

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELIEZER MIZRACHI,

Appellant,

v.

DIANE MIZRACHI,

Respondent.

Supreme Court No.66176

District Court Case No. D-15-47964-D

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Tracie K. Lindeman
Clerk of Supreme Court

Appeal from an Order Clarifying Holiday Visitation.
Eighth Judicial District Court – Family Division, Clark County, Nevada
The Honorable Jack B. Ames, Senior Judge, Dept. C

CHILD CUSTODY FAST TRACK STATEMENT

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v.

DIANE MIZRACHI,

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Supreme Court No.66176

District Court Case No. D-13-479664-D

CHILD CUSTODY FAST TRACK STATEMENT

- 1. Name of appellant filing this fast track statement:** ELIEZER MIZRACHI
- 2. Name, law firm, address, and telephone number of attorney submitting this fast track statement:** Rachel M. Jacobson, Esq., Jacobson Law Office, Ltd., 64 North Pecos Road, Suite 200, Henderson, Nevada 89074, Tel: (702) 601-0770
- 3. Judicial district, county, and district court docket number of lower court proceedings:** Eighth Judicial District Court of the State of Nevada in and for the County of Clark, Case Number: D-13- 479664-D
- 4. Name of judge issuing judgment or order appealed from:** Judge Jack B. Ames, Senior District Court Judge.
- 5. Length of trial or evidentiary hearing.** NA. Motion hearing lasted approximately 31 minutes.
- 6. Written order or judgment appealed from:** “Order Regarding May 19, 2014 Hearing” filed on June 25, 2014.
- 7. Date that written notice of the appealed written judgment or order’s entry was served:** July 6, 2014

8. **If the time for filing the notice of appeal was tolled by the timely filing of a motion listed in NRAP 4(a)(4),**
(a) specify the type of motion, and the date and method of service of the motion, and date of filing: N/A
(b) date of entry of written order resolving tolling motion: N/A
9. **Date notice of appeal was filed: July 24, 2014**
10. **Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a), NRS 155.190, or other: NRAP 4(a).**
11. **Specify the statute, rule or other authority, which grants this court jurisdiction to review the judgment or order appealed from: NRAP 3A(b)(7) & NRS 2.090**
12. **Pending and prior proceedings in this court. None.**
13. **Proceedings raising same issues. None known.**
14. **Procedural history. Briefly describe the procedural history of the case (provide citations for every assertion of fact to the appendix or record, if any, or to the transcript or rough draft transcript):**

The Parties, Appellant ELIEZER MIZRACHI (“Eliezer”) and Respondent DIANE P. MIZRACHI (“Diane”) married in December of 1999. Together, they have one child named NOVA MIZRACHI (“NOVA”) who was born on April 30, 2006. AA 000001. On May 8, 2013, Diane, through counsel, filed her Complaint for Divorce and the following day, on May 9, 2013, also through counsel, Diane filed a motion for preliminary relief. The record provides that Eliezer was served with the Complaint for Divorce and Diane’s Motion on May 22, 2013. Shortly thereafter, on June 5, 2013, an Answer was filed on Eliezer’s behalf. This Answer was

drafted and prepared for Eliezer's signature by counsel for Diane following brief negotiations between the parties through Diane's attorney. As both Answer and Decree of Divorce were given to Eliezer by Diane's counsel on the same day, the record shows that Eliezer signed his Answer and the parties' Decree of Divorce both on June 4, 2013. Likewise, on that same day, Eliezer also signed the Stipulation and Order to Vacate hearing which was also provided to him by counsel for Diane. AA 000019; AA 000020; AA 000030.

The parties' Decree of Divorce reflects that Eliezer agreed to waive interest in certain community property, to wit: the parties' marital residence, real properties in New Mexico; real property in Arizona; and real property timeshare located at Tahiti Village in Las Vegas, Nevada. AA 000027-000028. Eliezer was comfortable with this waiver of interests in property as he was granted visitation with the parties' minor child "for the Jewish holidays every year." AA 000025; AA 000074. The parties also agreed to share joint physical custody of Nova. They agreed that Nova would be with Diane on Wednesday, Thursday and Friday each week and every other Tuesday. And Nova would be with Eliezer on Saturday, Sunday and Monday each week and every other Tuesday. AA 000025. Counsel for Diane drafted the parties' agreement by preparing their Decree of Divorce which he ultimately filed on June 21, 2013. AA 000024.

Despite having drafted the agreement and having enjoyed the benefits of her personal property awards therein, on April 16, 2014 Diane, via counsel, filed a “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. A hearing on this Motion was held on May 19, 2014. At that time, Senior Judge Jack Ames ordered, *inter alia*, as follows:

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 entry of this Order, Eliezer filed his Notice of Appeal. AA 000158.

15. Statement of facts. Briefly set forth the facts material to the issues on appeal (provide citations for every assertion of fact to the appendix or record, if any, or to the transcript or rough draft transcript):

The parties met in 1998. Approximately two years later, on March 16, 2000, the parties married in Las Vegas, Nevada. AA 000008. Since the time of their first meeting and the entire duration of the marriage, Eliezer held himself out to the community and to Diane as Jewish. Diane shared in Eliezer’s Jewish heritage and was, at the very least, aware of it. AA 000108-000118. Diane saw photographs taken at Eliezer’s bris and his bar mitzvah. Diane celebrated Jewish holidays,

danced at various bar and bat mitzvahs, enjoyed traditional Israeli/Jewish foods, danced traditional Israeli and Jewish dances, was surrounded by Hebrew, watched Eliezer say the Kadish (Jewish Mourner's prayer) over his father when he passed away, maintained a Jewish calendar in the home referencing all Jewish holidays, and placed a mezuzah on the front door of their marital home marking it a "Jewish home." And, according to Diane herself, through the parties' marriage, she demonstrated respect to the Jewish religion and even thereafter continues to have the Mezuzah on the front door of her home though Eliezer no longer occupies the marital residence. AA 000144. AA 000151.

It is undisputed that in the 13 years that she was married to Eliezer, Diane was exposed to Eliezer's Jewish faith, family and community as well as all of the Jewish holidays. At minimum, Diane was able to learn the Jewish faith included many holidays including, but not limited to, Rosh Hashanah, Yom Kippur, Sukkot, Simchat Torah, Hanukkah, Tu B'Shvat, Purim, Passover, Lag B'Omer, and Shavuot. Diane was also exposed to the knowledge that the duration of most Jewish holidays was more than one day. *Id.* AA 000076; AA 000108-000118. And any cursory internet search would yield a list of all of those holidays. Further, in her Reply, Diane states she had a Jewish calendar in their marital home which referenced the "other days." AA 000144. Diane further states that the parties' disputes regarding Jewish holidays "date back to Thanksgiving, 2013." AA

000143. At that time, the parties were still within the 6 month period following entry of their Decree of Divorce.¹ In her Reply, Diane also points out that she rescheduled her vacation time (in or around November/December of 2013) to accommodate Eliezer's Passover visitation with their daughter. AA 000145. AA 000152.

In her Reply, on page 3, lines 20-28, Diane also alleges that Eliezer would not allow Diane to take Nova to church during the marriage. In this comment, Diane essentially tells the Court that she was aware of Eliezer's commitment to Judaism; yet, she still presents that she believed that, at the time they negotiated their Decree of Divorce and though it was never restricted as such, the Jewish holidays awarded to Eliezer should have been limited to only four. AA 000144.

When the parties negotiated the terms of their divorce, as mentioned above, Diane used these holidays to negotiate what she wanted in the divorce. As it was most important to Eliezer to be able to share the Jewish holidays Nova, Eliezer waived interest in community property to which he otherwise had rightful claim. Thus, as counsel for Diane authored a proposed Decree of Divorce which specifically granted to Eliezer "that Dad will have the minor child for *the* Jewish

¹ As Diane alleges the disputes regarding Jewish holidays arose in November of 2013, she was still within the 6 month period under NRCP 60(b) to bring forth a Motion to set aside the Decree as it relates to the Jewish holidays. Instead, Diane waited until April of 2014 to file her underlying Motion which is hereby presented to have been, therefore, untimely and inappropriate.

holidays *every year*,” Eliezer signed the Decree. AA 000025. Contrary to her agreement, however, Diane later began denying Eliezer his visitation with their minor child on Jewish holidays. AA 000077. AA 000104. Counsel for Diane also sent letters to Eliezer initially stating that “the Decree of Divorce does not set forth a holiday visitation schedule” and suggesting that the parties enter the Court’s default holiday schedule. AA 000084-000085. But, as Eliezer pointed in his response letter to counsel, the Decree DID include a holiday schedule and was the reason he accepted the terms of the Decree. AA 000087. AA 000090. AA 000097. AA 000102. AA 000104. In his letter, Eliezer also attempted to be reasonable with counsel for Diane but it quickly became apparent that Diane’s sole desire was to limit the Jewish holidays to only four days a year. *Id.* To that end, on April 16, 2014, Diane filed a Motion asking the Court to “clarify” or “amend” the parties’ Decree of Divorce in respect to the Jewish holidays and specifically requested that same be limited to the 4 holidays provided in the department’s default holidays schedule. AA 000031.

16. 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.
- 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.

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

16. Legal argument, including authorities:

a) Standard of Review.

As the matter necessarily involves construction of contract, the Court reviews the matter *de novo*. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). In evaluating a district court's decision regarding contract interpretation, the Court must be satisfied that the lower court reached its decision while construing the contract or agreement most strongly against the authoring party. *Mullis v. Nevada National Bank*, 98 Nev. 510, 513, 654 P.2d 533, 535 (1982).

As this contract involves an agreement regarding child custody, the Court may find that such matter rests in the District Court's sound discretion, *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996), and this Court will 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, however, 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).

b) The Standard for Modification of Child Custody Agreements.

When parents reach a custodial order by agreement, the Nevada Supreme court has held that the terms of the parties' agreement will control except when the parties move the Court to modify the custodial arrangement. *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213, 226 (2009). When modifying child custody agreements, the District Court must apply Nevada child custody statute and case law. *Id.* at 227. In this regard, Nevada Revised Statute (NRS) 125C(2) provides, "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." *Emphasis added. See also Truax v. Truax*, 110 Nev. 437, 874 P.2d 10 (1994). Thus, any modification to an order of joint physical custody must demonstrate it is in the child's best interests to be appropriate. NRS 125.510(2), *Rivero*, 216 P.3d 227.

Here, the Motion brought before the District Court was not presented as one for modification of custody. Rather, the Motion was one for clarification or, alternatively, to amend the Decree and focused solely on the construct of contract. At the time of hearing on this Motion, the District Court granted Respondent's request *for clarification* and, without findings of fact, clarified the contract terms

exactly per Respondent's request for interpretation. In doing so, the District Court abused its discretion.

c) 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 in Failing to Construe the Ambiguity Against the Drafter.

In evaluating the terms of the agreement, the District Court erred by finding the language "the Jewish holidays" to be ambiguous as the language is not subject to more than one reasonable interpretations. *See Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003). Under Nevada contract law, "[a] contract is ambiguous only when it is subject to more than one reasonable interpretation," *State ex rel. Masto v. Second Judicial Dist. Court ex rel. County of Washoe*, 199 P.3d 828, 832 (Nev. 2009), and courts are not free to modify or vary the terms of an unambiguous agreement, *Kaldi v. Farmers Ins. Exch.*, 21 P.3d 16, 21 (Nev. 2001).

The district court erred in finding that "there was not a clear understanding between the two parties at the time and there needs to be a clarification on the Jewish holidays ..." AA 000155. To understand this error, it is helpful to consider the District Court's rationale in denying Diane's request for "Monday holidays."

At the time of the hearing, the district court reasoned and held that the Court is not going to adopt Monday holidays as the parties *knew those existed at the time they entered the Agreement.*" AA 000156. As there was no reference

in the record to either party having knowledge of Monday holidays at the time they entered their Decree of Divorce, the district court simply assumed this fact. Likewise, as provided in the parties' papers, the district court should have found that Diane was well aware, or should have been well aware at the time the parties entered their agreement, of the Jewish holidays. Further, there was enough evidence to support that Diane was aware, or should have been aware, that many of the Jewish holiday last more than one day in duration. Counsel for Diane, at the time of the May 19, 2014 hearing, also advised the district court that he represented Diane during the divorce action and "she and her husband reached an agreement on issues which are reflected in the decree. They - - even though I discussed with her that there were other issues involving holidays and things like that, she told me and said they thought they could work all of that out." AA 000169.

While the district court applied this rationale to the request regarding Monday holidays, it failed to apply it to the request regarding Jewish holidays. The District Court should have denied Diane's request to restrict the Jewish holidays as the district court should have found that Diane knew or should have known of the Jewish holidays when she entered the agreement that she drafted. Indeed, in her Reply to Eliezer's Opposition and Countermotion, Diane admits having a Jewish calendar on the wall of the marital home and honoring Eliezer's

Jewish faith during the marriage. AA 000142. Further, in her Reply, Diane also admitted that, following the entry of the Decree of Divorce, she modified her vacation schedule to accommodate Eliezer's Passover visitation (which lasted well in excess of one day) and thus indicating performance consistent with Eliezer's understanding of the agreement. AA 000145. AA 000152.

Additionally, after finding that the language was ambiguous and that "there needs to be clarification on the Jewish holidays," the district court abused its discretion by failing to follow the established Nevada rule requiring that an agreement be construed most strongly against the authoring party. *See Mullis v. Nevada National Bank*, 98 Nev. 510, 513, 654 P.2d 533, 535 (1982); *see also Estwin Corp. v. Prescription Ctr. Pharmacy*, 93 Nev. 251, 563 P.2d 78 (1977).

It is a well settled rule that "[i]n cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language." *See Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992) *citing Jacobson v. Sassower*, 489 N.E.2d 1283, 1284 (N.Y. 1985). Since the divorce agreement was prepared by counsel for Diane, she must ultimately bear the responsibility for deficiencies or ambiguities. *See Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992) *citing E.F. Hutton Group, Inc. v. U.S. Postal Service*, 723 F. Supp. 951, 960 (S.D.N.Y. 1989). Thus, assuming *arguendo* that the district court correctly identified the term

“the Jewish holidays” as ambiguous regarding, the court erred by failing to construe the ambiguity against the drafter not in her favor as it did. *Id.*

Further, not only did the district court err in failing to construe the language of the Decree in light least favorable to the drafter, the district court also erred when it essentially modified the holiday schedule though it specifically found there was no change of circumstances. AA 000156. Further, instead of addressing the child’s best interests, the District Court, in holding that “Jewish holidays” should be limited to 4 one-day holiday visitation, reasoned: “And the Court thinks it’s unreasonable to ask that one parent give up five, six, seven, eight days of – for a holiday, a religious holiday for the one parent to have to give up those days. So and apparently, the other departments must agree, because they - - they’ve all adopted these.” AA 000183. And further, regarding the duration of each Jewish holiday, Judge Ames added, “But I’m going to keep it the same, treat each other religions the same. So it will be one day. Now I would suggest that if, you know, I had to go onto the internet and look up some of these holidays because I had never heard of them, the Jewish holidays, and see what they were.” AA 000184.

When asked for a basis for the ruling limiting Jewish holidays, Judge Ames replied, “I found that it’s not a clear - - there was not a clear understand, it needs to be clarified and so I’m clarifying it.” AA 000185. At no point did the district court make any findings regarding the child’s best interest; at no point did the

district court construe the ambiguity it found in light least favorable to the drafter; and at no point did the District Court attempt to understand the parties' intent at the time they entered the agreement. Judge Ames simply found that the language "the Jewish holidays" required clarification seemingly based upon his own unawareness of Jewish holidays and simply applied the clarification proposed by Diane – the author of the agreement – as it was apparently consistent with his own interpretation. AA 000184. In acknowledging his own lack of knowledge regarding Jewish holidays, Judge Ames pointed out that he had to look up those holidays online. But Judge Ames also apparently generalized his own level of knowledge regarding Jewish holidays onto that of the Respondent. In doing so, the district court failed to consider that subjective facts of the case which included the fact that Diane had been married to a Jewish man for 13 years, was immersed in that culture for at least 13 years, and herself reported having seen those holidays on her own Jewish calendar prior to entering the Decree of Divorce. Inconsistently, however, regarding another request in this matter, Judge Ames denied Diane's request for a change in the Decree of Divorce as he reasoned "you could have gone on the internet on June - - in June of 2013 when this divorce decree was entered. So if there's no agreement between the parties, then I'm not going to make a ruling on it and it'll stand the same as it was." AA 000189.

Had Judge Ames applied this rationale to the ambiguity he found regarding “the Jewish holidays,” he could have simply reasoned that Diane could have gone on the internet and pulled a list of the Jewish holidays. He certainly should have done so had he followed established Nevada law in construing an agreement against the drafter. In any event, again, the record itself also sufficiently showed Diane admitted having a Jewish calendar and being aware of the “other days.” AA 000142. Moreover, in denying Diane’s request for Monday holidays, the Court reasoned “the parties knew that those existed at the time they entered into the agreement.” AA 000191. Likewise, it is presented the parties knew what Jewish holidays existed when they entered the agreement. And, in the event Diane did not know, the purported ambiguity should have been construed against her as the author of the agreement.

18. Issues of first impression or of public interest. Does this appeal present a substantial legal issue of first impression in this jurisdiction or one affecting an important public interest: Yes ___ No x

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 statement has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Version 14 in 14 pt. Times New Roman; or

This fast track statement 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 statement complies with the page- or type-volume limitations of NRAP 3E(e)(2) because it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains 4,101 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 statement and that the Supreme Court of Nevada may impose sanctions for failing to timely file a fast track statement, or failing to raise material issues or arguments in the fast track statement. 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 9th day of February, 2015.

JACOBSON LAW OFFICE, LTD.

/s/ Rachel M. Jacobson

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CERTIFICATE OF SERVICE BY MAILING

Pursuant to Nevada Rules of Appellate Procedure 25(c)(1)(B), I hereby certify that service of the foregoing “Child Custody Fast Track Statement” was made this date by depositing a true copy of the same for mailing, first class mail, at Henderson, Nevada, addressed as follows:

Diane Mizrachi
6224 Villa Emo Street
North Las Vegas, Nevada 89031

Respondent in Proper Person

DATED this 9th day of February, 2014.

/s/ Rachel M. Jacobson
JACOBSON LAW OFFICE, LTD.