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2 IN THE SUPREME COURT OF THE STATE OF NEVADA

3 KATARINA E. KURZ,

4 Appellant,

5 vs.

6 SCOTT M. ANTHONY,

7 Respondent.

Supreme Court No.: 83231

Electronically Filed
Oct 13 2021 11:09 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

9 CHILD CUSTODY FAST TRACK STATEMENT

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11 1. Name of party filing this fast-track statement: Katarina E. Kurz.

12 2. Name, law firm, address and telephone number of attorney submitting
13 this fast-track statement: Denise A. Gallagher, Esq., Gallagher Attorney Group,
14 LLC, 1291 Galleria Drive, Suite 230, Henderson, Nevada 89014, (702) 448-1099.

15 3. Judicial district, county, and district court docket number of lower
16 court proceedings: The matter was heard in the Eighth Judicial District Court,
17 Clark County, Nevada. It was District Court Case No. D-20-618325-C.

18 4. Name of judge issuing the judgment or order appealed from: The
19 Honorable Soon Hee Bailey.

20 5. Length of trial or evidentiary hearing: The Evidentiary Hearing held
21 on the 14th day of June, 2021 was a one-day hearing.

1 6. Written order or judgment appealed from: The Appellant is appealing
2 the final order entered in the District Court Case on June 23, 2021.
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4 7. Date that written notice of the appealed written judgment or order's
5 entry was served: The order appealed from was served via E-Service on the parties
6 on June 22, 2021 and Notice of Entry of the Order was served on June 23, 2021.
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8 8. If the time for filing the notice of appeal was tolled by the timely
9 filing of a motion listed in NRAP 4(a)(4): (a) specify the type of motion, and the
10 date and method of service of the motion, and date of filing: (b) date of entry of
11 written order resolving tolling motion: N/A
12

13 9. Date notice of appeal was filed: July 13, 2021.
14

15 10. Specify the statute or rule governing the time limit for filing the notice
16 of appeal: NRAP 4(a).
17

18 11. Specify the statute, rule or other authority, which grants this court
19 jurisdiction to review the judgment or order appealed from: NRAP Rule 3A(b)(1).
20

21 12. Pending and prior proceedings in this court. List the case name and
22 docket number of all appeals or original proceedings presently or previously
23 pending before this court which involve the same or some of the same parties to
24 this appeal: N/A
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1 13. Proceedings raising the same issues. If you are aware of any other
2 appeal or original proceeding presently pending before this court, which raise the
3 same legal issue(s) you intend to raise in this appeal, list the case name(s) and the
4 docket number(s) of those proceedings: N/A
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6 14. Procedural history. Briefly describe the procedural history of the case
7 (provide citations for every assertion of fact to the appendix or record, if any, or to
8 the transcript or rough draft transcript):
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11 Parties were divorced in Nebraska following a trial. The decree of
12 dissolution was entered on September 19, 2019 in Douglas County, Nebraska.
13 ROA 0007-0020.
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15 The Respondent filed a complaint for custody in Nevada on December 7,
16 2020 in the Eighth Judicial District Court, Clark County, Nevada. ROA 0001-
17 0006.
18

19 The Appellant filed her Answer and Counterclaim on December 30, 2020.
20 ROA 0021-0026.
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22 An evidentiary hearing was held on the Respondent's request to modify
23 custody on June 14, 2021. ROA 0049-0123.
24

25 The Court issued a Decision and Order which was entered on June 23, 2021.
26 ROA 0127-0155.
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1 15. Statement of facts. Briefly set forth the facts material to the issues on
2
3 appeal (provide citations for every assertion of fact to the appendix or record, if
4 any, or to the transcript or rough draft transcript):

5 The parties to this appeal were divorced via trial in the State of Nebraska.
6
7 ROA 0007. A decree of dissolution from the Nebraska trial was entered on
8 September 2019, in Douglas County, Nebraska. ROA 0007-0020.

9 The Nebraska decree of dissolution awarded the appellant sole legal and sole
10
11 physical custody of the parties' minor child, Michael, age 7 and granted the
12 appellant's request to relocate from Nebraska to the State of Nevada. ROA 0008.

13 Although the decree of dissolution did not state the Douglas County,
14
15 Nebraska's findings, the Nebraska court issued a letter to the parties and their
16 attorneys in Nebraska which contained its findings that the Appellant was awarded
17 sole legal and sole physical custody of the child because the Respondent
18 committed domestic violence against the Appellant. ROA 0045-0048.

19 In October of 2020, the Respondent decided to relocate to Nevada to be
20
21 closer to the minor child. ROA 0001. Upon his relocation, the Appellant
22 voluntarily provided the Respondent with weekly visitation from Thursday after
23 the minor child is out of school until Saturday at 5:15 p.m. ROA 0089.
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1 In December of 2020, the Respondent filed a Complaint for Custody,
2 seeking to modify the Nebraska decree from sole legal and sole physical custody to
3 joint legal and joint physical custody. ROA 001-0020. The Appellant opposed the
4 Complaint. ROA 0021-0026.

6 An evidentiary hearing was set regarding the Respondent's request. That
7 evidentiary hearing occurred on June 14, 2021. ROA 0038

9 At the evidentiary hearing, the Appellant sought to introduce the letter from
10 the Nebraska judge with the Nebraska court's findings. ROA 0044-0048.

12 Judge Bailey did not admit the Nebraska judge's findings ruling that it was
13 hearsay. ROA 0055-0058.

15 Judge Bailey, however, indicated that she would review the relevant
16 Nebraska statute regarding domestic violence, read the transcript from the
17 Nebraska trial and determine if the Nevada Court could make a decision regarding
18 the Appellant's domestic violence allegation. ROA 0060-0061.

21 The Court then heard testimony at the evidentiary hearing and closing
22 arguments. In the Appellant's closing, the Appellant argued that the Respondent
23 relocating from Nebraska to Nevada did not satisfy the first prong of Ellis v.
24 Carucci, 123 Nev. 145 (2007). ROA 0067-0070.

1 The Court's Decision and Order from the evidentiary hearing was entered on
2 June 23, 2021. In its Decision and Order, the court ordered that the Respondent
3 met his burden to change custody and awarded him joint legal and joint physical
4 custody. ROA 0141. The Appellant now appeals that Decision and Order.
5

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7 16. Issues on appeal. State concisely the principal issue(s) in this appeal:

- 8 a. Whether the Court erred in excluding the Nebraska Court's letter in
9 which it issued its findings.
10
11 b. Whether a relocation by a parent is a sufficient change of circumstances
12 to satisfy the first prong of Ellis v. Carrucci.
13

14 17. Legal Argument, including authorities:

- 15 a. It was reversible error for the Court to not allow the Nebraska Court's
16 letter into evidence.
17

18 **NRS 51.155 Public records and reports.** Records, reports, statements
19 or data compilations, in any form, of public officials or agencies are not
20 inadmissible under the hearsay rule if they set forth:
21

- 22 1. The activities of the official or agency;
23
24 2. Matters observed pursuant to duty imposed by law; or
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26 3. In civil cases and against the State in criminal cases, factual
27 findings resulting
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1 from an investigation made pursuant to authority granted by law unless the sources
2 of information or the method or circumstances of the investigation indicate lack of
3 trustworthiness.
4

5 (Added to NRS by 1971, 795)

6
7 In the instant matter, the Appellant moved for the admission of the letter to
8 counsel from the judge in Douglas County, Nebraska with the court's findings
9 from trial. ROA 0055-0056.
10

11 No objection to its authenticity was made. The objection to the document
12 was a hearsay objection. The letter was a statement, made by a public official, in
13 the course of his duties. The letter was reliable and trustworthy. There was no
14 objection to its authenticity. ROA 0055-0058.
15

16 Because the document was not admitted into evidence, the Court found that
17 there were no findings in the Nebraska case that the Respondent had committed
18 domestic abuse. ROA 0140
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20 Because the Court found that the Nebraska court made no findings regarding
21 domestic abuse, the Court found that this factor did not apply when looking at the
22 best interest factors in NRS 125C0035. ROA 0136.
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1 The Appellant believes that had the Court accepted the findings of the
2 Nebraska court, through the letter from the Nebraska judge, the outcome of the
3 trial would have been different.
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5 The Appellant argues that this is reversible error and the court should
6 consider the letter from the Douglas County, Nebraska judge and make the proper
7 findings regarding the Respondent's domestic violence against the Appellant.
8

9 b. The Respondent's relocation to Nevada is not a substantial change in
10 circumstances of the child and therefore the Court's finding was an
11 abuse of discretion.
12

13 In the instant matter, the Appellant had been granted sole legal and sole
14 physical custody of the minor child following a divorce trial. ROA 0008. The
15 Appellant had also been granted permission to relocate with the minor child from
16 Nebraska to Nevada. ROA 0009.
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18 Approximately one and one-half years from the entry of the Nebraska decree
19 of dissolution, the Respondent relocated to the State of Nevada from the State of
20 Nebraska. ROA 0001. The Respondent, despite having been given weekly contact
21 with the minor child by the Appellant upon his relocation, moved the Nevada
22 District Court to modify custody. ROA 0001-0006.
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1 The Respondent proffered no evidence at trial regarding any change in the
2 circumstances of the minor child since the entry of the parties' last custodial order,
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4 their decree of dissolution. In fact, no evidence was presented at trial that
5 demonstrated that the minor child was not flourishing under the current custodial
6 arrangement. Conversely, the Appellant testified that the minor child was doing
7 well in school and attending church on a weekly basis. ROA 0108-0109.

9 The court, in its decision and order, stated: "A move to the same city as the
10 minor child, standing alone, does not automatically constitute a substantial change
11 in circumstances under Ellis. However, a major relocation to be near the minor
12 child, may be sufficient to meet this requirement under Ellis." ROA 0137.

13
14 Ellis v. Carucci, 123 Nev. 145, 161 P.3d 239, states: "a modification of
15 primary physical custody is warranted only when (1) there has been a substantial
16 change in circumstances affecting the welfare of the child, and (2) the child's best
17 interest is served by the modification. Under this revised test, the party seeking a
18 modification of custody bears the burden of satisfying both prongs. Id. at 150-151.

19
20 Additionally, Ellis specifically states that in determining whether or not
21 there has been a substantial change in circumstances, the focus should not be on
22 the parents, rather, it should be on the child. Ellis goes on to say, "In reaching
23 our conclusion, we overrule Murphy to the extent that it required a change in
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1 "the circumstances of the parents" alone, without regard to a change in the
2 circumstances of the child or the family unit as a whole. We note, however, that
3 under the revised test, there must still be a finding of a *substantial* change in
4 circumstances. While the Murphy test is too restrictive because it improperly
5 focuses on the circumstances of the parents and not the child, custodial stability is
6 still of significant concern when considering a child's best interest. The "changed
7 circumstances" prong of the revised test serves the important purpose of
8 guaranteeing stability unless circumstances have changed to such an extent that a
9 modification is appropriate. In determining whether the facts warrant a custody
10 modification, courts should not take the "changed circumstances" prong lightly.
11 Moreover, any change in circumstances must generally have occurred since the
12 last custody determination because the "changed circumstances" prong "is based
13 on the principle of res judicata" and "prevents 'persons dissatisfied with custody
14 decrees [from filing] immediate, repetitive, serial motions until the right
15 circumstances or the right judge allows them to achieve a different result, based
16 on essentially the same facts.'" Id., at 151-152.

23 In the instant matter, the Court found, that the Respondent's relocation,
24 alone, satisfied the first prong of the Ellis test and moved to the second prong,
25 which was an analysis of the best interest factors under NRS 125C.0035(4).
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1 ROA 0137. Additionally, the Court's ruling allowed the Respondent to re-
2 litigate those matters litigated in Nebraska a mere eighteen (18) months prior to
3 this evidentiary hearing.
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5 This finding that the Respondent's relocation from Nebraska to Nevada
6 had satisfied the first prong under Ellis constitutes an abuse of discretion and the
7 decision should be reversed and remanded for findings consistent with Ellis.
8

9 18. Issues of first impression or of public interest. Does this appeal
10 present a substantial legal issue of first impression in this jurisdiction or one
11 affecting an important public interest: Yes _____ No X. If so, explain.
12

13 19. Should this matter be retained by the Nevada Supreme Court or
14 should it be assigned to the Court of Appeals: The Appellant believes that this
15 matter can be assigned to the Court of Appeals.
16

17 VERIFICATION

18 1. I hereby certify that this fast-track statement complies with the
19 formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP
20 32(a)(5) and the type style requirements of NRAP 32(A)(6) because:
21

22 This fast-track statement has been prepared in a proportionally spaced
23 typeface using Microsoft Word 2016 for Windows, in 14-point font, Times New
24 Roman type style.
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2. I further certify that this fast-track statement complies with the page or type volume limitations of NRAP 3E(2) because it does not exceed 16 pages.

3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast-track statement and that the Supreme Court of Nevada may impose sanctions for failing to timely file a fast-track statement or failing to raise material issues or arguments in the fast-track statement. I therefore certify that the information provided in this fast-track statement is true and complete to the best of my knowledge, information and belief.

DATED this 12th day of October, 2021.

R. C. Clegg

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Henderson, Nevada 89014
(702) 448-1099

1 **DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1**

2 Pursuant to NRAP 26.1, undersigned counsel of record certifies that the
3
4 following are persons or entities as described in NRAP 26.1 and must be disclosed.
5 These representations are made in order that the justices of this Court may evaluate
6
7 possible disqualification or recusal.

8 There are no parent corporations for the Appellant, Katarina
9
10 Kurz. Ms. Kurz is employed with the law firm of GRANT MORRIS DODDS.

11 Appellant was represented in the District Court by Attorney
12
13 Denise A. Gallagher and is still represented by Attorney Gallagher of Gallagher
14 Attorney Group, LLC in this appeal.

15 DATED this 12th day of October, 2021.

16 By: ss://Denise A. Gallagher, Esq.
17 Nevada Bar No. 005739
18 1291 Galleria Drive, Suite 230
19 Henderson, NV 89014
20 Attorney for Appellant

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Joseph Houston, Esq.
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