1-14-2015

Sweet v. Foreman Appellant's Brief Dckt. 42226

IN THE SUPREME COURT OF THE STATE OF IDAHO

STANLEY P. SWEET,	)	
Plaintiff/Appellant/Cross-respondent,	)	**SUPREME COURT NO. 42226**
vs.	)	**Boundary District Court**
REBECCA L. FOREMAN,	)	**No. CV-2006-52**
Defendant/Respondent/Cross-appellant.	)	

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT
FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BOUNDARY

HONORABLE JEFF BRUDIE
District Judge

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STATEMENT OF THE CASE

Sweet and Foreman were romantically involved when SS was born of their relationship on December 16, 2005. R Vol. I, p. 159, L. 14. Child support was initiated by the Idaho Department of Child Support Services on March 20, 2006, under Boundary County Case No. CV-2006-118. Foreman moved into Sweet's home on July 2, 2006, with SS and her other child of a prior relationship. R Vol. I, p. 159, Ll. 18-20. Foreman told Sweet that he would not have to pay child support because they were living together and sharing expenses. R Vol. I, p. 163, Ll. 3-5.

Default judgment was entered by the court on August 9, 2006, ordering Sweet to pay child support in the amount of $454.00 per month beginning March 1, 2006, birth costs in the amount of $767.00, and attorney fees in the amount of $330.00. Paternity and Child Support Judgment and Order 08/08/2006 Case No. CV-2006-118.[1] The State provided no information supporting the child support calculations. Id. Sweet was employed as a logger and as a farmer. Tr 6/7/12, p. 75, Ll. 21-23, p. 106 Ll. 3-4. The economy was beginning its downturn, which has inordinately affected family farms and the local logging industry in the Pacific Northwest. Tr 6/7/12, p. 110, Ll. 13-18.

In December of 2006, Foreman accompanied Sweet to the office of Child Support Services in Coeur d'Alene, and signed a waiver of child support. R Vol. I, p. 163, Ll. 4-5. At that time, he was informed by Child Support Services that his obligation was zero dollars as a result of the waiver. R Vol. I, p. 163, Ll. 19-20. However, the amount continued to accrue, unknown to Sweet. R Vol. I, p. 163, Ll. 17-21. In March of 2008, Foreman took SS to

[1] Counsel will move the court to augment the record with a copy of the paternity order entered in the related and now consolidated support proceeding Boundary County Case. No. CV-2006-118.

California, and requested the Department to collect the arrearages, by this time in the amount of $9080.00. Tr 6/7/12, p. 42, Ll. 9-23. The State suspended Sweet's commercial driver's license, further reducing his employment income. Tr 6/7/12, p. 109, Ll. 9-13. Sweet filed a motion to modify custody and child support on April 1, 2008. R Vol. I, p. 160, Ll. 11-12. He was unable to continue making payments on the house that Foreman had lived in, and the property went into foreclosure. Tr 6/7/12, p. 109, Ll. 2-4.

The Order of Child Custody of June 16, 2008 did not address child support. Foreman was the primary custodian, but if she left town, Sweet could care for SS. R Vol. I, p. 55. This provision was not followed; Sweet obtained temporary custody February 4, 2010, after SS was found, with soiled clothes and his shoes on backwards, alone on a busy Spokane street. Police report.[2]. Foreman was working in Yakima, Washington, at the time. Id.

Both parties filed custody modification petitions, and on March 9, 2010, Sweet filed a renewed petition to amend the arrearage and to modify child support nunc pro tunc. R Vol. I, p. 161, Ll. 3-5. Following mediation, the court entered a custody order pursuant to the stipulation of the parties, October 1, 2010. Order Regarding Child Custody and Visitation 10/1/10.[3] Eight months later, Foreman filed another petition to modify custody. R Vol. I, p. 110. Trial was held June 7, 2012, and continued to August 8, 2012. R Vol. I, p. 126. The court ruled in open court on the custody issue, and ordered the parties to brief the child support and other financial issues. R Vol. I, p. 127. Foreman was charged with preparation of the order denying her petition to modify, which was filed October 4, 2012. R Vol. I, p. 149.

Foreman filed a motion to reconsider October 18, 2012. R Vol. I, p. 156. On October 23, 2012, the court entered its Memorandum Opinion and Order Re: All Pending Financial Issues and Child Support, ordering Foreman's attorney to calculate and prepare the final child support order. R Vol. I, p. 158. However, this was not done. On December 4, 2012, Foreman's

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[2] Sweet will move to augment the record with a copy of the police report which was admitted into evidence at the hearing of February 4, 2010.

[3] Sweet will move to augment the record with a copy of the 10/1/10 custody order.

motion to reconsider was denied, and the court again asked for the calculations to be completed. R Vol. I, p. 171. On January 11, 2013, Foreman appealed. R Vol. I, p. 174. The Order Regarding Child Support and Financial Issues was filed after hearing on January 15, 2013. R Vol. I, p. 177. On January 30, 2013, Sweet filed a motion for an award of attorney fees, R Vol. I, p., 184, and a motion to reconsider, R Vol. I, p. 186. Both were treated as motions to reconsider and denied March 25, 2013. Tr 3/25/13, p. 25, Ll. 4-8. Sweet cross-appealed March 28, 2013. R Vol. I, p. 194.

On appeal, the district court affirmed all of the magistrate's orders and denied attorney fees to either party. Sweet appeals against the district court's affirmation of the magistrate's findings and conclusions as to the respective incomes of the parties, as to the provision requiring Sweet to pay Foreman's mileage, and against the magistrate's denial of attorney fees pursuant to I.C. §12-121 or pursuant to I.C. §12-123. Sweet further requests attorney fees on this appeal, pursuant to I.C. §12-121.

ISSUES OF FACT

1. At hearing on Sweet's motion to reconsider, the court held that the parties did not stipulate to Sweet's income being set at $25,000.00. Tr 3/25/13 p. 11, Ll. 12-13.

2. At hearing on Sweet's motion to reconsider, the court held that Sweet stipulated that he was underemployed. Tr 3/25/2013, p. 16, L. 3.

3. The court believed Foreman suffered an increase in mileage when it required the receiving party to make the full drive both ways, instead of both parents meeting half-way. Tr 8/8/2012, p.203, Ll. 2-20.

4. The court held that Sweet's income should be imputed at $30,000.00 a year. Tr 3/25/2013, p. 16, Ll. 10-12.

5. The court held that Foreman was not underemployed, and that her guidelines income was $50,000.00 a year. R Vol. I, p. 178 Ll. 14-15.

LEGAL ISSUES

1. Did the court err in setting Sweet's income at $30,000.00 when he stipulated to the

amount of $25,000.00 as his annual income?

a. **Did the court abuse its discretion when it determined that Sweet was voluntarily underemployed?**

b. **Was Sweet's potential income a proper subject for judicial notice?**

2. **Did the court err in not finding Foreman voluntarily unemployed?**

3. **Did the magistrate err when it decided the change would result in increased driving distance and unfairness to Ms. Foreman, and ordered Sweet to pay half her mileage?**

a. **Foreman's driving distance did not change.**

b. **The requirement that Sweet pay Foreman's mileage amounts to a summary sanction for contempt of court, without due process.**

c. **Evidence shows that Foreman was responsible for most of the difficulties at the exchanges.**

4. **Was it an abuse of discretion not to award attorney fees pursuant to I.C. §12-121, where Foreman's denial of her waiver of child support was not based in fact or in law, and where Sweet spent thousands trying to prove he did not owe the arrears?**

5. **Was it an abuse of discretion not to award attorney fees pursuant to I.C. §12-123, where Foreman's request that the Department of Health and Welfare collect child support arrears was malicious and intended to harass or harm Sweet, and where her denial, for five years, of the waiver, was not based in fact or in law, and did in fact seriously harm and impair Sweet's ability to earn an income?**

6. **Should the court award attorney fees to Sweet pursuant to I.C. § 12-121 on appeal?**

STANDARD OF REVIEW

The decision of the trial court on a motion to modify child support is reviewed on appeal for an abuse of discretion. Atkinson v. Atkinson, 124 Idaho 23, 25, 855 P.2d 484, 486 (Id.App. 1993). The decision of whether or not to award attorney fees is also reviewed under the abuse of discretion standard. Straub v. Smith, 145 Idaho 65, 71, 175 P.3d 754, 760. When the district court has acted in an appellate capacity and a further appeal is taken, the Supreme Court

independently reviews the complete record before the magistrate, but with due regard for the district court's decision. Keeler v. Keeler, 131 Idaho 442, 444, 958 P.2d 599, 602 (Ct.App. 1998). The magistrate's findings of fact will not be set aside on appeal unless they are clearly erroneous. Id. Findings supported by substantial and competent evidence are not clearly erroneous. Id. Where the trial court is the ultimate finder of fact, the appellate court liberally construes the trial court's findings of fact in favor of the judgment entered. Kornfield v. Kornfield, 134 Idaho 383, 385, 3 P.3d 61, 63 (Id.App. 2000).

The reviewing court looks to see (1) whether the trial correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the applicable legal standards; and (3) whether the trial court reached its decision by an exercise of reason. Sun Valley Shopping Center Inc. v. Idaho Power Co., 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). However, the Supreme Court exercises free review over questions of law; State v. Doe, 146 Idaho 386, 387, 195 P.3d 745, 746 (Idaho App. 2008), (review of the authority of a court to take judicial notice); Kornfield, supra (the interpretation of the I.C.S.G. is a question of law.)

ARGUMENT AND AUTHORITY

1. Did the court err in setting Sweet's income at $30,000.00 when he stipulated to the amount of $25,000.00 as his annual income?

Evidence shows that Sweet was employed as a logger, which is seasonal employment, owned his own salad dressing business, and worked on his family's farm. Tr 6/7/12, p. 106 Ll. 2-4; p.110, Ll. 22-24; p. 75 Ll. 18-23. His tax returns reflected losses due to the downturn in the economy. Tr 6/7/12 p. 22, Ll. 10-16. Sweet stipulated that his annual income should be set at the amount of $25,000.00 for the purpose of calculating child support. That amount was used by both parties when the parties submitted their post-trial briefs on the matter. The magistrate, *sua sponte*, held that Sweet's annual income should be set at $30,000.00. On review, the district court noted that it was Sweet's testimony that he could make $25,000.00 a year at a job other than farming. This is very different from stipulating that he was underemployed. The Idaho

Child Support Guidelines do not inquire whether a parent could make more money if he were employed differently. The state does not tell parents what employment they should seek.

a) Did the court abuse its discretion when it determined that Sweet was voluntarily underemployed?

Voluntary unemployment or underemployment results when a parent quits a well-paying job, and takes a lower-paying job, or none at all. The statute bars a finding of underemployment when a parent already works full-time in his traditional field. Otherwise, the government could find itself forcing parents to pursue whatever employment the magistrate deems most lucrative or beneficial for the child. The law does not go so far.

Idaho Child Support Guidelines give specific guidance for evaluating evidence in child support proceedings. Rule 6(c)(6) Sec. 1. A parent shall not be deemed underemployed if gainfully employed on a full-time basis at the same or similar occupation in which he/she was employed for more than six month before the filing of the action or separation of the parties, whichever occurs first. Rule 6(c)(6) Sec. 6(c)(1). In this case, it was Sweet's uncontroverted testimony that he lost his commercial driver's license when Foreman decided to demand the child support that she had originally waived. Tr 6/7/12, p. 109 Ll. 2-22. Sweet was gainfully employed as a logger and as a farmer, for more than six months before the filing of the action, or the separation of the parties. He continues to work in those occupations, although no longer as a commercial driver due to the loss of that opportunity after Foreman attempted to collect the alleged arrears. Id. It was clearly erroneous for the magistrate to deem Sweet voluntarily underemployed.

If a parent has assets that do not currently produce income, or that have been voluntarily transferred or placed in a condition or situation to reduce earnings, the court may attribute reasonable monetary value of income to the assets so that an adequate award of child support may be made. Rule 6(c)(6) Sec. 6(c)(2). Although he was employed full time, Sweet's business and farm income produced a loss on his tax records. There was no evidence that Sweet's assets do not currently produce income, or that they were transferred, voluntarily or otherwise, or

placed in a condition or situation to reduce earnings. Finally, Foreman did not request or present any evidence regarding the reasonable monetary value of income of any specific assets and the magistrate did not make any findings in that regard.

At hearing on Sweet's motion to reconsider, the magistrate held that the parties did not stipulate to Sweet's income being set at $25,000.00. Tr 3/25/13, p. 16, Ll. 12-13. The magistrate also found that, at trial, Sweet stipulated that he was underemployed. Tr 3/25/13, p. 16, Ll. 2-4. The trial court erred; both parties used Sweet's voluntary figure of $25,000.00 a year for their post-trial arguments, no evidence was presented that he did not work full time, and no other figure was advanced or supported by either party. Sweet testified that he arrived at the figure because it was the amount that he might otherwise have earned if he wasn't a farmer. Tr 6/7/12, p. 75 Ll. 10-14. He did not testify that he agreed that he should work at such other employment, only that it was the basis for the figure he offered.

The district court should have found that the magistrate did not have discretion, and it was clear error, to decide that Sweet was underemployed when he was working full time at his traditional occupation.

b) Was Sweet's potential income a proper subject for judicial notice?

The court pointed out that Mr. Sweet, "...stipulated, readily, that he could make $25,000.00 if he chose to do other things that are available." Tr 3/25/13, p. 16, Ll. 5-6. The magistrate further stated, "I know what a man is worth in this community, I live in this community, I know what Mr. Sweet is capable of. If he wanted to make $30,000.00 and not do the farming in exchange for that, he could. And I'm going to stand with that. I might get reversed. I fully recognize that, because the evidence was not well put forward by Ms. Foreman on Mr. Sweet's potential income." Tr 3/25/13, p. 16, Ll. 9-14.

The magistrate did not have any evidence supporting the finding that Sweet could have earned $30,000 a year. Such evidence would have to be presented by a neutral witness, subject to cross-examination and impeachment. The magistrate should not have such personal knowledge of matters to be proven at trial; the court should only consider the evidence presented

in court. The district court should have found that the magistrate was acting outside of its authority, did not comply with the applicable legal standards, and abused its discretion when it determined, *sua sponte*, that Sweet's income should be $30,000.00 a year.

Judicial notice is governed by Rule 201 of the Idaho Rules of Evidence, which states in relevant part, as follows:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

I.R.E. 201. In this case, the community is not charged with knowledge of the skills and opportunities of its residents. The amount of income a given individual might be able to earn is not a matter that is generally known within the territorial jurisdiction of the trial court, nor is it capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. In *Brazier v. Brazier*, the Appellate Court noted that, "the parties offered no evidence regarding the likely evolution of the children's needs or parental resources. Rather, the magistrate, acting sua sponte, stated in his memorandum decision that "[a]s [the children] reach their teenage years it will undoubtedly become more expensive to maintain them regardless of inflation." Brazier v. Brazier, 111 Idaho 692, 700, 726 P.2d 1144 (Ct.App. 1986). Similarly in this case, judicial notice was not taken until the court issued its Memorandum Opinion and Order Re: All Pending Financial Issues and Child Support, wherein it acted sua sponte in its determination that Sweet earned more than the figure he stipulated could be used. The Supreme Court held that judicial notice was not appropriate:

> ...the "fact" allegedly noticed by the magistrate is plausible, but we are not prepared to say that it would be beyond dispute in every case. Neither do we find in the magistrate's memorandum decision any nexus between the general "fact" of increased cost and the particular adjustment of $100 per month ordered in the decree. [3] Idaho Code § 32-706 requires an individualized determination regarding the needs of children and the resources of parents. A magistrate's

general perception of increased cost will not suffice.

Id. Similarly in this case, Sweets skills and abilities, and his employment opportunities, are not proper subjects for judicial notice because these are disputable facts requiring to be proved.

The rule on judicial notice goes on to require that a party is entitled to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. I.R.E. 201 (e). Sweet was not afforded the opportunity to be heard as to the propriety of taking judicial notice, or as to the tenor of the matter noticed, and he was not afforded the opportunity to present evidence in opposition to the court's factual determination.

Absent notice and an opportunity to be heard, it was an abuse of the court's discretion to take judicial notice of Sweet's talents and abilities in order to suport his ruling that Sweet's income was greater than the parties had both employed in their briefs. The magistrate cannot testify, even if he had actual knowledge, as to the employment opportunities that might be available to Sweet had he chosen a different profession.

On review, the district court noted the following: "Phillip testified he has been employed as a logger, owns 40 to 60 acres of farm property in Idaho, has a rental unit on the Idaho property and one-half ownership in another rental unit near Twin Rivers Resort in Idaho, owns a four-unit apartment complex in Spokane, Washington, that he rents out three of the units and keeps one for himself, and he makes and sells a line of salad dressings." R Vol. II, p. 293, Ll. 7-12.

The district court's summary of Sweet's testimony is mistaken, and simply adding $500.00 a month to Sweet's imputed income to compensate for the empty unit is deeply flawed in that it (a) presumes a 100% occupancy rate; (b) presumes that such rental could be provided at no additional expense; and (c) adds the additional income to the $25,000.00 figure provided by Sweet, rather than to Sweet's actual income.

Sweet testified that he owned *some property on the farm*, not the entire farm itself. Tr 6/7/12, p.75 L. 16. Sweet testified that most of the farm income went to his parents. Tr 6/7/12, p.78 L. 11. Sweet testified that his parents sold hay to third parties, that he only used the hay to

feed his cows, and that he receives his income through the sale of the cattle. Tr 6/7/12, p.78 Ll. 14-22. Sweet also testified that a trailer located on the farm property rented out for $400.00 a month, but not that he himself received that income. Tr 6/7/12, p.77 Ll. 21-25; p. 78 Ll. 10-11.

Sweet testified that he owned a four-unit apartment building in Spokane, and that he usually has between two and three rented, bringing in between $1000.00 to $1,500.00. He also testified that he let Rebecca stay in one unit, which he normally keeps for his own use. Sweet testified that his mortgage payment is $1,200.00 a month, and that he pays utilities in the amount of $300.00 to $500.00 a month. Tr 6/7/12, p. 77 Ll. 2-10.

As for the rental unit near the Twin Rivers Resort, Sweet testified that he merely owned a remainder interest as a will substitute, that his mother retained the life estate, and that, when it is rented out, his mother receives all the income. Tr 6/7/12, p.79 Ll. 1-13.

Regarding the salad dressing business, Sweet testified that he rented the building from his parents for $500.00 a month, that he sold salad dressing to Harvest Foods, the Pizza Factory, and Yokes, that his gross income from sales amounted to about $500.00 a month, and that all his income was reported on his taxes. Tr 6/7/12, p.79 Ll. 14-25, p. 80 Ll. 1-4.

As noted by the district court, the resulting annual income reported on Sweet's tax return was negative $5,000.00. Foreman bore the burden of proof if she wished to dispute that amount. The extra income that might be available through renting an apartment unit would have to be added to the negative $5,000.00. She would have to come up with $30,000.00 of potential income to arrive at the $25,000.00 figure to which Sweet stipulated.

Expert testimony regarding farming and logging employment statistics, including the average income earned by full-time laborers in each of those occupations, after deducting reasonable costs and expenses for tools and/or equipment, including depreciation, might have proved that Sweet's potential income was far less than the amount to which he stipulated. Since Sweet lives on the family farm, and shares many of the benefits enjoyed by his parents, and in order to save himself and the court the time, trouble, and expense of protracted proceedings on the topic, Sweet generously stipulated that he would agree to an imputed income of $25,000.00.

As a result, Foreman did not have to prove that Sweet earned $25,000.00 a year; she could not, and did not, prove that Sweet earned a penny over that amount.

The magistrate conceded that, "...[T]here was no vocational expert who came in and looked at Mr. Sweet's skills and his work history and his experience and gave the Court the kind of testimony it would like to see in terms of identifying other local jobs that Mr. Sweet would be qualified for and could get, that paid X amount of dollars. I mean, that's the way we would like to see those sorts of things proven up." Tr 3/25/13 p. 15, Ll. 21-25; p. 16, Ll. 1-2. The matter of which the court took judicial notice must be proven through the testimony of expert vocational witness who could make a proper inquiry into Sweet's talents and abilities, and inform the court of its opinion. Sweet would have been on notice of the evidence before the court, and would have had the opportunity to refute it, and to present his own witnesses and account of the matter. None of this occurred.

The district court should have found that the magistrate did not act within the outer boundaries of his discretion, did not apply the correct legal standards, and did not arrive at his conclusion via an exercise of reason. It was an abuse of discretion for the magistrate to state that he had personal knowledge of Sweet's skills and abilities, and of the employment opportunities available to Sweet in the community, and to take judicial notice of his own opinion regarding Sweet's potential income.

2. Did the court err in not finding Foreman voluntarily unemployed?

The magistrate declined to impute an income to Foreman, although the evidence shows that she only worked twenty to thirty hours a week, down from her original full-time employment as a registered nurse. Tr 8/8/12, p. 67, Ll.21-22. The court stated that Sweet should have introduced vocational testimony that Foreman could obtain forty hours a week employment. Tr 3/25/2013 p. 18, Ll. 5 and 6. However, at hearing on one of several motions to compel, the court ordered Foreman to provide her income and employment information, and the order stated that, if she failed to do so, the court would impute her income at $120,000.00. Order

compelling discovery and vacating trial 8/15/11.[4] Almost one year later, Sweet was blindsided by the information, long after the time for discovery was past, that Foreman was no longer working for the National Guard, and that she intended to go to school, now only employed part-time as a critical care nurse at Sacred Heart Medical Center in Spokane, Washington. Tr 6/17/2012, p. 96 Ll. 1-5. Sweet did not have the time or the opportunity to prepare and present expert witness testimony as to Foreman's employment opportunities, and where the need for such evidence was not apparent due to Foreman's failure to disclose the facts as ordered by the court. Tr 6/7/2012, p. 97 Ll. 18-22.

It was a matter of record that Foreman worked full time when the 10/1/10 custody order was stipulated by the parties and entered into the record by the court. Order Regarding Child Custody and Visitation 10/1/10, p. 1-2. Foreman's income averaged $75,000.00 for five years. Her hourly wage as a nurse was $35.00 an hour, or $70,000.00 a year. Foreman was also employed with the National Guard, which bolstered her income. Tr 6/7/12, p.90, Ll. 19-25. Foreman voluntarily reduced her employment with the intention of going to school. As noted by the district court, "she is currently enrolled in school and works part time." R Vol. II. p. 294 L. 6.

Therefore, the magistrate should have found that Foreman was underemployed, because she is working part time, and her income should be imputed at $70,000.00, the amount she would earn working full-time as a nurse, or at $75,000.00, the average amount that she earned working part-time as a nurse while also enlisted in the National Guard.

The magistrate stated: "You're assuming there's employment out there in her specialized field, where she can work five days a week. I don't know that. In a lot of professions that's what you get, is about a three day a week shift." Tr 3/25/2013, p.17, Ll. 12-15. Foreman's full-time employment as a critical care nurse is a matter of record. A parent cannot avoid paying child support by the simple expedient of attending school. Foreman cannot object to the lack of expert

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[4] Sweet will move to augment the record with the order compelling discovery.

testimony on a subject that was not timely disclosed prior to trial. Foreman's hourly rate of $35.00 an hour was a matter of record, and it was an abuse of discretion for the magistrate not to impute her yearly income in the amount of $70,000.00 a year.

The district court should have found clear error, where it is obvious that Foreman has deliberately and voluntarily reduced her income; and, the district court should have found abuse of discretion, where the I.C.S.G. do not authorize reduction of a parent's obligation to support his or her child for personal educational goals.

3. Did the magistrate err when it decided the change would result in increased driving distance and unfairness to Ms. Foreman, and ordered Sweet to pay half her mileage?

The magistrate would not hear any argument or evidence in support of Sweet's motion to reconsider the provision that he pay half of Foreman's travel expense. Tr 3/25/13, p. 20, Ll. 6-16. However, the finding that Rebecca Foreman suffered an increase in driving distance to pick up SS is clearly erroneous and should have been reversed by the district court.

a) Foreman's driving distance did not change.

The October 1, 2010 custody order required both parties to travel half-way, and meet at the Priest River police station. Order Regarding Custody and Visitation 10/1/10 p.4, Ll. 2-5. The magistrate changed this provision. The new order has transfers taking place at the police station nearest the other parent's home. R Vol. I, p. 151, Ll. 19-24. The mileage has not changed, since both parents are still required to drive an equal distance. (Both parents used to drive half the distance every time. Now, each parent drives the entire distance when it is his or her turn to pick the child up, that is every other time, or half as often. The distance each parent drives is unchanged.) However, the magistrate appears to believe that the change resulted in a net benefit to Sweet: "I've obviously, given this a bit of thought and recognize the distance and unfairness to Ms. Foreman." Tr 8/8/12, p. 203, Ll. 1-3. The district court was equally mistaken: "The cost of travel for exchanges remains equally shared. Now, rather than Phillip making the drive, he must reimburse Rebecca for her cost to drive the extra distance." R Vol. II. p. 291 Ll. 5-6.

The court may make equitable compensation where travel expense can be an unjust burden imposed upon one party by the other's move. In this case, Foreman is the parent who left Bonner's Ferry, creating the distance between the parties. Sweet has not moved, and it would be equitable for Foreman to pay the travel cost. Furthermore, Foreman's actual income from her part-time job is twice Sweet's imputed income. Any equitable adjustment should reasonably operate to relieve the less affluent parent from the financial burden created by the more affluent parent. It is inequitable for the court to compensate Foreman for half her mileage where she is the one who moved away, the parties have always driven an equal distance, and the new order did not increase the driving distance for either party. The district court should have reversed the requirement that Sweet reimburse Foreman for her mileage.

b) The requirement that Sweet pay Foreman's mileage amounts to a summary sanction for contempt of court, without due process.

The court explained its ruling in open court as follows: "Because he cannot be trusted, by his own admission as well as the history established in this case, he is paying for the fact that she has to travel from that halfway point in Priest River up to Bonner's and then back to that halfway point, which she shouldn't have to do, if he were doing his part. So he's paying for that, and he's paying for it at the state rate, which is currently 55 cents per mile." Tr 8/8/12, p. 203, Ll. 16-21.

The magistrate found that Sweet was responsible for the majority of the difficulties surrounding the transfers between the parties. At trial, the magistrate directed counsel: "What the Court is extremely concerned about in this case is the number and the duration and the frequency of times with which Ms. Foreman has testified to events where she was denied her scheduled visitation, where pickups, drop offs, were not done on time. *Where the allegation is that Mr. Sweet would unilaterally change the place of the drop off and the time and basically say take it or leave it.* Things of that nature are extremely concerning to the Court, and so I would encourage you to spend your time focusing on that and ignoring these other non-issues that I've identified as being really not, particularly, relevant from the Court's perspective." (Emphasis added.) Tr 8/8/2012 p. 84, Ll. 16-24. At the commencement of Sweet's direct testimony, the

magistrate reiterated: "...obviously his attorney will want to walk him through each of these events so I can get his side of the story." Tr 8/8/2012, p. 129, Ll. 4-6. However, at the conclusion of the trial, the magistrate ruled that Sweet did not, at any particular time, unilaterally deny any of Ms. Foreman's mandatory parenting time. Tr 8/8/2012, p. 202, Ll. 1-2.

Sweet did not change the time or place of drop off. Sweet testified that, due to weather, and to SS' school schedule, he could not make it from Bonner's Ferry to Priest River on Thursdays by 5:00 o'clock p.m.[5] The parties had made various different arrangements in light of that reality, including Sweet driving extra distance to accommodate Foreman. Tr 8/8/2012, p. 156, Ll. 23-25; p.157, Ll. 1-11; p.158, Ll. 6-13.

Although the court did not state that it found Sweet in contempt of court, it visited a punishment upon him, because "he cannot be trusted" and "he's paying for that". The United States Supreme Court defined the difference between a civil and a criminal sanction: "An unconditional penalty is criminal in nature" and "[a] conditional penalty...is civil" Hicks v. Feiock, 485 U.S. 624, 633 (1988). An inequitable remedy provided to one party at the expense of the other, without any opportunity for cure amounts to criminal sanction. It is an abuse of discretion to award such a sanction without due process, notice and an opportunity to be heard. At no time did the magistrate warn Sweet that sanctions were being considered. The court made it clear that custody of SS depended upon Sweet providing satisfactory answers to Foreman's allegations; the court directed counsel to address specific dates, indicating that any omission would be treated as an admission. Tr 8/8/2012, p. 150, Ll. 16-20.

Foreman did not request the sanction imposed by the court, and Sweet did not have notice that it was being considered. There is no authority or precedence permitting the court to substitute a criminal proceeding for a civil hearing, without notice or opportunity to be heard, and then impose a criminal sanction. Sweet should have had the right to be informed that the charge could carry criminal penalties, to present defenses and cross-examine witnesses, and to be

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[5] Boundary County schools do not have class on Friday; the long weekend "A" began on Thursday night.

advised of the right not to incriminate himself. Foreman should have had to prove her case beyond reasonable doubt.

The district court should have reviewed de novo the magistrate's application of the legal standard, and determined that it was an abuse of the court's discretion. The portion of the custody order requiring Sweet to pay Foreman's mileage should be vacated.

c) Evidence shows that Foreman was responsible for most of the difficulties at the exchanges.

Even if the court had given Sweet notice and an opportunity to defend against the charges, there was not substantial evidence supporting the allegation that Sweet was the primary cause of the difficulties between the parties. There was substantial evidence that Foreman's interpretation of the custody order, refusal to comply with "floating weekend" requests, and her insistence that every week was her long weekend "A", were the most prevailing reasons for the conflict between the parties. The custody order itself contained a variety of flexible provisions designed to allow Foreman a maximum amount of time with SS "so long as Mother is not working". Order Regarding Custody and Visitation dated 10/1/2010, p. 1-2. If Foreman changed her work schedule, her parenting time changed, and Sweet would drive to Spokane to get SS back to Bonner's Ferry. When Foreman was free to spend time with SS, an exchange would again take place. If there was a dispute as to the meaning of the order, the police would be involved, and the order would be enforced subject to the officer's interpretation.

Other than Sweet's admitted tardiness on Thursdays, allegations that Sweet was at fault in the exchanges were dismissed by Foreman or proven false, due to a) the parties' making alternate arrangements, b) the dispute between the parties concerning Sweet's "floating weekends", or, c) the dispute between the parties concerning whether it was "week A" (her long weekend), or "week B" (one night). On one occasion Foreman took SS from Sweet's home, and was forced to return him by the police. Tr. 8/8/2012 p. 138, Ll. 3-10.

Because Sweet only had one monthly weekend with SS, the parties agreed that Sweet could have four "floating weekends" throughout the year. Since Boundary County schools

operate on a four-day school-week, in a strained interpretation of the "floating weekend" provision, Foreman insisted that she should have SS Thursday night and return SS to Sweet for the "floating weekend" on Friday. Tr. 8/8/2012 p.177, Ll. 22-25; p.178, Ll. 9-16.

Sweet testified that he kept SS pursuant to the custody order December 15, 2010, because Foreman was working. Tr 8/8/2012, p. 130, Ll. 1-7. December 15, 2010, was a Wednesday. Foreman complains she did not get SS on the 15th, then states that December 16, "...was my scheduled time for my normal pick-up..." Tr 8/8/2012, p. 86, Ll. 5-10. This is another case of confusion over the custody order.

March 3, 2011, was the first weekend of the month, and pursuant to the court order SS was supposed to remain with Sweet. Foreman complains because Sweet delivered SS to her at 10:30 at night, as an accommodation to her because he was going to be out of town. Tr 8/8/2012, p. 53, Ll. 16-18.

March 8, 2011, was a Thursday. Foreman testified that this was her scheduled time for her to have SS. At trial, Foreman used the "Memoranda" prepared by her attorney to refresh her memory, but doesn't remember anything it does not say: "I don't remember if he had actually dropped him off or not, it doesn't say, but he refused to talk to me and kept putting SS on the phone or put SS in the middle of it, which he's not supposed to be doing." Tr 8/8/2012, p. 40, Ll. 5-7. Sweet testified that the parties had agreed to a later time, that there was "no set time" on Thursday, because "it says five o'clock on the decree and I cannot make it a five o'clock because SS gets off the school bus at four thirty." Tr 8/8/2012, p. 157, Ll. 6-8.

In April 2011, pursuant to the custody order, Sweet had SS the first weekend of every month. Sweet testified that Foreman was in Hawaii from April 8 until the 22nd of April, and that she gave him no advance notice when she would return. Tr 8/8/2012, p. 131, Ll. 21-25; p. 132 Ll. 1-6; p. 133, Ll. 12-19; p. 135, Ll. 5-20. Sweet testified that, before they knew when Foreman would be back, [redacted]had planned Easter egg hunts for the next day; Foreman called late on the 22nd, and Sweet told her that she could come join SS at the community event, and take him from there. Tr 8/8/2012, p. 136, Ll. 1-8. This amounts to a change of circumstances resulting from

Foreman's travel in Hawaii. It is not a violation of the custody order. October 6, 2011, was a Thursday, again a "B" week. Foreman was supposed to have SS Friday morning. According to Foreman's testimony, Sweet allowed her to pick SS up anyway, but she complains because he did not drive SS to Priest River, which he was not obligated to do. Tr 8/8/2012, p. 44, Ll. 5-7. Foreman complains that she had to pick SS up at Walmart; Sweet drove an extra half-hour so that she could pick SS up in Sandpoint instead of driving all the way to Bonner's Ferry. Tr 8/8/2012, p. 139, Ll. 5-25. According to Sweet's testimony, he was on time and she was not. Tr 8/8/2012, p. 138, Ll. 23-24.

October 13, 2011, the Memoranda states that Sweet "didn't show up", however Foreman testified that Sweet called and told her he would not be able to make it on time, indicative of unusual circumstances. Tr 8/8/2012, p. 44, Ll. 16-18. Sweet testified that he attempted to work out an alternative arrangement that decreased her driving time, by delivering SS to Post Falls instead of Priest River. Tr 8/8/2012, p. 140, Ll. 4-15.

October 27, 2011, was a Thursday, again a "B" week, pick up was on Saturday. Foreman complains that she did not get SS on Thursday pursuant to the "A" week schedule. Tr 8/8/2012, p. 44, Ll. 19-25.

November 11, 2011 was supposed to be a "floating weekend" but Foreman refused to deliver SS. Sweet testified as to his plans for that time, and that Foreman finally brought SS for a two-hour visit. Tr 8/8/2012, p. 163, Ll. 9-16.

December 8, 2011 was a "floating weekend". Tr. 8/8/2012 p. 140, Ll. 21-25.

December 16, 2011 was the beginning of Christmas break, to Sweet in odd years. Order Regarding Custody and Visitation 10/1/10, p. 3, Ll. 20-21.

January 19, 2012, was a week "B", Foreman complains she did not receive SS on Thursday, while the court order required the exchange take place on Saturday morning.

February 16, 2012, Foreman believed it was an "A" week, transfer on Thursday, Sweet believed it was a "B" week, transfer on Saturday, both were wrong; it was President's Day weekend, transfer on Friday. Tr 8/8/2012, p. 154, Ll. 11-17.

February 23, 2012, Sweet testified that the police became involved in the custody confusion and told him it was week "B". Foreman testified that he informed her of the same. Tr 8/8/2012, p. 50, Ll. 17-20. SS was delivered Saturday. Tr 8/8/2012, p. 51, Ll. 5-6.

March 8 and 29, 2012, were "B" weeks, however SS was delivered on Thursday, albeit late, as an accomodation. Tr 8/8/2012, p. 51, Ll. 18-23. Sweet testified that he was delayed by the weather and road construction on the Dover Bridge, and that the parties had agreed to change the times. Tr 8/8/2012, p. 156, Ll. 23-25; p. 157, Ll. 6-8; p. 158 Ll. 6-10, 17-20.

Foreman dropped her allegations regarding April 19, 2012. Tr 8/8/2012, p. 158, Ll. 23-25; p. 159, Ll. 1-3.

Sweet testified that Foreman would always argue that it was week "A", or that the schedule did not apply because she said that she was not working. Tr. 8/8/2012,p. 130, Ll. 11-17. He testified that he often allowed Foreman to have SS during his custodial time, when she wasn't working. Tr. 8/8/2012 p. 131, Ll. 4-11. Sweet also testified that Foreman did not follow the "floating weekend" provision. Tr. 8/8/2012 p. 163, Ll. 18-24

The Court should note the evidentiary dispute at the end of the trial on August 8, 2012. Foreman introduced a packet of texts as evidence, which were admitted over Sweet's objection. Tr. 8/8/2012 p. 193, Ll. 11-19. One of the texts proved that, contrary to Foreman's assertion, Sweet had requested a floating weekend for December 29, 2011, however that particular text was omitted from the batch that was admitted into evidence. Tr. 8/8/2012 p.193, Ll. 5-23; p. 194, Ll. 1-5. Sweet was not aware of the omission until informed by counsel for Foreman. Tr. 8/8/2012 p.193, Ll. 5-23. The court would not allow Sweet to correct the omission, however the text would have shown that Sweet requested the weekend. Tr. 8/8/2012 p. 194, Ll. 1-5.

Although Sweet admitted to being late at exchanges on Thursdays due to weather, there was substantial evidence that Foreman's interpretation of the custody order, refusal to comply with "floating weekend" requests, and her insistence that every week was her long weekend, were the most prevailing reasons for the conflict between the parties. The magistrate commenced by noting that very fact on the record in his ruling on the custody issue; Foreman

denied Sweet two weekends that should have been his parenting time with SS. Tr. 8/8/2012, p. 201, Ll. 18-25. The magistrate goes on to state that "The Court cannot conclude that [Sweet], at any particular time, unilaterally denied Ms. Foreman her mandatory parenting time." Tr. 8/8/2012, p. 202, Ll. 1-2. Given these favorable findings by the magistrate, Foreman's history of custodial interference, and the number of false or unsubstantiated allegations on Foreman's part, the district court should have determined that it was an abuse of discretion for the magistrate to then find that the majority of the problems between the parties were Sweet's fault.

4. Was it an abuse of discretion not to award attorney fees pursuant to I.C. §12-121, where Foreman's denial of her waiver of child support was not based in fact or in law, and where Sweet spent thousands trying to prove he did not owe the arrears?

The court has broad discretion to grant or deny attorney fees to the prevailing party, pursuant to I.C. §12-121. The provision is intended to grant prevailing litigants in civil actions the right to be made whole for attorney's fees and costs when justice so requires.

The denial of attorney fees was reversed in the matter of Straub v. Smith, supra, at 145 Idaho 71. In that case the magistrate court believed that a prayer for costs and fees must be included in the pleadings, that Smiths had waived costs and fees, and that Smiths failed to cite a rule or basis for the motion. The Supreme Court held that the motion to reconsider pursuant to I.R.C.P. 11(a) should have been treated as a motion to amend the order of dismissal pursuant to I.R.C.P 59(e), and that Smiths supported their motion with an affidavit alerting the court to its factual error. Id. In this case, the magistrate gave no reason for denying fees and costs in its memorandum opinion and order. R Vol. I, p. 169, L. 3. Sweet filed a motion for attorney fees and costs after entry of the order, which was properly treated as a motion to reconsider. The magistrate denied reconsideration on the basis that Foreman's position was not frivolous, and that it was the Department of Health and Welfare who caused Sweet's child support problems.

Sweet is clearly the prevailing party on the majority of the issues at trial. Sweet asked for modification of his child support dating back five years, and was granted relief, including a retroactive modification of his guidelines income for child support purposes. Most significantly,

Sweet proved that Foreman lied about the waiver, and about the use of his credit card. He proved that Foreman used his credit card without his knowledge or consent, and won an offset against his arrears as compensation. Foreman's position on these issues was frivolous and without factual or legal basis.

Foreman asked for custody modification granting her full custody of SS, and was denied. Foreman moved for reconsideration and was denied, and again was denied on appeal before the district court. Because the magistrate articulated clear and convincing reasons why it is in the best interests of SS to continue residing with his father on the farm in Bonner's Ferry, Foreman's continued litigation on that issue is frivolous, again without basis in fact or in law.

Sweet does not contest issues in which he does not expect to prevail; Sweet did not ask for attorney fees litigating custody, even though he successfully defended against Foreman's attempt to take SS out of Idaho, and is, ultimately, the beneficiary of the modification. Sweet cannot prove that he is entitled to reimbursement regarding the counseling expense for SS, and the magistrate also denied compensation for the charges Foreman incurred on Sweet's cell phone. Those issues were not frivolous, encompassed a minute portion of the time at trial, and were not the cause of any pre-trial litigation. Sweet contests only the court's findings regarding the parties' income, the mileage penalty, and the denial of attorney fees, issues which are not frivolous, and on which he expects to prevail on appeal.

Foreman's motion for reconsideration of the court's custody decision, on the other hand, was frivolous, not based in fact or in law, as was her appeal to the district court on that issue, and her present cross-appeal before the Supreme Court. Sweet should be compensated for his expense litigating the reconsideration of custody, and the review of that issue in the present appeal. Sweet should also be reimbursed for having to litigate the issue of whether or not Foreman had waived $9,080.00 in child support where she continued to deny the matter up to the moment of her testimony at trial of the matter. The Department of Health and Welfare Child Support Services had been subpoenaed, and were sending a caseworker to testify on Sweet's behalf; it was finally her new attorney, Tevis Hull, with a little guidance from the court, who

recognized the futility of Foreman's argument, and voluntarily entered a stipulation on the record to the effect that Sweet's allegation was true, and that the support at issue had been waived. Due to Foreman's capitulation, the court ordered a recess so that counsel could inform the caseworker that the testimony would not be needed.

For two years, at the bottom of the recession, Sweet lost the use and the income derived from his commercial driver's license; he lost the right to drive until he finally obtained custody, and, although the court refused to consider awarding child support to Sweet at that time, it did order that collection of child support cease. Order Ceasing Child Support 2/4/10 Case No. CV-2006-118.[6]

Sweet was finally able to reverse the child support obligation that had been imposed on him by default in 2006, and to prove that he never owed the $9,080.00 arrears with which he was charged in 2008. He obtained a reduction in the income imputed to him, although he argues it should still be less. He was compensated for his stolen credit card. And, he obtained an award of child support, retroactive to 2010. Foreman's continued litigation against Sweet on those issues was frivolous, not based upon true facts, and not supported by law. Sweet prevailed on those issues, and should have been awarded attorney fees.

5. Was it an abuse of discretion not to award attorney fees pursuant to I.C. §12-123, where Foreman's request that the Department collect child support arrears was malicious and intended to harass or harm Sweet, and where her denial, for five years, of the waiver, was not based in fact or in law, and did in fact seriously harm and impair Sweet's ability to earn an income?

At the conclusion of the hearing on Sweet's motion to reconsider, the magistrate commented that it was not Foreman, but the Department of Health and Welfare, who was responsible for Sweet's arrearage, stating: "am I in a position to say that the way the Department of Health and Welfare is doing it is frivolous and therefore, to the extent that Ms. Foreman

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[6] Sweet will move to augment the record with the Order Ceasing Child Support.

should have to pay attorney fees incurred to address that issue, I think that would be, in and of itself, quite a stretch." Tr. 3/25/2013, p. 32, Ll. 16-19. The magistrate ignores the fact that Foreman herself denied the waiver, requested Child Support Services to collect $9,080.00 that Sweet did not owe, causing him to lose his commercial driver's license, and presented an unsubstantiated defense of duress and coercion on the day of trial, continuing to insist that Sweet owed the money until the falsity of her position became abundantly clear both to the court and to her counsel. Tr. 6/7/12, p. 38, Ll. 4-8.

Foreman told Sweet she waived support completely. Then, after two years had passed, she called the Department and requested they collect accumulated arrearages, causing him to lose his driver's license and his employment as a professional driver. If the Department mistook her intent, it would have been a simple matter for Foreman to correct the Department's error. The fact is that she did not do so, but instead persisted for five years:

> Q: Isn't it true that some of the child support arrears that are--that you requested to be collected from the Defendant [sic] were accrued during the time that he was living with you?
>
> A: I don't believe so. And there was the $3,000.00 that was forcibly--I was forced to sign off.

Tr 6/7/2012, p. 36, Ll. 4-8. In open court, Foreman admitted that her claims of legal duress were baseless, and retracted her opposition to the waiver. Tr 6/7/2012, p. 38, Ll. 23-25, p. 39, Ll. 1-7. She admitted that she contacted the department in September of 2008, and requested that the amount be collected from Sweet. Tr 6/7/2012, p. 42, Ll. 12-23. The court ordered a recess in order to allow counsel to inform the Department of Health and Welfare that they were no longer needed to testify. Tr 6/7/2012, p. 44, Ll. 4-15. Sweet prevailed on the issue, and proved that Foreman's opposition was groundless. The district court should have found that it was an abuse of discretion to deny attorney fees pursuant to I.C. § 12-123.

6. Should the court award attorney fees to Sweet pursuant to I.C. § 12-121 on appeal?

An award of attorney fees on appeal is appropriate when the appeal is brought or

defended frivolously, or without foundation. Getchel v. Butler, 104 Idaho 719, 664 P.2d 783 (Ct. App. 1983). In this case, Sweet has shown that the magistrate's findings of fact are clearly erroneous, unsupported by substantial and competent evidence; and presents issues of law that require reversal of the trial court's orders on those issues. Sweet should prevail on his appeal, and the Court should find that opposition to his appeal is not based in fact or in law, and that he is entitled to an award of attorney fees on appeal, pursuant to I.C. 12-121. Sweet should also prevail and be awarded attorney fees pursuant to I.C. 12-121 against Foreman on her cross-appeal, where she again asks the reviewing court to second-guess the trial court in its custody determination.

CONCLUSION

The district court should have found that the magistrate abused its discretion in its determinations regarding Sweet's guidelines income, which should have been imputed at the stipulated amount of $25,000.00 a year. Foreman should have been found to be underemployed, and her guidelines income should have been imputed at $70,000.00. The district court should have determined that it was clearly erroneous for the magistrate to compensate Foreman for an increase in mileage because there was none, and it was an abuse of discretion to impose the mileage requirement because it amounted to a criminal sanction without due process and because Sweet did not interfere with Foreman's parenting time. Sweet should have been awarded the attorney fees he requested for litigating the matter of child support as well as the matter of Foreman's waiver of child support, pursuant to I.C. § 12-121, where Foreman's denial of her waiver, for five years, was frivolous and without basis; or, Sweet should have been awarded attorney fees pursuant to I.C. § 12-123, where her request for collection of arrears that Sweet did not actually owe, was malicious and intended to harm and harass Sweet.

WHEREFORE IT IS PRAYED that the Court reverse the district court's order affirming the magistrate court as to the income of the parties, the requirement that Sweet pay half Foreman's mileage, and the denial of attorney fees to Sweet as the prevailing party. The Court should order that Sweet's income be imputed at $25,000.00, that Foreman's income be imputed at

$70,000.00, and that Foreman be ordered to pay attorney fees and costs, pursuant to I.C.§ 12-121, in the present appeal.

DATED this 2nd day of January, 2015

Val Thornton

Val Thornton, Attorney for Respondant/Cross-Appellant

CERTIFICATION OF MAILING

I hereby certify that a true and correct copy of the foregoing instrument was mailed, postage prepaid this 6th day of January 2015, to:

RUTH FULLWILER
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Val Thornton