

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2085

September Term, 2015

MARK ANTHONY SMITH

v.

RACHEL SMITH

Meredith,
Kehoe,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: November 17, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case involves a child custody dispute between appellant Mark Anthony Smith (“Father”), and his wife, appellee Rachel Smith (“Mother”). After two days of trial, the Circuit Court for Montgomery County awarded Mother temporary legal and primary physical custody of their two children with Father having a specific access and visitation schedule. Father appealed, presenting the following question for our review: Did the trial court err when using evidence of other alleged bad acts to assess the character of a party when awarding custody in a domestic case? We hold that the circuit court did not err in admitting character evidence, and accordingly affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Father and Mother were married in February 2011 in Michigan. They have two children as a result of their marriage: Nathalie, born in December, 2012, and Brandon, born in March, 2014. The family resided in Burtonsville, Maryland for the majority of their marriage.

This action began on February 23, 2015 with Mother filing, in proper person, a complaint for absolute or limited divorce. On March 4, 2015, Father moved out of the marital residence and took the children with him. On April 29, 2015, Mother, through counsel, filed a Supplemental and Amended Complaint for Absolute Divorce and Request for *Pendente Lite* Hearing and Child Custody Trial. As grounds for divorce, Mother alleged cruelty, desertion, adultery, and marital separation since March 4, 2015. Mother alleged that Father took the children without her knowledge or consent and denied her

visitation access. On May 4, 2015, Father filed a Complaint for Limited Divorce in which he requested legal and physical custody of the children as well as child support.

After a *pendente lite* hearing before a magistrate, the court entered an Immediate Order (*Pendente Lite*) on July 28, 2015, granting Mother's request for *pendente lite* access to the children. The Immediate Order did not specifically address legal or physical custody, but did require Mother to pay child support to Father.

A two-day custody trial was held on October 20 and 21, 2015. The trial court heard testimony from witnesses on behalf of both parties, including Father's two ex-wives: Leah Taylor and Samantha Smith. On October 30, 2015, the circuit court issued its bench ruling, which it memorialized in an Amended Temporary Custody Access and Child Support Order dated November 5, 2015. That Order, in pertinent part, granted Mother sole legal custody and primary physical custody of the children. The court granted Father regular and holiday visitation access in accordance with a specific schedule. The court also ordered Father to undergo a psychiatric evaluation and complete an anger management course. Father timely noted this appeal. His sole issue on appeal relates to the admissibility of character testimony provided by his two ex-wives.

STANDARD OF REVIEW

“Generally, ‘whether a particular item of evidence should be admitted or excluded is committed to the considerable and sound discretion of the trial court’ and reviewed under an abuse of discretion standard.” *Perry v. Asphalt & Concrete Servs., Inc.*, 447 Md. 31, 48 (2016) (quoting *Ruffin Hotel Corp. of Md., Inc. v. Gaspar*, 418 Md. 594, 619 (2011)). All

relevant evidence is generally admissible, while irrelevant evidence is not admissible. *Merzbacher v. State*, 346 Md. 391, 404 (1997). “Once a finding of relevance has been made, we are generally loath to reverse the trial court unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion.” *Id.* at 404-05.

DISCUSSION

In his brief, Father asserts that the circuit court erred in admitting “[e]vidence concerning allegations of [Father’s] mistreatment of prior spouses.” He argues that “evidence of other alleged bad acts unrelated to the children” is inadmissible pursuant to Maryland Rule 5-404(a)(1) and (b).

We summarily reject Father’s reliance on Rule 5-404(b). That rule addresses the admissibility of “bad acts” evidence in *criminal* proceedings. It is inapplicable in civil cases.¹ See *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 625 (2011) (holding that “Md. Rule 5-404(b) should continue to be applicable only to evidence offered by the State against the defendant in a criminal case.”).

Father’s reliance on Rule 5-404(a)(1) is also misplaced. Rule 5-404(a)(1) provides:

(a) **Character evidence.** (1) Prohibited uses. Subject to subsections (a)(2) and (3) of this Rule, evidence of a person’s character or character trait is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion.

¹ In his reply brief, Father abandons any reliance on Rule 5-404(b).

The Rule is clear: character testimony is not admissible as *circumstantial* evidence to prove how a party acted on a particular occasion. However, character evidence is admissible when a party's character is *directly* at issue. See Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 507(B) (4th ed. 2010). The seminal case of *Montgomery County v. Sanders*, 38 Md. App. 406, 420 (1978) sets forth a number of factors to be considered in custody cases. One of those factors is the “character and reputation of the parties.” *Id.* at 420. Accordingly, a parent's character is directly at issue and relevant character testimony is admissible. Professor Wigmore succinctly addresses this issue:

Thus, for example, the right of a parent to retain custody of his child may depend on a finding of the fitness of that person as a parent. In these cases, character evidence is of course admissible since what is at issue in this case *is* a character trait, and if the issue is to be resolved on the bases of evidence, evidence of character must be admitted.

I A Wigmore, *Evidence* § 69.1 (Tillers rev. 1983).

In this case, the ex-wives' testimony about Father's verbal and physical abuse against them is relevant to his long-term ability to co-parent with Mother in this case. The testimony concerning Father's strict control of the family finances is also relevant as character evidence in a custody case, particularly since the parties have a joint financial obligation to their children. Finally, the testimony of a former spouse, Samantha Smith, about Father's lack of affection toward their daughter is relevant to his ability to interact with the two children that are the subject of this litigation. The trial court in a custody case is “called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future.” *Sanders*,

38 Md. App. at 419. In short, the trial court properly admitted this testimony as character evidence to be considered in making its decision based on the best interests of the children.²

Finally, Father asserts that, before admitting evidence concerning “prior alleged acts toward his two ex-wives,” the trial court was required under Md. Code (1984, 2012 Repl. Vol.) § 9-101 of the Family Law Article (“FL”) to determine if there were “reasonable grounds to believe that a child ha[d] been abused or neglected by a party to the proceeding.” Father’s reliance on FL § 9-101 is misplaced. The circuit court did not find that Father abused or neglected either of the children and, accordingly, did not invoke the provisions of § 9-101. Instead, the trial court properly examined the *Montgomery County v. Sanders* factors commonly utilized in custody and visitation cases. Similarly, the circuit court did not expressly find that Father abused Mother or a child as described in FL § 9-101.1. Father incorrectly asserts that § 9-101.1(b) restricts evidence in *all* custody cases to evidence of abuse to a parent, spouse, or any child residing within the household. The clear purpose of FL § 9-101 and § 9-101.1 is to require trial courts to protect children where there has been

² Even if we were to conclude that evidence of Father’s mistreatment of ex-wives was improperly admitted, we would hold that any error was harmless. “[A]n error in evidence is harmless if identical evidence is properly admitted.” *Barksdale v. Wikowsky*, 419 Md. 649, 660 (2011). *See, e.g., Beahm v. Shortall*, 279 Md. 321 (1977); *Hollingsworth & Vose Co. v. Connor*, 136 Md. App. 91 (2000). In this case, while Father did timely object to the admission of character evidence on a few occasions, on numerous other occasions the same or similar evidence was admitted without objection. Since we cannot review the admissibility of evidence absent an objection to preserve the issue, this evidence is considered properly admitted. As a result, any error would be harmless.

abuse or neglect. There is no evidence that, in enacting these statutes, the General Assembly intended to preempt or restrict otherwise admissible evidence in custody cases.

We hold that the circuit court did not err in admitting evidence of Father's character and therefore affirm.

**JUDGMENT OF THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY AFFIRMED. COSTS TO
BE PAID BY APPELLANT.**