IN THE SUPREME COURT OF THE STATE OF NEVADA

LYUDMYLA ABID,

Appellant,

v.

SEAN ABID,

Respondent.

Supreme Court No. 69995

REPLY TO RESPONSE TO FAST TRACK STATEMENT

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1. **The Court's Findings Rely Solely on the Interview Report of Dr. Holland and the Inadmissible Evidence in It, and did not Consider the Direct Evidence Presented at Trial**

Other than the child's name, birthdate and nature of the dispute, ***all*** of the "findings" of the district court are statements from, or based upon, Dr. Holland's report. A.App Vol. 7, 1539-1548. The Findings do not reference or address any of the testimony of Lyuda, Sean, the child (Sasha)'s two teachers, Susan Abacherli (A.App. Vol.12, 705-727) and Amy Massa, (A.App. Vol. 12, 727-747), Lyuda's husband, Ricky Marquez (A.App. Vol. 17, 1350-1392), or Sean's wife, Angela Abid, (A.App. Vol.13, 1053-1077). Even when the district court reviewed the best interest factors under what is now NRS 125C.0035, the only "facts" she referenced were Dr. Holland's observations. *See* A.App. Vol. 7, 1542, at lines 24 "Dr. Holland indicates", A.App. Vol.7, 1543 at line 6 "Dr. Holland testified." Contrary Sean's argument on appeal, the district court's findings did not cite, analyze, or reference any of the testimony Sean cites in his Fast Track Response as supporting the district court's order changing custody.[1]

In *Davis v. Ewalefo,* 131 Nev. Adv. Rep. 45, 352 P.3d 1139, 1142 (2015), this Court recognized the deference given to the discretionary custody determinations of a district court, but found that "deference is not owed to legal error," "or to findings

[1] There may be good reason the district court did not cite Sean's testimony; it specifically found Sean's testimony "less than honest." A.App. Vol.7, 1529, line 16.

so conclusory they mask legal error." (Citations omitted). This Court emphasized the requirement of specificity, "Crucially, the decree or order must tie the child's best interest, as informed by specific, relevant findings respecting the [NRS 125C.0035] and any other relevant factors, to the custody determination made." The court emphasized the requirements of specificity in NRS 125.510(5), now 125C.0045(5), and cited with approval *Smith v. Smith,* 726 P.2d 423, 426 (Utah 1986)(deeming it "essential" that a custody determination set forth the basic facts which show *why* the conclusion is justified"). *Davis v. Ewalefo,* Id. at 54, 352 P.3d at 1143. The district court's findings fall far below that mark.

Dr. Holland's recitation of statements of the child are not substantive evidence. EDCR 5.13(c) specifically limits the use of interview and outsource evaluation reports: "A written report may be received as direct evidence of the facts contained therein that are within the personal knowledge of the specialist." Like NRS 50.285, Fed. R. Evid. 703 permits the use of inadmissible evidence if it is "those kinds of facts or data" reasonably relied upon by "experts in the particular field." The notes of the advisory committee on 2000 Amendments to that Rule state:

> Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted.

The various statements by the child that Dr. Holland relied on to reach her opinion were not within her personal knowledge, but nevertheless were treated as direct

evidence by the district court. Worse, we know that the district court did not limit its view of that evidence to the basis for Dr. Holland's recommendations, because Dr. Holland ***did not recommend a change of custody***, only "further study," and agreed that the information she gleaned in the interviews could not form the basis of a recommendation for a change of custody. *See,* Fast Track Statement, page 19.

By so doing, the district court functionally denied Lyuda due process. Dr. Holland's interactions with the child were not recorded by video or audio. Lyuda had no ability to rebut Dr. Holland's observations of the child except by providing witness testimony that contradicted them. The court ignored that evidence, and because Dr. Holland did not do a complete custody assessment, she did not interview the child's teachers or other collateral sources presented at trial, or use that information in her report. A.App. Vol. 16, 1231-1323, A.App. Vol. 17, 1326-1344.

2. Neither Federal or Nevada Law Allows the Use of Illegally Obtained Tapes in any Matter

Sean argues that the court should review FRE 703 for edification of the federal law on the use by experts of *illegally* obtained recordings. FRE 703 does not address illegally obtained evidence, only "inadmissible" evidence. Federal law prohibits the use of illegally obtained recordings in all federal or State tribunals. 18 USC §2511(1)(a) criminalizes the intentional interception of oral communications. In relevant part, 18 USC §2515 prohibits the "contents" or "evidence derived therefrom" from being received in any "trial" or "hearing" in or before "any court"

of "a State." 18 USC §2515 has been applied in civil cases between spouses. *See, e.g., Nations v. Nations,* 670 F. Supp. 1432 (W.D. Ark. 1987) and discussion of cases therein.

Here, Dr. Holland's report, admitted at trial, contained a ***transcript*** of the recordings (Holland Report, page 11-14) in violation of NRS 200.650 and 18 USC § 2515. She specifically references the tapes in forming her opinions on page 6 of her report. Sean's argument that Dr. Holland's report also obtained her observations during interviews of the child and the parties ignores the obvious. The district court, over Lyuda's objection provided the illegally obtained tapes to Dr. Holland, and permitted her to review the tapes before the interviews. That decision tainted the process. It is apparent from a review of the transcript of the altered tapes in Dr. Holland's report (at pages 11-14) and a comparison of it to her interview questions of the parties and the child, and the methods she used during those interviews, that she was looking for signs of alienation she may not have otherwise found absent the content of the tapes.

Dr. Holland never indicated that illegally obtained recordings were reasonably relied upon by experts in her field; she stated the opposite. *See,* Fast Track Statement, page 15. Industry guidelines agree. For example, the AFCC Guidelines for Brief Focused Assessment, section XV(1)(b) (2009), limit collateral source recordings to "video and audio data that have been **legally** obtained."

Sean suggests that an expert should not be tasked with the determination whether a recording is admissible; Lyuda agrees. Such a process is needlessly prejudicial. Because the act of disseminating, or even attempting to disseminate, recordings of oral communications made in violation of NRS 200.650 is a crime, this Court should impose a rule that requires a district court to make the determination of admissibility of an audio recording of a third party conversation *before* it is provided to an expert or anyone else. That was not done here, and that failure resulted in a report prejudiced by the illegally obtained material that the district court solely relied upon to modify *custody* of a child.

3. The District court Failed to Consider the Parties' Agreement of Joint Custody

The district court did not address the presumption arising from the parties' two previous stipulations. The court must give deference to parents' agreements regarding the care of a child. *See, Harrison v. Harrison,* 132 Nev. Adv. Rep. 56, 376 P.3d 173 (2016). The district court failed to do so here, and thus abused its discretion.

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Dated: September 22, 2016

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 1226 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 22nd day of September, 2016

RADFORD J. SMITH, CHARTERED

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CERTIFICATE OF SERVICE

I certify that I am an employee of Radford J. Smith, Chartered and that on this date Appellant's Reply to Response to Fast Track Statement was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

John D. Jones, Esq.

Garima Varshney

Employee of Radford J. Smith, Chartered