4-10-2014

Cook v. Arias Appellant's Brief Dckt. 41745

IN THE SUPREME COURT OF THE STATE OF IDAHO

DALRIE COOK Plaintiff/Appellant, vs. HUGO MARCELO ARIAS CASTRO, Defendant/Respondent.	)	Docket No. 41745

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR BONNEVILLE COUNTY

HONORABLE STEVEN A. GARDNER
Magistrate Judge, presiding

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I. STATEMENT OF THE CASE AND FACTUAL BACKGROUND

Appellant, Dalrie Cook (hereinafter, "Dalrie") and Hugo Arias (hereinafter, "Hugo") were married on April 9, 1993, and they are the parents of two children, namely, [redacted] who was born [redacted] and [redacted] who was born [redacted] R. p. 61. A trial was held on all pending divorce matters on January 6, 12, and 13, 2011. R. p. 63. The only relevant issues for this appeal relate to the custody and visitation issues presented during said trial. At trial, Dalrie sought an award of primary physical custody of the minor children and to be allowed to relocate to Salt Lake City, Utah. R. p. 83. Hugo agreed that Dalrie would have custody of the children if she remained in Idaho Falls, however; if she relocated, then he wanted to be awarded primary physical custody of the minor children. R. p. 88. Magistrate Judge Earl Blower presided over the trial. R. p. 107. Dalrie and Hugo were divorced, effective January 13, 2011, per the Decree of Divorce, Nunc Pro Tunc, entered January 25, 2011. R. p. 59.

Judge Blower issued his *Findings of Fact and Conclusions of Law* on February 4, 2011. R. p. 61. In said *Findings of Facts and Conclusions of Law*, Judge Blower found that Hugo should be awarded primary physical custody of the children unless Dalrie filed a statement with the Court indicating her desire to remain in Idaho Falls. R. p. 99. If she did so, then she would retain primary physical custody of the children. R. p. 99. On February 11, 2011, Dalrie filed her *Statement of Unequivocal Desire*, whereby indicating that she would not be relocating to Salt Lake City. Judge Blower then entered his *Supplemental Order* which finally resolved all issues related to the *Findings of Fact and Conclusions of Law*, and all pending post trial motions. R. p. 123. In said *Supplemental Order*, Judge Blower ordered that "the children shall reside with Dalrie", and thereafter, provided a visitation schedule for Hugo. R. p. 125.

The present appeal evolves from the filing of Dalrie's *Verified Petition to Modify Prior*

Court Orders, which was filed on March 25, 2013. R. p. 178. In said Petition, Dalrie sought an order allowing the children to relocate to Salt Lake City, Utah with her. R. p. 179. This Petition was based on the material and substantial changes of circumstances which she outlined in said Petition. R. p. 179-80. Hugo filed his *Motion to Dismiss Plaintiff's Petition to Modify Prior Court Orders and Request for I.C. §32-718 Violation* on September 5, 2013. R. p. 205. Dalrie filed her *Response to Motion to Dismiss Plaintiff's Petition to Modify Prior Court Orders and Request for Idaho Code Section 32-718 Violation* on June 17, 2013. R. p. 208. Dalrie also filed her *Motion for Temporary Orders* and *Affidavit of* [redacted] *in Support of Plaintiff's Motion for Temporary Orders* and *Affidavit of Plaintiff in Support of Motion for Temporary Orders* on August 5, 2013. R. p. 215-233. Dalrie was seeking a temporary order to be allowed to move the children to Salt Lake City, while her Petition to Modify was pending.[1] R. p. 215. Hugo filed various Affidavits in response to Dalrie's *Motion for Temporary Order.* R. p. 247-263. A hearing was held on both parties' motions on August 20, 2013. R. p. 264. After hearing, Judge Gardner entered his *Order Granting Motion to Dismiss.* R. p. 264. In said Order, Judge Gardner dismissed Dalrie's *Verified Petition to Modify Prior Court Orders*, he denied Dalrie's *Motion for Temporary Orders*, and he awarded Hugo his attorney fees pursuant to I.C. §12-120. R. p. 275-276. And specifically, he entered the following order: "IT IS FURTHER ORDERED that the prior orders herein remain in full force and effect."[2] R. p. 276. This Order became final when Judge Gardner entered his *Judgment* on September 19, 2013. R. p. 308. Dalrie appealed this *Judgment* on October 29, 2013, to the District Court. R. p. 347.

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[1] In the *Affidavit of Plaintiff in Support of Motion for Temporary Orders*, Dalrie outlines many of the reasons why she should be allowed to move with the children to Salt Lake City, Utah. R. p. 223. She also informed the Court in this pleading, that she was in fact relocating to Salt Lake City, Utah. R. p. 224.

[2] This order was also made part of the *Judgment*. R. p. 309.

Prior to Dalrie's Appeal being filed, Hugo filed his *Motion for Expedited Hearing as to Custody*, which was filed September 5, 2013. R. p. 278. In said Motion, Hugo sought an award of custody of the minor children, despite the fact that he had not filed a Petition to Modify the Court's *Supplemental Order*. R. p. 278. Hugo's Motion was supported by Hugo's Affidavits. R. p. 282 and 292. Dalrie filed her *Objection to Motion for Expedited Hearing as to Custody* along with Affidavits in support thereof. R. p. 297-307. A hearing was held on Hugo's Motion on September 19, 2013. R. p. 316. After said hearing, Judge Gardner entered his *Order Granting Motion for Expedited Hearing as to Custody* on October 3, 2013, and in so doing, awarded, in relevant part, Hugo primary physical custody of the children, Hugo his attorney fees pursuant to I.C. 12-120, and ordered Dalrie to pay child support to Hugo. The change of custody was based solely upon IRCP Rule 60(b)(6). When this Order was entered, there was no pending Petition to Modify. Judge Gardner did not award Dalrie any long term visitation with the children. R. p. 324-326. This decision became final when Judge Gardner entered his *Rule 54(b) Certificate* on November 25, 2013. R. p. 330.

As to the two attorney fee awards, Hugo filed a *Memorandum and Affidavit of Attorney Fees* on October 1, 2013 and *Memorandum and Affidavit of Attorney Fees from October 3, 2013 Order* on October 15, 2013. R. p. 338. Dalrie timely filed objections to both filings by Hugo, as evidenced in her *Objection to Memorandum and Affidavit of Attorney Fees*, filed October 8, 2013 (R. p. 334); her *Amended Objection to Memorandum and Affidavit of Attorney Fees*, filed October 10, 2013 (R. p. 336); and her *Objection to Memorandum and Affidavit of Attorney Fees from October 3, 2013*, filed October 23, 2013 (R. p. 345). A hearing was held on the issue of the attorney fee award on February 12, 2014. Tr. (February 12, 2014 hearing). After said hearing, Judge Gardner entered his *Order Granting Attorney Fees, Costs and Judgment* on February 13,

2014. R. p. 356. In doing so, he awarded Hugo a portion of his requested attorney fees. R. p. 356.

Dalrie sought a permissive appeal to this Court, and the same was granted when this Court entered its *Order Granting Motion for Permission to Appeal to the Supreme Court* on February 10, 2014. R. p. 354. This Court ordered that all issues raised in both of Dalrie's appeals, would be heard by the Supreme Court. R. p. 354-355.

II. ISSUES PRESENTED ON APPEAL

1. Did the Magistrate err by granting a change of custody to Hugo when there was no petition to modify pending and without having an evidentiary hearing?

2. Even if the Magistrate did not err by changing custody without a pending petition to modify, did the Magistrate err by not defining Dalrie's visitation with the children?

3. Did the Magistrate err by awarding Hugo attorney fees pursuant to I.C. §12-120?

4. Is Dalrie entitled to attorney fees and costs on this appeal?

III. STANDARD OF REVIEW

1. Custody issues.

The standard of review in custody determinations was well stated by this Court in Peterson v. Peterson, 153 Idaho 318, 320-21 (2012), when it outlined the following:

> Child custody determinations made by a magistrate court are reviewed by this Court under an abuse of discretion standard. *Schneider v. Schneider*, 151 Idaho 415, 420, 258 P.3d 350, 355 (2011) (citing *Hoskinson v. Hoskinson*, 139 Idaho 448, 454, 80 P.3d 1049, 1055 (2003)). In its analysis, this Court asks first whether the magistrate court correctly perceived the custody issue as one of discretion; then whether the magistrate court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to the court; and finally, whether the magistrate court reached its decision by an exercise of reason. *Schultz v. Schultz*, 145 Idaho 859, 861–62, 187 P.3d 1234, 1236–37 (2008).

> "An abuse of discretion occurs when the evidence is insufficient to support a magistrate's conclusion that the interests and welfare of the children would be best served by a particular custody award or modification." *Nelson v. Nelson*, 144 Idaho 710, 713, 170 P.3d 375, 378 (2007). When reviewing the magistrate court's findings of fact, this Court "will not set aside the findings on appeal unless they are clearly erroneous such that they are not based upon substantial and competent evidence." *Id.* Even if the evidence is conflicting, findings of fact based on substantial evidence will not be overturned on appeal. *Id.* (citing *State v. Hart*, 142 Idaho 721, 723, 132 P.3d 1249, 1251 (2006)).

2. Rule 60(b)(6) issues.

As set forth in Berg v. Kendall, 147 Idaho 571, 576 (2009), the Idaho Supreme Court has held that "this Court reviews a trial court's dismissal of a Rule 60(b)(6) motion for relief for abuse of discretion." "Accordingly, the Court must examine: '(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." Id. (citing *Win of Michigan, Inc. v. Yreka United, Inc.*, 137 Idaho 747, 753, 53 P.3d 330, 336 (2002)).

3. Attorney fee issues.

An award of attorney fees and costs is within the discretion of the trial court and subject to an abuse of discretion standard of review. Smith v. Mitton, 140 Idaho 893, 901 (2004). The party disputing the award of attorney fees has the burden of showing an abuse of discretion. Id.

IV. ARGUMENT

1. The Magistrate erred by granting a change of custody to Hugo when there was no pending petition to modify and no evidentiary hearing.

After the original trial of this matter, Magistrate Judge Earl Blower entered his

Supplemental Order on April 29, 2011. This Order awarded primary custody of the children to Dalrie and visitation to Hugo. On March 25, 2013, Dalrie filed her *Verified Petition to Modify Prior Court Orders* wherein, she sought, in relevant part, an order from the Court allowing her to relocate with the children to Salt Lake City, Utah. Pursuant to Hugo's *Motion to Dismiss Plaintiff's Petition to Modify Prior Court Orders and Request for I.C. §32-718 Violation*, Magistrate Judge Gardner issued his *Order Granting Motion to Dismiss* on August 30, 2013. In entering said Order, Judge Gardner dismissed Dalrie's *Verified Petition* and he entered the following Order:

> IT IS FURTHER ORDERED that the prior orders herein remain in full force and effect.

Based upon the entry of this Order, it was clear that the original custody order contained within the *Supplemental Order* would remain in effect, which provided that Dalrie was awarded custody.[3] However, Hugo then filed a *Motion for Expedited Hearing as to Custody.* In said *Motion*, Hugo sought a change of custody, despite the fact that he chose not to file a Petition to Modify. The Magistrate, when he issued his *Order Granting Motion for Expedited Hearing as to Custody,* after hearing, not only changed custody to Hugo, even though there was not a Petition to Modify pending, but he also modified Judge Blower's April 29, 2011 *Supplemental Order*. This was done under the guise of IRCP Rule 60(b)(6). It is clear that the Magistrate realized that he had to enter a new Order, and he did not have a Petition to Modify pending. Thus, he took it upon himself, without an evidentiary hearing, to change an Order which had been entered two and one-half years earlier! In doing so, the Magistrate abused his discretion.

a. Dalrie was not placed on notice that she could lose custody under

[3] The reason for this is due to the fact that up to the time the *Order Granting Motion to Dismiss* was entered, there had been no order entered which modified said *Supplemental Order.*

IRCP Rule 60(b)(6).

Hugo did not request relief under 60(b)(6) in his *Motion for Expedited Hearing as to Custody.* IRCP Rule 7(b)(1) requires that motions "state with particularity the grounds therefor including the number of the applicable civil rule, if any, under which it is filed." Hugo did not do this, but rather, the Magistrate determined that this was the appropriate rule under which to change custody. This is a major issue, as this decision vastly affects the lives of the children and their parents. To make such a drastic change, without notice of the applicable rule to Dalrie, is wrong. This was an abuse of discretion as it did not place Dalrie on notice of the applicable rule, so that she could adequately defend the same.

b. Child custody cannot be altered under IRCP Rule 60(b)(6).

There can be no modification of a prior custody order without the filing of a Petition to Modify. IRCP Rule 60(b)(6) is not a substitute mechanism to allow for a change of custody. IRCP Rule 3(a) provides that every civil action is "commenced by the filing of a complaint with the court." Of course the Complaint may be denominated as a Petition. Id. Furthermore, Local Rule C.3., in the Seventh Judicial District provides as follows:

> To modify an existing order of child support or of child custody (including visitation) the party seeking modification shall file a petition specifically setting forth the change in circumstances relied upon and the modification sought. Service of the petition shall be made pursuant to Rule 5(b) I.R.C.P. unless the opposing party is not represented or there is no attorney of record for the opposing party.

And finally, it is well stated in Idaho that in order to modify child custody, there must be a showing of a material, permanent and substantial change in conditions and circumstances subsequent to entry of the original decree which would indicate to the court's satisfaction that modification would be for the best interests of the child. Evans v. Sayler, 151 Idaho 223, 224-25

(2011).

Thus, it is clear that in order to change child custody, a Petition to Modify must be filed and an evidentiary hearing must be held to determine whether there has been a material and substantial change of circumstances to modify a prior custody order. As this Court stated in Allbright v. Allbright, 147 Idaho 752, 755 (2009), a court presiding over a child custody matter does not become a family czar with unlimited authority to order the parents to do anything that the court believes is in the best interest of the children. Rather, there are clearly established rules and mechanisms to provide for a change of custody, and to protect each parties' due process rights. In this case, the Magistrate wanted a result without following the proper procedure to change custody. He cannot do this as he does not have unlimited authority to order whatever he so desires, even if he believes it is in the best interests of the children. By changing a child custody determination under IRCP Rule 60(b)(6), the Magistrate abused his discretion.

c. Even if the Magistrate could change child custody under IRCP Rule 60(b)(6), the Magistrate abused his discretion in doing so in this matter.

IRCP Rule 60(b)(6) allows a Court to relieve a party from a judgment for "any reason justifying relief". *IRCP Rule 60(b).* However, Rule 60(b)(6) has clearly defined limits. Matter of Estate of Bagley, 117 Idaho 1091, 1093 (1990). First, a motion under IRCP Rule 60(b)(6) must be made within a reasonable time. *IRCP Rule 60(b).* Second, a party making a Rule 60(b)(6) motion must demonstrate unique and compelling circumstances justifying relief. Id. Third, a Rule 60(b)(6) motion cannot be a disguised substitute for a timely appeal. Id. Fourth, it was stated in Berg v. Kendall that the appellate courts of this state have infrequently granted relief under Rule 60(b)(6). Berg at 578.

The Magistrate, to his credit, understood the dilemma he was faced with. He wanted to

change custody, however, there was no pending petition to modify, there was no evidentiary hearing, and there was an Order which provided that Dalrie had primary custody of the children.[4] Thus, he looked to Rule 60(b)(6) to achieve his result. In doing so, he abused his discretion.

First of all, the Magistrate altered a custody Order which was two and one-half years old. This does not comply with Rule 60(b)(6), as Hugo seeking this relief, under Rule 60(b)(6), in 2013, is not "a reasonable amount of time". If this is a "reasonable amount of time" under the rule, then when is it not a reasonable amount of time for a magistrate to simply change custody of minor children under this rule?

Second of all, there are no unique and compelling circumstances to justify Judge Gardner's actions under Rule 60(b)(6). This is a typical custody case, wherein a change of custody should only take place after the proper filing a Petition to Modify, and an evidentiary hearing takes place. If it were otherwise, as this Magistrate believes, he can change a prior custody order, under Rule 60(b)(6), with no pending action. This is a frightening proposition. Imagine if a Magistrate has the power to change custody under IRCP Rule 60(b)(6), at any time he feels it is necessary. He or she could change custody any time a party requests the same, despite the fact that no Petition to Modify has been filed, discovery has not been completed, and an evidentiary hearing has not been held. The factual scenario herein is a perfect example of why the appellate courts of this state have infrequently granted relief under Rule 60(b)(6).

Third and finally, even assuming Hugo's *Motion for Expedited Hearing as to Custody* was properly filed as a Rule 60(b)(6) motion, it is simply a disguised appeal. In his *Findings of Fact and Conclusions of Law*, trial Judge Blower gave Dalrie a choice. She could remain in Idaho Falls and retain custody or she could leave to Salt Lake City, Utah and then Hugo would

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4 It must be recalled that the Magistrate in his *Order Granting Motion to Dismiss* specifically ordered that "the prior orders herein remain in full force and effect". R. p. 276.

be awarded custody. Dalrie informed Judge Blower on February 11, 2011, that she intended upon remaining in Idaho Falls and retaining custody of the children. Based upon this filing, Judge Blower entered his *Supplemental Order* on April 29, 2011, and the custody determination was finalized at that point. Once the final order is entered, it, and not the *Findings of Fact and Conclusions of Law* control. *See IRCP Rule 54(a)*[5] and Hamilton v. Hamilton, 240 P.2d 14 (Cal. App. 1952).[6] Thus, Hugo cannot argue that the alternatives given to Dalrie in the *Findings of Fact and Conclusions of Law* still control, which is what he argued in his *Motion for Expedited Hearing as to Custody,* and what the Magistrate essentially allowed to occur by changing custody per IRCP Rule 60(b)(6). If Hugo wanted the final order to continue to provide that he would receive custody of the children if Dalrie ever relocated to Salt Lake City, he should have appealed the *Supplemental Order*, and requested that said language be included in said final Order.[7] He did not do so, and relief granted under 60(b)(6) cannot be a disguised substitute for a timely appeal, which the Magistrate has allowed to occur in his decision.

In this case, there is a final order, and it provides that Dalrie has primary custody of the children. If Hugo is to be awarded custody, he must file a Petition to Modify and proceed accordingly. The Magistrate erred by granting Hugo his request to change custody, pursuant to IRCP Rule 60(b)(6).

d. The Magistrate's finding that Dalrie made a deliberate misrepresentation to the Court is not supported by substantial and

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5 It is well established that the final order/Judgment is the controlling order in Idaho, and the following examples are given to illustrate the same: the time limit for filing a request for fees or costs begins to run at the filing of the Judgment (IRCP Rule 54(d)(5)); a Motion to Alter or Amend begins to run at the filing of the Judgment (IRCP Rule 59(e)); and an Appeal begins to run at the filing of the Judgment (IRCP Rule 83(e)).

6 In said case, the California appellate court stated as follows: "There is a distinction between the findings and conclusions of a court and its judgment. While they may constitute its decision and amount of the rendition of a judgment they are not the judgment itself. They amount to nothing more than an order for judgment, which must, of course, be distinguished from the judgment." In so stating, the appellate court held that the statement in the findings of fact which did not make it into the judgment, had no validity.

7 Dalrie is not conceding that Hugo would have been correct if he would have proceeded with an appeal on this issue.

competent evidence.

From the *Order Granting Motion for Expedited Hearing as to Custody*, it is clear that the Magistrate found that the *Supplemental Order* was entered based upon a "deliberate misrepresentation to the court by Dalrie". R. p. 323. This finding is not supported by substantial and competent evidence. There has been no evidentiary hearing on this issue, and it is impossible for Judge Gardner, without such a hearing, to know what Dalrie's intentions were when she filed her *Statement of Unequivocal Desire* on February 11, 2011. She obviously changed her mind at some point after she signed the *Statement of Unequivocal Desire* and was determined to move to Salt Lake City, however, it is impossible for the Magistrate to know when this occurred, especially with no evidentiary hearing. Second, Dalrie's statement of her intentions to stay in Idaho, as provided to the Court on February 11, 2011 cannot be found to be a "fraud upon the court" or a misrepresentation. Our Idaho Supreme Court in Rae v. Bunce, 145 Idaho 798, 801, 186 P.3d 654, 657 (2008) stated:

> Rule 60(b) of the Idaho Rules of Civil Procedure recognizes that courts have the inherent power "to set aside a judgment for fraud upon the court." "The term 'fraud upon the court' contemplates more than interparty misconduct, and, in Idaho, has been held to require more than perjury or misrepresentation by a party or witness." *Compton v. Compton*, 101 Idaho 328, 334, 612 P.2d 1175, 1181 (1980). It 'will be found only in the presence of such 'tampering with the administration of justice' as to suggest 'a wrong against the institutions set up to protect and safeguard the public.' " *Id.* (quoting *Hazel–Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 246, 64 S.Ct. 997, 1001, 88 L.Ed. 1250, 1255–56 (1944)). "The party asserting a claim of fraud on the court must establish that an unconscionable plan or scheme was used to improperly influence the court's decision and that such acts prevented the losing party from fully and fairly presenting its case or defense." 47 Am.Jur.2d, *Judgments* § 728 (2006).

Thus, even assuming Dalrie made a misstatement to the Court (which she adamantly denies), said statement would not rise to the level of "tampering with the administration of justice" so as

to "suggest a wrong against the institutions set up to protect and safeguard the public". Based upon these arguments, the Magistrate's factual finding, as complained of herein, must be set aside.

e. Conclusion.

The Magistrate clearly abused his discretion in altering custody between the parties pursuant to IRCP Rule 60(b)(6), when there was no Petition to Modify pending and no evidentiary hearing. This decision (along with the decision to award Hugo child support from Dalrie) must be reversed, and the *Supplemental Order*, as originally written, must be the controlling Order regarding custody and child support.

2. Even if the Magistrate's actions in changing custody under Rule 60(b)(6) are upheld, the Magistrate erred in failing to define Dalrie's visitation rights with the children.

The trial court has broad discretion in establishing visitation rights, and 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. Nelson v. Nelson, 144 Idaho 710, 716 (2007). A court, by defining details of visitation, is merely supplying for the parties the element of reasonableness intended by the court, and fashioning the visitation remedy that the non-custodial parent should have. Id. at 716-17. The Supreme Court has suggested that cooperating divorced parents can achieve far more for their children than might flow from even the best thought-out orders of the courts. Id. at 717. However, when parents cannot agree on the time and places for visitation, the trial court is required, on proper application, to define "reasonable visitation" in such detail as may be necessary. Id.

This is a high conflict case, as can be seen by the repository print out, alone. It is clear that the parties will not be able to reach an agreement regarding Dalrie's visitation if Judge

Gardner's custody determination is upheld. Judge Gardner, thus, should have entered a visitation schedule for Dalrie with the children, and his failure to do so was an abuse of discretion.

3. The Magistrate erred by awarding Hugo his attorney fees under I.C. §12-120.

The Magistrate awarded attorney fees to Hugo under §12-120 in both its *Order Granting Motion to Dismiss* entered August 30, 2013 and its *Order Granting Motion for Expedited Hearing as to Custody* entered October 3, 2013. The Magistrate abused his discretion in so doing.

It has been held in Idaho that §12-120 does not apply to divorce actions. Smith v. Smith, 131 Idaho 800 (Idaho Ct. App. 1998). The Idaho Court of Appeals in said case stated as follows regarding wife's claim for an award of attorney fees pursuant to I.C. §12-120:

> Sharon's assertion of a claim under §12-120 is inappropriate. The action underlying the judgment that is the subject of this appeal was a divorce action, not an action "where the amount pleaded is twenty-five thousand dollars ($25,000) or less" nor an action to recover upon an account, note, contract for goods or services, commercial transaction or the like. Section 12-120 is therefore inapplicable.

Clearly, under Smith, attorney fees cannot be awarded to Hugo. Further, under a plain reading of the statute, none of the subsections of §12-120 apply. Subsections (3), (4), and (5) address matters other than divorce and post-divorce proceedings, and subsections (1) and (2) address attorney fees wherein a claim for monetary damages are at issue. In awarding fees to Hugo under §12-120, the Magistrate abused his discretion, and the decision must be reversed.

Finally, even if this Court believes that the Magistrate can award attorney fees to Hugo pursuant to I.C. §12-120, the award should be set aside as Hugo should never have been deemed the "prevailing party" due to the Magistrate's errors, as argued above.

4. Dalrie should be awarded attorney fees and costs on this appeal.

There is no justifiable basis for Hugo to oppose the relief sought in this appeal, for all of the reasons argued in this brief. If he does, Dalrie should be awarded her attorney fees on appeal pursuant to I.C. §12-121. Attorney fees on appeal should be granted pursuant to I.C. §12-121, if the court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably and without foundation. Wilson v. Wilson, 131 Idaho 533 (citing Balderson v. Balderson, 127 Idaho 48, 54 (1995) (1998)). Here, the Magistrate clearly erred in changing custody to Hugo under the guise of IRCP Rule 60(b)(6). If Hugo challenges the issues raised in this brief, then it must be found that he is defending this case frivolously, unreasonably, and without foundation, and Dalrie should be awarded his attorney fees and costs on appeal.

V. CONCLUSION

Based upon the issues raised in this appeal, the decision of the Magistrate to change custody (along with the decision to order Dalrie to pay child support), pursuant to IRCP Rule 60(b)(6), must be set aside, and the *Supplemental Order* entered on April 29, 2011, shall be determined to be the current Order of the Court related to custody matters, visitation matters, and child support issues. Further, the Magistrate's award of attorney fees pursuant to I.C. §12-120 must be set aside, and Dalrie should be awarded her attorney fees for pursuing this appeal pursuant to I.C. §12-121.

RESPECTFULLY SUBMITTED this 8 day of April, 2014.

AARON J. WOLF, ESQ.
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in Idaho, with my office in Idaho Falls, and that on the 8 day of April, 2014, I served a true and correct copy of the following-described document on the parties listed below, by mailing, with the correct postage thereon, or by causing the same to be hand delivered.

DOCUMENT SERVED: **APPELLANT'S BRIEF**

PARTIES SERVED:

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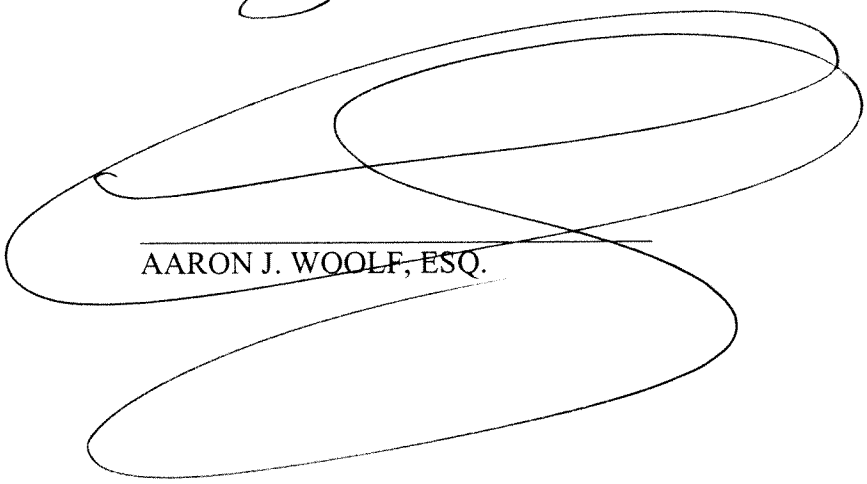
□ Mailed ☒ Hand Delivered □ Faxed



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