4-27-2010

Drinkall v. Drinkall Respondent's Brief Dckt. 37034

IN THE SUPREME COURT OF THE STATE OF IDAHO

KRISTINA MARIE DRINKALL,
Plaintiff/Respondent,

v.

DARREN DUANE DRINKALL,
Defendant/Appellant.

Docket No. 37034-2009

RESPONDENT'S BRIEF

On Appeal from the Fourth Judicial District of the State of Idaho, in and for the County of Ada. The Honorable Cheri C. Copsey, District Judge, Presiding

Darren Duane Drinkall
4145 W. Moon Lake Dr.
Meridian, Idaho 83646

Appellant, Pro Se

Stanley W. Welsh
Franki J. Hargrave
COSHO HUMPHREY, LLP
PO Box 9518
Boise, Idaho 83712

Attorneys for Respondent

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I. STATEMENT OF THE CASE

A. Nature of Case.

This appeal was initiated by Defendant/Appellant ("Darren") from the September 16, 2008 Order entered by the Honorable Terry R. McDaniel, Magistrate Judge modifying child support and denying Darren's motions to modify visitation and restrictions on flying the children in non-commercial aircraft. The Honorable Cheri C. Copsey, District Court Judge, affirmed Judge McDaniel's Order and ordered Darren to pay Plaintiff/Respondent's ("Kristina") attorney fees and costs incurred in defending the District Court appeal. Subsequently, Darren appealed to this Supreme Court from Judge Copsey's September 1, 2009 decision affirming the magistrate court. The nature of Darren's appeal is modification of child support and child custody.

B. Course of Proceedings.

Because Darren's appeal brief to this Court does not reference this Court's Record or the transcript from the district court appeal, Kristina sets forth the relevant proceedings and statement of facts in full below in compliance with Idaho Appellate Rule 35(e).

1. December 27, 2001 Decree of Divorce.

Kristina and Darren were divorced by their stipulated December 27, 2001 Decree of Divorce. (R., pp. 35-45.) Kristina and Darren were awarded joint and legal custody of their three minor children, namely: (1) [redacted] with Kristina receiving primary physical and residential custody.

Pursuant to Darren's stipulation, his visitation with the children did not include overnights until August 2002, when [redacted] began staying with Darren every first and third weekend of the month, beginning Friday at 6:00 p.m. and ending Sunday at 5:00 p.m. (R., p. 36.)

The Decree required Darren to pay child support in the amount of $1,122 per month. Darren was ordered to provide the children's medical, dental and optical insurance coverage, and was awarded the tax exemption for all three children. (R., pp. 38-39.)

2. July 3, 2003 Modification Order.

In 2002 Darren withdrew any objection to Kristina's request to move with the children from Ada County, Idaho, to Buhl, Idaho, a distance of approximately 100 miles. (R., p. 68.) Upon the court's approval, Kristina and the children moved to her family farm in Buhl in July 2002. (R., p. 68.)

In May 2003, Darren voluntarily made a lifestyle choice to eliminate his previous stand-by responsibilities and overtime work at Xerox such that his income dropped from $52,596 to $40,226. (R., p. 69.) Income in the amount of $21,996 per year was imputed to Kristina for child support purposes. (R., p. 75.) Based upon Darren having the children approximately 22% of the overnights per year, and with Darren providing the medical insurance for the children at a cost of $1,465.10 per year, Darren was ordered to pay Kristina child support in the amount of $954.50 per month. (R., p. 75.)

The court concluded that because Darren's work schedule and living arrangements did not lend themselves to large blocks of time to supervise three young children, and because the

Court was uncomfortable delegating parental duties to Darren's girlfriend, the court restricted Darren's summer and holiday visitation with the children to times when he would be exercising his vacation time from work. (R., p. 73.) The 2003 Order Modifying Decree of Divorce allowed Darren visitation with the three (3) children as follows:

> (a) Every first and third full weekend each month from Friday at 7:00 p.m. to Sunday at 5:00 p.m., with Kristina responsible for all travel arrangements necessary to transport the children to and from her residence and Darren's residence;
>
> (b) One week-night per week from 4:00 p.m. to 8:00 p.m. upon at least 72 hours advance notice to Kristina, with Darren solely responsible for all of his own travel costs to and from his residence and Kristina's residence;
>
> (c) Three non-consecutive one-week periods of time in the summer to coincide with Darren's vacation time from work, with Kristina responsible for the travel arrangements; and
>
> (d) The typical alternating holidays.

(R., p. 85.)

3. June 25, 2008 Contempt Order Against Darren.

On June 16, 2008, a hearing was held before the Honorable Terry R. McDaniel on Kristina's March 23, 2008 Motion for Contempt and Entry of Money Judgment. Darren had quit

providing the children's health insurance as ordered; had refused to pay Kristina for his share of the cost for the children's health insurance that Kristina then had to provide; had underpaid child support for a period of more than twenty (20) months; and had not reimbursed Kristina for non-covered medical expenses for the children. Darren did not purge himself of contempt until a few days prior to the contempt hearing. After presenting evidence and argument, Darren admitted he was in contempt of the 2003 Order, and Judge McDaniel entered his order granting Kristina's motion for contempt. (R., p. 10.) Darren paid Kristina the full $3,194.93 amount she requested for Darren's violations of the child support order.

On July 8, 2008, Judge McDaniel entered his Order for Attorney's Fees and Costs awarding Kristina the full $3,423.27 amount requested in her cost bill for having to bring her contempt motion. (R., p. 10.)

4. September 16, 2008 Order.

On December 28, 2007, Darren filed his Petition to Modify Visitation and Child Support. (R., p. 90-94.) Kristina filed her Answer on January 30, 2008. (R., p. 95-98.) On April 7, 2008, Kristina filed her objection to Darren's petition with regard to his requests for custody modification and an order allowing him to take the three young children flying in his experimental plane over Kristina's objection. However, Kristina agreed that child support should be modified. (R., p. 10.)

The trial was held on September 4, 2008 before the Honorable Terry R. McDaniel. At the conclusion of trial, Judge McDaniel ruled on Darren's petition in open court, denying Darren's motion to modify custody and denying his request to eliminate the restrictions on flying

the children in non-commercial planes, but increasing child support to $1,366 effective January 1, 2008. (R., pp. 99-100.)

5. District Court Appeal.

Darren filed his Notice of Appeal to the District Court and his Statement of Issues on Appeal on October 17, 2008. (R., p. 104-08.) In his appeal to the District Court Darren claimed that the Honorable Terry R. McDaniel (1) abused his discretion by failing to enlarge Darren's summer visitation with the children; (2) erred as a matter of law by including the rental income Darren received from his girlfriend as income for child support purposes; and (3) erred by failing to use the proper income for Kristina. (R., pp. 106-07.)

On February 2, 2009, Jennifer Schindele, from the law firm of Bevis, Thiry & Schindele, P.A., filed her Notice of Appearance for Darren. On February 9, 2009, Darren filed Appellant's Brief. Kristina filed her Respondent's Brief on March 9, 2009, and Darren filed his Reply Brief on March 30, 2009.

On September 1, 2009, the Honorable Cheri C. Copsey, District Judge, entered the Decision on Appeal affirming the magistrate court's decision in its entirety, and awarded Kristina her attorney fees and costs on appeal pursuant to Idaho § 12-121 and Idaho Rule of Civil Procedure 54(d) based on the District Court's finding that Darren's appeal had no reasonable foundation and was simply asking the Court to second-guess the magistrate's findings. (R., pp. 109-19.)

In his Appeal Brief, Darren completely omitted the procedural history of the District Court appeal.

6. Supreme Court Appeal.

On October 8, 2009, Darren filed his Notice of Appeal to this Supreme Court. (R., p. 120.) On November 10, 2009, Darren filed his Amended Notice of Appeal to this Court. (R., p. 123.) Neither the first Notice of Appeal nor the Amended Notice of Appeal included a preliminary statement of issues on appeal that Darren intended to assert, as required by Idaho Appellate Rule 17. Darren did not file a Statement of Issues on Appeal with this Court. Darren's Appeal Brief was filed with this Court on March 31, 2010. Darren's Appeal Brief to this Court is a zeroxed copy of his appeal brief to the district court (as evidenced by the highlighting on pages 3, 4, 12, and 20) to which he replaced the cover sheet and the last two pages with his signature and Certificate of Service.

C. Statement of Facts.

As noted above, Darren did not cite to this Court's Record in Appellant's Brief. He did cite to a transcript. But in his November 10, 2009 Amended Notice of Appeal Darren requested that two transcripts be prepared and submitted to this Court, "transcript No. 1" for the September 4, 2008 hearing before Magistrate Judge McDaniel; and "transcript No. 2" for the August 27, 2009 appeal hearing before District Judge Copsey. Apparently Darren is referring to Transcript No. 1 in his appeal brief to this Supreme Court.

In his December 28, 2007 Petition, Darren requested that he be awarded summer visitation with the children for the entire summer, excluding the first week after the children are released from school and the first week before beginning the next school session, with Kristina having visitation every other weekend and a two week vacation time. (R., pp. 90-92.)

In his petition Darren also requested that "child support be modified to an amount consistent with the Idaho Child Support Guidelines." (R., pp. 91-92.) But, on pages 2 and 9 of Appellant's Brief Darren claims that he petitioned the court to "*reduce* his child support obligation" and claims that the court erred by increasing his child support obligation. In fact, however, the magistrate court did grant Darren's request to modify child support to an amount consistent with the Idaho Child Support Guidelines.

Darren requested that his visitation with the children during the school year be increased from every first and third weekend of the month to every other weekend; and that the holiday schedule be adjusted to include Easter so that the parent who does not have the children on Easter weekend can have the children for at least two hours on that day. (R., p. 91.) Darren did not appeal the magistrate court's denial of these two requests.

Darren's petition also requested that the stipulated agreement that "neither party shall allow the children to fly in a non-commercial aircraft until further order of the court," be eliminated from the Judgment and Decree of Divorce. (R., p. 92.) Darren did not appeal Judge McDaniel's ruling that "there was no evidence presented as to the flight requirements, and so those will not be changed." (Tr. No. 1., p. 62, Ll. 4-6.)

In his petition Darren alleged the following "material, substantial and permanent" changes in circumstances:

(1) The children are older and asking to spend more time with him and his parents during the summer;

(2) Kristina re-entered the work force in July 2006 causing the children to require outside supervision while in her care; and

(3) His voluntary resignation from Xerox in July 2006 now allows him to spend greater amounts of time with the children.

(R., p. 91.)

At the September 4, 2008 hearing Kristina testified that she works Mondays through Fridays and that she does not work any weekends. (Tr. No. 1, p. 9, Ll. 1-21.) Kristina testified that during the summer when Kristina is at work the children attend day camps for 4H, they go the library from noon to four for 4H meetings and activities, and are otherwise under her mother's care or another person delegated by Kristina. (Tr. No. 1, p.30, Ll. 1-25; p. 31, Ll. 19-25; p. 32, Ll. 1-2.) Kristina also testified of the children's weekly (and sometimes more than weekly) involvement with 4-H projects for the County Fair, the animal projects during the summer, and swimming lessons. (Tr. No. 1, p. 40, LL. 1-20). These statements by Kristina were not disputed. On page 2 of Appellant's Brief Darren falsely claims that Kristina works "every day of the week" and that the children spend the whole summer with Kristina's mother or at the library.

Kristina agrees with Darren's statements of fact regarding the children's happy, close and caring relationship with Darren and his mother. (Appellant's Brief, p. 3.) Kristina also testified about how well all three children were doing and how well adjusted they were with the current custody schedule. (Tr. No. 1, p. 41, Ll. 1-25: p. 42, Ll. 1-5; p. 29, Ll. 3-5.)

Kristina testified that at the time of the September 2008 trial her salary was approximately $38,000 per year, which included a $1,900 pay raise she received in April or May of 2008. (Tr. No. 1, p. 10, Ll. 12-15; p. 32, Ll. 7-21.) Kristina also volunteered that the bank changed its incentive plan for 2008 and gave her a bonus of roughly a thousand dollars. (Tr. No. 1, p. 32, Ll. 23-25; p. 33, L. 1; p. 33, Ll. 1-6.)

Darren testified that he earns $50,000 annually. (Tr. No. 1, p. 43, Ll. 22-23.) In addition, Darren admitted that he received monthly rental income in the amount of $1,100 from Ms. Moss, his roommate of the past four years. (Tr. No. 1, p. 46, Ll. 1-3.) Darren's testimony was contradictory regarding whether Ms. Moss was still living with him the day of trial. At one point he testified that she "probably" moved out two days before the trial, and in the same breath testified that she was then "in the process of" moving out. (Tr. No. 1, p. 45, Ll. 21-23.)

Because Darren's testimony regarding his income is an important factual issue for this appeal, and because Darren omitted part of his testimony on page 5 of Appellant's Brief, Kristina sets forth in full Darren's testimony regarding his income when cross-examined (with the testimony Darren omitted underlined) as follows:

> Q. Mr. Drinkall, you, in addition to the $50,000 annual income, which you have had since January 2nd of 2008, you also have <u>rentable income</u> in which you rent part of your home by Ms. Moss paying you $1,100 a month?
>
> A. <u>That was the case</u>. That is no longer the case.
>
> Q. It was the case in March of '07 – excuse me, March of '08?
>
> A. <u>At the time of this deposition that was true</u>. That is no longer true.

Q. Why?

A. Ms. Moss found out of the intention – well, that Mrs. Drinkall was planning to use that as part of my income. And she said there was no way that she was going to allow that to happen, and she has moved out and is in the process of moving into her own – back into her own home.

Q. When did she move out?

A. Probably two days ago. In fact, she is still in the process of it.

Q. So she is moving out now two days before trial. And so up until the time of your deposition from January, February, March, she was paying $1,100 a month rental, correct?

A. Yes, she was.

(Tr. No. 1, p. 45, Ll. 3-25; p. 46, Ll. 1-3 (emphasis added).) Darren's testimony demonstrates that the sole basis for his claim that Ms. Moss was moving out was an attempt to prevent the magistrate court from considering the monthly $1,100 rental income for child support purposes. In fact, in response to Judge McDaniel's direct question to him, Darren testified that "as soon as [Ms. Moss] heard of Mrs. Drinkall's plan to use what she was paying as far as sharing of the bills, she decided there was no way she was going to allow to happen and she has decided she is going to move out." (Tr. No. 1, p. 47, Ll. 13-17 (emphasis added).) With this testimony Darren again indicated that Ms. Moss' move would be some time in the future.

By his own testimony, on three occasions Darren affirmed that the $1,100 monthly payment from Ms. Moss was "rent." (Tr. No. 1, p. 45, Ll. 5-8; Ll. 12-13; p. 46, Ll. 1-3.) While there was mention of Darren's deposition as a time reference, the three statements by Darren affirming that the monthly payments were rent were all from his direct testimony at the trial.

Only once did Darren say that Ms. Moss' payments were for "sharing of the bills." (Tr. No. 1, p. 47, L. 15.) Understandably, the magistrate court found:

> With regards to the child support, clearly both parties have changed their incomes. Mr. Drinkall, the fact that your roommate/ girlfriend, whatever, has decided to move out right now and has been paying you $1,100 a month, you know, your credibility in that regard is a little to be desired here.
>
> I don't have her here to testify. I don't have her saying what she is going. I don't have her saying that she has moved out. I just have your hearsay statement of what she has said she is doing. And so I can't really consider that. I mean I have to consider the actual evidence before me.
>
> And so what I do have it you receiving $1,100 a month in rental income from her and you have admitted that you make or could make $50,000 a year. When you take a voluntary reduction in your salary to take two months off, you could be working that time period.
>
> What is in the best interest of the children? The best interest of the children is that the children be able to get as much for child support as possible to help them be raised here. So what I am going to do here as far as the child support is concerned, I am going to find that there has been a change in circumstances concerning the child support. I am going to indicate here, Mr. Drinkall, that your yearly base income is $50,000 and that you are receiving $1,100 a month in rental income, and so that will be treated as your income for child support purposes.
>
> I am going to establish the, pursuant to the testimony of Mrs. Drinkall, the fact that her income is now $38,000 a year. She indicated that she received approximately $1,000 bonus. I have received no testimony concerning whether that is a consistent thing that it is happening during the year or a onetime bonus or anything.
>
> You didn't ask any questions concerning that and whether or not she could expect it or not expect it. And so in order for me to add that into her income, I have to be able to say that okay, I can make a finding that she is receiving that bonus every year in

> approximately the same amount that I can include that in her income. You haven't asked the questions concerning that. She volunteered the fact that she got a bonus this year.
>
> What type of bonus whether it is going to be happening next year, whether it happens a couple of times during the year, I don't know. So the only thing I can set her income at is $38,000.

(Tr. No. 1, p. 57, L. 25; p. 58, Ll. 1-25; p. 59, Ll. 1-25; and p. 60, Ll. 1-3.) On page 7 of Appellant's Brief, Darren also cited the magistrate court's finding above, but he omitted the court's reasoning that "The best interest of the children is that the children be able to get as much for child support as possible to help them be raised here."

On pages 8 and 9 of Appellant's Brief, Darren set forth the magistrate court's findings and conclusions regarding Darren's request to modify custody so that the children were with him nearly the entire summer each year. However, as he did with his recitation of the magistrate court's findings and conclusions with regard to child support, Darren omitted Judge McDaniel's reasoning with regard to Darren's availability to the children during the summer months even if he did voluntarily reduce his work schedule. The magistrate court's full findings and conclusions regarding Darren's request for summer custody (with the court's reasoning that was omitted in Darren's Statement of Facts underlined) is set forth as follows:

> Now, with regards to the change of visitation, sir, you have not shown a material change of circumstance. When this order was entered, it is acknowledged that children are going to get older. There is no question about it. What you have to do is you have to be able to show that any changes that you wish to have made here are in the best interest of the children. You haven't presented any evidence concerning what is in the best interest of the children.
>
> You have presented what are your wishes. You present what are her wishes, not what is best for the children. And so I don't have

any psychologists. I don't have any doctors. I don't have any teachers. I don't have anyone who is going to say it is best for these children to have additional time.

You have asked in your petition that you get them all of the summer, but you have indicated you are only taking two months off of the summer. And according to your prior testimony I believe that we had in the contempt proceeding, your busiest time of the year is in the month of June, so that is when you are traveling all over the place selling fireworks.

MR. DRINKALL: That is what they contended, Your Honor.

THE COURT: That is the finding that I made. And so there has not been a material change of circumstances that would require me to find that it is in the best interest of the children to make a change. From your own testimony and from her testimony and from your mother's testimony, it is indicated that the children are well-adjusted, are happy, they get along fine, they are doing well in school. There is no reason to change it. If it ain't broke, we are not going to fix it.

Now, if the children weren't doing well in school and that type of thing, that is something that I can, you know, wrap my hands around. But right now, the only thing that is happening here is what you want and not what is best for the children. And I haven't received any evidence on what is best for the children. It may be out there, but you didn't present it.

So based on that, there has been no material change in circumstance with regards to the custody is concerned, and therefore I will dismiss your petition concerning the visitation and custody.

(Tr. No. 1, p. 60, Ll. 4-25; p. 61, Ll. 1-25; p. 62, Ll. 1-3 (emphasis added).)

II. ADDITIONAL ISSUE ON APPEAL

As an additional issue on appeal, Kristina asserts that she should be awarded her attorney fees and costs in having to respond to Darren's Supreme Court appeal pursuant to Idaho Code §§ 12-121 and 12-107; and Idaho Appellate Rules 35(b)(4), 35(b)(5), and 41.

III. ARGUMENT

A. Standard of Review.

A magistrate court's decision to modify child support will be set aside only for an abuse of discretion. *Margairaz v. Siegel*, 137 Idaho 556, 558, 50 P.3d 1051, 1053 (Ct.App. 2002). Only if there is a manifest abuse of discretion will a trial court's child support decision be interfered with on appeal. *Embree v. Embree*, 85 Idaho 443, 451, 380 P.2d 216, 221 (1963). The appellant "bears the burden of establishing that the magistrate's child support calculations constitute a manifest abuse of discretion." *Henderson v. Smith,* 128 Idaho 444, 451, 915 P.2d 6, 13 (1996).

As stated by this Supreme Court, "this Court recognizes the long established rule that our province is to examine the record in the light most favorable to the judgment and that when findings of the trial court are supported by competent, substantial evidence, they are binding and conclusive on appeal." *Martsch v. Martsch*, 103 Idaho 142, 144, 645 P.2d 882, 884 (1982). "Findings cannot be deemed clearly erroneous if they are supported by substantial, even though conflicting, evidence in the record. *In the Matter of the Estate of Logan*, 120 Idaho 226, 231, 815 P.2d 35, 40 (Ct. App. 1991) (emphasis added).

When a discretionary decision is appealed, the appellate court examines whether the magistrate court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with applicable legal standards, and reached its decision by an exercise of reason." *Siegel, supra,* at 558, 50 P.3d at 1053.

The interpretation of the Idaho Child Support Guidelines is a question of law that may be reviewed freely by the appeal court. *Kornfield v. Kornfield,* 134 Idaho 383, 385, 3 P.3d 61, 63 (2000).

Whoever files the petition seeking modification of child support bears the burden of proof, regardless of whether that party is seeking to have his child support obligation reduced, or whether he is seeking to have his ex-spouse's obligation increased. *Humberger v. Humberger,* 134 Idaho 39, 43, 995 P.2d 809, 813 (2000).

On review, a trial court's ruling in a child custody case should only be reversed for abuse of discretion if the evidence of record is insufficient to support the judge's conclusion that the interest and welfare of the children involved are best served by a particular custody award. *Larkin v. Larkin,* 85 Idaho 610, 614, 382 P.2d 784, 786 (1963). In fact, an abuse of discretion occurs if the court does modify custody and the evidence presented by the petitioner is insufficient to support a finding that the best interests and welfare of the child will be best served by changing the custody. *Rogich v. Rogich,* 78 Idaho 156, 160, 299 P.2d 91, 94 (1956).

The Supreme Court reviews the trial record with due regard for, but independently from, the district court's decision. *Hentges v. Hentges,* 115 Idaho 192, 765 P.2d 1094 (Ct.App. 1988).

B. Darren Must be held to the Same Standards as an Attorney.

This Supreme Court has stated: "The law cannot excuse willful ignorance, but imposes an obligation on such a person to seek out assistance of legal counsel." *Newbold III. v. Arvidson,* 105 Idaho 663, 664, 672 P.2d 231, 232 (1983). "*Pro se* litigants are held to the same standards and rules as those represented by an attorney." *Golay v. Loomis,* 118 Idaho 387, 392, 797 P.2d 95, 100 (1990) (citing *Golden Condor, Inc. v. Bell,* 112 Idaho 1086, 1089, n. 5, 739 P.2d 385, 388, n. 5 (1987); *State v. Sima,* 98 Idaho 643, 570 P.2d 1333 (1977)).

"Pro se litigants are not accorded any special consideration simply because they are representing themselves and are not excused from adhering to procedural rules." *Nelson v. Nelson,* 144 Idaho 710,718, 170 P.3d 375, 383 (2007) (holding that the father acted as his own attorney repeatedly and brought his appeal without factual basis asking the appellate court to reweigh the facts, causing significant costs to his former wife that justified an award of fees and costs to her).

As noted above, Darren's Notices of Appeal and Appellant's Brief are not in compliance with Idaho Appellate Rules 17 and 35. The cover of Darren's Supreme Court Appeal Brief does not comply with Idaho Appellate Rule 36. Because Kristina did not receive a bound copy of Appellant's Brief, she is not aware if Darren provided this Supreme Court with the required six bound copies and one unbound, unstapled copy of his brief as required by Idaho Appellate Rule 34; nor is she aware if Darren's bound copies (if any) had the required light blue cover.

Finally, any failure by Darren at the trial court level to present sufficient evidence because he was *pro se* cannot be a basis for reversal of the magistrate court's decisions.

C. **The Magistrate Court Properly Found that Darren Received Monthly Rental Income in the Amount of $1,100 and that Darren Failed to Prove that the Rental Income was no Longer being Received.**

In his appeal, Darren claims that the magistrate court erred as a matter of law by considering contributions to his living expenses as income without finding compelling reasons. But the magistrate court did not actually receive sufficient evidence to find that the rental payments were simply contributions to living expenses. The magistrate court found that Darren had been consistently receiving monthly "rental income" in the amount of $1,100, not "contributions to living expenses." Findings of Fact made by a trial court will not be set aside unless they are clearly erroneous. *Rohr v. Rohr,* 118 Idaho 689, 800 P.2d 85 (1990). In fact, only if there is a manifest abuse of discretion will a trial court's child support decision be interfered with on appeal. *Embree, supra.* Whether Darren's monthly receipt of $1,100 is "rent" or "contributions to expenses" is a question of fact, *not* a question of law subject to free review as Darren claims.

As noted in the Statement of Facts, above, on at least three occasions at trial Darren acknowledged that the $1,100 payments were "rental income." Darren specifically testified that up to the time of his deposition, which took place on March 13, 2008, and then at least until the first week of September 2008, at the time of trial, he was receiving monthly rent from Ms. Moss in the amount of $1,100. Darren also admitted that he rented part of his home to Ms. Moss for which he earned $1,100 per month. Only once did Darren describe the $1,100 monthly payments as contributions to living expenses when he testified that "as soon as [Ms. Moss] heard of Mrs. Drinkall's plan to use what she was paying as far as sharing of the bills, she decided

there was no way she was going to allow to happen and she has decided she is going to move out."

"When an action is tried to the court, without benefit of a jury, determinations as to the credibility of witnesses, the weight to be given their testimony, its probative effect and the inferences and conclusions to be drawn therefrom, are all matters within the province of the trial court." *Levin v. Levin,* 122 Idaho 583, 587, 386 P.2d 529, 533 (1992). It was Judge McDaniel's role to determine the weight to be given to Darren's testimony regarding whether the $1,100 monthly payments were rental receipts or contributions to living expenses. In fact the court did weigh Darren's testimony when it specifically held, "Mr. Drinkall, the fact that your roommate slash girlfriend, whatever, has decided to move out right now and has been paying you $1,100 a month, you know, your credibility in that regard is a little bit to be desired here." (Tr. No. 1, p. 58, Ll. 2-6 (emphasis added).)

Darren is simply inviting this Supreme Court to second-guess the trial court's finding of fact that was based on substantial, but somewhat conflicting, evidence. Not only is second-guessing a magistrate court's finding of fact inappropriate, it is also frivolous to file an appeal asking the appellate court to do so. *Benninger v. Derifield,* 145 Idaho 373, 377, 179 P.2d 336, 341 (2008).

Because the magistrate court properly found that Darren received rental payments, and because Darren has not established that the court abused its broad discretion in finding that fact, Darren's entire argument regarding his income for child support purposes fails.

A child support order may be modified only upon a showing of a substantial and material change of circumstances. Idaho Code § 32-709(1). Both parties testified and plead that there had been substantial and material changes of circumstances that justified modifying child support, and Darren is not appealing the magistrate court's conclusion that that initial threshold had been satisfied.

Darren correctly identifies Idaho Rule of Civil Procedure 6(c)(6), the Idaho Child Support Guidelines, as the proper authority to apply when calculating the correct child support amount. Section 6(a) of the Idaho Child Support Guidelines defines income for child support purposes. Gross income is then subdivided into four categories: (1) income from any source; (2) rent and business income; (3) income of a parent who has since remarried; and (4) contributions to living expenses. In this instant matter, there is no disagreement that Darren earns a $50,000 annual salary, which is clearly "income from any source defined by Section 6(a)(1)." However, Darren does disagree that his monthly $1,100 rental payments from Ms. Moss should be included as income for child support purposes.

Rent income is defined by Section 6(a)(2) of the Idaho Child Support Guidelines. Based upon the overwhelming evidence provided by Darren's own testimony, and the magistrate court's finding, the monthly $1,100 payments he received by renting out part of his home to Ms. Moss is clearly "rent income" as defined in Section 6(a)(2). Even the software used by Idaho courts and attorneys to calculate child support includes a specific line for entering rental receipts received by the parents as child support income.

On page 18 of Appellant's Brief, Darren argues that his rental receipts cannot be classified as "rental income" because the payments were "not derived from a trade or business," and the home "was not an investment property." However, income for child support purposes defined by Section 6(a)(2) specifically differentiates between "rent" and income derived from a "trade or business," and specifically provides the disjunctive "or" in the Rule: "For "rents, royalties, **or** income derived from a trade or a business ...." Darren provided no legal authority to support his claim that rental income must be derived from an investment property or from a trade or business, and his argument is without merit. Nor can Darren argue that any ordinary and necessary expenses required to earn the rent he received from his girlfriend should be deducted from the monthly rental receipts of $1,100, since he presented absolutely no evidence at trial of any ordinary and necessary expenses he must pay just in order to receive the rental income. Such "ordinary and necessary expenses incurred specifically to receive rent" would not be the normal household expenses already figured into the Idaho Child Support Guidelines that were discussed by the magistrate court on page 37 of Transcript No. 1. Since Darren's entire argument at trial was that the monthly payments of $1,100 were not rent, he apparently determined that it was not necessary to provide any evidence of specific expenses he had to earn that income.

Only by avoiding the obvious application of Section 6(a)(2) for rent income, could Section 6(a)(4) for contributions to living expenses even be considered. Because the magistrate court found that the monthly receipts were rent based upon Darren's testimony and admissions,

Darren's reliance upon Section (a)(4), dealing with contributions to living expenses, is misplaced and without merit.

Similarly, Darren's reliance upon the Idaho Court of Appeals decision *Kornfield* is also misplaced. In *Kornfield* the wife was voluntarily unemployed and was receiving free rent and a car from her parents. (*Kornfield, supra,* at 385, P.3d at 63.) The magistrate court in that case was therefore required to impute a potential income for the wife. Mrs. Kornfield was not receiving a monthly income by renting out part of her home, as is the case with Darren, she was in fact receiving free benefits from her parents. The Court of Appeals properly concluded that the contributions she received from her parents could not be considered an available resource unless the magistrate court made specific findings on the record that there were compelling reasons to do so. *Kornfield* in no way supports Darren's argument since the $1,100 monthly payments were actually received as income by Darren in exchange for renting out part of his home to Ms. Moss. The payments were not "imputed" income and the evidence did not support a finding that the payments were simply contributions to living expenses.

Interestingly, the *Kornfield* decision actually supports Judge McDaniel's conclusion to include the monthly payments received by Darren as income. The Court of Appeals held that "where two statutes appear to apply to an issue, the more specific statute should control over the general statute." *Kornfield*, at 386, P.3d at 64.) Rental income is income for child support purposes since it is specifically defined as income by the Section 6(a)(2) of the Guidelines which controls over the general Section 6(a)(4) which does not include rental income. Pursuant to

Kornfield it would have been error if the magistrate court had considered the rent as contributions to living expenses.

Darren then cites to *Harris v. Carter*, 146 Idaho 22, 189 P.3d 484 (Ct.App. 2008) as authority for his argument that the magistrate court was required to make a written or specific finding of compelling reasons to include a parent's community property interest in the income of a new spouse for the parent's income for child support purposes. Kristina will assume that Darren is not arguing that Ms. Moss is his spouse and that Judge McDaniel included her income in the child support calculation. Therefore, Darren is apparently relying upon the *Carter* decision for his argument that Kristina held the burden of proving the existence of compelling reasons to consider the monthly rental income as income for child support purposes.

Because the overwhelming evidence submitted to the magistrate court by Darren's own testimony demonstrated that the payments were in the form of rent, and not contributions to living expenses, the magistrate court was not required to make a specific finding of compelling reasons to consider the rental income, and consequently, Kristina did not bear the burden of proving any such compelling reasons.

Finally, Darren argues that the monthly $1,100 payments could not be included as income because at the time of trial "Ms. Moss no longer lived with him and no longer provided $1,100 a month toward expenses." Darren even claims that "the evidence was not rebutted." (Appellant's Brief, p. 16-17.)

The problem with Darren's argument regarding whether Ms. Moss was living with him or not at the time of trial is that the evidence he presented was in fact contradictory. In answer to

the question "When did she move out?" Darren stated "Probably two days ago. In fact, she is still in the process of it." Also, in response to Judge McDaniel's direct question to him, Darren testified that "as soon as [Ms. Moss] heard of Mrs. Drinkall's plan to use what she was paying as far as sharing of the bills, she decided there was no way she was going to allow to happen and she has decided she is going to move out." On page 17 of Appellant's Brief, Darren claims that he had personal knowledge of whether or not Ms. Moss was living with him. However, his testimony that she moved "probably two days ago," that she was "going to move" and that she "is still in the process of" moving," does not provide uncontradicted testimony that she had already moved out.

Darren relies on *Dinneen v. Finch*, 100 Idaho 620, 603 P.2d 575 (1979), to support his argument that the magistrate court was required to accept his testimony as the truth. Since Darren testified to three different scenarios (she had moved two days before trial, or she was still in the process of moving, or she was going to move) the magistrate court had three different options from which to choose as the truth.

In *Dinneen*, the Idaho Supreme Court also held that "the trial court has a far better opportunity to weigh the demeanor, credibility, and testimony of witnesses, and the persuasiveness of all of the evidence." *Id.* at 626, 603 P.2d at 581. See also, *Levin, supra.* As already noted, Judge McDaniel found that Darren's "credibility in that regard is a little bit to be desired."

Because the evidence presented by Darren was contradicted, and because the magistrate court had found that Darren was not a credible witness, *Dinneen* does not support Darren's

argument that the magistrate court erred by including the monthly payments of $1,100 from Ms. Moss as income to Darren for child support purposes. For the same reasons, Darren's hearsay argument is without merit. Darren simply did not prove that Ms. Moss was no longer living with him even when all of his contradictory testimony is considered.

Finally, when a parent moves a court to reduce his child support obligation to his children because of a reduction in income, the court also considers that parent's motive for the income reduction. In *Aguiar v. Aguiar,* 142 Idaho 331, 127 P.3d 234 (Ct.App. 2005), the father moved from California to Idaho to take a job that reduced his income. The Idaho Court of Appeals affirmed the magistrate court's finding that "the sole purpose for moving was to circumvent the increase in his child support obligation," and affirmed the magistrate court's decision to use an income much higher than proposed by the father. *Id.* at 335, 127 P.3d at 238.

Similarly, it is proper for a magistrate court to increase a father's child support obligation to his children when the income claimed by the father is "nothing more than an artifice to create the appearance that his earnings were less than the income he actually generated." *Margairaz v.Siegle*, 137 Idaho 556, 559, 50 P.3d 1051, 1054 (Ct.App. 2002). In *Pace v. Pace,* 24 P3d 66, 69 (Id.Ct.App. 2001), the Court affirmed the magistrate's finding that the decrease in a mother's income was "not motivated by a desire to shed her parental responsibilities."

At the trial in this case Darren did provide uncontroverted testimony as to the motive for his claim that he was no longer receiving the $1,100 rental income. In response to Judge McDaniel's direct question to him, Darren testified that "as soon as [Ms. Moss] heard of Mrs. Drinkall's plan to use what she was paying as far as sharing of the bills, she decided there was no

way she was going to allow to happen and she has decided she is going to move out." When asked by Kristina's attorney why he was no longer receiving the payments, Darren testified that when Ms. Moss found out that Kristina was planning to use the monthly $1,100 as part of his income for child support purposes, she said that "there was no way that she was going to allow that to happen" and she was in the process of moving back into her own home. The sole purpose of Ms. Moss' last minute decision to move was to circumvent an increase in Darren's child support obligation and Darren's desire to shed his parental responsibilities. Such actions cannot be used to support a decrease in child support.

D. The Magistrate Court Properly Exercised its Broad Discretion in Setting Kristina's Income at $38,000.

As his second issue on appeal, Darren claims that the magistrate court erred when finding Kristina's income to be $38,000 for child support purposes; and argues that the magistrate court should have used Kristina's 2007 W-2 income in the amount of $38,410.49 as her 2008 income plus an additional $1,000 as an "annual" bonus. (Appellant's Brief, pp. 19-20.) However there was no evidence before the court that Kristina received a thousand dollar bonus annually. The only testimony presented was that the bank changed its incentive plan for 2008. (Tr. No. 1, p. 32, Ll. 23-25; p. 33, L. 1.)

The evidence presented to the court was Kristina's 2007 end-of-year pay stub, her 2007 W-2, and her testimony that she was earning approximately $38,000 per year at the time of the September 2008 trial. The magistrate court quite properly found that "pursuant to the testimony of Mrs. Drinkall" her income is $38,000 per year; and properly concluded that there was no

evidence that the 2008 $1,000 bonus was received by her every year, and no evidence that any bonus would always be in that amount. (Tr. No. 1, p. 59, Ll. 8-25; p. 60, Ll. 1-3.)

Findings cannot be deemed clearly erroneous if they are supported by substantial, even though conflicting, evidence in the record. *In the Matter of the Estate of Logan, supra.* Only if there is a manifest abuse of discretion will a trial court's child support decision be interfered with on appeal. *Embree, supra.* The magistrate court correctly perceived this issue as one of discretion, acted within the boundaries of such discretion and consistently with applicable legal standards, and reached its decision by an exercise of reason." *Siegel, supra.*

Darren is again merely asking this Court to overturn factual findings of the magistrate that are plainly supported by substantial evidence, which renders his appeal frivolous and unreasonable. *Siegel, supra.*

E. The Magistrate Court Properly Exercised its Broad Discretion in Denying Darren's Petition to Modify Custody.

As his third issue on appeal Darren claims that the magistrate court erred in failing modify custody so that he would have the children nearly all of the summer. (Appellant's Brief, pp. 20-23.)

1. Darren Failed to Demonstrate a Substantial and Material Change in Circumstances Regarding Custody.

Darren first argues that the magistrate court erred in its finding that Darren failed to prove that there had been a substantial and material change in circumstances.

"Once a custody 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." *Brownson v. Allen*, 134 Idaho 60, 63, 995 P.2d 830, 833 (2000). It is the petitioner's burden of proof to demonstrate the required material and substantial changes. *Id.* A custody determination is committed to the sound discretion of the trial court and will not be set aside except in cases where the record reflects a clear abuse of discretion such as insufficient evidence to support the court's finding. *Levin, supra.*

Darren's entire argument regarding substantial and material changes in circumstances for custody modification is set forth in one paragraph on pages 21 and 22 of Appellant's Brief. In that paragraph Darren claims that the magistrate court: "failed to acknowledge it had been almost six years since the summer visitation schedule had been first ordered," and "did not consider the changes in Darren's employment and Kristina's employment."

With regard to the number of years that had passed since the entry of the last order, Darren admits that the magistrate court had acknowledged the evidence that the children were older at the time of trial. Clearly the magistrate court recognized that some years had passed since the last order because that is the only way children can become older. But the magistrate also held that the children becoming older was something that was contemplated when the last custody order had been entered. (Tr. No. 1, p. 60, Ll. 4-8.) Apparently Darrin is arguing that the magistrate is required to specifically state in its findings the exact amount of time that has passed since the last order. However, it is not error for a court to omit findings that are immaterial to the case. In *Quiring v. Quiring,* 130 Idaho 560, 566, 944 P.2d 695, 701 (1997), this Supreme Court affirmed the court's decision to omit immaterial findings, holding that "the specificity of the trial court's findings required by I.R.C.P. 52(a) is not that every factual dispute between the parties

must be resolved but, rather, the court's findings need address only those factual issues that are material to the resolution of the claims."

With regard to changes in employment the magistrate court did consider the changes in Darren's employment. The magistrate court acknowledged that Darren testified that he was taking only two months off during the summer. Because Darren had requested custody for nearly the entire summer in his petition, the court obviously found it relevant that Darren did not have the entire summer off from work. The court also noted that it had already made the finding of fact that Darren's busiest time of the year for his current employment selling fireworks is the month of June, based upon Darren's previous testimony.

Determinations as to the credibility of witnesses, the weight to be given their testimony, its probative effect and the inferences and conclusions to be drawn therefrom, are all matters within the province of the trial court. *Levin, supra,* at 587, 836 P.2d at 533. It was Judge McDaniel's role to determine the weight to be given to Darren's testimony regarding his ability to be away from work during the summer.

Darren's single paragraph argument in no way indicates that the magistrate court did not have sufficient evidence for its finding that Darren had failed to demonstrate a substantial and material change in circumstances since the entry of the prior order with regard to changing the children's summer custody schedule.

Secondly, Darren did not provide any legal authority for his claim that the magistrate court erred in finding that Darren had failed to establish a substantial and material change in circumstance regarding custody modification. When issues on appeal are not supported by

propositions of law, authority, or argument, they cannot be considered. The seminal Idaho case explaining that basic requirement for appellate briefs is *State v. Zichko,* 129 Idaho 259, 923 P.2d 966 (Ct.App. 1996). The Idaho Court of Appeals explained: "A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking. Zichko supported his assignment of error with argument, but no authority. Consequently, he waived this issue on appeal." *Id.* at 263, 923 P.2d at 970. Further, when an appellant fails to present either argument or authority for his or her issues presented on appeal, thereby waiving those issues on appeal, the appellant cannot rectify that fatal procedural error either in Appellant's Reply Brief or by later motion. *Gallagher v. State,* 141 Idaho 665, 669, 115 P.3d 756, 760 (2005) (stating when the opening brief contains no authority on an issue presented, it is immaterial that the party provides authority either in a reply brief or in supplemental briefing because the issue had already been waived); see also *Suitts v. Nix,* 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

2. Darren Failed to Demonstrate that his Request to have the Children Nearly the Entire Summer Would be in the Children's Best Interests.

As the second part of his argument regarding his request for custody of the children during the summer, Darren claims that the magistrate court erred in its conclusion that Darren had failed to demonstrate that such a custody change was in the children's best interests. Kristina agrees that there was evidence regarding Darren's wishes as to custody, Kristina's wishes as to custody, the interaction and interrelationship between the parents and other family members and the children, and evidence regarding the children's adjustment to their respective homes. (Appellant's Brief, pp. 22-23.) The magistrate court also acknowledged that evidence. (Tr. No. 1, p. 60, Ll. 14-25.)

Idaho Code § 32-717 provides a directive for the trial court to determine the best interests of the children when making a custody decision, setting forth relevant, non-exhaustive factors, to aid in making its determination. Because Darren has accurately set forth Idaho Code § 32-717 on page 23 of Appellant's Brief, it will not be reprinted here in Respondent's Brief.

The party seeking custody modification has the burden of justifying a change in custody, and although the threshold question is whether a permanent and substantial change in circumstances has occurred, the paramount concern is the best interests of the child. *Brownson v. Allen, supra*, at 62, 995 P.2d at 832.

One of this Supreme Court's most cited decisions regarding custody modification is *Poesy v. Bunney*, 98 Idaho 258, 561 P.2d 400 (1977). The Idaho Supreme Court explained that the change must not only be "material, permanent and substantial," the alleged change must also relate directly to the best interest of the child. *Id.*, at 261, 561 P.2 d at 403. This Court reiterated that "the personal desires of the parent and even the wishes of a minor child must yield to the paramount consideration of the child's ultimate good." *Id.*, at 261, 561 P.2 d at 403 (citing *Mast v. Mast,* 95 Idaho 537, 539, 511 P.2d 819, 821 (1973)). See also *Tomlinson v. Tomlinson*, 93 Idaho 42, 46, 454 P.2d 756 (1969); *Shumway v. Shumway,* 106 Idaho 415, 418, 679 P.2d 1133, 1136 (1984); and *Strain v. Strain,* 95 Idaho 904, 523 P.2d 36 (1974) (holding that the personal desires of the parent and the 15 year-old child were insufficient to warrant a change in custody and reversing the magistrate court's decision to modify custody).

So, while Darren did provide evidence of his wish to have the children for nearly the entire summer, he did not provide any evidence that such an abrupt change in the children's summer schedule would be in the children's best interests. Idaho law is clear that without a

showing that a parent's wish to modify custody is directly related to the child's ultimate good that wish cannot support the modification.

The magistrate court also acknowledged that the evidence presented showed that the children were well adjusted, happy and doing well in school under the current custody schedule. But that evidence demonstrates that the children's best interests were being met with the current schedule. It does not support an argument that their best interests would be better met by the custody modification requested by Darren.

Even if the magistrate had found that Darren was indeed available to the children the entire summer, and even though Kristina was employed in the summer, those facts could not support the custody modification Darren requested if there was no evidence demonstrating that the children's best interests would be met by the change. On page 22 of Appellant's Brief, Darren claims that Kristina's 2006 reentry to the workplace causes the children to be with their grandmother or at the library. He did not provide any evidence as to why Kristina's return to work in 2006 or as to why the children spending time with their grandmother or at social activities was not in the children's best interests. In 2006 the Idaho Court of Appeals addressed a custody modification case involving the parents' work schedules in *Silva v. Silva*, 142 Idaho 900, 136 P. 3d 371 (Ct.App. 2006). The Court held that "consideration of a parent's work schedule and need for third-party child care is appropriate in a child custody determination only to the extent that these circumstances are shown to affect the well-being of the children." *Id*, at 906, 136 P. 3d at 377 (emphasis added). In *Silva* the Court relied upon a case in which the trial court was reversed when awarding custody to the parent who maintained an erratic work schedule

when the other parent worked during the day and was available to care for the child in the evenings and on the weekends. *Id.* (Citing *Maloblocki v. Maloblocki*, 646 N.E. 2d 358 (Ind.Ct.App. 1995)). Because Darren failed to demonstrate the required nexus between the children's best interests and Kristina's employment, that alleged change in circumstances also failed to support a change in the current custody schedule.

Contrary to Darren's claim otherwise, Judge McDaniel did not "require testimony from a doctor." He simply explained to Darren that such testimony may have provided evidence that a custody change was necessary for the children's best interests.

The relevant factors from Idaho Code § 32-717(1) in this case are the need to promote continuity and stability in the life of the child; the child's adjustment to his or her home, school, and community; the interaction and interrelationship of the child with his or her parent or parents, and his or her siblings; and the mental and physical health and integrity of all individuals involved. Those factors all support Judge McDaniel's decision that it was in the children's best interests that no modification be made to the current custody schedule.

F. Darren is Not Entitled to an Award of Attorney Fees and Costs on Appeal.

On page 23 of Appellant's Brief Darren makes the incredible and untenable claim that in the trial below it was frivolous of Kristina to take "the position that the money given to Darren by Ms. Moss was rental income to him." Darren failed to provide any authority for this novel claim. Nor did he explain how it is frivolous to take a position in a trial that was actually adopted by the trial court in reaching its decision.

Idaho Code § 12-121 a uthorizes the court to award reasonable attorney fees to the prevailing party on appeal, not as a matter of right, but only where the court is left with the abiding belief that the appeal was brought, pursued or defended frivolously or without foundation. *Thompson v. Pike*, 125 Idaho 897, 876 P.2d 595 (1994) (emphasis added). All that can be surmised from Darren's argument for attorney fees is that he thinks he should receive the attorney fees incurred by him from his own decision to file an appeal for the second time because Kristina prevailed below at the trial court level. Idaho law is well settled that an award of fees to an appellant can only be awarded if the respondent defended the appeal frivolously, not if the respondent defended the initial action frivolously (which of course Kristina did not do).

The Idaho Supreme Court has ruled that a request for attorney fees on appeal that fails to include any argument to support a claim to attorney fees should be summarily denied. *See Toyama v. Toyama*, 129 Idaho 142, 922 P.2d 1068 (1996). Even if an appellant cites authority for an issue they present on appeal, if the authority offers no support for the appellant's position, the appeal court cannot address the merits of that issue. *Brewer v. La Crosse Health and Rehab,* 138 Idaho 859, 865, 71 P.3d 458, 464 (2003). Because Darren did not, and clearly cannot, argue that Kristina is defending this appeal frivolously, he has failed to support his claim for attorney fees and his request should be summarily denied, as the District Court did based on the same frivolous argument Darren made to that court in the lower appeal.

It does not appear from Appellant's Brief that Darren is appealing the magistrate court's or the district court's decisions awarding Kristina her attorney fees and costs in the lower courts.

G. Kristina is Entitled to an Award of Attorney Fees and Costs for Having to Respond to Darren's Appeal to this Supreme Court.

Kristina should be awarded her attorney fees and costs in having to respond to Darren's appeal pursuant to Idaho Code §§ 12-121 and 12-107; Idaho Appellate Rules 35(b)(4), 35(b)(5), and 41; and Idaho Rule of Civil Procedure 54(e).

Attorney fees and costs may be awarded on appeal, pursuant to Idaho Code § 12-121 and Idaho Appellate Rule 41, to the prevailing party where the appellate court is left with an abiding belief that the appeal was brought or defended frivolously, unreasonably or without foundation. *Excel Leasing Co. v. Christensen*, 115 Idaho 708, 712, 796 P.2d 585, 589 (Ct. App. 1989) (*citing, Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979)). Costs on appeal are mandatory to the prevailing party pursuant to Idaho Code § 12-107.

An award of attorney fees under Idaho Code § 12-121 "is appropriate if the appellant simply invites the appellate court to second-guess the trial court on conflicting evidence." *Benninger v. Derifield, supra.*

Where issues of discretion are involved, an award of attorney fees is proper if the appellant fails to make a cogent challenge to the judge's exercise of discretion. *Andrews v. Idaho Forest Indus., Inc.,* 117 Idaho 195, 786 P.2d 586 (Ct.App. 1990).

Attorney fees pursuant to Idaho Code § 12-121 are appropriate even when the evidence that was presented to the lower court was conflicting because it is not the appellate court's function to second-guess a trial court on conflicting evidence. *Scott v. Castle*, 104 Idaho 719, 726, 662 P.2d 1163, 1170 (Ct.App. 1983).

In his appeal brief to this Supreme Court, Darren presents the same arguments that he put before the magistrate court and the exact same arguments that he put before the District Court in his first appeal, and he makes no cogent legal argument justifying a reversal of either the magistrate judge's decision or the District Court's affirmation. Darren has not demonstrated that the lower courts' decisions were an abuse of discretion, or unsupported by substantial and competent evidence.

In *Nelson, supra,* this Supreme Court held that because the father acted as his own attorney repeatedly and brought his appeal without factual basis asking the appellate court to reweigh the facts, causing significant costs to his former wife an award of fees and costs to her was justified. This second appeal by Darren has again caused significant costs to Kristina that should be reimbursed by Darren.

Kristina respectfully requests that this Court award her the reasonable attorney fees and costs incurred in defending against Darren's frivolous appeal to this Supreme Court pursuant to Idaho Code §§ 12-121 and 12-107, Idaho Rule of Civil Procedure 54(e)(1) and Idaho Appellate Rule 41, and as supported by the above cited decisions of this Idaho Supreme Court and the Idaho Court of Appeals.

IV. CONCLUSION

Having properly exercised his broad discretion in finding that Darren received monthly rental income in the amount of $1,100, that Kristina's income was $38,000 per year, and that Darren had failed to demonstrate a substantial and material change in circumstances directly related to the children's best interests, Kristina respectfully requests that this Supreme Court

affirm Judge McDaniel's September 16, 2008 Order modifying child support and denying Darren's petition to modify custody; and affirm Judge Copsey's decision that also affirmed the magistrate court's decisions. Kristina also respectfully requests that this Court award her the attorney fees and costs she incurred in having to defend against Darren's appeal that simply invites this Court to second-guess the trial court and the district court.

DATED this 21 day of April, 2010.

COSHO HUMPHREY, LLP

STANLEY W. WELSH/FRANKI J. HARGRAVE
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21 day of April, 2010, a true and correct copy of the within and foregoing instrument was served by U.S. Mail upon:

Darren Drinkall
Pro Se
4145 W. Moon Lake Dr.
Meridian, Idaho 83646

STANLEY W. WELSH/FRANKI J. HARGRAVE