

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SAMUEL WILLIAM BAILEY,
Appellant,
vs.
LEAH J. KINZER,
Respondent.

No. 65805

FILED

AUG 31 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order awarding the parties joint legal custody and respondent Leah J. Kinzer primary physical custody. Eighth Judicial District Court, Family Court Division, Clark County; Bryce C. Duckworth, Judge.

We address three issues in this appeal: (1) whether the district court erred in admitting character evidence regarding appellant Samuel William Bailey over his objections; (2) whether the evidence was relevant to the custody arrangement; and (3) whether the district court applied the correct legal standard to determine physical custody. Bailey contends character evidence was inadmissible and not relevant to the court's decision. Kinzer contends character evidence was not offered or considered by the court. Kinzer also claims Bailey failed to object to the evidence. For the reasons discussed herein, we affirm the district court's order.

The parties were never married but have one child together, Liam, age two. Kinzer moved from Nevada to Ohio with Liam shortly after Liam's birth and apparently developed a close bond with the child. Bailey remained in Nevada and filed a Complaint for Child Custody, and later an Amended Complaint, seeking among other things, primary physical custody of Liam. Kinzer opposed the amended complaint and the

district court held a full-day trial. Liam was 14 months old at the time of the trial. At trial, Bailey objected to Kinzer offering evidence surrounding his previous divorce, his earlier calls to Child Protective Services concerning previous marriages, and his relationship with his two other children. The district court allowed the evidence over Bailey's character and relevance objections.

The court awarded Kinzer primary custody and Bailey parenting time consisting of three weeks during the summer in Las Vegas, one weekend per month in Ohio, and Christmas, Thanksgiving, and spring break in Las Vegas to coincide with Bailey's parenting time with his two other children. At the trial, the court contemplated increasing Bailey's parenting time in the future stating "what is critical for me is I want to see [Bailey's] time begin to ramp up." Therefore, the court ordered the monthly visits in Ohio in 2014 be replaced in 2015 with two blocks of time consisting of two weeks each in February and September with Liam in Las Vegas, Nevada.

A trial court has broad discretion in determining child custody arrangements. *Primm v. Lopes*, 109 Nev. 502, 504, 853 P.2d 103, 104 (1993). This court will not disturb the trial court's determination absent a clear abuse of discretion. *Rico v. Rodriguez*, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005) (citation omitted) (internal quotation marks omitted). Pursuant to NRS 125.480(1), in determining custody of a minor child, "the sole consideration of the court is the best interest of the child." A district court must consider several factors when determining the best interest of the child and set forth specific findings. NRS 125.480(4).

First, Bailey contends the district court erred by admitting evidence of his character. Pursuant to NRS 48.045(1), "[e]vidence of a

person's character or a trait of his or her character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion" Evidence is admissible, however, for relevant nonpropensity purposes. *See Bigpond v. State*, 128 Nev. ___, ___, 270 P.3d 1244, 1249 (2012).

Here, Bailey objected to testimony about his former relationships and his two other children. Kinzer offered the evidence to show how Bailey's conduct has impacted Liam and to show Bailey's fitness as a parent. This evidence was admitted for the central issue before the district court—the best interest of the child—rather than being admitted for any propensity purpose. *See Castle v. Simmons*, 120 Nev. 98, 105, 86 P.3d 1042, 1047 (2004) (holding paramount concern in custody cases is best interest of the child). *Cf. Ledbetter v. State*, 122 Nev. 252, 263, 129 P.3d 671, 679 (2006) (noting, in the criminal context, evidence of previous sexual abuse is not character evidence, and is admissible to explain motive). The court disavowed the use of the evidence in this case as character evidence, but allowed it to be presented for other purposes. *See* NRS 125.480(i) and (j) (sibling relationships and history of parental abuse or neglect of a sibling). Therefore, the court did not err in admitting the evidence over Bailey's objections as it was not used as propensity evidence. *See Bigpond*, 128 Nev. at ___, 270 P.3d at 1249.

Regarding Bailey's claim that the character evidence was not relevant, the court may consider both parents' character as evidenced by their past conduct when determining the best interest of the child.¹ *See*

¹Insofar as Kinzer claims Bailey did not adequately object to the evidence, the record reflects he made some timely objections during the trial, and generally objected to any character evidence that might be
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Gaskill v. Gaskill, 936 S.W.2d 626, 630 (Tenn. Ct. App. 1996) (citing *Bah v. Bah*, 668 S.W.2d 663, 666 (Tenn. Ct. App. 1983)). Although a portion of the evidence here spoke to Bailey's character, it was relevant for the court to determine the best interest of Liam. Thus, the evidence was relevant to the court's custody determination. Therefore, we conclude the district court did not err in allowing the evidence.²

Finally, the record of the transcript of proceedings shows the district court applied the factors enumerated in NRS 125.480(4), particularly the factors described in subsections (g), (h), and (i), as well as other relevant factors—i.e. Bailey's past conduct—in determining the best interest of Liam. The district court thus applied the correct legal standard and did not abuse its discretion. We recognize the parenting time in Nevada is limited; however, it coincides with Bailey's summer and holiday time with his other children, and therefore facilitates Liam's ability to maintain a relationship with the siblings. Additionally, Liam was awarded monthly parenting time in Ohio.

The district court explicitly declared its intention to expand parenting time as Bailey's relationship with Liam. We trust the district court to honor its stated intent to appropriately adjust the parenting time in accordance with Liam's physical, developmental and emotional needs


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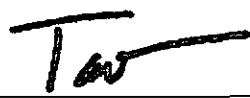
offered. See NRS 47.040(1)(a); *Hotel Riviera, Inc. v. Short*, 80 Nev. 505, 509, 396 P.2d 855, 858 (1964).


²When determining the best interest of the child, the court should look to the factors set forth in NRS 125.480(4) as well as any other relevant factors. See *Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 243 (2007).

and his relationship with Bailey upon a party's motion, should the parties be unable to reach an accord. See NRS 125.480(4)(g),(h). We therefore,

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Bryce C. Duckworth, District Judge, Family Court Division
Larry J. Cohen, Settlement Judge
David L. Mann
Michael J. Warhola, LLC
Smith Legal Group
Eighth District Court Clerk