

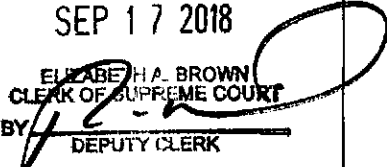
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KATHERIN SHERRY,  
Appellant,  
vs.  
TIMOTHY SHERRY,  
Respondent.

No. 73721

FILED

SEP 17 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Katherin Sherry appeals the district court's final order granting respondent Timothy Sherry primary physical custody of the parties' children and denying Katherin's request to relocate with the minor children. Second Judicial District Court, Family Court Division, Washoe County; Frances Doherty, Judge.

The parties have three children, S, N, and M (ages 12, 10, and 7, respectively).<sup>1</sup> Timothy timely filed a Notice of Child Witness and a Motion to Permit Child Testimony Through Alternate Means. Katherin objected but ultimately stipulated to the procedure in which the district court would interview only S, without counsel or parties being present, and both parties waived their right to examine S. However, Katherin retained her overall objection to any child testimony. After the trial concluded, the district court awarded primary physical custody of the children to Timothy and denied Katherin's request to relocate to Birmingham, Alabama with the children.

Katherin contends that the district court erred by: (1) interviewing S without evidence that S had the capacity to form an intelligent custodial preference; (2) failing to conduct a hearing regarding

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<sup>1</sup>We do not recount the facts except as necessary to our disposition. We note that these are the ages of the children at the time of the trial.

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Timothy's motion for the children to testify by alternate means; (3) denying Katherin's due process rights by asking S questions that Katherin had no notice of or opportunity to respond to; and (4) violating Katherin's due process rights by failing to properly record and preserve S's interview. She also contends that the district court abused its discretion by making findings that were not supported by the evidence and by concluding that the children's best interests were served by awarding primary physical custody to Timothy. We disagree.

"Matters of custody . . . of minor children . . . rest in the sound discretion of the trial court . . . . Additionally, we will uphold the district court's determination if it is supported by substantial evidence." *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004) (internal citation and quotation marks omitted). "Substantial evidence 'is evidence that a reasonable person may accept as adequate to sustain a judgment.'" *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (quoting *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007)). This court reviews a district court's decision regarding relocation for an abuse of discretion. See *Flynn*, 120 Nev. at 444, 92 P.3d at 1229. Further, this court will not reweigh evidence or reassess witness credibility. *Ellis* at 152, 161 P.3d at 244.

We need not address in detail Katherin's contentions regarding S's interview because she has raised new arguments on appeal,<sup>2</sup> and there is substantial evidence to support the district court's custody and relocation

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<sup>2</sup>By stipulating that S be interviewed by alternate means, Katherin has waived this argument on appeal. See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

decision without S's testimony.<sup>3</sup> Because there is substantial evidence to support the district court's decision even without S's testimony, any error that may have occurred regarding S's testimony is harmless. See NRCP 61 (stating "[n]o error in either the admission or the exclusion of evidence . . . is ground for . . . modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice."); see also *Halinan v. Halinan*, Docket No. 65406, (Order of Affirmance, Jan. 27, 2016) (holding the erroneous admission of evidence was harmless "as even without this testimony, there remains substantial evidence in the record for the court's finding").

We now address Katherin's arguments regarding custody and relocation. NRS 125C.0035(4) sets forth factors that a district court must consider when determining a child's best interest. NRS 125C.007(1) and (2) set forth the methodology and factors that a district court must consider when determining whether to grant a parent's motion to relocate with the party's minor children. NRS 125C.007(3) states that the party seeking to relocate with the parties' child bears the "burden of proving that relocating with the child is in the best interest of the child." The district court made detailed findings regarding the factors of both statutes. The evidence

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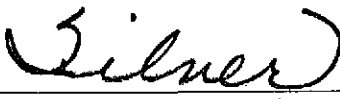
<sup>3</sup>Although we need not address the issues regarding S's interview because she stipulated to the process, we note that Katherin's due process rights were not violated. Katherin did not challenge the quality of the interview recording before trial and she was able to review a better recording at trial. She had the opportunity to recall witnesses based on that review but declined. Therefore, Katherin had the opportunity to fully present any evidence and arguments related to that interview. See *J.D. Constr., Inc. v. IBEX Int'l Grp., LLC*, 126 Nev. 366, 376, 240 P.3d 1033, 1040 (2010) ("[D]ue process is satisfied by giving both parties 'a meaningful opportunity to present their case.'" (quoting *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976))).

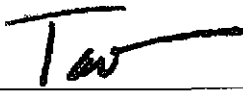
presented supports those findings and that Katherin did not meet her burden of proof under NRS 125C.007(3).

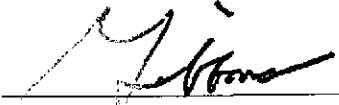
Both parties testified extensively about the children's activities and relationships in Reno, their relationships with the children, their parenting styles, and their work schedules. Both parties testified that the other parent is a good parent. The court also heard testimony from family friends and at least one teacher regarding the children's lifestyle in Reno. This evidence supports the district court's findings that the children have deep roots and strong bonds in the community, strong friendships and bonds with their friends' families, and strong relationships with both parents; that the parents are able to co-parent; and that the children are well established and thriving in Reno. Substantial evidence also supports the district court's findings that the children's quality of life would not improve by relocating to Birmingham and that a joint physical custody arrangement is not feasible despite Timothy's large amount of vacation time.<sup>4</sup>

Therefore, we conclude that the district court did not abuse its discretion in determining that the children's best interests were served by awarding Timothy primary physical custody and denying Katherin's request to relocate the children to Birmingham. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

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

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

<sup>4</sup>We have considered Katherin's other arguments, including that the district court improperly analyzed this case as a relocation case and put undue emphasis on retaining the status quo, and find them unpersuasive.

cc: Hon. Frances Doherty, District Judge, Family Court Division  
David Wasick, Settlement Judge  
Woodburn & Wedge  
Dickinson Wright PLLC  
Kathleen T. Breckenridge  
Washoe District Court Clerk