**IN THE SUPREME COURT OF THE STATE OF NEVADA**

LYUDMYLA ABID,

Appellant,

v.

SEAN ABID,

Respondent.

Supreme Court No. 69995



# CHILD CUSTODY FAST TRACK STATEMENT

RADFORD J. SMITH, ESQ.
RADFORD J. SMITH, CHARTERED
Nevada State Bar No. 2791
2470 St. Rose Pkwy – Ste. 206
Henderson, Nevada 89074
(702) 990-6448
rsmith@radfordsmith.com

ATTORNEY FOR APPELANT

## TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES



STATUTE AND RULE

## CHILD CUSTODY FAST TRACK STATEMENT

1. **Party filing this statement:** Lyudmyla A. Abid

2. **Attorney Submitting this fast track statement:** Radford J. Smith, Radford J. Smith, Chartered, 2470 St. Rose Parkway – Ste. 206, Henderson, Nevada 89074.

3. **Lower Court:** Eighth Judicial District Court, Clark County, No. D-10-424830-Z

4. **Judge:** Judge Linda Marquis

5. **Length of trial or evidentiary hearing:** Two and one-half days of trial over four separate calendar days, November 17-19, 2015 and January 25, 2016.

6. **Written order or judgment appealed from:** Findings of Fact, Conclusions of Law and Decisions filed January 5, 2016 and Findings of Fact, Conclusions of Law and Decisions filed March 1, 2016.

7. **Dates of notice of entry served:** January 5, 2016; March 1, 2016.

8. **Date notice of appeal filed**: March 14, 2016.

9. **Law governing time limit for notice of appeal**: NRAP 4(a)

10. **Law granting jurisdiction**: NRAP 3A(b)(1).

11. **Statement of the Case:** This is an appeal of the district court's order permitting a court appointed expert to admit a report and testify about audio tapes the district court found inadmissible and illegally obtained, A.App. 1537-38, and the trial court's subsequent order, after the evidentiary hearing, changing joint physical

custody to primary physical custody based exclusively on the contents of that report and testimony. A.App. 1543.

**12. Statement of Facts:** Sean and Lyuda were divorced by stipulated Decree filed February 17, 2010 A.App. 0001. The Decree contains the parties' agreement to joint legal and physical custody of their minor child Aleksandr "Sasha" Anton Abid, born February 13, 2009 ("Sasha"). A.App. 0002. The parties confirmed their agreement of joint legal and physical custody in an amended stipulated order filed September 9, 2014, arising from the resolution of Sean's Motion to Change Custody for the Purposes of Relocation or in the Alternative to Change Custody in December 2013. A.App. 1521.

The September 9, 2014 stipulation contained a change in timeshare allowing Sean to pick up Sasha afterschool and keep him until 5:30 p.m. on those weekdays when Lyuda got off work at 5:00 p.m. A.App. 0029-30. As he read the stipulation into the record, Sean's counsel indicated the change was due to Lyuda's work schedule until "Mom is able to get off work." A.App. 0627.

In August 2014, Lyuda changed her work schedule so that she was off at 3:30 p.m. every day, and began retrieving Sasha, with Sean's consent, from Sean's home. In November 2014, Sean abruptly stopped that practice after an argument between the parties. A.App. 0793-94. Sean claimed he had done so because of concerns raised by the teacher during a conference in October 2014, but when she testified, the

teacher, Susan Abacherli, had no recollection of such a conference concerning Sasha's progress. A.App. 0715-16. The parties' communication broke down after that point. Sean then refused to provide Lyuda with Sasha's passport even though each party at that time, under the parties' stipulation, could travel for six weeks with Sasha the following summer.

On January 9, 2015, Lyuda moved for an Order to Show Cause against Sean for his refusal to provide Sasha's passport to Lyuda. A.App. 0026. She further moved to address the provision in the September 9, 2014 stipulated order regarding her time with Sasha, contending that the provision was only intended to apply when she was working. A.App. 0029-30.

By Countermotion filed February 4, 2015, Sean moved for primary physical custody, his second motion to modify custody in less than two years. A.App. 0047. He based his motion almost entirely upon an audio recording that Sean surreptitiously obtained. A.App. 0049. Without the consent of anyone who was residing in Lyuda's home, Sean placed the recording device in Sasha's backpack (without Sasha's knowledge) with the intent to record conversations in Lyuda's home and in her vehicle. A.App. 1529-30.

### A. Sean's Transfer to the Court of Information Contained in Tapes Procured in Violation of NRS 200.650.

Lyuda objected to the use and admission of the tapes as evidence because they were illegally obtained in violation of NRS 200.650. That statute prohibits the

surreptitious recording of an in-person conversation between two persons without the consent of one of those persons. Sean countered that his surreptitious recording was permissible under the "vicarious consent" doctrine adopted in other jurisdictions, but not Nevada, that allowed a parent or guardian to receive vicarious consent from a child under certain circumstances. A.App. 1516-1517.

### B. The District Court's Adoption of the Vicarious Consent Doctrine, and Permission to Allow a Court Appointed Psychologist to Review the Tapes Before Determining Whether They Were Admissible.

The district court directed briefing on the issue of "vicarious consent." A.App. 1517, and the parties complied. A.App. 0400; 0423. After briefing, the district court stated that it was inclined to adopt the vicarious consent doctrine, but indicated that it would be Sean's burden to prove "good faith" to justify the recording. A.App. 1516-17. Sean, however, had already supplied a transcript of the illegally obtained recording before the court ever addressed his alleged good faith. A.App. 0081. Over Lyuda's continued objection, the district court permitted Sean to provide the transcripts of the surreptitiously obtained and selectively altered recordings to Stephanie Holland, Ph.D., who conducted a child interview in the case. A.App. 1513.

Dr. Holland's letter report included a transcription of the tapes and numerous references to the tapes. *See,* Dr. Holland's report at pages 11-14. The contents of the tape formed the basis of the questions she asked in her interviews of Sasha and

the parties. Lyuda objected to the admission of the recordings, and objected to the admission of any expert report that utilized the tapes as all or part of its basis. A.App. 0175.

Prior to issuing her report, and based upon the content of the tape recordings, Dr. Holland made findings and a recommendation (in the form of a letter to the Court) that the Court modify the stipulated summer visitation schedule set forth in the parties' Decree of Divorce. A.App.1514-15. The Court, based upon and consistent with Dr. Holland's recommendation, modified the 2015 summer visitation schedule in the parties' stipulated order. A.App. 1514-15.

**C. The Trial Court Correctly Found that the Tapes were Inadmissible.**

On November 17, 18 and 19, 2015, the district court held an evidentiary hearing on the issue of Lyuda's objection to the admission of the tapes, the use of the tapes by Dr. Holland, and Sean's defense of "vicarious consent." A.App. 0700--01. Though the recording of the tapes without consent of either party to the conversation violated NRS 200.650, the trial court was inclined to permit the admission and use of the tapes if Sean could meet the elements of the "vicarious consent doctrine." A.App. 1517.

At the evidentiary hearing, Sean testified that he understood that Lyuda, her husband, Ricky Marquez ("Ricky"), and her daughter Irena (from a previous marriage), all resided in Lyuda's home. He further understood that the recording

would, for a period of 30 hours, record all conversations of any individual within recording distance of the device in the backpack. A.App. 0807-08

During the litigation, Sean did not produce the entirety of the two recordings that he secretly recorded, and he later acknowledged that he destroyed and/or altered selected portions of the recordings, he trashed the computer that housed them, he trashed the device used to record them. A.App. 0817-0818. He did not provide any of that information in his pleadings he submitted with the tapes to the district court. A.App. 0047. Instead, he submitted what he later admitted were selected portions of the recordings that he edited with software that he could not identify, and that he erased from his computer. A.App. 0818.

By Findings of Fact, Conclusions of Law and Decision entered on January 5, 2016, Judge Marquis concluded that Sean's testimony was not credible, and Sean did not have good faith basis to place the recording device in Lyuda's home. A.App. 1537. The Court found that the doctrine of vicarious consent does not extend to the facts in this case, and that Sean surreptitiously caused a recording device to be placed inside Lyuda's home. The Court denied Sean's request to admit any portion of the audio recording into evidence.

. . .

. . .

. . .

### D. Though Ostensibly Recognizing the Tapes were Illegally Obtained, the Trial Court Permitted Their Admission through the Report and Testimony of Dr. Stephanie Holland.

Though finding the tapes were not admissible, the Court ordered that it would allow the tapes' admission and use through the report and testimony of Dr. Holland. A.App. 1538. At a hearing held 20 days after its order regarding the inadmissibility of the tapes, the trial court admitted into the record the report of Dr. Holland that contained a transcription of the altered tapes. Lyuda objected both before and at the hearing to the use or admission of the report.

### E. Dr. Holland acknowledged that Experts in her field do not regularly rely upon Illegally procured tapes:

Dr. Holland admitted under *voir dire* that had she known the tapes were found inadmissible and illegal by the district court (something the district court had ruled 20 days before), she would not have relied on that evidence, A.App. 1238, and experts in her position would not rely on such evidence. A.App. 1239.

> By Mr. Smith: [I]s it common practice of experts in your area who are performing child custody analyses to use material that had been found to be illegal or inadmissible by the Court?
>
> Dr. Holland: No. Again, if directed by the Court that something has been found to be inadmissible or illegally obtained by the Court –
>
> Mr. Smith: Right.
>
> Dr. Holland: -- then – then – then the answer would be no.
>
> Mr. Smith: Right. That wouldn't be common practice or –
>
> Dr. Holland: Correct.

Nevertheless, the district court permitted the admission of Dr. Holland's report, and permitted her testimony regarding the tape recordings and their content.

### F. Dr. Holland's Report was not a Recommendation for a Change of Custody, only Further Study:

Dr. Holland testified under cross that her report made "no recommendation regarding custody" of Sasha, and testified that it would be "inappropriate for her to have rendered an opinion whether or not Sasha had been alienated and by whom" because of the "limited data" she had. A.App. 1279. In both her report and her testimony, she testified that her recommendation was "further study."

### G. The Trial Court's Findings Rely Almost Exclusively on Statements Made by Dr. Holland in her Report.

Despite Dr. Holland's testimony, the district court based its order granting Sean's Motion to Change Custody almost solely on statements made by Dr. Holland. In its March 1, 2016, Findings of Fact, Conclusions of Law, and Decision, the trial courts "Findings of Fact" exclusively quote information contained in Dr. Holland's report or testimony. There is no reference to the testimony of the parties, Lyuda's husband, or the child's teachers who testified. A.App. 1539-48.

The district court's primary basis for a change of custody was ostensibly its perception that in interviews with Dr. Holland, "the child exhibited significant signs of stress and confusion. Further, the child is internalizing a belief system that is not his own. The child is confused about statements Mom makes to the child about the

child's father." A.App. 1540. Only Dr. Holland made those statements; none of the third party witnesses who saw Sasha nearly every day supported the notion that he "exhibited significant signs of stress and confusion."

The trial court's findings did not consider, or misstated, the testimony that was presented at hearing. Sasha's kindergarten teacher, Ms. Susan Abacherli, and his first grade teacher, Ms. Masa, testified that Sasha had and is doing well in school, did not evidence any behavioral problems, and did not evidence of any signs of alienation from his father. A.App 0715; 0730-31. The teachers did not identify any significant amount of stress, and described Sasha as talkative and friendly. A.App. 0708; 0713.

Dr. Holland in her letter report, at page 6-7, expressed concern about Sasha's ability in school. The teachers both acknowledged that he was doing well in school. A.App. 0707-08; 0744. Dr. Holland also expressed concern about Sasha's "preoccupation" with the game "Call of Duty," and the trial court relied on Dr. Holland's statements to opine that the "Parties homes are structured differently. Dad's home is more rigid and Mom's home is unstructured." That statement ignores that Dr. Holland's testimony on that issue was equivocal; she admitted the child played Call of Duty while in Lyuda's care and in Sean's care (through his friend Riley). A.App. 1332. Moreover, the wholly unjustified leap between gaming and structure in homes contradicts both Lyuda and her husband's unchallenged

testimony that Lyuda had removed the game machine (an Xbox) and Call of Duty from her home as soon as she read Dr. Holland's report. A.App. 1369-70; 1452. Lyuda and her husband both testified, without challenge, to the routine and structure for Sasha at their home. A.App. 1352-1366; 1410-11.

The district court's findings concluded with "As a direct result of Mom's direct and overt actions, the child is experiencing: confusion; distress; a divided loyalty between parents; and a decreased desire to spend time with Dad." A.App. 1541. That conclusion was not shared by Dr. Holland. She testified that an affinity for one parent's home does not lead to the conclusion that the child is alienated, and that more information would be necessary, and required under applicable ethical guidelines she follows, before she could ever render that conclusion. A.App. 1304.

**13. Issues on appeal.** State concisely the principal issue(s) in this appeal:

1. Whether the district court erred in providing and disseminating illegally obtained tapes to a court appointed expert before ruling upon their admissibility or legality.
2. Whether the district court erred in permitting the admission of illegally obtained and altered tape recordings through the testimony of an expert.
3. Whether the district court erred in admitting Dr. Holland's report after Dr. Holland recognized her report included evidence not regularly relied upon by experts in her field.
4. Whether a district court erred by almost solely relying upon facts attested to by an expert, and rebutted by fact witnesses, as the basis for a modification of custody.
5. Whether the court erred in relying upon an expert report to change custody when the expert acknowledged that her report did not provide a sufficient

basis for a recommendation of a change of custody as being in the child's psychological best interest.

**14. Standard of Review**: This court reviews a district court's decisions regarding custody, including visitation schedules, for an abuse of discretion. District courts have broad discretion in child custody matters, but substantial evidence must support the court's findings. Substantial evidence "is evidence that a reasonable person may accept as adequate to sustain a judgment." *Rivero v. Rivero,* 125 Nev. 410, 428, 216 P.3d 213, 226 (2009)(citations omitted).

A court may not, however, enter an order changing custody to punish a parent's behavior. *Sims v. Sims,* 109 Nev. 1146, 1149, 865 P.2d 328, 330 (1993).

**15. Legal Argument:**

**A. The district court erred in providing and disseminating illegally obtained tapes to a court appointed expert before ruling upon their admissibility or legality.**

In his Motion to Change Custody, Sean acknowledged that he had placed a recording device in Sasha's backpack with the intent to record conversations between Sasha and Lyuda. The recording device was continuously on, and recorded anything near the backpack.

Illegally intercepted communications are not admissible. NRS 48.077 reads in relevant part:

> The contents of any communication lawfully intercepted under the laws of the United States [. . .], and any evidence derived from such a communication, are admissible in any action or proceeding in a court [.

. .] Matter otherwise privileged under this title does not lose its privileged character by reason of any interception.

Implied in that statute is that communications that are not lawfully intercepted are not admissible. *See, e.g. Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1181, 969 P.2d 938, 941 (1998). It is illegal in the State of Nevada to surreptitiously record any conversation without the consent of one of the parties to the conversation. NRS 200.650 reads:

> Except as otherwise provided in NRS 179.410 to 179.515, inclusive, and 704.195, a person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

Sean admitted that he surreptitiously attempted to record, and recorded, through the use of an electronic device, private conversations engaged in by the persons in Lyuda's home. Sean further admitted that he did not have express consent to do so from any of the members of Lyuda's household. Sean's acts violated NRS 200.650.

The trial court was on notice of Sean's acts. Before ruling on the admissibility of the recording, however, it caused the dissemination of the recording to a court appointed expert. That procedure tainted the proceedings. Even disclosing the "existence, content substance purport, effect or meaning of any conversation so listened to" is prohibited under NRS 200.650, yet the trial court provided the tape

recording to a third person before determining its admissibility. Lyuda contends that this court should set a standard requiring a trial court to address the admissibility of a recording alleged to be violative of NRS 200.650 before listening to, or submitting the tape to an expert regarding custody (an exception would be an expert who would solely address whether the tape was altered in some manner).

### B. The district court erred by permitting the admission of illegally obtained and altered recordings through the testimony of an expert.

The trial court permitted the use of the illegal recordings even after finding them inadmissible. The trial court cited NRS 50.285(2) and *Barret v. Baird,* 111 Nev. 1496, 908 P.2d 689 (1995). NRS 50.285 reads:

> 1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.
>
> 2. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

In *Barret*, this court addressed a constitutional challenge to the now vacated system of a screening panel for medical malpractice claims. The court upheld the statute, even though it permitted the expression of the screening panel's findings, that were based on otherwise inadmissible evidence, to a jury. The decision in *Barret* arose out of a specific statutory mandate that was ostensibly promoting a public policy of preventing the prosecution of meritless malpractice claims.

Here, however, the information Sean submitted to the court was not obtained via statute designed to protect the public interest, but instead he procured the tapes in violation of statute. The public policy behind NRS 200.650 is clear; the law allows persons to have private conversations that eavesdroppers cannot record without consent. Sean's acts were in violation of the statute, and the public policy behind it. In *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1181, 969 P.2d 938, 941 (1998), this court approved the dismissal of the complaint based upon the Plaintiff's illegal recording of conversations in the case. Here, the district court's ruling would encourage others to illegally tape conversations that otherwise could not be submitted to the court, but could be admitted by providing them to an expert.

In *I.K v. M.K,* 753 N.Y.S.2d 928 (N.Y. 2003) the court addressed the admissibility of an illegally obtained recording in a custody case. The court found that there was no exception to the inadmissibility to tapes illegally obtained under its statute precluding eavesdropping. *Id.* at 830. The father, who illegally obtained and requested the admission of the tapes in that case, argued that the best interest standard granted the trial court the power to make inadmissible evidence admissible, but the court ruled that the best interest standard was not a "panacea that allows the court to simply disregard established rules of evidence." *Id.* The court further held that the tapes could not be used by experts, as their opinions would be "derived from the tapes and excludable from evidence [. . .] The court can avoid this potential

problem by prohibiting the experts from having the tapes in the first instance." 753 N.Y.S.2d at 831.

### C. The district court erred in admitting Dr. Holland's report after Dr. Holland recognized her report included evidence not regularly relied upon by experts in her field

NRS 50.285(2) requires a showing that otherwise inadmissible evidence is "reasonably relied upon by experts in forming opinions or inferences upon the subject" of their testimony. Dr. Holland agreed that illegally procured tapes were not regularly relied upon by experts in her field, and thus her report, that quotes and repeatedly references the tapes, should have not been admitted under that statute.

Dr. Holland relied on the tape's contents to form her opinions expressed in her report. At page 6 of her report, she specifically cites the tape as a basis for her opinion about Lyuda's behavior. She spends a long paragraph addressing the behavior on the altered and illegal tape. Dr. Holland admitted that she was not aware that the tape had been altered by Sean.

### D. The district court abused its discretion by solely relying upon the statements of the child attributed to him by the expert during a limited interview process.

Dr. Holland admitted she performed no psychological analysis or tests. She admitted that she did not have sufficient information to opine on the key factor upon which the district court relied, the affinity of Sasha for his mother over his father. She quotes Sasha as indicating his father was "mean," but fails to give any

significance to that statement. She indicated she would need to do further study of Sasha to determine the meaning of Sasha's behavior. Nevertheless, the trial court ignored all other evidence presented at trial, and made the leap that Dr. Holland indicated she could not ethically make by finding Sasha had been alienated.

The attributed statements made by the then five-year-old Sasha in the context of an interview were not an adequate basis for a change of custody, particularly when all of the objective facts indicated that he did not show any symptoms ("confusion and distress") of the maladies attributed to him by the Court.

The court also ignored the undisputed evidence that Lyuda had encouraged Sasha's relationship with Sean by regularly making modifications to the parties' parenting schedule to afford Sean time when Sean wanted to take Sasha to an event. The court further ignored Sean's anger and hatred of Lyuda, referring to her as a "monster" in his testimony. A.App. 0774.

Moreover, the trial court seemingly invented a report that Dr. Holland did not give. A logical reading of Dr. Holland's report at pages 6 and 7 is that it is the child's exposure to the parent's conflict amongst themselves, particularly in Sasha's presence, was Dr. Holland's primary concern. She described the "discord and tension" between the parties as "palpable," and she opined the Sasha had been placed in the middle of their conflict. Requiring a grant of custody to one parent due to parental conflict is an evil already identified by this court: "To permit one non-

cooperative parent to come in and get sole custody just because of a mutual conflict not only rewards uncooperative conduct but also, as said before, unnecessarily deprives the child of the company of one or the other of his or her parents." *Mosley v. Figliuzzi*, 113 Nev. 51, 66-67, 930 P.2d 1110, 1120 (1997).

As addressed above, Dr. Holland expressed a concern about Sasha being influenced by his ability to play Call of Duty at his mother's home, and that such exposure could be damaging to the child. See, Dr. Holland's report at page 6. She opines in his report that his play of the game contributed to an inability to stay on task. That "inability to stay on task" was not reported by either teacher, and his report cards indicated Sasha was a good, attentive student. A.App. 0708. There was nothing unusual that they saw about Sasha's ability to concentrate in the combined 18 months, five days per week that they had Sasha in their classrooms. A.App. 0708; 0744.

Moreover, Dr. Holland's findings about violent video games are not generally supported, and she did not cite any authority for that position. Courts addressing the issue have not approved studies finding a link between violent video games and aggressive behavior. *See, Brown v. Entertainment Merchants Association,* 564 U.S. 786, 800-801, 131 S.Ct.2729, 2739 (2011)(State of California failed to show harmful effects of violent video games on children, and studies finding such effects "have been rejected by every court to consider them.")

**E. The court's change of custody was centered upon punishing Lyuda.**

In *Sims v. Sims,* 109 Nev. 1146, 1149, 865 P.2d 328, 330 (1993), the court prohibited a district court from changing custody as a "sword to punish parental misconduct." The court recognized that like here, the *Sims* court order "recites the change is in the best interests of the child," the findings focused on the mother's disobedience to the court's prior order. The court further found that the court's failure to enter an order changing custody for six months after the petition was evidence that the court did not believe the child was in physical or psychological danger with the mother. *Id.* 865 P.3d at 331.

In the present case, the court punished Lyuda's behavior and statements depicted on the illegally obtained and altered recording. The court waited over a year from the alleged incident to make any change. There was no evidence of any psychological testing of the child or the parents at hearing. There was no objective evidence of the child being anything but a happy, healthy child. The focus of the court's findings addressed behaviors of Lyuda, but there was no evidence of harm to the child.

The appropriate remedy would have been counseling, education, and strict prohibitions on certain types of behavior, not a change of custody in which the child's historical joint custody. There is no meaningful discussion of the effect of his loss of time with his sister (Iryna was not interviewed by Dr. Holland), or the

loss of time with his mother. The district court does not address the presumption of joint custody under former NRS 125.480 where the parties previously agreed to joint custody. As stated, the district court ignored actual real world observations of Sasha in his most common environment, school, and instead based her findings on four one hour interviews with a single individual in a single room.

**F. The court erred in relying upon an expert report to change custody when the expert acknowledged that her report did not provide a sufficient basis for a recommendation of a change of custody as being in the child's psychological best interest.**

Dr. Holland expressly indicated that the information she gleaned from her interviews was not sufficient for her to recommend a change of custody. She acknowledged adherence to the American Psychological Association Specialty Guidelines for Forensic Psychologists, that can be found at http://www.apa.org/practice/guidelines/forensic-psychology.aspx. Those guidelines state, in section 9 in relevant part:

> Forensic practitioners strive to utilize appropriate methods and procedures in their work. [. . .] [F]orensic practitioners seek to maintain integrity by examining the issue or problem at hand from all reasonable perspectives and seek information that will differentially test plausible rival hypotheses.

Dr. Holland raises concerns in her report regarding Sasha's schooling, his ability to stay on task, and his level of stress. Her report did not include, however, any discussions with collateral sources such as the teachers who testified at hearing.

> Forensic practitioners ordinarily avoid relying solely on one source of data, and corroborate important data whenever feasible. [. . .] When relying upon data that have not been corroborated, forensic practitioners seek to make known the uncorroborated status of the data, any associated strengths and limitations, and the reasons for relying upon the data.

Dr. Holland admitted that she did not use additional sources of information to verify her concerns about Sasha or the parties.

> Forensic practitioners recognize their obligations to only provide written or oral evidence about the psychological characteristics of particular individuals when they have sufficient information or data to form an adequate foundation for those opinions or to substantiate their findings.

Dr. Holland admitted that she did not have sufficient information upon which to opine as to the custody or visitation of Sasha. Indeed, arguably she provided nothing more than an impression of her communications with Sasha, without specialized scientific, skill, knowledge or citation upon which those impressions could be objectively judged. Nevertheless, the district court utilized the statements of Dr. Holland almost verbatim to form its order changing custody.

**16. Conclusion:** Lyuda requests that this court reverse the decision of the lower court based upon the lower court's admission, through an expert, of illegally obtained evidence. Further, Lyuda requests that in the event of reversal, this court remand the matter to the district court for review of its order causing each party to bear its own fees. The bulk of the costs and fees expended in this case arose from

Sean's illegal recording, and his unsuccessful attempt to justify that recording through the "vicarious consent" doctrine.

**17. Retainer by Supreme Court:** The clarification of the court's policy regarding the use of surreptitious audiotapes in custody matters, and the use of inadmissible tapes by experts is a matter of first impression in Nevada, and should be addressed by the Supreme Court.

Dated July 7, 2016

RADFORD J. SMITH, CHARTERED

RADFORD J. SMITH, ESQ.
Nevada State Bar No. 002791
KIMBERLY A. MEDINA, ESQ.
Nevada State Bar No. 014085
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
*Attorney for Appellant*

## VERIFICATION

1. I hereby certify that this fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track response has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Font Size 14, in Times New Roman;

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more, and contains 4993 words;

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

Dated this 7th day of July, 2016

RADFORD J. SMITH, CHARTERED

RADFORD J. SMITH, ESQ.
Nevada State Bar No. 002791
KIMBERLY A. MEDINA, ESQ.
Nevada State Bar No. 014085
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
*Attorney for Appellant*