IN THE SUPREME COURT OF THE STATE OF NEVADA

LYUDMYLA ABID,

Appellant,

v.

SEAN ABID,

Respondent.

Supreme Court No. 69995
Supreme Court No. 71042
District Court Case No. D-10-424830-Z

MOTION TO CONSOLIDATE SUPREME COURT NO. 69995 AND SUPREME COURT NO. 71042

Appellant, LYUDMYLA ABID ("Lyuda") hereby moves to consolidate two appeals – Supreme Court No. 69995 and 71042 pursuant to NRAP 3(b). Both appeals stem from the same district court case (D-10-424830-Z) with the same parties and address related issues.

The first appeal (69995) arose from the Findings of Fact, Conclusions of Law and Decision entered on March 1, 2016. Sean and Lyuda were divorced by Decree filed February 17, 2010. Under the stipulated Decree, the parties agreed to joint legal and physical custody of their minor child Aleksandr Anton Abid, born February 13, 2009. The parties confirmed their agreement of joint legal and physical custody in a stipulated order filed September 9, 2014, arising from a hearing in December 2013. In November 2014, Lyuda moved Judge Linda Marquis, Department B of the Eighth Judicial District

Court, to issue an Order directing Sean to show cause why he should not be held in contempt for failing to provide the child's passport to Lyuda so that she could travel with the child. She further moved to address the provision in the September 9, 2014 order regarding her time with Sasha after school on the days she was scheduled to have him in her care.

By Countermotion filed February 4, 2015, Sean moved to modify primary custody. He based his motion almost entirely upon an audio recording that Sean surreptitiously obtained by placing a recording device into Sasha's school backpack. 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 vehicle. 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 identifies the surreptitious recording of an in person conversation between two persons without the consent of one of those persons as a crime. 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.

Over Lyuda's continued objection, the district court permitted Sean to provide the surreptitiously obtained and selectively altered recordings to Dr. Stephanie Holland who conducted a child interview in the case. Dr. Holland's report included a transcription of

the tape and numerous references to the tape. The contents of the tape formed the basis of the questions she asked in her interview 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.

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. The Court, based upon and consistent with Dr. Holland's recommendation, modified the 2015 summer visitation schedule consistent with Dr. Holland's recommendation.

After Dr. Holland interviewed the parents and Sasha, she made recommendations arising from those interviews and her review of the tape recordings. She did not recommend a modification of custody, acknowledging that she did not have sufficient basis upon which to make such a recommendation.

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." The district court acknowledged that the tapes on their face were violative of NRS 200.650, but that it would permit the admission and use of the tapes if Sean could meet the elements of the "vicarious consent doctrine." Those elements At the evidentiary hearing, Sean testified that he understood

that Lyuda, her husband, Ricky Marquez ("Ricky"), and her daughter Iryna (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.

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 device used to record them. Instead, he submitted, what he admitted were selected portions of the recordings that he edited with software that he could not identify, and that he erased from his computer.

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. The Court found that the doctrine of vicarious consent does not extend to the facts presented 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.

Remarkably, in that order the district court indicated that content of the illegally obtained tapes would be admissible as a basis for the testimony and report of Dr. Holland. At further hearings, the Court admitted the report of Dr. Holland, containing a transcription of the altered tapes. Lyuda objected at those hearing, and under her

counsel's cross examination, Dr. Holland admitted that if the tapes were found inadmissible and illegal by the district court (something the district court had already done), then experts in her position would not rely on such evidence. Nevertheless, the district court permitted the admission of Dr. Holland's report, and permitted her testimony regarding the tape recordings and their content.

Equally important, Dr. Holland testified that her interviews of Sasha and the parties did not grant her adequate basis to recommend a modification of custody. Dr. Holland's written report also indicated that given the scope of the ordered child interview, Lyuda and Sean were not evaluated and therefore, definitive recommendations regarding custody were not requested by the Court as a result, Dr. Holland did not offer any definitive recommendations.

By Findings of Fact, Conclusions of Law, and Decision entered on March 1, 2016, the Court entered into an Order granting Sean's Motion that he be granted primary physical custody of Sasha. The Court relied upon Dr. Holland's testimony and report to form the basis of its order changing custody. The district court held that the modification was justified by the ill effects to the child of Lyuda's parental alienation. The Court's findings did not materially consider, or misstated, other evidence or testimony that was presented, including the testimony of Sasha's two teachers, Ms. Susan Abacherli and Ms. Masa, who 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.

Moreover, the did not address the presumption that joint custody is in the best interest of the child when the parties have previously agreed to joint custody. The findings upon which the district court supported its order should have not been admitted, were not based upon substantial evidence, and constituted an abuse of discretion.

The second appeal (71042) arose from the Order re: The Court's Minute Order of July 14, 2016 entered on July 27, 2016. On May 23, 2016, Sean filed a Motion to Reapportion Dr. Holland's Fees in the district court. In that motion, Sean requested that the district court enter an order directing Lyuda to pay for Dr. Holland's fees. Lyuda filed an Opposition to that motion and a Countermotion for Stay, Sanctions and attorney's fees on June 9, 2016. In that opposition and countermotion, Lyuda requested that Sean's motion be denied and she countermoved for a stay of Findings of Fact, Conclusions of Law and Decision entered on March 1, 2016. The parties were before the district court for a hearing on Sean's motion and Lyuda's opposition and countermotion. By an Order entered on July 27, 2016, Sean's motion was granted and Lyuda's countermotion was denied.

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Both appeals (Supreme Court No. 69995 and 71042) stem from the same district court case (D-10-424830-Z) with the same parties and address related issues. Lyuda therefore requests that the Supreme Court consolidate the two appeals pursuant to NRAP 3(b).

Dated this 25th day of August, 2016.

RADFORD J. SMITH, CHARTERED

Garima Varshney

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CERTIFICATE OF SERVICE

I certify that on the 25th day of August, 2016, I served a copy of this MOTION TO CONSOLIDATE SUPREME COURT NO. 69995 AND SUPREME COURT NO. 71042 upon all counsel of record by mailing it by first class mail with sufficient postage prepaid to the following address:

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