IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LINDA BROKASKI,
Appellant,
vs.
DAVID BROKASKI,
Respondent.

No. 70865

FILED

MAR 06 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a fast track appeal from a district court order modifying child custody and denying a motion to relocate. Second Judicial District Court, Family Court Division, Washoe County; Frances Doherty, Judge.

Appellant Linda Brokaski and respondent David Brokaski[1] entered into a marital settlement agreement that was incorporated into their divorce decree. That decree provided that Linda would have primary physical custody of the parties' two minor children, with David having parenting time every other weekend. It further provided that the parties would work towards transitioning to joint physical custody as the children got older and their needs changed, subject to the children's best interest, and that any additional parenting time requested by David would not be arbitrarily or unreasonably denied.

Less than two years later, David filed a motion seeking to enforce the transition to joint physical custody and additional parenting

[1]We will refer to the parties by their first name for ease of reference.

time provisions of the decree or, alternatively, for joint physical custody. Linda opposed the motion and filed a motion to relocate, seeking to move the parties' children from Reno, where both parties resided, to Denver, Colorado. After a two-day hearing, the district court granted David's motion to modify the custody arrangement to provide for joint physical custody and denied Linda's motion to relocate. This appeal followed.

On appeal, Linda first asserts that the district court abused its discretion in finding that changed circumstances warranted a modification of the parties' custody agreement to joint physical custody. *See Ellis v. Carucci*, 123 Nev. 145, 149, 150, 161 P.3d 239, 241, 242 (2007) (providing that a modification of primary physical custody is only appropriate when the child's welfare has been affected by a substantial change in circumstances and the modification serves the best interest of the child, and that such decisions are reviewed for an abuse of discretion). While the district court found that the decreasing level of cooperation between the parties as to their children and Linda's increasingly antagonistic attitude towards David constituted a change in circumstances affecting the children's welfare under *Ellis*, Linda asserts that the parties always had poor interactions. And because the parties were always acrimonious, Linda argues the district court abused its discretion in finding this constituted a change in circumstances. *See McMonigle v. McMonigle*, 110 Nev. 1407, 1408, 887 P.2d 742, 743 (1994) (recognizing that events that took place prior to the most recent custodial order cannot form the basis of a finding of a change in circumstances), *overruled in part on other grounds by Castle v. Simmons*, 120 Nev. 98, 105, 86 P.3d 1042, 1047 (2004).

Having reviewed the briefs and record on appeal, we conclude that the district court did not abuse its discretion in finding a change in circumstances affecting the welfare of the children and therefore modifying the parties' arrangement to provide them with joint physical custody of the minor children. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241. While increasing acrimony between the parents, alone, is not enough to support a finding of changed circumstances, *Rennels v. Rennels*, 127 Nev. 564, 574, 257 P.3d 396, 402 (2011), here, the district court found that the increasing acrimony interfered with the parties' ability to cooperate regarding each party's exercise of parenting time with the children outside of the specific custody schedule set forth in the divorce decree, despite the decree's language that such additional time should not be arbitrarily or unreasonably refused. The district court also found that Linda's inability to "find one positive thing to say about [David] either as a parent or a person," suggested that it was not proper for her to have primary physical custody of the children as it demonstrated her contentiousness towards David, especially in light of the fact that there was little to no evidence, aside from Linda's testimony, that supported her assertion that he was not a fit parent.[2] And because substantial evidence in the form of the parties'

[2]In commenting upon Linda's poor attitude towards David, the district court noted that joint physical custody was usually inappropriate in such high conflict situations. But, because Linda had followed the unambiguous provisions of the decree, the court determined that an award of joint physical custody would satisfactorily reduce the parties' conflict as it would necessarily eliminate the provision providing that David could request additional parenting time outside of the time awarded in the decree and that Linda should not unreasonably deny such requests, which had proved to be a source of significant conflict between the parties.

testimony and their written exchanges regarding modifications to the custody schedule supports the district court's decision to find a change in circumstances and modify the custody arrangement, we discern no abuse of discretion in the finding of a change in circumstances.[3] *See Ellis*, 123 Nev. at 149, 161 P.3d at 242 (refusing to set aside a district court's factual findings in custody matters if those findings are supported by substantial evidence, "which is evidence that a reasonable person may accept as adequate to sustain a judgment").

Linda next argues that the district court abused its discretion in denying her relocation motion. *See Reel v. Harrison*, 118 Nev. 881, 888-89, 60 P.3d 480, 485 (2002) (reviewing a relocation decision under an abuse of discretion standard). Pursuant to NRS 125C.007(1), in order for the district court to grant relocation, Linda must have first demonstrated that "[t]he best interests of the child are served by allowing the relocating parent to relocate with the child," that there is a good faith reason for the move, and that both the child and relocating parent will get an actual advantage from the move. Below, the district court focused only on the

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[3]Linda does not assert that the district court erred in its application of the best interest factors as they relate to the grant of David's request for joint physical custody, but rather, only raises best-interest arguments in referencing the denial of her motion for relocation. Regardless of this failure, our conclusion below that the district court did not abuse its discretion in applying the best interest factors to the relocation motion applies equally in the context of the district court's grant of joint physical custody. *See Ellis*, 123 Nev. at 150, 161 P.3d at 242 (requiring a showing of changed circumstances and that modification is in the best interests of the child before the court may modify a primary physical custody arrangement).

best interest requirement[4] and concluded that Linda failed to demonstrate that the best interests of the child supported granting relocation, specifically focusing on its findings that there was a high degree of conflict between the parents, particularly from Linda towards David as she had nothing positive to say about him as a parent or a person, and as it related to cooperating to provide additional parenting time to the other parent outside of the schedule in the divorce decree. *See* NRS 125C.0035(4)(d), (e) (providing that the level of conflict between the parents and their ability to cooperate are two factors relevant to determining what is in the best interest of a child). The court also found that the children's best interests were not served by relocating because both children were extremely close and bonded to each of their parents.[5] *See* NRS 125C.0035(4)(h) (including the nature of the relationship between the child and each parent as a factor in determining what is in a child's best interest).

On appeal, Linda asserts that the children's best interests are served by allowing relocation because they will have a better education and expanded sports opportunities in Denver, and that she will still cooperate to allow the children to spend an adequate amount of time with

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[4]Because Linda must prove all three requirements of NRS 125C.007(1) in order for the district court to grant relocation, the district court can properly deny relocation if it finds that just one of those requirements is not met. Here, the district court focused on the best interests of the child. *See* NRS 125C.007(1)(b).

[5]This finding was also supported by substantial evidence as both the parties and their witnesses provided testimony regarding each parent's relationship with the children.

David.[6] The district court considered these arguments, however, and still concluded that the children's best interests would not be served by granting relocation based on the level of conflict between the parents, the lack of cooperation regarding additional parenting time, and the bond the children had with David. *See* NRS 125C.0035(4)(d), (e), (h). As stated above, because these findings were supported by substantial evidence, we will not overturn them even when there is conflicting evidence in the record. *See Ellis*, 123 Nev. at 149, 161 P.3d at 242; *Fletcher v. Fletcher*, 89 Nev. 540, 542, 516 P.2d 103, 104 (1973) ("Where a trial court, sitting without a jury, has made a determination upon the basis of conflicting evidence, that determination should not be disturbed on appeal if it is supported by substantial evidence."). And, with Linda providing no other

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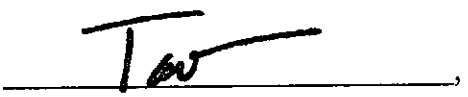
[6]Linda asserts that the district court erred by not utilizing the test laid out in *Schwartz v. Schwartz*, 107 Nev. 378, 382-83, 812 P.2d 1268, 1271 (1991), in considering her motion for relocation. But the *Schwartz* factors were codified in NRS 125C.007 prior to Linda filing her relocation motion, and we therefore conclude the district court did not err in applying the statute. And, although Linda bases her argument that the district court abused its discretion in denying her relocation motion on her application of the *Schwartz* test, because that test is similar to the factors laid out in NRS 125C.007, we will consider her arguments in the context of that statute to the extent they are relevant. In doing so, however, we note that most of the arguments she presented, while applicable to other factors under NRS 125C.007, are not applicable to whether she demonstrated that the relocation would serve the best interests of the children under NRS 125C.007(1)(b), which is the singular basis upon which the district court denied relocation. *See* NRS 125C.007(1) (requiring a parent requesting relocation to demonstrate it is in the best interest of the child, amongst other requirements, in order for the court to grant the request).

basis upon which to overturn the district court's decision denying relocation, we necessarily affirm that decision.[7]

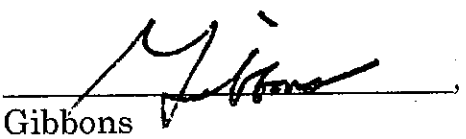
Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver



_____, J.
Tao



_____, J.
Gibbons

cc: Hon. Frances Doherty, District Judge, Family Court Division
Linda Brokaski
Attorney Marilyn D. York, Inc.
Washoe District Court Clerk

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[7]Linda also argues that the district court erred in allowing testimony into evidence regarding the parties' intentions in entering into their marital settlement agreement. But, because she does not allege any harm from the admission of that evidence—and in fact states that the court "properly ruled at the end of the case" as to this issue—we conclude that any such error was harmless and does not provide a basis for reversal of the district court's decision. *See* NRCP 61 (requiring the court to disregard any error that does not affect a party's substantial rights).