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Abid v. Abid, 133 Nev. Adv. Op. 94 (Dec. 7, 2017) (en banc)

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EVIDENCE: CHILD CUSTODY

Summary

The Court held that the district court properly exercised its discretion in allowing illegally recorded conversations to be used by a court appointed child psychologist to evaluate a child’s welfare in a custody case.

Background

Sean and Lyudmyla Abid divorced in 2010 and subsequently shared joint legal and joint physical custody of their child. In 2015, Sean moved to get primary physical custody. On at least two occasions, Sean recorded conversations between the child and Lyudmila without their knowledge or consent, likely in violation of NRS 200.650. Sean moved to admit the recordings into evidence, which the court denied. However, the court did provide those recordings to Dr. Holland, a psychologist, to aid in evaluating the child’s welfare. Based in part on the recordings, Dr. Holland testified that Lyudmyla’s behavior was “creating confusion, distress, and divided loyalty.” Based on this and other evidence, the district court determined it was in the child’s best interest that Sean be awarded primary physical custody. Lyudmyla appealed the decision.

Discussion

Lyudmyla argued that the district court abused its discretion by allowing Dr. Holland to consider evidence obtained in violation of NRS 200.650.² The court disagreed.

An expert witness in a child custody proceeding may consider evidence obtained in violation of NRS 200.650

NRS 50.285(2) allows experts to consider inadmissible evidence only if the evidence is “of a type reasonably relied upon by experts.”³ Lyudmyla argued that psychologists do not normally rely upon illegally produced recordings. The Court reviewed the district court’s decision to provide the recordings to the psychologist and to deny Sean’s motion to admit under an abuse of discretion standard. However, the Court reviewed the district court’s legal conclusions regarding admissibility de novo.⁴

The Court held that the recordings, which contain Lyudmyla’s unfiltered interactions with her child, are the type of evidence that a psychologist would use to evaluate a child’s welfare. Further, while Nevada law allows a criminal defendant to move to suppress illegal

¹ By Carmen Gilbert.

² NEV. REV. STAT. § 200.650 (2017).

³ NEV. REV. STAT. § 50.285(2) (2017).

⁴ *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501,508 (2012).

recordings⁵, no analogous law exists in the civil context. The Court refused to read a broad suppression rule into NRS 200.650, and thereby conflate criminality with inadmissibility. To do so would be particularly unreasonable in the context of a child custody case wherein the, “[c]hild’s best interest is paramount.”⁶

Further, this case is distinguishable from *Lane v. Allstate Insurance Co.*, where the plaintiff illegally recorded phone conversations to support tort and contract claims. There, the Court sanctioned Lane by prohibiting the recording’s use “in any fashion.”⁷ This sanction did not create a bright line rule, and the Court only held that suppression was appropriate in that particular case.⁸ This case is distinguishable from *Lane* because a child custody proceeding is more than a “mere adversary proceeding between plaintiff and defendant.”⁹ Here, the deterrent effect of barring Sean’s evidence in court was outweighed by the State’s “overwhelming interest in promoting and protecting the best interests of its children.”¹⁰ Moreover, there are many other methods to deter parents from taking actions like Sean’s; they could be prosecuted for the criminal activity, sued for intrusion of privacy, or sanctioned in other ways by the court.

There is no per se rule that evidence obtained illegally is inadmissible in a child custody proceeding

Lyudmyla’s argument that illegally obtained evidence is inadmissible in a child custody proceeding is unfounded as there is no per se rule of inadmissibility in this context, and the Court refused to adopt one. Unless a statute expressly prohibits the admission of relevant evidence, it is presumed to be admissible.¹¹ This presumption is derived from the common law, and while *Mapp v. Ohio* changed the rule to exclude evidence illegally acquired by the government in criminal cases, it did not affect the treatment of evidence illegally acquired by a private individual in a civil case.¹² Categorically excluding illegally obtained evidence in a child custody proceeding would undermine the court’s duty to act in the best interests of minor children.¹³

Here, the recordings’ illegality did not render them inadmissible, and the court had broad discretion to rule on their admissibility.¹⁴ Where the court excluded recordings based on a belief that the law required exclusion, that ruling was erroneous, but harmless because it did not affect the court’s decision to award Sean primary custody.

The district court did not otherwise abuse its discretion in awarding Sean primary custody

⁵ NEV. REV. STAT. § 179.505(1) (2017).

⁶ *Bluestein v. Bluestein*, 131 Nev. Adv. Op. 14, 345 P.3d 1044, 1048 (2015).

⁷ *Lane v. Allstate Insurance Co.*, 114 Nev. 1176, 1177, 969 P.2d 938, 939 (1998).

⁸ *Id.* at 1181, 969 P.2d at 941.

⁹ *Munson v. Munson*, 166 P.2d 268, 271 (Cal. 1946).

¹⁰ *Rogers v. Williams*, 633 A.2d 747, 749 (Del. Fam. Ct. 1993).

¹¹ NEV. REV. STAT. § 48.025(1) (2017).

¹² *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹³ NEV. REV. STAT. § 125C.0045(2) (2017).

¹⁴ *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005).

Lyudmyla also argued that the district court (1) abused its discretion by misinterpreting and relying on Dr. Holland's opinion, and (2) unjustly ordered the change in custody to punish Lyudmyla in violation of *Sims v. Sims*.¹⁵ Based on the record, the Court found these claims to be without merit.

Conclusion

A court's duty to determine the best interest of a non-litigant child outweighs the policy interest in deterring illegal conduct between parent litigants. Accordingly, the district court did not abuse its discretion in providing illegally obtained recordings for use in the psychologist's evaluation, and this evaluation aided in the district court's final determination. The Court affirmed the district court's judgment.

¹⁵ *Sims v. Sims*, 109 Nev. 1146, 1149, 865 P.2d 328, 330 (1993).