9-7-2011

Abolafia v. Reeves Appellant's Reply Brief Dckt. 38189

IDAHO SUPREME COURT

JOSEPH MICHAEL ABOLAFIA,

Plaintiff/Respondent,

vs.

REBECCA REEVES,

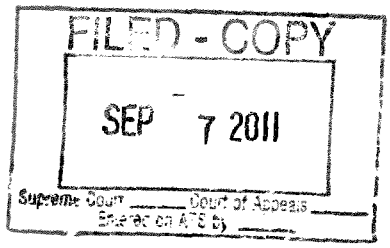
Defendant/Respondent.

KENNETH PAUL ADLER,

Guardian Ad Litem/Appellant.

Docket No. 38189

Bonner Case No. CV 2006-0709



REPLY BRIEF ON APPEAL OF APPELLANT KENNETH ADLER

On Appeal from the First Judicial District, County of Bonner
The Honorable Benjamin R. Simpson, District Judge, Presiding

Charles B. Bauer
Margalit Z. Ryan
BAUER & FRENCH
ParkCenter Pointe
1501 Tyrell Lane
Post Office Box 2730
Boise, Idaho 83701-2730
Telephone (208) 383-0317
Facsimile (208) 383-0412
ISB Nos. 2446/5903

Attorneys for APPELLANT

Glorianne Gooding-Jones
Attorney at Law
323 North First Ave, Ste 206
Sandpoint, ID 83864
Telephone (208) 255-2088
Facsimile (208) 255-4395
Attorneys for Plaintiff/RESPONDENT

Todd M Reed
POWELL & REED
318 Pine
PO Box 1005
Sandpoint, ID 83864
Telephone (208) 263-3529
Facsimile (208) 263-4438

Attorneys for Defendant/RESPONDENT

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ARGUMENT

I. THE ORDERS APPEALED FROM WERE FINAL JUDGMENTS ENTERED WHILE ADLER WAS ACTING AS THE GAL

Both Respondents argue that the orders entered by the trial court, which Adler appealed from, were not final judgments ending the lawsuit, adjudicating the subject matter, or representing a final determination of the rights of the parties. Their contention is contrary to the facts and the record.

Adler's *Notice of Appeal* dated March 21, 2008 (R. Vol. I, p. 181), appeals from the trial court's *Order for Modifications of Decree Re Child Custody,* R. Vol. I, p. 175, and the *Order Granting Motion to Terminate Appointment of Guardian Ad Litem*, R. Vol. I, p. 174 (hereinafter referred to as "Two Orders"). The Two Orders were simultaneously entered on February 15, 2008 and ended the case and disposed of all claims in the original pleadings. Although the Court entered two separate orders, the relevant issues were discussed, and the orders were entered simultaneously at the same pre-trial conference where Adler was acting as the GAL. The trial court first accepted the parties' stipulation, then terminated he GAL ("So I would accept the terms of the stipulation, I'll grant the request to terminate Mr. Adler as Guardian Ad Litem . . ."). (Augmented Record on Appeal, Exhibit A, p.19, ll3-5).

The trial court's entry of two separate orders was a choice which, although arguably inconsistent with the substance of the proceedings, does not alter the substance of those proceedings. Whether an instrument is an appealable order is to be decided from its content and substance, and not its form. *Spokane Structures, Inc. v. Equitable Investment, LLC.*, 148 Idaho 616, 621 226 P.3d 1263, 1268 (Idaho 2010). Following a colloquy at the pretrial

conference, the trial court entered its decision, accepting the stipulation of the parties, then terminating the GAL (Augmented Record on Appeal, Exhibit A, p.19, ll 3-5). The Two Orders constitute a final resolution of all the issues in the case. But they were reached without addressing any of the GAL Adler's concerns about the best interests of the children.

It is well established that review of a final order allows review of all interim or interlocutory orders to which an objection has been raised. *Estate of Spencer*, 106 Idaho 316, 678 P.2d 108 (Ct. App. 1984). This is a corollary to the rule that an appeal from an interim order which resolves all the issues in the case becomes valid once the court enters a final judgment which is consistent with the interim order. *Spokane Structures,* at 621, 1268 Even if the trial court could be regarded as terminating the GAL appointment prior to accepting the parties' stipulation, the issues in this case were resolved with finality without proper inquiry into the best interest of the children. Regardless of which order came first or specifically constituted the final judgment, a final order was entered and this appeal is valid.

Moreover, Adler was acting as the GAL at the hearing where the Two Orders were entered. The decisions made, and the orders entered, occurred at the pretrial conference where Adler was acting as GAL and representing the children pursuant to the order appointing him. (Augmented Record on Appeal, Exhibit A, p.2, ll. 3-4). If his efforts to seek review of the Trial Court's actions constitute frivolous behavior, then his appointment at the parties' request amounts to nothing but an idle exercise.

II. THE PARTIES ARE ESTOPPED FROM ARGUING THAT THEIR FAILURES TO FOLLOW PROCEDURE DEPRIVED THE GAL OF AUTHORITY TO ACT

Both Respondents cite authorities for certain procedures which are required for appointment of Guardians ad litem for children. They then argue that Adler has no standing because of Respondents' own failure to comply with these procedures. This circular position is unsupported.

This is not a case about whether Adler had authority to act as the GAL. The issue here is whether, in taking the steps he believed were necessary to fully discharge his obligations, he acted frivolously. There is no dispute that Adler was appointed as GAL by the trial court's order entered on June 12, 2007 (R. Vol. I, p. 138). The order granted Plaintiff Father's verified *Motion for Order Appointing Guardian Ad Litem for Minor* on May 15, 2007, citing *Idaho Code,* Section 32-704(4), 15-5-207, and *Idaho Rules of Civil Procedure*, Rule 17(c), as grounds for his motion (R. Vol. I, p. 123). Nothing in the order indicates that the trial court granted the motion on grounds other than those enumerated in the motion that was before it. (R. Vol. I, p. 138).

Yet, there has been extensive debate about exact authority for the appointment of a GAL. The trial court took the view that in the absence of statutory authority the only remaining authority for the appointment was that bestowed on the trial court by stipulation of the parties. The trial court then interprets this to mean she was required to dismiss the GAL if the parties demanded. But as discussed previously in Appellant's opening brief, the trial court has broad discretion under Idaho Rules of Civil Procedure, Rule 65(g) and *Idaho Code*, Section 32-717. Such authority is not bestowed on the court by the parties.

In their respective response briefs, the Respondents argue that failure to strictly comply with the authority cited in Plaintiff's motion for the appointment of the GAL means that this GAL had lesser rights, and thus no standing to appeal. Respondents argue that despite the murky procedures that lead to his appointment, the GAL's lack of standing to appeal should have been so plainly clear to him, that his appeal was frivolous.

The Respondents' position defies logic.[1] In this case, the parties moved for the appointment of the GAL, citing to a specific statutory authority (R. Vol. I, p. 123). The GAL was appointed without any other authority for his appointment being cited by the parties or the court, and the parties ratified his appointment with their subsequent actions making broad use of his services and even asking that he also act as a parenting coordinator for them. (R. Vol. I, p. 138; Augmented Record on Appeal, Exhibit B). The parties and the trial court expected Adler to discharge his obligations regardless of the manner of his appointment, and he did so. Having been appointed pursuant to the parties' request, Adler does not bear the burden of the parties's own compliance with the statutory requirements.

Ken Adler was, indisputably, the GAL in this case. Consequently, the parties are estopped, when it's convenient for them, from arguing that the actions he took to fully discharge his duties were frivolous because of their failure to follow procedure in appointing him.

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[1] *Adler's Brief on Appeal* elaborates on his standing to appeal. *See* p. 30-33, Appellants Opening Brief.

III. THE FOCUS ON THE ABSENCE OF A FINAL GAL REPORT MISSES THE POINT IN THIS CASE

The focus on the absence of a final written report from the GAL diverts from the real issue in this case – the trial court's refusal to address the GAL's concerns regarding the best interest of the children. The argument appears to suggest that if there were a written report, the trial court would have addressed the GAL's concerns. The record disputes this argument. This is not a case of an inactive GAL. Adler was clearly taking an active role in assuring the discharged his duties to address the interests of the minor children: he met with the parties and the children, filed discovery to get more information, filed a claim on behalf of the children, and filed a motion to join him in this case so that he can properly address the best interest of the children (R. Vol. I, p. 155-161, 162-166).

Adler communicated his ongoing concerns regarding the best interest of the children to the trial court and the parents. He made it clear that a written report was premature, stating, at the pre-trial conference that constituted the final hearing in this case: "the motion I filed was filed after attempting collboratively to engage counsel in some negotiations about what I considered to be in the best interest of the children . . . you have not received a report from me I elected to make a pleading because it appeared to me that there was now an eleventh hour attempt by the parties to avoid litigating that issues that are corrosive to the actual co-parenting" (Augmented Record on Appeal, Exhibit A, p.9, ll 7-13). Despite the clear insistence of the GAL that there should be further inquiry into the best interest of the children, the trial court didn't address his concerns. Instead of holding a hearing on the GAL's motions,

the trial court elected to put an end to the case summarily. The GAL's effort to seek review of these decisions is not frivolous.

IV. THE TRIAL COURT'S DISCRETIONARY AUTHORITY TO TERMINATE THE GAL DOES NOT NEGATE A FINDING OF ABUSE OF DISCRETION

The Respondents argue that the trial court has authority to terminate the GAL. The extensive argument is purely distracting as this issue is not in dispute. Whether the trial court had discretionary authority to terminate a GAL is not dispositive of the issue of whether the court abused its discretion in entering its orders. It is the court's application of its discretionary authority, in light of the specific circumstances of this case, that renders the court's actions an abuse of its discretion. Abuse of discretion by trial court in determining custody issues occurs when evidence is insufficient to support its conclusion that welfare and interests of child will be best served by particular custody award, and abuse of discretion may also occur where court overemphasizes one factor, thereby similarly failing to support its conclusion that welfare and interests of child will be best served by particular custody award. *Moye v. Moye*, 102 Idaho 170, 172, 627 P.2d 799, 801 (Idaho, 1981).

Here, the magistrate overemphasized the parents' stipulation and chose to exercise her authority to terminate the GAL without allowing him to address his concerns regarding the best interest of the children. The pleadings in this case paint a picture of parents who exhibited high conflict and repeated inability to cooperate. The petition to modify custody that was before the trial court was the third proceeding in one and a half years regarding the custody of the same minor children. (R. Vol. I, p. 116). This time, Defendant Mother (Petitioner) alleged that the Plaintiff Father had taken steps to undermine the parties minor

children's healthcare and education issues, and had negatively impacted their daughter's medical treatment. (R. Vol. I, p. 116). She further alleged that following the entry of the *Order Modifying Decree,* the parties are unable at any time to work out parenting issues between them on ongoing basis. See *Id.* In his *Verified Motion For Order Appointing Guardian Ad Litem For Minor*, dated May 15, 2007, the Plaintiff Father alleges that the parties are unable to communicate regarding summer custody, that Defendant Mother was making decisions regarding the welfare and education of their minor child that concern him, and that this case can be defined as high conflict in nature. (R. Vol. I., p. 127).

The court appointed a GAL to represent the best interests of the children, precisely because the parents were unable to do so. From the context of the appointment, the goal was to have an independent voice for the children in a high-conflict case. By ignoring and terminating the Guardian ad Litem, the magistrate judge allowed the parents to silence the discussion regarding the best interest of the children, and, for the third time, enter into a custody agreement that was not in the best interest of the children, and did not address their original claims, but merely brought an expedient end to the current conflict.[2] The decision of the trial court to terminate the GAL without addressing his concerns in regards to the best interest of the children was within the magistrate's discretionary authority, but outside the outer limits of her discretion and contrary to established law.

[2] As stated earlier, the parties were back in court on another motion to modify custody within ten months of entry of the stipulated custody agreement. (R. Vol. I, p. 191).

CONCLUSION

The District Court on appeal found that a GAL, appointed by the court to assure that the children were properly represented at all hearings, does not have standing to appeal errors made by the trial court at those very hearings. Indeed the District Court found that Ken Adler was frivolous in attempting such an appeal. Moreover, if the GAL had a standing to appeal such errors, the trial court could simply avoid an appeal by summarily terminating the GAL before an appeal was filed, on the theory that once a GAL with standing to appeal is terminated, his standing is terminated as well.[3] This position is contrary to Idaho's law and policy and would leave no mechanism to remedy abuses of discretion in such cases, creating a void in addressing the best interest of the children.

The decisions of the District Court should be reversed, and the judgments entered against Mr. Adler should be vacated.

RESPECTFULLY SUBMITTED this 7th day of September, 2011.

BAUER & FRENCH

By _____
Charles B. Bauer, Attorneys for Appellant

[3] p.15 of the District Court's *Decision on Appeal.*

CERTIFICATION OF SERVICE

I hereby certify that on the 7th day of September, 2011, two true and correct copies of the foregoing was served upon:

Glorianne Gooding-Jones
323 North First Ave, Ste 206
Sandpoint, ID 83864
208-255-4395

- ☑ First Class Mail
- ☐ Hand Delivery
- ☐ Express/Overnight Mail
- ☐ Facsimile

Todd M Reed
Powell & Reed
318 Pine
PO Box 1005
Sandpoint, ID 83864
(208) 263-4438

- ☑ First Class Mail
- ☐ Hand Delivery
- ☐ Express/Overnight Mail
- ☐ Facsimile

Charles B. Bauer