6-17-2016

Bickel v. Bickel Respondent's Brief Dckt. 43323

M. LYNN DUNLAP, P.C., ISB #3200
Attorney at Law
415 Addison Avenue
P.O. Box 2754
Twin Falls, ID 83303-2754
Telephone: (208) 734-5885
Facsimile: (208) 736-2074

Attorney for Plaintiff/Respondent

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

MAGISTRATE DIVISION

CRISTIN J. BICKEL, nka CRISTIN J. BATES, Plaintiff/Respondent, v. ROBERT J. BICKEL, Defendant/Appellant.	SUPREME COURT NO: 43323 DISTRICT COURT NO: CV 09-4254 **RESPONDENT'S BRIEF ON APPEAL**

* * * * *

APPEAL FROM THE DISTRIC COURT OF THE FIFTH JUDICIAL DISTRICT FOR

TWIN FALLS COUNTY, HONORABLE RANDY J. STOKER

DISTICT JUDGE, PRESIDING

Robert Bickel
10671 W. Treeline Ct.
Boise, ID 83713
Appellant/Pro Se

M. Lynn Dunlap
415 Addison Avenue
PO Box 2754
Twin Falls, ID 83303-2754
Attorney for Plaintiff/Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I.

INTRODUCTION

This appeal is based upon the findings of the trial court, the Honorable Judge Thomas Borresen presiding, and the affirmation of that opinion by the Honorable Randy J. Stoker.

The issue at trial was whether or not the Appellant had violated the Court's Decree of Divorce dated April 14, 2011 during the month of May, 2014.

The first two counts of the Motion for Contempt deal specifically with weekends in the month of May, 2014 wherein the Appellant denied the Respondent proper visitation. As the Decree was quite involved relative to the visitation, the pleadings in the contempt were actually in the alternative, although not so stated. That was subsequently clarified to the court, with no objection from the Appellant.

The final count, dealt with utilization of the wrong exchange location, and was withdrawn. No evidence was presented on that matter.

II.

ISSUES ON APPEAL

a. Whether the Magistrate erred by finding the Appellant guilty of willful contempt for following a reasonable construction of the Decree of Divorce that differed from the Respondent's and subsequently ordering attorney fees based on the error.

b. Whether the Magistrate abused his discretion in finding Appellant guilty of a charge that was not alleged by Respondent.

c. Whether the Magistrate abused his discretion in sentencing the Appellant unjustly as an example to both parties since the Court is tired of this case.

III.

STATEMENT OF THE CASE

a. The factual background relative to the matters at issue deal with paragraphs 2 and 3 of the April 14, 2011 Decree. At the hearing, it was agreed that the first weekend of May was the Respondent's weekend for visitation. The second weekend of May would be the Respondent's time as it was Mother's day and she was entitled to the weekend. The issue arises regarding the third and fourth weekends in May. The Respondent asserted that she agreed to forgo what would have been her alternating weekend, the third weekend of May, at the Appellant's request, and in exchange she would receive the fourth weekend in May. Unfortunately, the Appellant refused/failed to present the child for visitation on either the third or fourth weekend of May.

b. Pursuant to paragraph two of the Decree of Divorce, the Appellant had residential custody of the child. While paragraph two of the Decree is quite lengthy, the pertinent section is as follows:

> For the 2011 year, the parties will adjust the schedule to insure that the Mother's weekend includes Mother's day and her wedding day on May 13, 2011. The parties may vary this schedule by joint written agreement, however, if the parties cannot agree upon on a variance, the above-stated schedule should be followed. The exchange of the minor child shall continue to take place on Sundays at 4:00 p.m..

Paragraph 2 of the Decree of Divorce was altered by paragraph 3. Paragraph 3 dealt with a change in schedule when the minor child entered Kindergarten. There was no dispute at hearing that the minor child was of school age. Paragraph 3 states in pertinent part:

> 3. When the minor child enters Kindergarten, the custodial schedule will be modified as follows: The father shall have residential custody and the mother will have custodial access during the school months, on alternating weekends from Friday afternoon at 6:00 p.m. until Sunday at 6:00 p.m. The Mother shall have Mother's Day weekend every year with the minor child and the Father shall have Father's Day weekend every year with the minor child…

Both paragraphs refer specifically to Mother's Day weekend. Paragraph 3 did modify visitation relative to other issues as well.

However, the important portion is that paragraph 2 had language that did not appear in paragraph 3, i.e.:

> With respect to these holidays, the parties will adjust the weekly schedules in order to assure that the holiday falls during the appropriate parent's custodial access time.

That sentence specifically refers to the holidays covered in the first half of paragraph 2. The Mother's Day section follows below that portion and includes Mother's week to include Mother's Day and her wedding on May 13, 2011.

Paragraph 3 does not have the sentence regarding the adjusting of the weekly schedules.

The Appellant appears to rely upon paragraph 2 regarding the adjustment of visitation to also apply to paragraph 3.

In May of 2014, there was no argument that the first weekend was the Respondent's regularly scheduled alternating weekend. The following weekend involved Mother's Day, to which the Appellant was entitled to as per paragraph 3 of the Decree. The Appellant had Mother's Day visitation.

During the early portion of May, Appellant contacted his attorney and requested that he be granted the third weekend in May, to prohibit the Respondent from having

three consecutive weekends with the child. That request was made by the Appellant's counsel to Respondent's counsel. Such an agreement was entered into. However, the agreement was not reduced to writing.

The Appellant was permitted the third weekend of May. He then asserted that based upon alternating weekends, he would be entitled to the last weekend of May. In that fashion, the Appellant attempted to make arrangements with the Petitioner so he would have two weekends in a row and she would have had two weekends in a row.

Respondent advised counsel that she was willing to provide the Appellant with the third weekend provided that she received the following weekend. The Respondent asserts that no such agreement existed, he was simply entitled to both weekends.

Judge Borresen's determination that the oral modification was enforceable, determined that the Appellant violated the Decree by refusing to grant the Respondent visitation on the fourth weekend of May.

!V.

LEGAL ARGUMENT

Judge Stoker's analysis indicated that as no alteration to visitation was performed in writing, the third weekend in May rightfully belonged to the Respondent and the Appellant' failure to provide the child for that visitation constituted the contempt.

Apparently, it was appropriate for the matter to be viewed as a pleading in the alternative, as if the court enforced the strict language of the Decree, the violation of the order occurred on the third weekend of May. Whereas if the court looked behind the strictures of the document and allowed the oral agreement to stand, the violation would

have been on the third weekend of May. In either case, a contempt did take place when the Appellant refused to grant visitation on either weekend.

V.

LEGAL ANALYSIS

When an Appellant court reviews the findings of a Magistrate court, the test is whether or not the trial court's findings were based on substantial and competent, though conflicting evidence. *Hawkins v. Hawkins 99 Idaho 785, 5890 P. 2nd 532 (1978); Reuth V. State, 103 Idaho 74, 644 P. 2nd 1333 (1982).* Additional authority relative to the standard of the Appellate Court's review may be located in the District Courts Appellate Memorandum on page 4.

There was very little factual dispute in this matter as far as the finding of contempt itself went. The parties both agreed that the Decree of Divorce filed April 14, 2011 was the controlling document. Both parties agreed that the child was enrolled in Kindergarten or a level thereafter. Everyone agreed that the first two weekends of the month were properly exercised by the mother. All parties agreed that the child was not provided by the father on either the third or fourth weekend. The issue before the court was the interpretation of paragraphs two and three.

Judge Borresen made his determination as to the violation of the previous order as set forth on pages 66 and 67 of the July 11, 2014 transcript. Paragraph 3 of the Decree specifically states that the mother should have Mother's Day every year and the father should have Father's day every year with the minor child. There is no adjustment language set forth in paragraph 3. Paragraph 3 is the operative paragraph relative to this matter because the child was of school age when this matter arose. Judge

Borresen indicated that as neither party requested a written modification, analysis would be under paragraph 3. However, he found the agreement was made as to weekend visitation, which did not occur, therein lies the contempt. Page 63 L 17 to page 64 L 15 and page 66 L 3 to page 67 L 6.

Judge Stoked framed the issue as to whether or not the modification was in writing. He never got to the issue of the weekend trade arrangement. A simple reading of paragraph 3, states that the mother shall have alternating weekends, the mother shall have Mother's Day weekend, and any modifications were to be made in writing. As there was no modification made in writing, the contempt took place.

Under either of the foregoing analysis, it is clear that both judges had substantial and competent evidence placed before them to justify their findings that the conduct of the father was wrongful, willful and therefore contemptible.

The argument of the father must be taken into consideration. It was his position, that paragraph 2 did not have an expiration date. It was his posture that there was always to be adjustments so that the visitation on holidays would occur on that parties weekends. In order to accomplish the results which occurred, apparently, Mr. Bickel requested to combine the contents of paragraph 2 and 3 into one paragraph with a smorgasbord of options. His position appears to be that since Mother's Day fell on his weekend, it was the mother's obligation to make the weekly adjusted schedule in order to insure that his visitation was uninterrupted. In essence, pursuant to paragraph 2, she had the obligation to correct her visitation in his favor. Having not done that, it is his position that she had two weeks in a row, then he was entitled to have two weeks in a row, and thereafter back to the alternating weekends. Accordingly, he had every right to

the third weekend of the month as that would be the adjustment for her having Mother's Day on the second weekend of the month. Then, it would be his regular weekend, the fourth weekend, for visitation. And in his mind that utilization of that scheduling would accomplish two weekends for her and two weekends for him.

VI.

JUDICIAL INTERPRETATION

The problem is, paragraph 2 is expired. Paragraph 3 does not authorize the adjustments, unless they are made in writing. Further, the adjustments are voluntary not mandatory as per paragraph 2. It is the tortured explanation of Mr. Bickel attempting to utilize an expired provision of the Decree to justify his conduct. Additionally, there was testimony that the agreement was made between the attorneys' offices, and presumably passed onto the client. Mr. Bickel asserts that he was never informed of such a situation by his attorney, and that his attorney had no authority to make such an agreement. Accordingly, Mr. Bickel asserts that he is being held criminally liable for the actions of his attorney.

A. Pertinent Provisions Interpretation

Based upon the foregoing, it is clear that under any of the three theories set forth by Judge Borresen, Judge Stoker, or the Respondent, a violation of visitation did in fact take place. At that juncture, the Appellant's defense is that any such conduct was not willful.

B. The Act Was Willful

Willful is defined in the Idaho Criminal Jury Instruction 340. That is a definition for a jury to consider when determining whether or not a crime has a been committed. It

is posited to the court that the Judge making the determination is well aware of what is required for willful conduct.

It is the Appellant's position that his conduct was not willful, and that he did not know or intend to violate the terms of the custody order. However, the definition itself takes care of that:

> An act or a failure to act is "willful" or done "willfully" when done on purpose. One can act willfully without intending to violate the law, to injure another, or to acquire any advantage.

Further, the comment to the instructions states:

> Idaho Code Section 18-101 (1). The word "willfully", when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate the law, or injure another, or to acquire any advantage.

Without belaboring the point, it is rather clear that willful violation of the custody arrangements, simply indicated that one must make an election to either grant or deny visitation. It is not a determination as to whether or not the perpetrator intended to violate the provision of custody, but merely whether or not he intended to commit the act that did violate the terms of visitation.

As such, there is little or no doubt that the Appellant's conduct was in fact willful.

C. Sentencing

The primary concern regarding sentencing is that it was unduly harsh for several reasons.

The Appellant was sentenced to 5 days incarceration with 2 suspended and 3 to serve, no fine was awarded. Terms of serving that sentence were very amenable to the

Appellant in that it could be done on Sheriff's work crew or any other program Ada or Twin Falls County may have.

The Appellant seems to have two bases relative to his belief as to the harshness of the sentence:

1. The sentence as adjudged impacts him far more than anyone else, in view of his need to maintain professional dignity.
2. The sentence imposed is unduly harsh as a warning to both him and the Respondent.

Dealing with the first issue. The sentence is unduly harsh in that as an IT tech he works for Fortune 500 companies. It is his concern that such a conviction on his record would cause him to lose his security status through various companies who perform on behalf of the Department of Defense. It would also impair his future marketability with other governmental agencies and publicly held companies.

By the same token, if a party has so much to lose, their conduct must be much more circumspect. The fact that they have marketable and professional skills should help them avoid such conduct. He elected to gamble on being right, he failed, so be it.

Idaho Code § 19-2521 sets forth a criteria for placing an individual on probation or imposing imprisonment. That statute requires the court to consider the nature and circumstances of the crime and the history character and condition of the Defendant. The court must also determine whether imprisonment is appropriate for protection of the public, concerning 6 specific factors. The vast majority of those specified concerns are not applicable in this particular case, or probably in any contempt sentencing matter.

However, there are several which are of importance. The factors involved would be subparts 1(c), (d), (e).

Subpart C deals with the fear that a lesser sentence depreciates the seriousness of the conduct. That is appropriate in this case, as missed visitation can never be truly regained. The time for that visitation has come and gone. Whatever may have occurred during that period of time regarding bonding, educational benefits, or simply deepening the appreciation between parent and child cannot necessarily be made up by simply giving additional time, the time was then, not potential in the future. The court clearly detected an attitude of confrontation between the parties and an inability of the parties to coexist peacefully. This sentence, certainly will make the Appellant question his conduct and perhaps attempt to result in conduct more conducive to raising the child as apposed to continually being at war.

Dealing with sections D and E, incarceration albeit for a very short term, i.e. 3 days, will act as a deterrent not only to the Appellant, but toward the Respondent as well. The Appellant's appreciation of Judge Borresen's comment that the orders could be thrown away, indicates an unwillingness to accept the fact that there are issues at play. The court's comment dealt specifically with the parties treating each other with mutual respect and admiration. As the court alludes to the fact it appears as though a mutual exchange point from Boise to Jerome will obviously in a necessity take place. Additionally, the court was flabbergasted by the Appellant's refusal/unwillingness to advise Respondent when he moved to Boise.

The court's commentary indicates that the issues between the parties are multifaceted, and of a wide variance regarding seriousness.

The court was clearly indicating that it felt that incarceration was necessary, and directed that such be provided. Obviously, there had been a considerable disagreement over meanings of the court's orders and adherence to them. The court clearly was making an example of the Appellant for that purpose, and specifically told Respondent that she too needed to mend her ways, if needed. A sentence of 3 days in the county jail should alert both parties these rules exist. They violate court orders at the own risk, Respondent acknowledges her understanding of the price of contentions, hopefully the Appellant will too.

Statute 19-25-21(2) sets forth factors in order to avoid a sentence. Those factors, rapidly indicate that in this instance, they do not militate against a jail sentence.

The Appellant's conduct caused harm. Respondent missed visitation time with the child.

The Appellant should have contemplated harm would result. Obviously, lost visitation is lost visitation.

There was no strong provocation for the Appellant to refuse to comply with the terms of the agreement or the terms of the Decree. It is posited that in June, Father's Day, a similar issue would arise in his favor.

Additionally, the conduct was the result of circumstances unlikely to occur is directly related to the character and attitude of the Appellant. As indicated by Judge Borresen, simple issues such as a midpoint exchange appeared as though it was going to require additional litigation. The likelihood of further problems coming forth, was high. Especially as the Appellant points out, this has been a solid, continual case since 2009.

This sentence did not exceed the maximum potential sentence for contempt.

VII.

Attorney Fees Awarded by the Magistrate Court

Respondent had filed for a request for attorney fees in the amount of $1,625.00. The court, awarded attorney fees in the amount of $1,400.00. It would appear that the Appellant simply declines to admit that the Respondent prevailed in this particular instance. The Appellant asserts that only victory was obtained on 1 of 3 counts, therefore he prevailed.

As previously indicated, counsel had conferred prior to the hearing that count number 3 was being withdrawn. No evidence was produced relative to count 3. Again, its rather clear that counts 1 and 2 while not actually pled in the alternative, were intended to be in the alternative, and there is no indication that the Appellant was misled in any fashion relative to the way count 1 and count 2 meshed. If there was any question as to how the claim was presented a motion for more definite statements could have been filed.

Based upon the foregoing, it is rather clear that Respondent prevailed. Respondent is not the one filing this appeal, that is the Appellant. The Appellant lost. The Appellant has a fine and a period of county jail time. The Respondent does not. The Respondent prevailed.

Thereafter, the Appellant appears to make argument that the court made numerous misstatements and referred to evidence that did not exist. One page 32 of Appellant's Brief he refers to the fact that court stated:

> Well, and again I'm – what I was looking at, if there was I think some evidence that Mr. Bickel said yes, I will plead guilty to a, b, or c whichever one the case may be.

The Appellant thereafter states in parenthetical that he did not agree to plead guilty to anything, in fact there was a trial. The Appellant is completely right, he did not agree to plead to anything.

The Appellant set forth an extensive argument relative to whether his conduct was willful or willfully done. That argument has been previously discussed on pages 10-11 of this brief.

VIII.

Attorney Fees

Request for attorney fees in the first Appeal brief filed by a party is timely. *Tentinger v. McTheters, 123 Idaho 620, 977 P.2d 234 (Ct. App. 1999).* This is the first brief and accordingly is timely.

The thrust of Appellant's claim is simply that he disagrees with the Trial Court's findings and requests this court to substitute its opinion rather than grant due deference to the trial court.

The Appellant fails to understand or appreciate the dictates of Idaho Code §7-610. That statute permits the court to exercise its discretion in awarding fees and costs. The court inquired as to settlement negotiations in the case. The court was advised that no agreement has been reached on any issues. See: October 4, 2014 transcript P5 L23 – P6 L21.

The facts were primarily undisputed, the controlling document, the times of visitation that took place, and the times it didn't were all understood. It is appropriate to have an award to the prevailing party in a contempt case, because the prevailing party was entitled to do as they did, in this case lose visitation, and should not suffer a second injury, attorney fees, for enforcing their rights.

Appellant is doing little more than asking the appellant court to substitute its opinion for that of the trial court. Such a request on appeal, results in an award of attorney fees against the Appellant pursuant to Idaho Code Section 12-120, 12-121, and Idaho Appellant Rule 41, *Knowelton v. Mudd, 116 Idaho 262 775 P.2d 154 (Ct. App. 1989).* See also: *Pass v. Kenny, 118 Idaho 445, 797 P.2d 153 (Ct. App. 1990); Blaser v. Cameron, 121 Idaho 1012, 829 P.2d 1361 (Ct. App. 1991).*

Additionally, the Appellant fails in this appeal to present any significant issue regarding a question of law, no findings of fact made by the district court which are clearly or arguably unsupported by substantial evidence, the court has not been asked to establish any new legal standards or modify any existing standards, and the focus of this appeal is the application of said law to the facts. In that situation an award of attorney fees against the Appellant is appropriate. *Excel Leasing Company v. Christensen, 115 Idaho 708, 769 P.2d 585 (Ct. App. 1989)*

Appellant has done little more than simply invite the Appellant Court to second – guess the trial court on conflicting evidence. The case law is well settled, if the Appellant attacks the discretion of the trial court, and fails to show a misapplication of the law, and no cogent challenge is presented to the exercise of discretion, attorney

fees are awarded to the Respondent. *Pass v. Kenny, 118 Idaho 445, 797 P.2d 153 (Ct. App. 1990).*

The Appellant disputes minor details, and points to conflicts in the evidence. However, no meaningful issues relative to questions of law or application of discretion were raised. Again, reasonable attorney fees on appeal is an appropriate award. *T-Craft Aero Club, Inc., v. Blough 102 Idaho 833 642 P.2d 70 (Ct. App. 1982).*

IX.

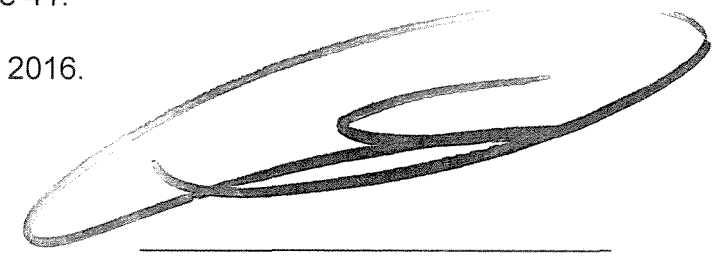
Closing

Based upon the foregoing, it is clear that the Magistrate had ample evidence to make a determination as to what a reasonable construction of the Decree of Divorce was, and that Appellant is in contempt thereof. Further, the Magistrate's award of attorney fees in that matter was justified and correct. The Magistrate exercised his discretion, and kept within the bounds of reason, in the contempt finding. The Magistrate did not exceed his discretionary boundaries by advising the parties that future misconduct would not be permitted in issuing a sentence including incarceration of the Appellant for such conduct.

The District Court properly upheld the determination by the Magistrate Court, even though on a different factual finding. It is important to note, that the factual find do not conflict with each other, it is simply that the District Court Judge applied a term form the Decree of Divorce, whereas the Magistrate applied an oral argument basis. Additionally, the attorney fees awarded in the District Court, having not been appealed should be upheld in the amount of $4,525.00.

Finally, attorney fees regarding this appeal, should also warrant an award of attorney fees, in an amount yet to be determined, based upon the conduct of the Appellant throughout this case, in failing to file his brief timely, in filing his brief in improper format, and for merely asking the court to act as a new fact finder relative to these issues. Attorney fees should be awarded pursuant to Idaho Code Section 12-120, 12-121, and Idaho Appellant Rule 41.

DATED this 16 day of June, 2016.



M. LYNN DUNLAP
Attorney for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 16 day of June, 2016, a true and correct copy of the foregoing document was served to the following:

Robert Bickel
10671 W. Treeline Ct.
Boise, ID 83713

Idaho Court of Appeals
451 W State St
Boise, ID 83702

Hayley Deer
Legal Assistant