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Evans v. Sayler Appellant's Reply Brief Dckt. 38321

IN THE SUPREME COURT OF THE STATE OF IDAHO

JECONIAH EVANS, Respondent, vs. JESSICA SAYLER, Appellant.	)	SUPREME COURT NO. 38321-2010 Bonner County Case No. CV 2007-2149

APPELLANT'S REPLY BRIEF

Honorable Debra Heise, Magistrate Judge, Presiding

Appeal from the Magistrate Court of the First Judicial District for Bonner County

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I. STATEMENT OF THE CASE

The Appellant and Respondent are not, nor have they ever been, married to each other. The Appellant and Respondent have two minor children in common, specifically, Zebadiah Evans, whose date of birth is [redacted] and Videaliah Evans, whose date of birth is [redacted] Appellant and Respondent's original child custody order was entered April 8, 2008, wherein they shared joint legal and physical custody, with an alternating week on, week off parenting schedule. On December 23, 2009 Appellant and Respondent entered into a stipulated child custody and support agreement, due to Appellant's enrollment in college. The December 23, 2009 Stipulation Agreement granted Respondent primary physical custody of the minor children during the school year, and Appellant primary physical custody in the summer months. The Stipulation Agreement was formed solely due to Appellant's unavailability while attending college classes. On January 5, 2010, pursuant to the December 23, 2009 Stipulation Agreement, the Magistrate court entered its Order re: Child Custody and Support. Due to unforeseen circumstances, Appellant did not enroll in school. Subsequent to the January 5, 2010 order, Respondent served the retained jurisdiction program for a felony DUI (his fourth or fifth lifetime DUI), and was placed on four years' supervised probation. While the Respondent was serving the Retained Jurisdiction, the Appellant moved to Newman Lake, Washington, closer to her family. Appellant, on May 3, 2010, filed a motion to modify the January 5, 2010 Order due to a substantial, material and permanent change in circumstances, and requesting primary, residential custody. The motion to modify proceeded to trial on October 5, 2010; and in its Order Re: Child Custody, entered October 5, 2010, the Magistrate Court found that Appellant failed to establish a

substantial, material and permanent change in circumstances in order to justify a modification of the January 5, 2010 custody order, and dismissed the case. Pursuant to I.A.R. 12.2, Appellant appeals the Magistrate Court's decision and now submits the following Reply Brief in support of her original argument.

II. ISSUE PRESENTED

1. Did the lower court abuse its discretion in dismissing the motion to modify by finding that Appellant failed to establish a material and substantial change in circumstances?

   ANSWER: YES

III. LAW AND ARGUMENT

A. Standard of Review

In awarding custody, the welfare and best interests of children are of paramount importance, and the court is required to provide for them as it deems necessary or proper to achieve this end. I.C.§32-717; *Schmitt v. Schmitt,* 83 Idaho 300, 305, 362 P.2d 884, 887 (1961). Once a custodial order is entered, the party seeking to modify it must first demonstrate that a material and substantial change of circumstances has occurred since the entry of the last custodial order. *Osteraas v. Osteraas,* 124 Idaho 350, 859 P.2d 948 (1993). When reviewing an exercise of discretion the Court inquires: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion

and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *Id.*

[The Supreme] Court will not attempt to substitute its judgment and discretion for that of the trial court except in cases where the record reflects a clear abuse of discretion. *Levin v. Levin,* 122 Idaho 583, 836 p.2d 529 (1992); *Biggers v Biggers,* 103 Idaho 550, 650 P.2d 692 (1982). An abuse of discretion occurs where there is insufficient evidence to support the court's finding regarding the best interest of the child. *Roeh v. Roeh,* 113 Idaho 557, 746 P.2d 1016 (1987). A trial court's finding of fact will be upheld if there is substantial and competent evidence supporting them. *Schultz v. Schultz*, 145 Idaho 859, p.3d 1234 (2008). The party seeking modification has the burden of justifying a change in custody, and although the threshold question is whether a [material] and substantial change in the circumstances has occurred, the paramount concern is the best interest of the child. *Biggers,* 103 Idaho 550, 650 P.2d 692; *Cope v. Cope,* 98 Idaho 920, 576 P.2d 201 (1978).

B. Appellant can establish that the Magistrate Court abused its discretion in concluding that Appellant failed to make a sufficient showing that there was a material and substantial change in circumstances.

In response to Appellant's original brief, Respondent argues that the Magistrate Judge did not abuse her discretion in finding that Appellant failed to show a substantial and material change in circumstances. In support of this argument, Respondent states that the substantial and

material change in circumstances cited in Appellant's May 3, 2010 Motion to Modify an Order or Decree was "Father is incarcerated at the North Idaho Correctional Institution in Cottonwood, Idaho."(R. Vol.I, p.45). This fact is uncontested. Appellant's argument and the decision of the court regarding a material and substantial change of circumstances were not based on Respondent's incarceration status. At the August 17, 2010 Motion and Scheduling Conference the Magistrate Judge, of her own initiative, brought to the attention of the parties the more prevalent change in circumstances; the fact that Appellant will no longer be attending school. *Tr. Vol. I, p.9, L. 20.* A court is not confined by the allegations of the petition to modify in seeking out what custody arrangement would be in the best interest of the child. *McGriff v. McGriff,* 140 Idaho 642, 99 P.3d 111 (2004). Appellant's argument and the decision of the Magistrate Judge in the October 5, 2010 Court Trial was based on Appellant's changed student status. Respondent's incarceration status was not addressed relative to a material and substantial change in circumstances. This alteration follows from the Magistrate Court's findings on August 17, 2010. Accordingly, the controlling question in [a] case where the judge made findings as to the best interests of the children largely outside of those changes originally alleged...is whether the evidence supports the findings made by the magistrate as to a change of circumstances and whether the best interests of the children were served by considering a modification of the custody arrangement." *McGriff,* 140 Idaho 642, (2004).

In support of his argument, Respondent next places significance on the following unanswered Requests for Admissions:

Request for Admission 1: Please admit that you decided not to go to school because of this case;

Request for Admission 2: Please admit that you intend to enroll/and or attend school when this case is completed;

Request for Admission 3: Please admit that you moved out of the state of Idaho in reliance on the Stipulation in this case.

Through naivety and not neglect, in her Pro-Se representation, Appellant failed to respond to Respondent's Request for Admissions. Pursuant to I.R.C.P § 36, Request for Admission 1 and Request for Admission 2 were deemed admitted by the Court. Request for Admission 3 was not addressed by the court, and is immaterial to this case. Regardless of the above, the Magistrate Judge's decision that Appellant failed to make a sufficient finding that there was a material change in circumstance between the January 5, 2010 Order and Appellant's May 3, 2010 Motion to Modify an Order or Decree was not based on the above admissions. The Magistrate's decision was based on her conclusion that Appellant's securement of full-time employment in place of attending school did not constitute sufficient significance to justify a change in the previous order. *See Tr. Vol. II, p.24, L. 8.*

Respondent's Requests for Admission are not relevant to the decision of the Magistrate. What is relevant however; is that the Magistrate's October 5, 2010 decision directly contradicted her prior statement in the August 17, 2010 Motions and Scheduling Conference whereupon the understanding that Appellant would no longer be attending school, The Magistrate Judge stated "Well, that's a fairly significant change in circumstances." *Tr. Vol. I, p.9, L.20.* Reemphasizing Appellant's original argument; The Magistrate Court cannot dismiss Appellant's Motion to Modify the January 5, 2010 Custody Order upon a finding of no substantial and material change in circumstances, when she previously found that there was a substantial and material change in circumstances. For this reason, and the reasons stated herein, it is respectfully requested of this Honorable Court that this case be reversed and remanded to the lower court for a finding consistent with the above facts.

C. Appellant can establish that the Magistrate Court abused its discretion as there is insufficient evidence to support the Magistrate Court's finding regarding the best interest of the children.

The Magistrate Court failed to make a finding in the best interest of the children. Respondent concedes this fact, however argues; that because the Magistrate Judge did not find that there was a material, substantial and permanent change of circumstances that the Magistrate was not required to consider the best interests of the children. Respondent's argument is wrong in both logic and law. Authorities indicate that such a change in circumstances is a prerequisite to any custody award modification. *By example; Levin v. Levin,* 122 Idaho 583, 836 P.2d 529

(1992). However; the effect of a change in circumstances on the minor children involved is a significant factor in determining whether such change constitutes a material, substantial and permanent change of circumstances. As such, any change in circumstances must consider the best interest of the children. In *Posey v. Bunney,* 98 Idaho 258, 561 P.2d 400 (1977) the court carefully analyzed these two rules of law and placed them in proper perspective. Quoting from *Posey* as follows:

> **"While the material, permanent and substantial change standard is a sound legal principle, care must be exercised in its application. The tendency is to search for some greatly altered circumstance in an attempt to pinpoint the change called for by the rule. Thus, the emphasis is placed on defining some change, and making that change appear, in itself, to be material, permanent and substantial. This focus is misleading. *The important portion of the standard is that which relates the change in conditions to the best interest of the child* [emphasis added]. The changed circumstance standard was designed, as a matter of policy, to prevent continuous re-litigation of custody matters. That policy goal, however, is of secondary importance when compared to the best interest of the child, *which is the controlling consideration in all custody proceedings* [emphasis added]. The court must look not only for changes of condition or circumstance which are material, permanent and substantial, *but also must thoroughly explore the ramifications, vis a vis the best interest of the child, of any change which is evident. What may appear by itself to be a small and insignificant change in circumstances may have significant effects insofar as children are concerned* [emphasis added]." *Posey v. Bunney,* 98 Idaho 258 (1977).**

The Magistrate Judge in the August 17, 2010 Motions and Scheduling Conference stated that Appellant's changed enrollment status was a "fairly significant change in circumstances." *Tr. Vol. I,* p.9, L.20. In the October 5, 2010 Court Trial, The Magistrate Judge holding directly to the contrary stated " ...the only change is that you're not going to school and you're working full time..." *Tr. Vol. II, p.24,L.8.* Regardless of the broad discrepancy in the Magistrate Judge's evaluation of Appellant's enrollment status, such enrollment status indicates an evident change

in circumstances. "The Court must look not only for changes of condition or circumstance which are material, permanent and substantial, but [the court] *also must thoroughly explore the ramifications, vis a vis the best interest of the child, of any change which is evident. What may appear by itself to be a small and insignificant change in circumstances may have significant effects insofar as children are concerned* [emphasis added]." *Posey v. Bunney,* 98 Idaho 258 (1977). The fact that Appellant will no longer be attending classes is a material and substantial change of circumstances. The effect of Appellant not attending classes is a material and substantial change of circumstances.

The Supreme Court will not attempt to substitute its judgment and discretion for that of the [lower] court in resolving whether to modify child custody, except in cases where the record reflects a clear abuse of discretion, *which occurs where there is insufficient evidence to support trial court's finding regarding the best interests of the child* [emphasis added]. *Brownson v. Allen,* 134 Idaho 60, 995 P.2d 830 (2000). When reviewing an exercise of discretion the Supreme Court inquires: (1) whether the lower court rightly perceived the issue as one of discretion, (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices, and (3) whether the court reached its decision by an exercise of reason. *Brownson,* 134 Idaho 60 (2000).

In our present case, it is undisputed that the Magistrate Court failed to apply the best interest standard in its modification of custody evaluation. A court must consider the best

interest of the minor child[ren] when making custody determinations, and when analyzing this may [among other factors] consider: ...The character and circumstances of all individuals involved; ...and the need to promote continuity and stability in the life of the child. I.C.§32-717(1). As a result of the Magistrate Court's failure to apply the best interest standard the above factors were not taken under consideration.

As of today's date, and as of the October 5, 2010 Order re: Child Custody, Respondent is on supervised felony probation for four years following his Retained Jurisdiction Program for a Felony DUI; that conviction being his fourth or fifth lifetime DUI. Respondent has a history of "very heavy drinking", as emphasized by the Honorable Judge Heise. *Tr. Vol. II, p.25, L.4.* If Respondent violates his probation, he is facing a term of imprisonment in the State Penitentiary. Although Respondent is working to reform his behavior, there is still a significant risk of relapse that should not be minimized. Respondent has an alarming history of alcohol abuse. This pattern in Respondent's life is a significant factor and creates vulnerability in his ability to promote continuity and stability with the parties' minor children.

The following exchange between The Magistrate Court, Respondent's Attorney, and Appellant took place during the October 5, 2010 Court Trial:

The Court: Why was Mr. Evans in the pen?
Mr. Featherston: It was for a felony DUI.
Appellant: His fourth or fifth.
Mr. Featherston: He did a rider and is on probation at this time...

The Court: I don't... I don't know if I was thinking clearly when I gave... you know I guess it was agreed to in January, 2010." ***Tr. Vol. II,p.19, L. 3-13.***

Although not spelled out word for word in the *October 5, 2010 Court Trial Transcript*, it is apparent that the Magistrate Judge significantly questioned placing custody in Respondent as a result of his criminal history. The fact that Appellant will no longer be attending school, is in a stable and healthy home environment, will be working full time and is available during non-work hours to provide for the care of her children establishes a custody option that better facilitates the best interest of the children. To disregard this fact is to disregard reason

Four times Respondent cites to *Reed v. Reed,* 137 Idaho 53, 44 P.3d 1108 (2002) stating: "A magistrate's findings of fact, however, will be upheld if they are supported by substantial and competent evidence and not clearly erroneous." *Reed,* 137 Idaho 53 (2002). The Magistrate Court failed to support its findings with substantial and competent evidence. The Magistrate Court did not reach its' decision by an exercise of reason. There is no evidence to support the Magistrate Court's finding regarding the best interests of the children. The best interest standard was not even applied. For the reasons state herein, the Magistrate's finding is clearly erroneous. It is respectfully requested of this Honorable Court that the Magistrate Court's decision be reversed and remanded to the lower court for a finding consistent with the above facts.

IV. CONCLUSION

Substantial and material changes have occurred since the entry of the January 5, 2010 Order re: Child Custody and Support. Specifically, Appellant will not be attending college. This change was recognized and identified by the Magistrate Judge at the August 17, 2010 Motions and Scheduling Conference as a "significant change in circumstances." *Tr. Vol I, p.9, L.20.* Appellant's non-student status significantly changes Appellant's capacity to care for her children. More importantly, this change makes the custody order currently in place no longer in the best interest of the children. [The Court] "must thoroughly explore the ramifications, vis a vis the best interest of the child, of any change which is evident." *Posey*, 98 Idaho 258 (1977). The recognition of an evident change prompts the duty to consider the best interests of the children. Only upon consideration of the effect of an evident change on the parties minor children (i.e., consideration of the children's best interest) can a determination of whether a material, substantial and permanent change exists be rationally made. For the reasons stated herein and at length above, it is respectfully requested of this Honorable Court that the Magistrate Court's decision be reversed and remanded to the lower court for a finding consistent with the above facts.

Respectfully submitted this 1 day of April, 2011.

John George
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of April, 2011 a true and correct copy of the foregoing document was served by the method indicated below and addressed to the following.

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