

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KATARINA E. KURZ,  
Appellant,  
vs.  
SCOTT M. ANTHONY,  
Respondent.

No. 83231-COA

**FILED**

MAR 23 2022

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

*ORDER OF AFFIRMANCE*

Katarina E. Kurz appeals from a district court order modifying child custody. Eighth Judicial District Court, Family Court Division, Clark County; Soonhee Bailey, Judge.

Scott M. Anthony and Katarina were married in Nevada in 2008 but later moved to Nebraska.<sup>1</sup> The two had one child together, M.A., born February 23, 2014. Scott and Katarina separated in early 2017 and Katarina moved back to Nevada. Scott filed for divorce in Nebraska and, ultimately, the court entered a divorce decree finding that “[t]he best interests of the minor child will be maintained through the ongoing involvement of both [Katarina] and [Scott] in the child’s life.” Nevertheless, the court granted Katarina sole legal and physical custody of M.A., as well as her request to relocate to Nevada with M.A. The court also granted Scott approximately 70-75 days of parenting time with M.A. per year without any restrictions. Notably, the divorce decree did not mention a finding of domestic violence against Scott, despite Katarina alleging it during the divorce proceedings.

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<sup>1</sup>We recount the facts only as necessary for our disposition.

In 2020, Scott relocated to Nevada and, as a result, Katarina agreed to give Scott extra parenting time with M.A. but refused to modify the custody arrangement to a 50/50 timeshare. Scott filed a complaint in Nevada requesting a modification of custody to joint physical and legal custody over M.A., which Katarina opposed. At the hearing in the district court, Katarina renewed her allegation that Scott had engaged in domestic violence in Nebraska and it was in M.A.'s best interest for Katarina to continue to exercise sole legal and physical custody.<sup>2</sup> To support her allegation of domestic violence, Katarina sought to admit a letter purportedly written by the judge who presided over the divorce proceedings in Nebraska and which was sent to Katarina and Scott before the divorce decree was entered. The letter read, in part in the section titled REMOVAL, that "[t]he evidence supports a finding that [Katarina] moved from Omaha because of the deteriorating marriage of the parties and because she had suffered physical abuse by [Scott]." The letter then states that her motives for moving were legitimate. Scott objected to the letter as constituting inadmissible hearsay, but Katarina claimed the letter was admissible pursuant to the business records exception.<sup>3</sup> The district court excluded the letter, finding that it did not fall under a hearsay exception.

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<sup>2</sup>In support of maintaining sole legal and physical custody, Katarina also voiced concerns about Scott's parents being utilized as caregivers while Scott was at work and her feeling that the parents had been abusive toward her.

<sup>3</sup>At the hearing, the district court stated that Katarina was offering the letter under the business records exception and permitted Katarina to put forth an offer of proof. Katarina's argument in favor of admitting the evidence used language like "record kept in a normal course of business by the courts," which aligns with Nevada's statute on the business records exception.

After the hearing, the district court issued an order stating that “Scott met his burden to demonstrate a substantial change in circumstance that affects the welfare of the child.” The district court granted Scott’s request for joint legal and physical custody over M.A., finding that the custody modification was in M.A.’s best interest.

On appeal, Katarina first argues that the district court abused its discretion by improperly finding that Scott’s relocation alone satisfied the change in circumstances prong necessary for a custody modification. *See Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). Second, Katarina argues that it was reversible error for the district court to have excluded from evidence the letter from the Nebraska judge that referenced Katarina’s allegation of domestic violence by Scott. Katarina contends that the letter was admissible under Nevada’s public records hearsay exception and should have been considered by the district court to deny Scott’s request for a custody modification.

First, a district court has “broad discretionary powers to determine child custody matters” and its custody determinations will not be disturbed “absent a clear abuse of discretion.” *Id.* “[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 child’s best interest is served by the modification.” *Id.* at 150, 161 P.3d at 242. “[T]he party seeking a modification of custody bears the burden of satisfying both prongs.” *Id.* at 151, 161 P.3d at 242-43. A change in circumstances of a parent can satisfy the first prong of *Ellis* so long as the court can sufficiently tether the parent’s change in circumstances to a substantial change in the child’s wellbeing. *Cf. Godifay v. Asgedom*, No. 64289, 2015 WL 9597499, at \*2 (Nev. Dec. 30, 2015) (Order of Reversal and

Remand) (noting that there was not sufficient evidence that a change in a parent's work schedule affected the children's well-being) (citing *Silva v. Silva*, 136 P.3d 371, 377 (Idaho Ct. App. 2006) (noting that a parent's work schedule is only relevant if shown that the parent's work schedule affects the well-being of the children)).<sup>4</sup>

Here, the district court did not abuse its discretion in finding a substantial change in circumstances based on Scott's relocation to Nevada. In its order, the district court directly tethered Scott's relocation to positive and substantial changes in M.A.'s life, such as (1) an increase in Scott's parenting time with M.A. than what was originally arranged by the Nebraska court, and (2) Scott having regular parenting time with M.A. The district court found that these changes positively affected M.A. such that M.A. now "enjoys his time with his father and they have a loving relationship." Thus, the district court did not abuse its discretion in finding that Scott's relocation to Nevada constituted a substantial change in circumstance positively affecting the child's welfare and, therefore, it was

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<sup>4</sup>This view is consistent with this court's determinations that a change in a parent's schedule and timeshare with the children can constitute a change in circumstances so long as that change directly impacts the welfare of the children. See *Maurice v. Maurice*, No. 83009-COA, 2022 WL 214014, at \*1-2 (Nev. Ct. App. Jan. 24, 2022) (Order of Reversal and Remand) (remanding for the district court to consider whether a change in the parent's work schedule, such that the parties were exercising a different timeshare as compared to what was provided in the stipulated divorce decree, constituted a change in circumstances affecting the welfare of the children); *Giddens v. Giddens*, No. 72533-COA, 2018 WL 2130845, at \*1-2 (Nev. Ct. App. Apr. 30, 2018) (Order of Reversal and Remand) (remanding for the district court to consider whether a change in the parents' work schedules, which had changed the parties' ability to spend time with their children, constituted a change in circumstances affecting the welfare of the children).

not an abuse of discretion for the district court to have modified custody based on this change of circumstance.

Second, we consider the district court's decision to modify custody in light of a letter referencing an alleged instance of domestic violence by Scott, which the district court excluded as evidence. We review a district court's determination to admit or exclude evidence for an abuse of discretion. *M.C. Multi-Fam. Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). When an appellant fails to argue the proper hearsay exception before a district court, the appellant cannot argue that hearsay exception for the first time on appeal. *Guy v. State*, 108 Nev. 770, 780, 839 P.2d 578, 584 (1992); *see also Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal").

Here, it is undisputed that the letter from the Nebraska judge was hearsay. However, in the district court, Katarina only argued that the letter should be admitted based on the business records hearsay exception. Katarina failed to argue the public records hearsay exception below.<sup>5</sup> Specifically, Katarina made no express reference to the public records exception, nor did she implicitly signal that she was arguing the public records exception during the hearing. Now, for the first time on appeal, Katarina argues that the letter from the Nebraska court judge should have been admitted pursuant to the public records hearsay exception. Because Katarina failed to raise the public records exception below, we decline to

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<sup>5</sup>Nevada statutes make clear that the business records and public records exceptions are two distinct exceptions. *Compare* NRS 51.135 (business records exception) *with* NRS 51.155 (public records exception).

consider it for the first time on appeal.<sup>6</sup> Further, while we are concerned about Katarina's allegation of domestic violence, which is one of the best interest factors to be considered under NRS 125C.0035(4)(k), we agree with the district court that there is no mention of a finding of domestic violence in the divorce decree, nor were any additional restrictions imposed by the Nebraska court on Scott's parenting time, which would have been required had such a finding been made. Neb. Rev. Stat. § 43-2932(1)(b) (2016). Thus, we conclude that the district court did not abuse its discretion in not

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<sup>6</sup>Even if the district court erred in excluding the letter because it should have been admitted under an applicable hearsay exception, the error was harmless because Katarina has not demonstrated how the result would have been different had the letter been admitted. *See Beattie v. Thomas*, 99 Nev. 579, 586, 668 P.2d 268, 272-73 (1983) (finding that a court's erroneous evidence determination was harmless and therefore not reversible). Although the letter was not admitted, the district court did in fact consider Katarina's allegation that Scott engaged in domestic violence in Nebraska. In doing so, the district court reviewed and analyzed Nebraska law, concluding that if the Nebraska court had in fact made an actual finding of domestic violence, Nebraska law required mandatory action to be taken by the Nebraska court, which did not occur. Therefore, the district court concluded that while the Nebraska court may have considered the allegation of domestic violence, it declined to make a specific finding of such. This conclusion by the district court was correct especially when considering that the Nebraska court referred to "abuse" in the context of relocation and Katarina's motives for the same. Further, during the hearing before the district court, Katarina did not allege that any further instances of domestic violence had occurred in either Nebraska or Nevada. In fact, Katarina testified below that she had no present concerns with Scott's care or supervision of M.A. Thus, we conclude that even though the letter was not admitted into evidence, the district court did evaluate Katarina's allegation of domestic violence in making its custody determination and concluded in its order that "the Court did not receive credible evidence that Scott engaged in an act of domestic violence against either [M.A.] or Katie/Katarina."

admitting the letter into evidence under a hearsay exception and in proceeding to modify custody.<sup>7</sup>

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Soonhee Bailey, District Judge, Family Court Division  
Lansford W. Levitt, Settlement Judge  
Gallagher Attorney Group, LLC  
Joseph W. Houston, II  
Eighth District Court Clerk

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<sup>7</sup>During the hearing, the district court also expressed concerns regarding the authentication of the letter based on the letter not being included in the record received from the Nebraska court, as well as the district court's uncertainty as to the purpose of the letter. We note, however, that the district court did not address the letter's authenticity in its order, but rather declined to admit it under a hearsay exception.