It is so ORDERED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. James Todd Russell, District Judge
Javier Ramirez Rivas
Mayra Arreguin
Carson City Clerk

adequate cause for an evidentiary hearing. *See id.* at 543, 853 P.2d at 125 (explaining that, to establish adequate cause, the moving party must present a prima facie case for modification). If, on remand, the district court determines that Rivas failed to establish adequate cause for an evidentiary hearing, it must apply *Rooney's* standard. Otherwise, an evidentiary hearing is required.

³Given our disposition of this appeal, we deny Rivas's request for transcripts.