IN THE SUPREME COURT OF THE STATE OF NEVADA

LYUDMYLA ABID,

Appellant,

vs.

SEAN ABID,

Respondent.

S.C. DOCKET NO.: 69995
District Court Case No. D-10-424830-Z

CHILD CUSTODY FAST TRACK RESPONSE

1. **Name of party filing this fast track response**: Sean R. Abid.

2. **Name, law firm, address, and telephone number of attorney or proper person respondent submitting this fast track response**:

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3. **Proceedings raising same issues. If you are aware of any other appeal or original proceeding presently pending before this court, which raise the same legal issue(s) you intend to raise in this appeal, list the case name(s) and docket number(s) of those proceedings**:

None of which Respondent is aware.

4. **Procedural history. Briefly describe the procedural history of the case only if dissatisfied with the history set forth in the fast track statement (provide citations for every assertion of fact to the appendix or record, if any, or to the transcript or rough draft transcript)**:

The case below was initiated by an initial motion seeking to hold Respondent in contempt and related relief by Appellant.(AA26) Respondent filed an Opposition and Countermotion (AA47) seeking primary custody and a Supporting Declaration.(AA90) The District Court found the Countermotion to present adequate cause for an evidentiary hearing.(AA224). The District Court also appointed, by stipulation, a psychologist to conduct a child interview.(RA01) The District Court invited briefing related to whether the Psychologist could receive certain recordings made by the Respondent could be submitted to the Psychologist.(AA277, 230) The Court ruled on the evidentiary issue on the 24th day of March, 2016. (AA1513) An evidentiary hearing was held over the course of three separate days concluding on the 25th day of January 2016. On the 1st day of March 2016, the District Court issued its decision awarding respondent Primary Physical Custody.(AA1539)

5. Statement of facts. Briefly set forth the facts material to the issues on appeal only if dissatisfied with the statement set forth in the fast track statement (provide citations for every assertion of fact to the appendix or record, if any, or to the transcript or rough draft transcript):

Pursuant to a Stipulation and Order and Amended Stipulation and Order entered on March 17, 2014 and September 15, 2014 respectively, the parties shared Joint Physical Custody of their minor child Sasha. (AA15 and AA19) After certain statements made by Sasha to his father which made clear that mother had been undermining his relationship with his father, Respondent, acting on the good

faith belief that his son was being abused, on two occasions placed a recording device in his son's backpack.(AA107) The recording device captured conversations between the minor child and Appellant which were so abhorrent they compelled Respondent to seek a change in custody in order to protect his son.(AA50)

In response to a motion to resolve certain parent-child issues, Respondent filed a Countermotion seeking primary custody (AA47). The basis of the Countermotion was the continued pattern of alienation that had been perpetrated by Appellant to the detriment of the minor child and his relationship with his father. (Id.)

At the initial hearing, Appellant spontaneously admitted that she had said horrible things to Sasha about his father.(AA1554-1558) Based upon the Parties' Stipulation, the Court appointed Psychologist Stephanie Holland to conduct a child interview.(RA01)

The Court requested briefing on whether or not Dr. Holland could receive and consider the recordings. After receiving Briefs from both sides, the Court issued a minute order allowing Dr. Holland to receive and consider the recordings. (RA02)

Dr. Holland's reports of June 5th 2016 and June 22nd 2016 provided the Court with the fact finding the Court asked for. (See reports transmitted per Order

of this Court dated May 18, 2016) The body of the reports contain no reference to the recordings. All of the statements upon which Dr. Holland relied in drawing her conclusions came from Sasha and the parties.

At the time of trial, Respondent offered testimony establishing the types of concerning things that his son had said and behaviors which compelled him to place the recording device and also offered detailed testimony establishing Appellant's total unwillingness to co-parent and the negative impact of Appellant's actions on Sasha. (AA 758-759,761,762-763,773-774,796,798,812,815,818,941-942,948,956-959,962-968,992,1080-1081,1086,1100,1111)

Appellant also offered testimony that confirmed, regardless of the existence of the tapes, the types of horrible things that she said to Sasha about his father. (AA1118,1121-1123,1126,1130-1134,1419,1421-1422,1428,1445,1469)

Appellant retained and designated her own expert (RA04) but he did not testify at trial.

Dr. Holland's trial testimony confirmed that the evidentiary admissibility of collateral data is not considered by professionals in her field and that she routinely considers recordings and other inadmissible evidence. (AA1231-1233) Specifically, Dr. Holland testified as follows:

> Q Now in the custody evaluations and interviews you've done in the past, you receive any number of documents and evidence that parents bring to you for the purposes of your evaluation; is that fair to say?

A Correct.
Q You receive audio recordings, you receive video recordings. Have you ever relied on those in previous evaluations?
A I have.
Q Private investigator reports?
A Yes. I tell parents anything and everything they think that will be helpful for me to review and consider.
Q Recorded phone conversations?
A Yes.
Q And you also conduct collateral interviews of third parties? Is that usually a common occurrence?
A Yes.
Q And your reports are oftentimes based upon those types of witness statements, right?
A Correct.
Q And you review medical records and the like if it's appropriate for the case?
A Yes.
Q Do you ever know when you're performing your court-appointed tasks whether or not the things that you're relying upon are admissible in evidence at the time of trial?
A No.
Q And are those the types of materials that you and your colleagues routinely rely on when conducting interviews and evaluations?
A Yes.

The Court admitted Dr. Holland's two reports as Court's exhibits 1 and 2. (AA1245, 1250) Dr. Holland's substantive testimony focused on the interviews with Sasha and the findings and conclusions which resulted from those interviews. (AA1246-1266). Very few questions were asked on direct examination regarding the tapes. The testimony and report of Dr. Holland, which was based solely on the

interviews of the parties and Sasha were reflected in many of the Findings of Fact entered by the Court.(AA1539)

On March 1, 2016, the District Court issued the following findings of fact:

> Dr. Holland relied upon: four separate interviews with the child; an interview of Mom; an interview with Dad; the child's medical records; email and text messages between the parties; pleadings relative to the instant litigation; and audio recordings made by Dad.
>
> The child's behavior and statements were consistent throughout the four interviews.
>
> During the interviews, the child described his father as "sneaky" and "mean." Further, the child indicated that Mom told the child that the child's Dad was "sneaky" and "mean." However, those descriptions were in direct contrast to the child's description of the child's actual experiences with his Dad.
>
> The child's own statements during the four interviews clearly established that Mom was directly and overtly attempting to influence the child's belief system regarding Dad.
>
> The child exhibited significant signs of distress and confusion. Further, the child is internalizing a belief system that is not his own. The child is confused by statements Mom makes to the child about the child's father.
>
> During Mom's interview with Dr. Holland, Mom admitted she told the child not to tell Dad what happens in Mom's home.
>
> Dr. Holland testified that children should be able to speak freely to their parents about the other parent. This type of speech restriction causes confusion and distress in children. It also creates a loyalty bind for children, especially younger children.
>
> The Parties' homes are structured differently. Dad's home is more rigid and Mom's home is unstructured. Mom indicated that child was allowed to play Call of Duty, a video game rated for mature players only, thirty (30) minutes per day. Dad does not allow the child to play Call of Duty.

> The child exhibited a preoccupation with the video game Call of Duty throughout the interviews. The child's level of preoccupation with Call of Duty was not consistent with Mom's statement that the child is only allowed to play Call of Duty thirty (30) minutes per day.
>
> Call of Duty, with or without any additional controls, is inappropriate for a five or six year old.
>
> Based on the child's own statements during the interview, the child exhibited a decreased desire to spend time with Dad.
>
> As a direct result of Mom's direct and overt actions, the child is experiencing: confusion; distress; a divided loyalty between his parents; and a decreased desire to spend time with Dad

(AA Id.)

Based upon the forgoing findings the Court awarded Respondent primary physical custody of Sasha. None of the forgoing findings which were the basis of the Court's order, reference the substance of the recordings.

6. Issues on appeal. State concisely your response to the principal issue(s) in this appeal:

Appellant, seeks the reversal of the District Court's Order determining that it was in the best interests of Sasha to reside primarily with his Father. The issues defined by Appellant in her Fast Track Statement ignore the findings of the Court which were based upon substantial evidence. Contrary to Nevada law and overwhelming authority from other jurisdictions, Appellant asserts that the Court appointed expert should not have been entitled to review certain recordings made by respondent which Appellant claims were improperly obtained. The Court appointed expert's report was based upon interviews, not recordings. The contents

of the recordings are not even mentioned in the body of the expert report. The expert report was properly admitted into evidence. The District Court did not rely solely on the expert report in making its Findings and Orders. The Decision of the District Court should be affirmed.

7. Legal argument, including authorities:

A. The Court Should Have Admitted the Recordings

Case law recognizes the ability of a parent to consent to recording conversations on behalf of a child. In Pollock v. Pollock, the 6th Circuit Court of Appeals address the issue of "vicarious consent" by summarizing the status of the law as follows:

> Conversations intercepted with the consent of either of the parties are explicitly exempted from Title III liability. The question of whether a parent can "vicariously consent" to the recording of her minor child's phone calls, however, is a question of first impression in all of the federal circuits. Indeed, while other circuits have addressed cases raising similar issues, these have all been decided on different grounds, as will be discussed below. The only federal courts to directly address the concept of vicarious consent thus far have been a district court in Utah, Thompson v. Dulaney, 838 F.Supp. 1535 (D.Utah 1993), a district court in Arkansas, Campbell v. Price, 2 F.Supp.2d 1186 (E.D.Ark.1998), and the district court in this case, Pollock v. Pollock, 975 F.Supp. 974 (W.D.Ky.1997).
>
> ....
>
> The district court in the instant case held that Sandra's "vicarious consent" to the taping of Courtney's phone calls qualified for the consent exemption under § 2511(2)(d). Accordingly, the court held that Sandra did not violate Title III. The court based this decision on the reasoning found in Thompson v. Dulaney, 838 F.Supp. 1535 (D.Utah 1993), and Silas v. Silas, 680 So.2d 368 (Ala.Civ.App.1996).

The district court in Thompson was the first court to address the authority of a parent to vicariously consent to the taping of phone conversations on behalf of minor children. In *Thompson,* a mother, who had custody of her three and five-year-old children, recorded conversations between the children and their father (her ex-husband) from a telephone in her home. 838 F.Supp. at 1537. The court held:

> [A]s long as the guardian has a *good faith basis* that it is *objectively reasonable* for believing that it is *necessary* to consent on behalf of her minor children to the taping of phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children. Id. at 1544 (emphasis added).

The court noted that, while it was not announcing a *per se* rule approving of vicarious consent in all circumstances, "the holding of [*Thompson*] is clearly driven by the fact that this case involves two minor children whose relationship with their mother/guardian was allegedly being undermined by their father." Id. at 1544 n. 8.

An obvious distinction between this case and *Thompson,* however, is the age of the children for whom the parents vicariously consented. In *Thompson,* the children were three and five years old, and the court noted that a factor in its decision was that the children were minors who "lack[ed] both the capacity to [legally] consent and the ability to give actual consent." Id. at 1543. The district court in the instant case, in which Courtney was fourteen years old at the time of the recording, addressed this point in a footnote, stating:

> Not withstanding this distinction [as to the age of the children], *Thompson* is helpful to our determination here, and we are not inclined to view Courtney's own ability to actually consent as mutually exclusive with her mother's ability to vicariously consent on her behalf.

Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998)

The District Court specifically stated that if it determined Sean to have placed the recording device in good faith, it would admit the recordings under the vicarious consent doctrine. The testimony referenced above clearly established

that as a parent, Sean in good faith acted to try to protect his son. As such if there was any abuse of discretion, it was in not admitting the recordings.

B. The Court Properly Allowed the Court Appointed Expert to Receive the Recordings Regardless of the Manner in Which They Were Obtained.

NRS 50.285 states as follows:

> 50.285 Opinions: Experts.
>
> 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**. (emphasis added)

As set forth above, in the testimony of Dr. Holland, the list of potentially inadmissible evidence routinely relied upon by experts, particularly in child custody cases, is vast. Appellant provides no authority for a distinction between illegally obtained evidence and otherwise inadmissible evidence. Respondent's counsel has diligently searched for any such distinction in Nevada law and was unable to find one. Moreover, there has been no judicial determination that the tapes were, in fact, illegally obtained.

This Court has conclusively held that even if the testimony of the expert is on the ultimate issue (such as negligence, or in this case, best interests) the expert can rely on evidence that is absolutely inadmissible. In Barrett v. Baird 908 P2d 689 (1995), this Court held as follows:

> *Barrett* first claims that the screening panel statute denies her right to a jury trial because jurors will overvalue the weight of the panel's decision without knowing that the panel's decision relies on evidence that would be inadmissible at trial. This claim lacks merit. In *Jain v. McFarland,* 109 Nev. 465, 472, 851 P.2d 450, 455 (1993), this court held that the screening panel process "is not a full trial on the merits and should not be represented as such." Indeed, NRS 41A.069, which sets out jury instructions that a jury are to be given when panel findings are introduced at trial, clearly indicates that the panel's recommendation is, in effect, "an expert opinion which is to be evaluated by the jury in the same manner as it would evaluate any other expert opinion." *Comiskey v. Arlen,* 55 A.D.2d 304, 390 N.Y.S.2d 122, 126 (1976), *aff'd* 43 N.Y.2d 696, 401 N.Y.S.2d 200, 372 N.E.2d 34 (1977). In Nevada, as in most jurisdictions, experts may rely on evidence that is otherwise inadmissible at a trial even when testifying before a jury as to an ultimate issue such as negligence.[6] NRS 41A.100, 50.285, 50.295. A jury is free to accept or reject that expert's opinion. Therefore, the fact that the screening panel's decision is introduced to the jury does not infringe on the jury's fact-finding duty even though the panel decision is based on otherwise inadmissible evidence.
>
> Barrett v. Baird, 111 Nev. 1496, 1502-03, 908 P.2d 689, 694-95 (1995) overruled on other issues by Lioce v. Cohen, 122 Nev. 1377, 149 P.3d 916 (2006) overruled by Lioce v. Cohen, 124 Nev. 1, 174 P.3d 970 (2008)

On this issue, the authority from other jurisdictions concludes that even if the recordings were illegal, an expert can rely on them. In In re Marriage of Karonis, the Illinois Appellate Court address the issue of a Court appointed expert listening to recordings that one parent claimed were made in violation of the state's eavesdropping statute. In addressing the same argument asserted by Appellant and facts nearly identical to the case before this Court. The Illinois Appellate Court held in In re Marriage of Karonis as follows:

Respondent next argues that the trial court erred in allowing the GALs to listen to telephone conversations between respondent and his children that were recorded by petitioner. Respondent alleges that the recordings violated the eavesdropping statutes (720 ILCS 5/14–1 *et seq.* (West 1996)). Respondent contends that, although the trial court properly barred the tapes from being admitted as evidence, the tapes were nevertheless effectively used as evidence, because the trial court allowed the GALs to use those tapes to formulate their recommendations to the court. Respondent asserts that allowing the GALs to use the allegedly illegally obtained tapes prejudiced him. . . .

We first note that respondent assumes that the tapes were recorded in violation of the eavesdropping statutes. He cites *Fears v. Fears,* 5 Ill.App.3d 610, 283 N.E.2d 709 (1972), and the eavesdropping statutes for the proposition that evidence obtained in violation of those statutes should not be admitted or relied upon at trial. Further, petitioner argues that the recordings did not violate those statutes and therefore the trial court improperly barred the tapes from being used as evidence at trial. We find these arguments irrelevant here because, regardless of a violation, neither the tapes nor their contents were used as evidence at trial or relied on by the trial court. Moreover, as petitioner admits, she was not harmed by the trial court's ruling since she prevailed on the custody issue.

Even assuming *arguendo* that the trial court relied on the tapes, *91 we fail to find any prejudice. The trial court based its finding on the expert testimony and documents as well as the testimony of the parties, including their temperaments, personalities, and capabilities. Respondent has merely asserted the existence of prejudice without demonstrating how he was prejudiced.

Further, if the contents of the tapes were so inflammatory as to bias the GALs, respondent could have cross-examined the GALs. Contrary to respondent's assertion that the cross-examination of the GALs concerning their personal bias would be impossible, respondent could have made an offer of proof and introduced the tapes for the limited purpose of proving bias. Such an offer would have allowed this court the opportunity to assess any prejudice allegedly arising from the tapes. Regardless, respondent chose not to listen to the tapes, even though he was a party to the taped conversations, and made no request to cross-examine the GALs. He merely argued that the eavesdropping statutes render such material inadmissible. Because he failed to act, he cannot now complain that he was prejudiced. See *In re Marriage of Pylawka,* 277 Ill.App.3d 728, 734, 214 Ill.Dec. 651, 661 N.E.2d 505 (1996).

> To the extent respondent asserts that the GALs cannot consider inadmissible evidence in forming their opinions, his argument is baseless. Section 506 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/506 (West 1996)) requires the GAL to defend and protect the best interest of the child whom he or she represents. In discharging his or her duty, the GAL will review or consider all kinds of information regarding the child, both admissible and inadmissible at trial. Such information assists the GAL in determining the existence of problems that might cause the child psychological or physical harm. We fail to see any prejudice where the GAL listens to information that may be inadmissible at trial. Compelling reasons of public policy dictate that the GAL perform duties essential to the health and welfare of the child whom the GAL represents. See *Scheib v. Grant,* 22 F.3d 149 (7th Cir.1994). Paramount among these is the GAL's duty to ascertain and defend the child's best interests. Reviewing the tapes materially advanced the GALs' ability to determine and defend the child's interests here. Accordingly, we find that the trial court did not err in allowing the GALs to listen to the tapes.

In re Marriage of Karonis, 296 Ill. App. 3d 86, 89–91, 693 N.E.2d 1282, 1285–86 (1998)

The Louisiana Court of appeal also dealt with the exact same set of facts as that currently before this honorable Court. In Smith v. Smith, a Court appointed expert reviewed recordings that were alleged to have been made in violation of the state's wiretapping statute. The Court held as follows:

> The trial court has great discretion in determining the qualifications of experts and the effect and weight to be given to expert testimony. Absent a clear abuse of the trial court's discretion in accepting a witness as an expert, an appellate court will not reject the testimony of an expert or find reversible error. *Belle Pass Terminal, Inc. v. Jolin, Inc.,* 92–1544 (La.App. 1st Cir.3/11/94), 634 So.2d 466, 477, *writ denied,* 94–0906 (La.6/17/94), 638 So.2d 1094.
>
> Michaelle Duncan contends that the trial court erred in allowing Dr. Pellegrin to testify and in refusing to remove or disqualify Dr. Pellegrin as an expert, since she reviewed and rendered an opinion based on that

> allegedly illegal wiretapped conversation. Again having found that Markus Smith's actions were not in violation of La. R.S. 15:1303, and that the wiretapped conversation was admissible into evidence, we find no abuse of the trial court's discretion in allowing Dr. Pellegrin to testify and render an opinion in this matter based on that conversation. Accordingly, we find no merit in this assignment of error.

Smith v. Smith, 2004-2168 (La. App. 1 Cir. 9/28/05), 923 So. 2d 732, 742)

Appellant cites no Nevada Authority which would exclude the report of Dr. Holland or her testimony. Because of the limitations on page length imposed on Respondent, a full analysis of Federal Rule of Evidence 703 (the counterpart to NRS 50.285) was not possible, but would likely be very helpful to the Court.

C. The District Court has Broad Discretion on Evidentiary Issues and on Determining the Best Interests of the Child.

The District Court has extremely Broad discretion regarding issues pertaining to child custody. In Rico v. Rodriguez, this Court held as follows:

> The district court has broad discretion in making child custody determinations, and we will not disturb the district court's custody determination "absent a clear abuse of discretion."[2] This court, however, must also be satisfied that the district court's determination was made for appropriate reasons.[3] The district court's factual determinations will not be set aside if supported by substantial evidence.[4]
> Under NRS 125.480(1), "[i]n determining custody of a minor child ..., the sole consideration of the court is the best interest of the child." In determining the child's best interests, the court may consider several factors, including which parent is more likely to allow the child to have a "continuing relationship with the noncustodial parent."

Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005)

Similarly, the District Court's determination to allow Dr. Holland to consider the recordings and to admit her report were well within the trial Court's broad discretion. In Sheehan & Sheehan v. Nelson Malley & Co., this Court held as follows:

> On prior occasions, we have explained that "[t]he trial court is vested with broad discretion in determining the admissibility of evidence. The exercise of such discretion will not be interfered with on appeal in the absence of a showing of palpable abuse."
> *State ex rel. Dep't Hwys. v. Nev. Aggregates,* 92 Nev. 370, 376, 551 P.2d 1095, 1098 (1976) (citations omitted).

Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 492, 117 P.3d 219, 226 (2005)

The breadth of this discretion also extends to determinations related to expert witnesses. (See Prabhu v. Levine, 112 Nev. 1538, 930 P.2d 103 (1996)

Finally, given the fact that so much evidence which supported the findings of fact and decision of the Court had nothing to do with the tapes and everything to do with the child interviews, if this Court finds the provision of the tapes to Dr. Holland be error, it would be harmless error.

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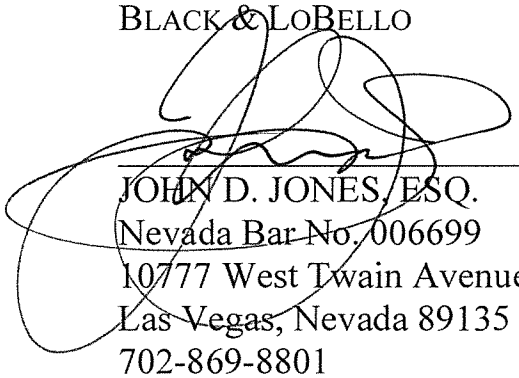
CONCLUSION

Based upon the fact that decision of the District Court was based upon substantial evidence, not including the recordings, it should be affirmed.

RESPECTFULLY SUBMITTED this 18 day of August, 2016.

BLACK & LOBELLO



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VERIFICATION

1. I hereby certify that this fast track response 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:

[x] This fast track response has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman font; or

[ ] This fast track response has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3E(e)(2) because it is either:

[x] Proportionately spaced, has a typeface of 14 points or more, and contains **4745** words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

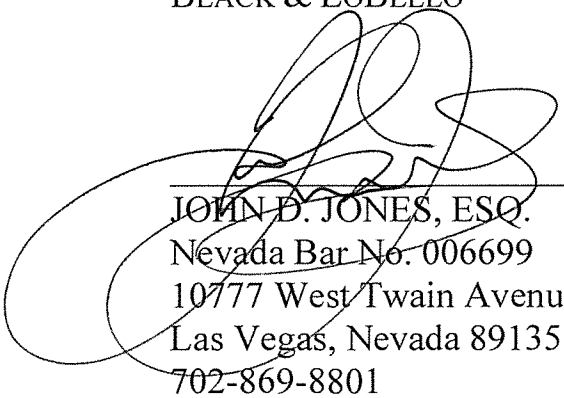
[ ] Does not exceed ___ pages.

3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast track response and that the Supreme Court of Nevada may impose sanctions for failing to timely file a fast track response. I therefore certify that the

information provided in this fast track response is true and complete to the best of my knowledge, information, and belief.

RESPECTFULLY SUBMITTED this 18 day of August, 2016.

BLACK & LOBELLO



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PROOF OF SERVICE

I, Cheryl Berdahl, declare:

I am over the age of eighteen (18) years and not a party to the within entitled action. I am employed at Black & LoBello, 10777 West Twain Avenue, Las Vegas, Nevada 89135. I am readily familiar with Black & LoBello's practice for collection and processing of documents for delivery by way of the service indicated below.

On August 18, 2016, I served the following document:

RESPONDENT'S CHILD CUSTODY FAST TRACK RESPONSE

On the interested party(ies) in this action as follows:

Radford J. Smith, Esq.
Radford Smith Chtd.
2470 St. Rose Pkwy. Suite 206
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Attorney for Appellant,
Lyudmyla Abid

By Mail. By placing said document in an envelope or package for collection and mailing, addressed to the person(s) at the address(es) listed above, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing of mail. Under that practice, on the same date that mail is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on August 18, 2016, at Las Vegas, Nevada.

Cheryl Berdahl