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Myers v. Haskins, 138 Nev. Adv. Op. 51 (Nev. Ct. App. June 30, 2022)¹

FAMILY LAW: ALLEGATIONS A DISTRICT COURT MAY CONSIDER IN DETERMINING MODIFICATION OF CUSTODY ARRANGEMENTS

Summary

This case concerns whether the district court properly denied a motion to modify custody of a minor under *Rooney*.² Since that decision in the early 1990's, attorneys and district court judges have been unclear on what sources and allegations can be considered in determining a potentially meritorious claim. Caleb Haskins and Lisa Myers, parents of S.H., disputed whether a district court must consider alleged facts or offers of proof by the nonmovant.

The Court of Appeals held that a district court must generally only consider properly alleged facts in the movant's verified pleadings, affidavits, or declarations in determining if the movant has demonstrated a prima facie case for modification of child custody. However, the Court also announced an exception whereby the district court may consider a nonmovant's evidentiary support when it "conclusively establishes" the falsity of the movant's allegations. Thus, a district court cannot deny an evidentiary hearing once a prima facie case has been made based upon the movant's filings unless the allegations are disproven by the nonmovant. If a hearing is denied, district courts must adequately justify the denial of a motion to modify child custody absent an evidentiary hearing. The form of the evidentiary hearing remains within the district court's discretion.

Background

In 2010, respondent Caleb Haskins ("Caleb") and appellant Lisa Myers ("Lisa") divorced. The parties have one minor child together, S.H., now 12 years old, of whom they share joint legal custody. Caleb lives out of state with S.H. and Lisa is allowed visitation. At the end of the summer of 2020, Lisa failed to return S.H. after her visit. According to Lisa, she took S.H. to the airport, but S.H. feared going back to Caleb. S.H. refused to board the airplane.

Tensions rose when Lisa failed to return S.H. to Caleb in accordance with the custody order. Caleb, in turn, moved for enforcement of the custody order in district court. Caleb further requested a custody order modification so that Lisa's parenting time would instead be virtual. Lisa opposed Caleb's motion and simultaneously filed a countermotion to modify custody, alleging: (1) medical, physical, and educational neglect; (2) verbal and emotional abuse; and (3) interference with Lisa's parenting time. This opposition and countermotion was supported by an unsworn declaration, as permitted by NRS 53.045.³

¹ By Olivia Williamson.

² *Rooney v. Rooney*, 109 Nev. 540, 542-43, 853 P.2d 123, 124-25 (1993).

³ NEV. REV. STAT. § 53.045 (2021).

The district court then held a non-evidentiary hearing and granted Caleb's motion. However, the district court also concluded, sua sponte, that Lisa had demonstrated adequate cause to re-open discovery. The parties were given 90 days to conduct discovery. At the conclusion of the discovery period, Lisa submitted informal offers of proof to support her allegations against Caleb. Caleb provided documentation as well, and Lisa was permitted to submit a responsive declaration that contested Caleb's allegations. Following Lisa's declaration, the district court ultimately denied Lisa's countermotion to modify child custody without holding a formal evidentiary hearing. Specifically, the district court concluded that Lisa's filings did not follow the requirements announced by the Nevada Supreme Court in *Ellis*.⁴

Lisa appealed the district court's order.

Discussion

The Court, in determining what evidence and allegations must be reviewed by a district court before concluding whether a prima facie case for child custody modification has been established, held that the district court "must not consider the alleged facts or offers of proof the nonmovant provides." A movant must use specific, properly alleged facts to show that their motion is possibly credible. The Court carved out an exception for cases in which a nonmovant's evidentiary support "conclusively establishes" the falsity of the movant's allegations. As such, the Court further held that nonmovants should be given the opportunity to address allegations presented by the movant. Applying this analysis, the Court determined that the district court abused its discretion when it concluded that Lisa failed to make a prima facie case before having an evidentiary hearing. The Court continued, holding that the district court should not have weighed Caleb's offers of proof without conclusive evidence that Lisa's allegations were false.

The Court reviews a district court's denial of a modification to a child custody order for an abuse of discretion.⁵ Lisa argues that the district court abused its discretion because it refused to hold an evidentiary hearing before denying her countermotion to modify physical custody of S.H. The district court determined that Lisa did not allege or show a substantial change in circumstances affecting the welfare of the child nor that S.H.'s best interest would be served by the modification, as required under *Ellis*.⁶ However, the district court made these determinations without holding an evidentiary hearing. As the movant's allegations must be accepted as true, the Court determined that the district court should not have required Lisa to prove her allegations prior to an evidentiary hearing.

⁴ *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007) (holding that a court may modify a joint or primary physical custody arrangement only when "(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").

⁵ *Bautista v. Picone*, 134 Nev. 334, 338, 419 P.3d 157, 160 (2018).

⁶ *Ellis*, 123 Nev. at 150, 161 P.3d at 242.

Under *Rooney*, a district court should not weigh evidence until an evidentiary hearing has been held.⁷ As such, the Court agreed with Lisa and held that the district court abused its discretion in weighing the evidence prior to holding an evidentiary hearing. The Court further disagreed with the district court in stating that, if proven, Lisa's allegations could, in fact, constitute a substantial change in circumstances affecting S.H.'s welfare and that it then would be in S.H.'s best interest to modify custody, thus satisfying the requirements of a prima facie case for modification under *Ellis*.⁸ The Court detailed Lisa's allegations of abuse in support of this decision.

Caleb argues that the district court properly denied Lisa's countermotion because his discovery responses disposed of Lisa's allegations. Although the Court did recognize that nonmovants should be allowed to address the movant's allegations, it rejected Caleb's reasoning and clarified that the nonmovant's evidence should only be considered if it "conclusively establishes" that the movant is making false claims. The Court held that the district court improperly relied upon Caleb's allegations in determining whether Lisa met her burden under *Ellis*.⁹ Further, district courts do not need to consider facts irrelevant to the claim, cumulative, or impeaching, nor do they need to consider facts not supported by verified pleadings, declarations, or affidavits.

Conclusion

In sum, once a prima facie case for custody modification has been made based on the movant's filings, a district court cannot deny the movant's motion to modify without first holding an evidentiary hearing. A district court must, with the stated exception, only consider properly alleged facts in the movant's verified pleadings, affidavits, or declarations when determining if the movant has demonstrated a prima facie case for child custody modification. The Court thus held the district court abused its discretion in denying Lisa's motion for modification without first holding an evidentiary hearing. Therefore, the Court reversed and remanded with instructions to hold an evidentiary hearing on Lisa's allegations.

⁷ See *Rooney*, 109 Nev. 540, 853 P.2d 123.

⁸ *Ellis*, 123 Nev. at 150, 161 P.3d at 242.

⁹ *Id.*