

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE A. PAGAN,
Appellant,
vs.
JOANNA S. MARTINEZ,
Respondent.

No. 70456

FILED

MAY 30 2017

ELIZABETH BROWN
CLERK OF THE COURT
BY *AWilcox*
COUNTY CLERK

ORDER OF AFFIRMANCE

Appellant Jose A. Pagan appeals from a district court order declining to modify child custody and holding him in contempt. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

After the parties' child was born, they stipulated to joint legal custody with respondent Joanna S. Martinez having primary physical custody. Several years later, Martinez moved for a modification to her having sole legal custody and sought contempt sanctions against Pagan for violating a behavior order. Pagan opposed the motion and filed a countermotion to modify the parties' custody arrangement to provide for him to have primary physical custody. After an extensive evidentiary hearing, the district court declined to modify either legal or physical custody. The court also held Pagan in contempt of the behavior order. This appeal followed.

With regard to custody, Pagan asserts on appeal that the court should have treated the parties as being on equal footing under *Druckman v. Ruscitti*, 130 Nev. ___, ___, 327 P.3d 511, 514 (2014), which provides "that unmarried parents have equal custody rights regarding their children, *absent a judicial custody order to the contrary.*" (Emphasis

added). Here, the parties had an existing custody order, under which Martinez had primary physical custody of the child. Thus, rather than treating the parties as though they had joint physical custody, the district court properly applied the standard for modification of primary physical custody set forth in *Ellis v. Carucci*, 123 Nev. 145, 150-51, 161 P.3d 239, 242-43 (2007) (addressing modifications of primary physical custody).

Under that standard, Pagan was required to demonstrate that “(1) there ha[d] been a substantial change in circumstances affecting the welfare of the child, and (2) the child’s best interest [would be] served by the modification.” *Id.* While Pagan’s fast track statement generally addresses the district court’s conclusions with regard to the best interest factors,¹ he does not identify any substantial change in circumstances affecting the welfare of the child. As a result, we conclude that he has waived any argument that there was a substantial change in circumstances. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (“Issues not raised in an appellant’s opening brief are deemed waived.”). And in the absence of any showing that there was a substantial change in circumstances, we discern no abuse

¹Pagan asserts, among other things, that the district court focused on his shortcomings while failing to hold Martinez accountable for any wrongdoing. Our review of the district court’s order demonstrates, however, that the court recognized certain issues with Martinez’s conduct and weighed those issues in its ultimate decision. To the extent that Pagan disagrees with the weight the court afforded to those issues, that is a matter within the district court’s discretion, *see Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996) (recognizing the district court’s discretion in child custody matters), and Pagan has not demonstrated that the court abused its discretion in this regard.

of discretion in the district court's denial of Pagan's motion to modify child custody. *See Ellis*, 123 Nev. at 150-51, 161 P.3d at 242-43.


With regard to the contempt issues, Pagan first asserts that he was denied the right to counsel. But he was represented below by retained counsel of his own choosing during the underlying hearings, and there is no indication that Pagan ever moved for appointment of counsel as to the contempt issues. Thus, he was not denied the right to counsel. *See Patterson v. State*, 129 Nev. 168, 174, 298 P.3d 433, 437 (2013) (explaining that "[t]he Sixth Amendment to the United States Constitution guarantees a criminal defendant's right to counsel").

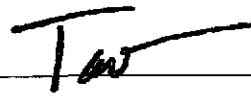
Additionally, insofar as Pagan argues that all but one of the contempt charges were previously adjudicated in a December 6, 2013, order, that order included general instructions for the parties to follow with regard to their behavior, but it did not make any factual findings or otherwise adjudicate whether the allegations of contempt set forth in Martinez's motion were meritorious. Thus, Pagan's contention that those issues were previously adjudicated, and therefore barred under preclusion principles, lacks merit. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054-55, 194 P.3d 709, 713 (2008) (setting forth the elements for claim and issue preclusion).

Finally, Pagan contends that the specific incidents for which he was held in contempt were not proper grounds for finding him to be in contempt. Having considered the parties' arguments and the record on appeal, we discern no abuse of discretion in the district court's determination that the circumstances of those incidents amounted to

contempt of the behavior order.² See *Lewis v. Lewis*, 132 Nev. ___, ___, 373 P.3d 878, 880 (2016) (explaining that contempt orders are generally reviewed for an abuse of discretion); see also NRS 22.010(3) (providing that “[d]isobedience or resistance to any lawful writ, order, rule or process issued by the court” constitutes contempt). And because Pagan has not demonstrated that the district court abused its discretion either by declining to modify custody or by holding him in contempt, we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

²To the extent that Pagan argues the district court should have held Martinez in contempt for certain of her actions, Pagan did not file a motion for an order to show cause in the district court or otherwise follow the proper procedure to seek a contempt finding in the district court. See EDCR 5.509 (setting forth requirements for a motion for an order to show cause for contempt).

³Insofar as any of Pagan’s appellate arguments are not specifically addressed in this order, we have considered those arguments and conclude that they do not provide a basis for reversal.

cc: Hon. Cheryl B. Moss, District Judge, Family Court Division
Jose A. Pagan
Dempsey, Roberts & Smith, Ltd.
Eighth District Court Clerk