

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES EARL LILLIAN,
Appellant,
vs.
KATELYN MARIE NELSON,
Respondent.

No. 68382

FILED

DEC 16 2015

TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court child custody order. Eighth Judicial District Court, Family Court Division, Clark County; William S. Potter, Judge.

During the parties' marriage, appellant James Lillian was arrested for using a computer to lure a minor for a sexual purpose, and he later pleaded guilty to this charge. Although the parties stayed together for two years following Lillian's arrest, respondent Katelyn Nelson ultimately moved out of their home and filed for divorce, seeking sole legal and physical custody of the parties' child when she did. After an evidentiary hearing, the district court initially granted Nelson's request, subject to Lillian having two hours per week of supervised parenting time with the child. The court reserved making a final ruling, however, because it was waiting to review the presentence investigation report and psycho-sexual evaluation relating to Lillian's criminal charge.

Subsequently, the court issued an order setting out a graduated schedule of increased parenting time, which ultimately resulted in Lillian having two supervised eight-hour daytime visits per week. After the presentence investigation report and psycho-sexual evaluation were reviewed and a status check hearing was held, the district court entered a permanent custody order, which modified its prior order to provide for the

parties to have joint legal custody of the child. The permanent order also implemented another graduated schedule of parenting time. Specifically, the order provided that the two supervised eight-hour visits per week would continue until Lillian had successfully completed 12 months of probation. Then, the supervision requirement would be removed and Lillian would have two unsupervised eight-hour daytime visits per week for six months. And if no incidents occurred in that time, Lillian would thereafter have two unsupervised overnight visits per week until he had successfully completed and was released from supervision with regard to his criminal charge. At that point, the parties would be required to mediate to attempt to reach a new custody arrangement. This appeal followed.

On appeal, Lillian argues that the district court abused its discretion by failing to recognize that he had overcome any presumption that he was a danger to the child by being the child's primary caregiver for the two years prior to the divorce, including one month during which Nelson had left the child with Lillian after she moved out of the parties' home. Lillian further contends that the district court's order was against the weight of the evidence, was not based on the child's best interest, was punitive, and was out of line with Nevada's preference for joint physical custody.

Initially, while there is sometimes a preference for joint physical custody in Nevada law, *see* NRS 125.490 (creating a presumption that joint custody is in the best interest of a child when the parents agree to joint custody); *see also* 2015 Nev. Stat., ch. 445, §§ 6, 19, at ___, ___ (repealing NRS 125.490, but enacting a similar statute providing that there is a preference for joint physical custody if the parents agree to such an arrangement), "other factors must also be considered." *McGuinness v. McGuinness*, 114 Nev. 1431, 1436, 970 P.2d 1074, 1077 (1998). Here, the

district court considered each of the statutory best interest factors and made specific findings in the custody order relating each factor to this case. *See Davis v. Ewalefo*, 131 Nev. ___, ___, 352 P.3d 1139, 1143 (2015) (explaining that, in determining child custody, the district court must make specific, relevant findings as to the child's best interest). Moreover, to the extent that Lillian argues the evidence showed that he was not a danger to the child¹ and that it was in the child's best interest for the parties to share joint physical custody, Lillian failed to provide this court with a transcript of the evidentiary hearing underlying the district court's custody order or of the status check hearing conducted after review of the presentence investigation report and psycho-sexual evaluation.² And in the absence of the transcript, we presume that the content of these

¹With regard to Lillian's contention that the presentence investigation report and psycho-sexual evaluation did not show him to be a danger to the child, the district court initially found that Lillian was a danger to the child and awarded Nelson primary legal and physical custody, subject only to two hours of parenting time per week by Lillian. The court's final custody order reflects a more favorable evaluation of Lillian, as the court provided for increased parenting time, including unsupervised and overnight visits once Lillian had successfully completed certain portions of his probation. Thus, the record demonstrates that the district court viewed these reports as favorable to Lillian and took them into account when making its final custody decision.

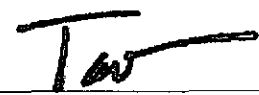
²On August 11, 2015, before this appeal was transferred to this court, Lillian filed in the Nevada Supreme Court a transcript request form certifying that he had ordered the transcripts from the court reporter and paid the deposit. No transcript was ever filed in the Nevada Supreme Court or in this court, however. The instructions on the transcript request form direct the party filing it that the court reporter has 30 days to prepare and deliver the transcripts to the court, and that if the transcripts are not filed on time and the party has paid the required amount, the party may request the Nevada Supreme Court to direct the court reporter to prepare the transcripts. Thus, it was Lillian's responsibility to follow up on the transcript request form to ensure that the transcripts were filed.

hearings supported the district court's decision. See *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision.").

In light of the district court's specific findings regarding the child's best interest and the presumption that the content of the hearings supported the court's findings, we cannot conclude that the district court abused its discretion in awarding primary physical custody to Nelson in this case. See *Davis*, 131 Nev. at ___, 352 P.3d at 1142 (noting that a district court has broad discretion in making a child custody determination and that such a decision is reviewed deferentially in the absence of legal error). Moreover, nothing in the documents before us indicates that the district court's custody determination was punitive. As a result, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. William S. Potter, District Judge, Family Court Division
James Earl Lillian
Katelyn Marie Nelson
Eighth District Court Clerk