ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELIZER MIZRACHI, Appellant vs. DIANE MIZRACHI, Respondents.	Supreme Court No. 66176 District Court No. D-13-479664-D

FILED

MAR 10 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

RESPONSE TO CHILD CUSTODY FAST TRACK STATEMENT

APPELLANT:
Eliezer Mizrachi

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RESPONDENT:
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15-07395

FACTS/HISTORY

Respondent admits to the information provided by Petitioner in the Fast Track Statement, pertaining to items 1-13. Respondent herein shall provide her position on the Procedural History, Statement of Facts, Issues on Appeal, and Legal Argument. Respondent agrees with Appellant's Appendix, and does not desire any additionl documents. Therefore, she will refer to the documents in Appellant's Appendix just as Appellant does.

PROCEDURAL HISTORY

Respondent agrees with the initial procedural history set forth by Petitioner; however, when he begins to allege he waived interest in property in exchange for specified visitation, she wildly disagrees. The waiver of property interest was due to his acknowledged community waste due to a serious gambling problem. Therefore, Respondent sets forth an accurate procedural history herein.

The parties married in December, 1999. There is one female minor child, to wit: NOVA AUTUMN MIZRACHI (DOB: 4/30/06). AA 000001. On May 8, 2013, Respondent, through counsel, filed her Complaint for Divorce, and on May 9, 2013, also filed her motion for preliminary relief. It is set forth in both documents that Appellant had secreted the parties assets, including money from their home safe and her jewelry from the home; that he refused to disclose community assets as he had sole control of the finances; and that there was marital waste by Appellant due to a severe gambling habit - which he admitted. Appellant had always been demanding and controlling, and Respondent had no idea of the extent of the community waste due to settlement, but she does know it was significant.

Appellant was served with the Complaint and Motion on May 22, 2013, as set forth in the record. On June 5, 2013, after negotiations, an Answer was filed on Appellant's behalf. This

was signed and notarized by Appellant. Appellant had every opportunity, from the date of service on May 22, 2013, until the day he signed, on June 5, 2013, to seek and pay for his own counsel. In fact, he did consult with attorneys, and decided rather than accrue legal expenses, and be outed for his community waste, that he would make a settlement. The Decree of Divorce was drafted and prepared following the parties extensive negotiations.

Respondent originally sought primary physical custody of the child, annual tax exemption for the child, and an order for child support and alimony. The Decree of Divorce reflects the parties settlement on shared physical custody, no child support, no alimony, and alternating years for the child tax credit. Clearly, Appellant negotiated a very favorable settlement - and he was not required to disclose his finances, and more importantly, his community waste. The Answer was prepared on the same day, as a procedural matter. In obtaining a settlement, the court also requires either a default, or an Answer. The Answer was provided by Respondent's counsel as a courtesy, and to simplify the divorce process. It was undisputedly signed by Respondent. At the same time, the parties executed a Stipulation and Order to Vacate the hearing. AA 000019, AA 000020; AA 000030.

This is where Respondent disagrees with Appellant's version of the procedural history. Appellant misrepresents that the parties' marital residence, real property in New Mexico, real property in Arizona, and real property timeshare at Tahiti Village in Las Vegas, Nevada were awarded to Respondent in exchange for shared custody. AA000027-000028. They were negotiated to Respondent in consideration of the community waste, detailed in Respondent's initial motion. Upon agreement, the extent to which Appellant benefitted as a result of the community waste was no longer an issue; and his current finances were not disclosed. This had nothing to do with child custody.

The parties agreed to a shared custody of the child, with Respondent having the child each Wednesday, Thursday and Friday, and every other Tuesday. Appellant had the child each Saturday, Sunday and Monday and every other Tuesday. AA 000025.

Upon these negotiated settlements, Respondent's attorney prepared the Decree of Divorce, filed June 21, 2013. AA 000024.

Disputes thereafter arose between the parties concerning holiday visitation, as the only holiday visitation set forth in the Decree of Divorce was the Jewish and Christian holidays, and not the national holidays. On November 25, 2013, Respondent's attorney sent a letter to Appellant, who was in Proper Person, and indicated that the national holidays were not set forth in the Decree of Divorce, and requested the parties agree to the Family Court recommended holiday schedule. This is attached as Exhibit "4" to Respondent's Motion to Clarify And/Or Amend Decree of Divorce in Respect to Holiday Visitation for the Parties' Minor Child, And For Attorney's Fees and Costs. AA 000031. As a result of that communication, Respondent's attorney prepared a Stipulation and Order adding the unmentioned holidays. Appellant refused to sign, demanding that the standard Jewish Holidays were not acceptable to him, and demanding what he now alleges are 12 Jewish Holidays. The court recognizes four Jewish Holidays. Appellant refused to resolve the matter and agree to the standard schedule. Thus, Respondent filed the above stated motion, seeking the court clarify national holiday visitation, as well as specify that the Jewish Holiday visitation include the standard Jewish holidays. Respondent agreed to all Jewish holidays on the standard calendar - not the Jewish Calendar, which Appellant did not exercise anyway.

Additionally, the issue of Passover and Easter Sunday overlapping needed to be addressed.

The motion also makes clear that, although Appellant is Jewish, in 13 years of marriage, the parties did not celebrate the 12 'holidays' Appellant now demands, and in fact, Respondent had not heard of some of the holidays. She indicates in the motion that Appellant only paid slight attention to the Jewish holidays during the parties' marriage; he did not even attend temple on a regular basis. His mother lives in town, and would occasionally fix a Passover meal which the parties would attend with the child. Occasionally Appellant would take a day off work for a Jewish holiday, but it was rare. Most of the Jewish holidays came and went without any notice in the parties' home. Respondent could not say Appellant was an observant Jew. Suddenly, again due to his controlling nature, he demands holidays he did not previously celebrate. Further, these holidays are not on the standard calendar, and no where does the Decree of Divorce profess to honor a completely different calendar. The standard calendar provides four Jewish Holidays. The court standard schedule honors these four Jewish holidays. Appellant desires the court to look to the Jewish calendar, never designated, as the calendar to honor Jewish holidays.

The motion was filed to address these issues on 4/16/14. AA 000031.

In fact, Appellant acknowledges the child did not attend services of any faith in his Opposition to Respondent's Motion (AA 000072), page 4, line 24, when he states, "Up to this point, Nova did not attend Sunday School or church of any kind."

According to the Jewish tradition, the religion must come through the mother, and Respondent/Mother is Protestant, not Jewish. Respondent objected to Appellant suddenly demanding Jewish holidays the child, or even the Appellant, did not celebrate during the marriage.

Appellant's Fast Track Statement indicates that Respondent was aware of some Jewish holidays, danced at various bar and bat mitzvahs, and enjoyed some Jewish food. That has

nothing to do with the present issue. She was respectful, as she would be to anyone's religion. She might have knowledge of Muslim customs and religion as well. So what? The fact is the parties divorced. A decree of divorce was entered on 6/21/13, and further, Appellant failed to seek modification and clarification of the Jewish Holidays within six months of the divorce, which would have been 12/21/13. The matter was not addressed until Respondent filed a motion on April 16, 2014, almost ten months after the Decree of Divorce. When the matter did appear before the court at a hearing on May 19, 2014, the court stated:

> "IT IS HEREBY ORDERED that the Court finds there was not a clear understanding between the two parties at the time and there needs to be a clarification on the Jewish holidays and so the court is going to adopt the default Jewish holiday system that has been set up in Department D. The court is going to agree that the four major holidays: Passover, Hanukkah, Yom Kippur and Rosh Hashanah be the four holidays and will continue only the first day of each holiday." AA 000155.

Following this Order, Appellant appealed.

STATEMENT OF FACTS

The parties met in 1998, and married on March 16, 2000 in Las Vegas, Nevada. AA 000008. Appellant held himself out as Jewish, however, he did not take days off work very often for Jewish holidays; and did not celebrate or even attend temple regularly. His religion, though known, was not a large part of the parties marriage, nor consideration of the divorce. Appellant has presented no evidence contradictory to these facts. Further, Respondent disputes that the parties' maintained a Jewish calendar in the home. Appellant indicates in his Fast Track Statement that the parties placed a mezuzah on the front door, and that she continues to have it there - two years after divorce. Respondent desires to inform the court why that is. She did attempt to remove it after the divorce, but it would cause damage to the door because it has

huge nails in it. She would have to hire someone to remove it and repair the door. It was not that important to her; however, due to this action, she will incur the expense of doing so.

Being exposed to the Jewish faith does not mean that Appellant is entitled to all Jewish holidays on the Jewish calendar, including holidays he previously did not celebrate. While Appellant continues to detail Respondent's exposure to the Jewish religion, he indicates she is Protestant and therefore she never converted to the Jewish faith; that she continued to maintain that she is Protestant; and that sought the Christian holidays and AGREED to allow Appellant the Jewish holidays at the time of divorce. What was not indicated was that Appellant would seek to have Jewish holidays not recognized on the standard calendar. As indicated, Appellant would occasional have a Jewish day off from work, but it was not consistent, and in fact, was rare, rather than commonplace. Further, he did not consistently attend Temple. While Respondent acknowledges she did not regularly attend Christian events, it is also true Appellant did not consistently attend Jewish events. Thus, the argument for numerous Jewish holidays is inappropriate. The court clarified that "Jewish holidays" for the purpose of visitation, would be the standard calendar for Jewish Holidays with the court. It was an appropriate decision.

Appellant comes before the court and alleges he negotiated away real property for specified visitation. That was not the case at all. The initial motion filed demonstrates the issue of community waste was front and center; and that Appellant hid the parties finances. The real property was awarded to Respondent in consideration of community waste, and to avoid Appellant's need to disclose the extent thereof.

Custody was negotiated between the parties in consideration of maintaining a strong relationship between each parent and the child, as a completely separate issue.

16. **ISSUES ON APPEAL**

Appellant sets forth the following issues on appeal:

a. The district court abused its discretion when it summarily concluded that the language "the Jewish holidays" which was awarded to the Appellant in the parties' Decree of Divorce, was ambiguous and, hence, required clarification.

Respondent believes Appellant sought to mislead the court by seeking "the Jewish holidays" on the Jewish calendar, rather than the Jewish holidays on the standard calendar. Such demand has been made in bad faith, as Appellant fails to celebrate these additional holidays, and further, does not consistently attend Temple. Further, he admits the child never has attended church or Temple, and therefore, does not subscribe to the Jewish faith. The court should consider that Appellant has alternative motives.

b. The district court abused its discretion by failing to construe the purported ambiguity regarding the language "the Jewish holidays" against the drafter of that language and agreement.

Respondent believes there is no ambiguity in this matter, and that Appellant is acting in bad faith with unclean hands. She believes both parties were of a meeting of the minds that they were using the standard calendar. Appellant only now uses the Jewish calendar to create conflict. It is within the court's discretion to make determinations regarding custody and visitation and holiday visitation. The court had the facts and evidence before it, and the court made an appropriate determination that should not be upset with clear abuse of discretion - which did not occur in this matter.

c. The district court abused its discretion in modifying the Jewish holiday schedule through the District Court specifically found there was no change of circumstances and through the district court did not take any testimony nor make any findings regarding the child's best interest.

Respondent denies the court 'modified' the Jewish holiday schedule. The court 'clarified' the Jewish holiday schedule. The schedule complies with what is customary and what is reasonable. It complies with standard Jewish holidays celebrated in Nevada. It complies with the department schedule.

Standard of Review:

Respondent disputes this is a matter regarding the construction of a contract. It is a clarification of visitation. Therefore, Respondent disputes the court reviews this matter de novo.

This is a matter of an agreement involving child custody and visitation. Such matters rest in the District Court's sound discretion, *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P. 2d 541, 543 (1996); and the Supreme Court does not disrupt the District Court's custody decision absent an abuse of that discretion. *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993). In reviewing a custodial order issued by the district court, this Court must be satisfied that the District Court obtained its decision for appropriate reasons and that the Court's factual determinations are supported by substantial evidence. *Rico v. Rodriquez*, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005).

Standard for Modification of Child Custody Agreements.

When modifying child custody agreements, the District Court must apply child custody statute and case law. "Any order for joint custody may be modified or terminated by the court upon the petition of one or both parents or on the court's own motion if it is shown that the best interest of the child requires the modification or termination. The court shall state in its decision the reasons for the order of modification or termination if either parent opposes it. See NRS 125C(2) and Truax v. Truax, 110 Nev. 437, 874 P.2d 10 (1994).

Here the motion was brought 10 months after the Decree of Divorce, by Respondent for clarification of "the Jewish holidays" - Respondent believed this was for the primary holidays that were celebrated consistently on the standard calendar, and she acquiesced to the District Court standard holiday visitation. Appellant chose to interpret "the Jewish holidays" to include numerous holidays, including those he did not routinely celebrate, as set forth on a Jewish calendar.

The court did not say the language "the Jewish holidays" was ambiguous. It stated that there was not an understanding between the parties at the time what "the Jewish holidays"

referred to. Respondent (reasonable) believes that refers to Jewish Holidays found on the regular calendar. Appellant, for purposes of this action, at least, seeking Jewish holidays that are found on the Jewish calendar. That is not what is typically used in this country, and is not a reasonable inference.

Further, this was not questioned until nearly 10 months after the Decree of Divorce was entered, and the parties had not been exchanging the child for each of the Jewish holidays outlined in Appellant's request.

Appellant alleges the District Court abused its discretion first by finding that ambiguity existed in the parties agreement regarding Jewish holidays and then also by failing to construe the ambiguity against the drafter.

In response, Respondent would again indicate the court did not indicate that there was ambiguity in regard to the Jewish holidays. It indicated that there was not an understanding of what the Jewish holidays were. In fact, Respondent does not believe there was ambiguity at all. She believes the parties were both considering the standard calendar at the time of the divorce, but that Appellant, in seeking to maintain control as he historically does, decided that it would benefit him if the Jewish holidays were given to him from the Jewish calendar. Thus, he is seeking the court grant him the additional, minor, Jewish holidays found only on the Jewish calendar. He did not complain about this within six months of the divorce. The court reasonable decided to define the Jewish holidays to ensure no ambiguity about which calendar is used in the United States, and which calendar the Jewish holidays are found on but using the court departments' standard Jewish holiday calendar. Appellant appealed.

Respondent believes the court acted appropriately in specifying the Jewish holidays, and there is no grounds to modify the order. In fact, Appellant did not even cite a change of

circumstances, such has he now faithfully and regularly attends Temple; that he consistently takes off work on the four traditional Jewish holidays; or that he celebrates the additional Jewish holidays he now seeks to have the court award to him, for purposes of additional time with the child.

Thus, Appellant's appeal should be summarily denied, and determined not to be in the best interest of the child. There is no reason to disrupt the child's daily routine to add holidays that are not celebrated.

VERIFICATION

1. Respondent hereby certifies that this fast track reponse complies with the formatting requirements of NRAP 32(a)(6), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[x] This fast track response statement has been prepared in a proportionally spaced typeface using WordPerfect, in 12 pt. Times New Roman.

2. Respondent further certifies that this fast track response statement complies with the page volume limitations of NRAP 3E(e)(2) because it:

[x] does not exceed 20 pages.

3. Respondent certifies that the information provided in this fast track response statement is true and complete to the best of her knowledge, information and belief.

Dated this 2 day of March, 2015.

DIANE MIZRACHI
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Respondent in Proper Person