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Markwood v. Markwood Respondent's Brief Dckt. 39294

IN THE SUPREME COURT OF THE STATE OF IDAHO

Case No. 39294-2011

AMBER ROSE MARKWOOD,

Plaintiff/Respondent,

vs.

JOSHUA ROBERT MARKWOOD,

Defendant/Appellant.

RESPONDENT'S BRIEF

Appeal from the District Court of the Second Judicial District for Latah County.
Appeal from Case No. CV 09-00802.

The Honorable John R. Stegner, District Judge, presiding.

For Appellant:

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STATEMENT OF THE CASE

This case arises from a proposed relocation by Amber Markwood (Amber)[1] to The Dalles, Oregon, to be with her now-husband Kevin Hashizume (Mr. Hashizume). Amber and her ex-husband, Joshua Markwood (Joshua) have two children, PM and MM. Under the prior custody order, the parents shared joint physical and joint legal custody, with Amber having primary residential custody of the children. Each party has sought primary residential custody of the children in light of Amber's relocation.

On January 25, 2011, after four days of trial, Magistrate Judge John Judge delivered his decision from the bench. Applying the standard for relocation cases enunciated in Roberts v. Roberts, 138 Idaho 401, 64 P.3d 327 (2003), Magistrate Judge Judge considered all relevant factors presented by the parties. The magistrate judge described his reasoning regarding each factor and found that allowing Amber to retain primary residential custody would serve the best interests of the children.

Joshua, failing to avail himself of direct review by this Court under I.A.R. 12.1, appealed the magistrate judge's decision to the District Court of Latah County. Judge John Stegner affirmed the magistrate's decision. Joshua now appeals to this Court.

RESTATEMENT OF THE ISSUES ON APPEAL

1. Whether the magistrate judge applied the proper standard, considering the best interests of the children, in the decision to permit the custodial parent to relocate.

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[1] Joshua's current partner is also named Amber. Within this brief, she is referred to as Ms. Macintosh.

2. Whether substantial and competent evidence exists to support the magistrate judge's findings, conclusion, and order.
3. Whether the magistrate judge abused his discretion by overemphasizing any single factor.

Additional Issues on Appeal

4. Whether Amber is entitled to attorney fees under Idaho Code § 12-121 and costs under I.A.R 40.

FACTUAL AND PROCEDURAL BACKGROUND

The parties, Amber and Joshua, were married in the early years of the new century. They had two children: MM, born [redacted] and PM, born [redacted] During the marriage, Amber completed her nursing studies and Joshua worked in manufacturing. Joshua was seriously depressed and became abusive in the home. His explosive behavior prompted police intervention and involvement of professional counseling and psychologists, including psychiatric outpatient treatment.

The marital relationship deteriorated and a variety of events, including Joshua throwing things and breaking household items finally led to Amber leave in 2008, taking the children with her. Amber was concerned about instances of domestic violence against her in front of the children and an instance involving breaking the children's possessions in front of the children. Tr. vol. IV, p. 655, L. 8 – p. 657, L. 18.

The parties divorced September 25, 2009. The Decree awarded joint legal custody and physical custody consistent with the parties' mutually-agreed parenting plan. R. vol. I at 36; Decree of Divorce 2; R. vol. I at 24-30; Parenting Plan.

As contemplated by the Decree and Parenting Plan, since the divorce, Joshua moved to Clarkston, Washington, and Amber remained in Moscow, Idaho. Since their divorce, Joshua has moved in with Amber Mackintosh (Ms. Mackintosh), a Clarkston preschool teacher and day care worker. Amber Markwood met and fell in love with Kevin Hashizume (Mr. Hashizume), a lawyer practicing in The Dalles, Oregon. They planned to marry during the Summer 2011, and did so July 16, 2011.

As a result of these changes, Amber began discussing the future custodial arrangements for the girls with Joshua in December, 2009. She sought assistance from her divorce lawyer who advised her that a relocating parent would lose residential custody and she, Amber, should negotiate an agreement with Joshua that would give her as much visitation as possible, though the girls would have to live with their father. Tr. vol. I, p. 63, L. 19-24.

Unhappy with this possibility and concerned about the welfare of the children, Amber sought a second opinion at the suggestion of the prior attorney. The next attorney was similarly pessimistic and, without analysis of the children's best interests, said that she would lose custody and the girls would have to live with their father. Reluctantly, Amber began discussing with Joshua various provisions of a new custody arrangement where she would be in Oregon, Joshua would be in Washington and the girls would spend the weekdays with their father and weekends with their mother. However, each time the paperwork went to Joshua with what Amber thought was an agreement, it would return with more detailed requests that did not conform with what she was willing to agree to. Finally, in July, around July 23, 2010, the matter came to a head with an exchange of the girls in Clarkston that went very badly. The parties argued because Joshua

had not returned the children on time to Amber. At the same event, in front of the children, Joshua had Amber served through his neighbor (Tyrel Ward) with a Motion for Contempt and Motion for Change of Custody, throwing the entire matter before the Court. Tr. vol. I, p. 67, L. 12-24. Amber had discovered an accusation of inappropriate touching involving the girls and the children of Mr. and Mrs. Ward and intended to follow up on this with the Wards. Amber became upset and angry about all of these events but most especially those concerning the welfare of the children. She reacted badly from the shock and upset and was hysterical. Tr. vol. I, P. 68, L.17-p. 69, L. 4; Tr. vol. I., p. 72, L. 7-15. Following this, Amber sought other counsel and defended the Motions vigorously. R., vol. I at 64; Notice of Appearance; R. vol. I at 66-89; Pl's Resp. to Mot. for Contempt & Related Docs.

Amber's counsel requested both mediation and a custodial evaluation. The Court ordered mediation but reserved a decision on the custodial evaluation. R. vol. I at 91; Ct. Mins.; R. vol. I at 93; Order for Mediation. The mediation with Judge Gaskill was unsuccessful. Based on Amber's motion, the court ordered a custody evaluation of Joshua, including a psychological evaluation. R, vol. I at 104; Order to Participate in Psychological Evaluation. During the fall, Dr. Gregory Wilson performed the court-ordered psychological evaluation on Joshua and his live-in companion, paid for by Amber Markwood.

In the meantime, the parties maintained the existing custodial schedule. During the three and a half months between early August and mid-December, 2010, problems continued between the parents, including pick-up and drop-off arrangements, communication generally and mutual collaboration for the benefit of the girls.

Amber felt that she should try to be flexible and encourage the children's relationship with their father and volunteered extra time from August 20 to August 30, which Joshua agreed to. Amber also invited him to go with her and the girls on the first day of school, which he did. On September 29, Amber offered extra time from October 5 to 10 but Joshua declined, saying he had to work during the week on those days. Amber also extended the offer to have the girls with Joshua for Halloween night, which he agreed to. Amber further gave him additional teacher workdays during the first week of November. She extended an invitation to Ms. Mackintosh to have her and her daughter, Skye, join Amber and the girls to attend Festival Dance ballet, which Ms. Mackintosh accepted. Despite these efforts, a continuing undercurrent of rudeness and lack of cooperation persisted. Amber's efforts to bridge the gap between the two families and provide a basis for cooperation failed. Tr. vol. IV, p. 687, L. 1 – p. 688, L.2.

The trial was moved to December 17 and January 12 and 14, all afternoon settings, 1 P.M. and after. At the end of the January 14 portion of the trial, Joshua's attorney had not yet rested. A further date, January 25, was arranged to allow Joshua to complete his case (at 11:20 A.M.) and for Amber's case to begin. Amber, was able to complete her case later that afternoon, and the Judge announced his decision, reviewing the factors in I.C. § 32-717 and in Roberts v. Roberts, 138 Idaho 401, 64 P.3d 327 (2003). At the end of the day, just before 7 P.M., Amber was permitted by the court to relocate to The Dalles, Oregon, with Joshua to maintain the exact same percentage access to his daughters with the new arrangement as he had in the original parenting plan that was annexed to the Decree of Divorce. Joshua chose to appeal the magistrate's decision to the District Court of Latah County.

Following briefing and oral argument before the district court, Judge John Stegner found that Judge Judge had not abused his discretion and affirmed the decision of the magistrate court. R. vol. II at 335; Ct. Mins., Sept. 2, 2011; R. vol. II at 336; Order Affirming Magistrate's Dec. Joshua's Notice of Appeal to the Supreme Court of Idaho followed on October 7, 2011. R. vol. II at 338; Notice of Appeal.

STANDARD OF REVIEW

"[W]hen reviewing a decision of the district court acting in its appellate capacity, this Court will review the record and the magistrate court's decision independently of, but with due regard for, the district court's decision." Losser v. Bradstreet, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008) (citing Carter v. Carter, 143 Idaho 373, 378, 146 P.3d 639, 644 (2006)).

> The Supreme Court reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure.

Nicholls v. Blaser, 102 Idaho 559, 561, 633 P.2d 1137, 1139 (1981), quoted in Losser, 145 Idaho at 672, 183 P.3d at 760.

"Child custody determinations are committed to the sound discretion of the magistrate judge." Bartosz v. Jones, 146 Idaho 449, 453, 197 P.3d 310, 314 (2008) (citing McGriff v. McGriff, 140 Idaho 642, 645, 99 P.3d 111 (2004)). "On appeal, this Court will only overturn the magistrate's decision for an abuse of discretion." Bartosz, at 453, 197 P.3d at 314 (citing Roberts v. Roberts, 138 Idaho 401, 403, 64 P.3d 327, 329 (2003); see also Koester v. Koester, 99 Idaho 654, 657, 586 P.2d 1370 (1978) ("In custody disputes, the awarding of custody of minor children

rests within the sound discretion of the trial court and will not be upset on appeal absent an abuse of discretion."). "In general, a trial court does not abuse [its] discretion so long as it recognizes the issue as one of discretion, acts within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reaches its decision through an exercise of reason." Roberts, 138 Idaho at 403, 64 P.3d at 329 (internal citations omitted). "It is also an abuse of discretion for the trial court to overemphasize any one factor. All of the relevant factors impacting the custody decision must be considered and reflected in the record." Schultz v. Schultz, 145 Idaho 859, 863, 187 P.3d 1234, 1238 (2008) (citing Moye v. Moye, 102 Idaho 170, 172, 627 P.2d 799, 801 (1981)).

ARGUMENT

As discussed in the Standard of Review, this Court's review of the instant case involves a review of the magistrate's record for an abuse of discretion, with due regard for the district court's intermediate appellate decision. Joshua's argument on appeal is centrally an attack on the discretion of the magistrate judge. Therefore, rather than following the structure Joshua advances, we look directly to the review of decisions based upon the abuse of discretion standard: an analysis of the standard applied and the scope of the decision, an analysis of the findings of the trial court and the competent evidence in support of that decision, and, finally, a discussion of the claim that the magistrate judge abused his discretion by overemphasizing the prior custody agreement. Because we argue that Joshua's appeal is fundamentally a request for this Court to reweigh the evidence, we conclude with an argument that Amber should be entitled to attorney fees under I.C. § 12-121.

Given the free review that this Court exercises over the magistrate judge's conclusions of law and the direct review of the magistrate court's decision, Joshua's failure to provide this Court with a transcript of the proceedings before the district court does not substantively affect this Court's review. However, the transcript of the district court hearing includes the only enunciation of the district court's rationale for its decision affirming the magistrate. R. vol. 2 at 336; Order Affirming Magistrate's Decision; see also R. vol. 2 at 335; Ct. Mins. 2 (stating only Judge Stegner's findings). To the extent that due regard for the district court's decision is appropriate, this Court has been denied that opportunity. "Where an incomplete record is presented to this Court, the missing portions of that record are to be presumed to support the action of the trial court." Rutter v. McLaughlin, 101 Idaho 292, 293, 612 P. 2d 135, 136 (1980) (citing Stewart v. Arrington Constr. Co., 92 Idaho 526, 446 P.2d 895 (1968); Cullison v. City of Peoria, 584 P.2d 1156 (Ariz. 1978)).

1. The magistrate court correctly identified and applied the standard for a modification of a custody agreement involving relocation.

> Once custody has been granted in a divorce action, the district court has continuing jurisdiction to modify that decree, but modification may not be had unless there has been a material, substantial and permanent change in circumstances subsequent to the entry of the original decree which indicates to the trial court's satisfaction that modification would be in the best interests of the child.

Chislett v. Cox, 102 Idaho 295, 298, 629 P.2d 691, 694 (1981). Joshua agreed that Amber's move constituted a substantial, material, and permanent change before the magistrate court. R. vol. 1 at 53; Mot. to Modify Child Custody & Support 2. He has not argued otherwise on appeal.

Therefore, a decision to modify the custody agreement is within the bounds of discretion granted to the magistrate court.

The magistrate judge identified the standard for cases involving the relocation of a parent as that enunciated in Roberts v. Roberts, 138 Idaho 401, 64 P.3d 327 (2003). "I do think that we've been – we've identified the correct standard under *Roberts* and *Proginy* [sic], that there is a burden on the relocating parent to show that relocation is in the best interest of the child considering all of the factors of Idaho Code 32-717." Tr. vol. IV, p. 767, L. 7-11. *See also* Tr. vol. IV, p. 743, L. 24-p. 744, L. 3 (finding that Roberts emphasized the burden on the moving parent but noting that it "never changed the ultimate directive to the Court, the responsibility that the Court will be charged with in determining what is in the best interests of the children").

The magistrate's statements are consistent with the statement in Roberts that:

> In Idaho, the best interests of the children is always the paramount concern. Therefore, in any judicial determination regarding the custody of children, including where they reside, the best interests of the child should be the standard and primary consideration. In addition, Idaho favors the active participation of both parents in raising children after divorce, which policy is reflected in I.C. §32-717B supporting joint custody. For these reasons, in Idaho, the moving parent has the burden of proving relocation would be in the best interests of the child before moving in violation of a previous custody arrangement.

138 Idaho at 405, 64 P.3d at 331. Likewise, the Court has stated that "[o]nce the parent seeking permission to relocate proves that relocation is in the child's best interest, he or she will be allowed to move with the child." Bartosz, 146 Idaho at 456-7, 197 P. 3d 310, 317-18 (2008) (citing Roberts, 138 Idaho at 405, 64 P.3d at 331). The magistrate judge correctly identified that this placed the burden upon Amber to show that the move was in the children's best interest but that the focus was on the children's best interests overall. Tr. vol. IV, p. 746, L. 14-18.

The magistrate judge also recognized the discretionary nature of his decision, stating, "[m]agistrates are accorded a huge amount of discretion in making the custody determinations, as long as they deal properly with the factors of 32-717 and are -- and are guided by the Best Interests of the Child standard." Tr. vol. IV, p. 746, L. 6-10. This is consistent with this Court's statement that I.C. § 32-717 "gives trial courts wide discretion in making custody determinations, but it requires them to consider all relevant factors when evaluating the best interest of the child." Bartosz, 146 Idaho at 454, 197 P.3d at 315; see also Nelson v. Nelson, 144 Idaho 710, 716, 170 P.3d 375, 381 (2007) (emphasizing the broad discretion granted to the magistrate court).

Joshua now argues that the magistrate judge incorrectly applied the standard in Roberts because he did not evaluate the modification of the custody order (including relocation) against the preexisting custody order. This argument must fail for three related reasons: because a comparison with the *status quo ante* is not consistent with the facts of the case, because it is not consistent with the fundamental directive of this Court to consider the best interests of the children, and because it is not consistent with the case law that counsel for Joshua has presented.

i. A comparison with the status quo ante *is inconsistent with the facts of the case.*

Perhaps most importantly in the present case, the alternatives that the magistrate was faced with were either a) primary residential custody with Joshua, in Clarkston, or b) primary residential custody with Amber, in The Dalles. The preexisting custody agreement was not an alternative to the proposed change. Joshua has made no substantive argument as to why the Court should mandate a comparison with an alternative that did not exist.

As noted above, supra at 8, there had already been a showing of a substantial, permanent, and material change in circumstances. Amber was going to move and the decision posed to the magistrate court was whether Amber or Joshua would have primary physical custody of the children. Indeed, in his Motion to Modify Child Custody and Support of July 15, 2010, Joshua had moved the magistrate court to give Joshua primary residential custody. R. vol. 1 at 53; Mot. to Modify Child Custody & Support 2. Joshua has since relied on the fact that living in Clarkston or The Dalles were the two alternatives, arguing that Amber said that she was "going to The Dalles no matter what" and that because "the mom is going to be in The Dalles," various factors weighed in Joshua's favor. Tr. vol. IV, p. 739, L. 9-13. Joshua's own argument before the magistrate court recognized that the determination to be made was between primary residential custody in Clarkston and primary residential custody in The Dalles. The magistrate made the only obvious comparison: between the two proposed custody schedules.

ii. A comparison with the status quo ante *is inconsistent with the best interests of the child analysis.*

This Court has repeatedly stressed the primacy of the best interests analysis. E.g., Hopper v. Hopper, 144 Idaho 624, 627, 167 P.3d 761, 764 (2007) ("In making child custody determinations, 'a child's welfare and best interests are of paramount importance.'") (quoting Hoskinson v. Hoskinson, 139 Idaho 448, 455, 80 P.3d 1049, 1056 (2003)); Poesy v. Bunney, 98 Idaho 258, 261, 561 P.2d 400, 403 (1977) ("[T]he best interest of the child . . . is the controlling consideration in all custody proceedings.") (citing Bryant v. Bryant, 92 Idaho 76, 78, 437 P.2d 29 (1968); Patton v. Patton, 88 Idaho 288, 399 P.2d 262 (1965); Stratton v. Stratton, 87 Idaho

118, 391 P.2d 340 (1964); Larkin v. Larkin, 85 Idaho 610, 382 P.2d 784 (1963); Rogich v. Rogich, 78 Idaho 156, 299 P.2d 91 (1956)); Brashear v. Brashear, 71 Idaho 158, 163, 228 P.2d 243, 246 (1951) ("In exercising this discretion the court must be guided by a rule of universal application, which is to the effect that the welfare and best interests of the child is the paramount consideration, and controlling factor, in determining the custody.") (citing Roosma v. Moots, 62 Idaho 450, 112 P.2d 1000 (1941); Arkoosh v. Arkoosh, 66 Idaho 607, 164 P. 2d 590 (1945); Fish v. Fish, 67 Idaho 78, 170 P. 2d 802 (1946)).

Instead of this well-settled standard, Joshua now proposes to apply one where, "[i]f the non-moving parent is a miniscule [sic], or bad, actor in the lives of his or her children, the other parent would likely be able to relocate." Appellant's Br. 13. This is inconsistent with the plain language of Roberts that "in any judicial determination regarding the custody of children, including where they reside, the best interests of the child should be the standard and primary consideration." 138 Idaho at 405, 64 P.3d at 331. Roberts and the numerous other decisions of this Court on the question of a change in custody do not speak of bad actors; they speak of the best interests of the children. "In Idaho, the best interests of the children is **always** the paramount concern." Id. (Emphasis added).

Indeed, the determination of the non-moving parent's character alone provides no basis for a custody determination based on the best interests standard. This Court has identified a variety of non-exclusive factors (from I.C. § 32-717, Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996), and In re Marriage of Burgess, 913 P.2d 473 (Cal. 1996)) that Idaho courts may use in evaluating whether a moving parent has met his or her burden of showing that relocation is in the

best interests of the children. Roberts, 138 Idaho at 405, 64 P.3d at 331. Some of these do go to the character of the parents. E.g., I.C. § 32-717(1)(e) ("The character and circumstances of all individuals involved . . . ."). Others go to the needs of the children. E.g., I.C. § 32-717(1)(d) ("The child's adjustment to his or her home, school, and community . . . ."). Still others engage in a comparison with the pre-existing custody plan. E.g., Tropea, 665 N.E.2d at 741 ("[T]he impact of the move on the quantity and quality of the child's future contact with the noncustodial parent . . . ."). However, even then, the factors are phrased in terms of the underlying question of whether the move will be in the best interests of the children. Not only does Joshua's proposed standard fail to do that, but it deprives the magistrate court of important bases for determining whether a given custody arrangement is, in fact, in the best interests of the child. Such a limitation would eliminate I.C. § 32-717's requirement that the "court shall consider all relevant factors . . . ." I.C § 32-717(1).

Notably, the concerns enunciated in Justice Eismann's concurrence in Bartosz are not at play here. Justice Eismann (joined by Justice Warren Jones) argued that the Court should apply a standard whereby "Idaho Code § 32-717B creates a presumption that a parent not be permitted to move away with a child if doing so would prevent the other parent from having frequent and continuing physical custody of the child." Bartosz, 146 Idaho at 464, 197 P.3d at 325 (Eismann, J., concurring). In this case, the custody arrangement ordered after trial provides for joint legal and physical custody and frequent and continuing contact by both Amber and Joshua. See Tr. vol. IV, p. 764, L. 16-19 ("[T]here's no -- nothing that -- that keeps me from making a finding that -- that joint legal and joint physical custody is appropriate in this case. That was already

agreed to by the parties in the decree."). As discussed further below, infra at 23-24, Joshua has a similar number of overnight visits and the same frequent and continuing contact. Thus, even were the Court to revisit in the decision in Bartosz, Justice Eismann's concern that "permitting a parent to move away with a child will typically prevent the other parent from having frequent physical custody of the child" is not a factor in the present case because, given the Magistrate's decision, Joshua will not alter his scheduled contact with the children. Bartosz, 146 Idaho at 464, 197 P.3d at 325 (Eismann, J., concurring).

iii. Joshua has failed to provide any legal citation that would support determining the best interests of the children solely based on a comparison between the proposed change and the status quo ante.

Joshua has presented no citation to any case, from Idaho or elsewhere, that would support his argument. In fact, the three cases he cites in discussing his proposed standard, Allbright v. Allbright, 147 Idaho 752, 215 P.3d 472 (2009), Danti v. Danti, 146 Idaho 929, 204 P. 2d 1140 (2009), and Bartosz, all support the standard applied by the magistrate judge.

In Allbright, the Court found that a magistrate court acted improperly in prohibiting a parent from moving. 147 Idaho at 756, 215 P.3d at 476. The Court specifically bracketed the question of whether the mother would be allowed to move the children. Id. at 754, 215 P.3d at 474 ("This appeal does not involve the issue of whether Mother should be permitted to move to Michigan with Daughter."). If Joshua's proposed standard were applied, the magistrate judge would be basing his comparison on an outcome that he had no right to impose (in this case, requiring Amber to stay in Moscow). Id. at 755, 215 P.3d at 475 (a magistrate court "can

determine with which parent the child will reside, but it cannot determine where either parent will reside").

Nor can Danti reasonably be read to support Joshua's argument. While the Court never specified the point of comparison, the decision can only be read to suggest the choice was between granting custody to the mother and granting custody to the father. The Court noted the magistrate's "concern for continuity and stability in the children's lives. The court concluded that this factor favored awarding physical custody to [mother]." Danti, 146 Idaho at 936, 204 P.3d at 1147. If the point of comparison was the preexisting custody arrangement, continuity and stability would have been served by denying the proposed change in custody.

A determination of best interests based solely on a comparison with the preexisting custody arrangement is also inconsistent with the Court's ruling in Bartosz, which noted the magistrate judge's consideration of "the extent [to which] alternative visitation would allow Sydney and Patrick to maintain a close relationship . . . ." 146 Idaho at 456, 197 P.3d at 317. By explicitly comparing the alternative visitation arrangements, Bartosz thus excludes the possibility that the only comparison was with the preexisting custody arrangement. Just as the Court saw no problem with a comparison of alternative visitation arrangements in Bartosz, there should be no problem with the same comparison in this case.

Joshua has cited to three cases in passing for his proposition that the magistrate judge applied an improper standard. None of these cases support applying Joshua's proposed standard and, in fact, each of them contain some discussion that indicates that the magistrate judge applied the proper standard.

iv. Joshua's argument and proposed standard are fundamentally inconsistent

The Court should note that Joshua's argument on appeal is internally inconsistent. When arguing that the magistrate judge did not apply the proper standard, he argues that the only valid point of comparison is between the preexisting custody arrangement and the proposed move. Appellant's Br. 12. However, as discussed in more detail below, infra at 32-39, when arguing that the magistrate judge overemphasized one particular factor, he argues that the magistrate judge placed too much emphasis on the similarities to the preexisting custody arrangement. Id. at 11-12 ("Utilizing the time allotted to each parent in a preexisting order and comparing that to the primary custodian's proposed schedule, as a primary reason for . . . a best interests finding is impermissible . . . ."). Joshua cannot realistically argue that the preexisting custody order should be the only basis for comparison but that the magistrate court overemphasized that same basis.

This internal conflict is important, not just because it highlights the fact that Joshua's argument is ultimately an attempt to have this Court reweigh the evidence and obtain a second (or third, when considering his intermediate appeal to the district court) bite at the apple, but also because it highlights the rationale for maintaining deference to the magistrate court's findings. The consideration of the children's best interests, as the center-point of any custody analysis, has been committed to the magistrate judge who is in the best position to determine which factors are relevant and what comparison is proper given all of the circumstances. There may be cases where a decision on a change in custody is properly evaluated against the preexisting order, but that was not the case here. The magistrate judge properly recognized that Amber's move was going to occur and that the best interests of the children required a choice between primary

residential custody with Amber and primary residential custody with Joshua. Tr. vol. IV, p. 775, L. 21-24.

Because the magistrate court recognized the issue as a matter of discretion, applied the proper legal standard, and ruled within its discretion, the magistrate court did not abuse its discretion.

2. The magistrate court properly considered all relevant evidence and the findings are supported by substantial and competent evidence.

i. Magistrate Judge Judge properly found in favor of Amber based on a consideration of all relevant factors, with findings supported by substantial and competent evidence.

> When reviewing the trial court's findings of fact, the appellate court will not set aside the findings on appeal unless they are clearly erroneous such that they are not based upon substantial and competent evidence. Reed v. Reed, 137 Idaho 53, 56, 44 P.3d 1108, 1111 (2002); Hunt v. Hunt, 137 Idaho 18, 20, 43 P.3d 777, 779 (2002). If the findings of fact are based on substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal. State v. Hart, 142 Idaho 721, 723, 132 P.3d 1249, 1251 (2006).

Nelson v. Nelson, 144 Idaho 710, 715, 170 P.3d 375, 380 (2007). "The statute gives trial courts wide discretion in making custody determinations, but it requires them to consider all relevant factors when evaluating the best interest of the child." Bartosz v. Jones, 146 Idaho 449, 454, 197 P.3d 310, 315 (2008). "An appellate court will view the evidence in favor of the trial court's judgment and will uphold the trial court's findings of fact even if there is conflicting evidence. We will not make credibility determinations or replace the trial court's factual findings by reweighing the evidence." Schneider v. Schneider, __ Idaho __, 258 P. 3d 350, 355 (Idaho 2011) (internal citations and quotations omitted). As discussed below, infra at 39-40, where a party merely asks this Court to reweigh the evidence, it is a basis for a finding that the appeal has been

pursued frivolously, unreasonably, or without foundation. Crowley v. Critchfield, 145 Idaho 509, 514, 181 P.3d 435, 540 (2007).

The magistrate judge considered "all relevant factors" and reached a decision that was based on substantial and competent evidence. Among the factors that the magistrate judge considered were those listed in I.C. § 32-717(1):

> (a) The wishes of the child's parent or parents as to his or her custody;
> (b) The wishes of the child as to his or her custodian;
> (c) The interaction and interrelationship of the child with his or her parent or parents, and his or her siblings;
> (d) The child's adjustment to his or her home, school, and community;
> (e) The character and circumstances of all individuals involved;
> (f) The need to promote continuity and stability in the life of the child; and
> (g) Domestic violence as defined in section 39-6303, Idaho Code, whether or not in the presence of the child.

The magistrate judge also considered a number of factors discussed by the New York Court of Appeals in Tropea v. Tropea, including:

> each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements.

665 N.E.2d 145, 151-52 (NY 1996). This Court has sanctioned the use of the Tropea factors in assessing the best interests of the children in cases concerning relocation, provided that the moving parent has the burden of proving the best interests of the children. Roberts v. Roberts, 138 Idaho 401, 405, 64 P.3d 327, 331 (2003). As discussed above, supra at 9, the magistrate judge did apply that burden and found that Amber had met it.

While the magistrate judge found that some of these factors weighed equally for Amber and Joshua, he found that many of them weighed in favor of Amber, thereby allowing relocation. Notably, throughout the eighteen pages of the trial transcript that discuss the magistrate court's findings regarding the children's best interests, there is not a single factor that the magistrate court found weighed in favor of Joshua. Tr. vol. IV, p. 768, L.5-p. 786, L. 7. To the contrary, there are a number of areas, most importantly in considering the character and the circumstances of the individuals involved, the promotion of continuity and stability, and the enhancement of the economic, emotional, and educational well-being of the custodial parent and the children, where the magistrate court found in favor of Amber. For each of these findings, the court's decision is supported by substantial and competent evidence.

In addressing the character and circumstances of the parents, the magistrate court found that Amber "has been the most consistent stable parent" and noted Joshua's "extreme reactive behavior," stating that he did not see the same kind of behavior from Amber. Tr. vol. IV, p. 770, L. 23-p. 771, L. 15. Of particular concern to the judge was Joshua's admission of a list of angry, abusive behaviors including knocking off Amber's glasses and stomping on them, Tr. vol. IV, p. 475, L. 19-23, breaking the children's DVD player, done in front of the children by his own testimony, Tr. vol. IV, p. 476, L. 9-11, with the children crying, according to Joshua's reports to Dr. Wilson. Tr. vol. II, p. 197, L. 1-5. The magistrate court's finding is supported by substantial and competent evidence.

The magistrate judge found that the wishes of the parents weighed in favor of allowing relocation. Tr. vol. IV, p. 768, L. 15-19. While he acknowledged that the parents now disagree,

he stressed the fact that, in 2009, they had agreed that the best interests of the children were served by Amber having primary residential custody. R. vol. I at 27-30; Parenting Plan; R. vol. I at 33; Stipulation to Entry of Decree of Divorce 1. That provided the magistrate court with a prior agreement on the question of the best interests of the children and a prior expression of the parents' wishes. In making this finding, Magistrate Judge Judge emphasized that prior agreement and did not place significant weight on Joshua's argument that he was pressured into making that agreement. This Court has upheld decisions by a magistrate judge emphasizing a prior agreement where the objecting party is motivated by "buyer's remorse." Evans v. Sayler, __ Idaho __, 254 P. 3d 1219, 1223 (Idaho 2011).

The magistrate court found that allowing the relocation would promote continuity and stability. Tr. vol. IV, p. 779, L. 20-p. 780, L. 21. The magistrate judge noted that, while Joshua had gotten some help and had improved from those times of "extreme reactive behavior" he could not ignore the testimony of Dr. Gregory Wilson, the psychologist who testified that Joshua still has a diagnosis related to his depressive episodes, dysthymic disorder. Tr. vol. IV, p. 771, L. 13; see also Tr. vol. II, p. 231 L. 5-12. Dr. Holmes' (Joshua's original mental healthcare provider) records show that Holmes still finds Joshua with the diagnosis of major depression although he is much improved over the 2008 period when the most serious abusive behavior manifested itself. Pl's Ex. 6. Magistrate Judge Judge had also previously noted Joshua's resistance to attending the "Focus on Children" class. Tr. vol. IV, p. 769, L. 4-9; see also Tr. vol. IV, p. 666, L. 20-p. 668, L.1 (describing Joshua's resistance to adhering to the order).

Posing a "worst case scenario" for Joshua, the magistrate judge expressed concern about Joshua's stability if his partner, Ms. Mackintosh, were no longer in his life. Tr. vol. IV, p. 774, L. 1-7. Joshua depends upon the help of Ms. Mackintosh to make sure that he can deal with his work schedule and the children's schedules with school and sharing time with Amber. When his schedule changed shortly after the divorce was final, Joshua had to have his companion provide most of the weekend childcare. Tr. vol. IV at 519, L. 14-p. 520, L. 25.

On the other hand, the judge found Amber's situation very adaptable and her current nursing schedule "just about perfect for having the children during the week. She can be home with them in the afternoon." Tr. vol. IV, p. 774, L. 15-17. This finding is supported by Amber's testimony regarding her work schedule. Tr. vol. IV, p. 695, L. 2-11.

The magistrate also expressed concern over the prospective living arrangement with Joshua, stating:

> It doesn't sound like a situation that's ideal for -- for the -- that -- the girls to be going to school from that place. I mean, I think that, especially if they get older, they're going to need more -- need more privacy. I'm not sure why Anthony -- is it Anthony? I think it's Anthony -- was sleeping in the same room. I mean, I don't think there's anything wrong with that necessarily, but it's just -- there was a sense of not so much permanency, I guess, in the sleeping arrangements there as I felt from even -- even what was demonstrated in talking about, in showing the pictures of what the setup was going to be in Mr. Hashizume's house there.

Tr. vol. IV, p. 778, L. 23-p. 779, L. 9. Ms. Mackintosh's testimony that PM and MM shared a bedroom with her daughter and her fifteen year-old son provides competent evidence support the magistrate judge's concern. Tr. vol. IV, p. 514, L. 6-21. The picture of the children's prospective

bedroom provides competent evidence of the stability of the arrangements in The Dalles. Pl's Ex. 3.

Although it did not weigh strongly, the factor of domestic violence did weigh in favor of allowing the move. "I've already talked about, just some of the behaviors, which I'm confident will not -- will not continue." Tr. vol. IV, p. 780, L. 22-25. That is, Magistrate Judge Judge did acknowledge Joshua's history of problematic behavior that would fall under the definition of domestic violence although he said that it was not a significant factor in his decision.

Moving on to the factors enunciated in Tropea, the magistrate judge found that Amber's motivations for the move indicated that allowing the relocation was in the children's best interests. "After hearing all the testimony, I'm confident that -- that Ms. Markwood's motivations for the move are -- are pure, and they're not to disrupt the relationship. That's partly evidenced by her willingness to switch the schedule even." Tr. vol. IV, p. 781, L. 7-11. Joshua has not substantively disputed the magistrate judge's findings on this point but it is worth emphasizing that Amber's testimony regarding her relationship with Mr. Hashizume provides substantial and competent evidence to support that finding. Tr. vol. I, p. 93, L. 13-15.

In considering the extent that the move would enhance the economic, emotional, and educational well-being of the custodial parent and the children, the magistrate judge stated, "I think that -- that those factors really favor the move." Tr. vol. IV, p. 783, L. 23-784, L. 1. The magistrate judge's finding emphasized that "Ms. Markwood's financial, or economic, emotional, educational to a less extent, but emotional and economic interests, and thereby those of the children, will be served by the move." Tr. vol. IV, p. 784, L. 1-5. There was significant evidence

introduced regarding the educational and extracurricular opportunities available to the children in The Dalles. Tr. vol. IV, p. 698, L. 2-p. 699, L. 1; Pl's Ex. 5. With regard to her economic opportunities, Amber testified to her new position as head RN at the correctional facility in The Dalles. Tr. vol. IV, p. 650, L. 24-p.6 51, L. 3. Finally, Amber testified about her relationship with Mr. Hashizume and that they had been talking about getting married since late 2009 and had been formally engaged to be married as of Spring 2010. Tr. vol. I, p. 53, L. 3-5. Mr. Hasizume, in turn, testified extensively about his involvement with Amber and their relationship with the children. Tr. vol. IV, p. 550, L. 5-p. 557, L. 14; see also Pl's Exs. 1-4. All of this tends to support the finding that moving to The Dalles is a unique opportunity and one that will serve the children's best interests. While Joshua argues that Amber is "putting her romantic interests ahead of the best interest of [PM] and [MM]," that argument ignores the fact that the presence of a happy, stable, and successful home-life in The Dalles will do nothing but serve the children's best interests. Appellant's Br. 19.

Finally, the magistrate court found that allowing the move would preserve the existing relationships with Joshua and the children's relationships in the Clarkson area. Tr. vol. IV at 785, L. 23-p. 786, L. 4. Of particular import to this finding was the magistrate judge's statement that "[w]hat I'm going to order here does not change Mr. Markwood's contact with the children significantly from the current decree." Tr. vol. IV, p. 786, L. 5-7. This is supported, not only by a direct comparison between the prior custody agreement (R. vol. I at 24-30; Parenting Plan 1-7) and the order the magistrate judge entered (R. vol. II at 228-35; Order for Custody 1-33), but also by Amber's testimony that her proposal would make "a marginal difference of three percent or, I

think, 16 days less total, but he would be getting more quality time because it would be bigger chunks of time in the summer as opposed to little weekends." Tr. vol. IV, p. 693, L. 22-25.

Altogether, the magistrate judge considered twelve different factors and found in favor of Amber with regard to seven of those.[2] There is substantial and competent evidence for each of those findings. The other five factors were viewed as weighing equally for Joshua and Amber and no factors were found to weigh in favor of Joshua.

Joshua's argument on appeal, trying to find slight differences or tenuous connections between the facts of this case and those in cases that the Court has previously addressed, ignores the underlying standard of review and the broad discretion granted to the magistrate court. Nelson v. Nelson, 144 Idaho 710, 716, 170 P.3d 375, 381 (2007). Rather, Joshua is asking this Court to reweigh the evidence presented to the magistrate court and to second-guess the magistrate judge's factual findings. He has not identified any factors he raised below that were not considered by the trial court. He has, with a few exceptions discussed below, infra at 25-27, failed to argue that the magistrate judge's findings are not supported by substantial and competent evidence. In short, he has failed to argue that the magistrate court's decision was not within the bounds of its considerable discretion.

[2] This is actually a conservative reading of the magistrate's decision as some factors, such as the magistrate judge's description of the children's lifestyle in the Dalles as being "a positive" could also represent an implicit finding in favor of Amber. Tr. vol. IV, p. 784, L. 24-p. 785, L. 3.

ii. Joshua's arguments that particular findings are not supported by substantial and competent evidence is contradicted by substantial evidence in the record.

Joshua does make a few claims regarding the record that are inconsistent with the magistrate judge's findings and with the evidence presented at trial. It is worth addressing these in turn.

He states that "the finding that Mr. Markwood's [sic] was sporadic in his ability to spend time with his children was not supported by the record." Appellant's Br. 7. This is incorrect as demonstrated by Ms. Mackintosh's testimony that, due to Joshua's work schedule, she was the primary caregiver for two out of every three days that Joshua had custody of the children on the weekends. Tr. vol. IV, p. 519, L. 14-p. 520, L. 25. It is also contradicted by Joshua's testimony that he had been requesting a shift change "for a long time," without success and that he relied on Ms. Mackintosh for childcare when he was unavailable. Tr. vol. IV, p. 473, L. 1-10.

Joshua states that "[o]ne could not say in this case that [PM] and [MM] would receive increased emotional support in The Dalles." Appellant's Br. 20. Of course, "one" not only could say this, but the magistrate judge did say this. Tr. vol. IV, p. 783, L. 23-p. 784, L. 5. (finding that the Tropea factor considering the enhancement of "the economic, emotional, and educational well-being of custodial parent and the child . . . really favor[ed] the move"). As discussed above, supra at 22-23, the magistrate judge's findings on this point are amply supported by the evidence.

Joshua goes on to state that "[o]ne could not say they are getting an opportunity to be around their extended family." Appellant's Br. 20. First, because the magistrate judge found that he "didn't hear a lot about extended family members," we have not regarded that as a finding in

Amber's favor although his statement that the presence of Mr. Hashizume's family was "a positive" may be viewed as an implicit finding. Tr. vol. IV, p. 785, L. 4-15. There is substantial and competent evidence for the magistrate judge's findings based on the testimony of Mr. Hashizume regarding his parents. Tr. vol. IV, p. 551, L. 24-p. 552, L. 8 (describing his parents interaction with PM and MM during a Mother's Day visit); Tr. vol. IV, p. 557, L. 15-p. 558, L. 20 (describing his parents' reaction to having step-grandchildren). It is also supported by the fact that Ms. Mackintosh's parents live in Grants Pass, Oregon, indicating that they, too, may have a greater role in the children's lives. Tr. vol. IV, p. 538, L. 14-22. Combined with the magistrate judge's attention to the fact that the children's relationships in Clarkston would be preserved, substantial evidence exists in support of this finding. Tr. vol. IV, p. 785, L. 18-22.

He states that "[o]ne could not say that [PM] and [MM] are likely to have increased stability." Appellant's Br. 20. Again, this statement is contrary to the magistrate court's findings that Amber was the most consistently stable parent, Tr. vol. IV, p. 770, L. 23-25, and the magistrate judge's concerns over the worst case scenario if Joshua were to break up with Ms. Mackintosh without similar concerns over Amber's situation. Tr. vol. IV, p. 773, L. 16-p. 774, L. 17. The evidence discussed above, supra at 19-21, in relation to those factors provides ample evidence that the magistrate judge relied on in his ruling.

Joshua states that there is "insufficient evidence" to support the magistrate's conclusion that The Dalles provided an economic opportunity for Amber. Appellant's Br. 19 n.1. Joshua seems willing to accept the $30 per hour figure offered by Amber's counsel. Id. (citing Tr. vol. I, p. 4, L. 15). This is an increase of one-sixth of the salary from the $25 per hour she earned on an

irregular schedule in 2009. Tr. vol. I, p. 53, L.19-p. 54, L. 5. Even assuming the same irregular schedule, that would increase Amber's economic opportunity by nearly $10,000. It is also supported by Amber's description of her move from working on the medical-surgical floor of Gritman Memorial Hospital to being the head RN for the correctional facility in The Dalles. Tr. vol. IV, p. 650, L. 24-p.651, L. 3. That is sufficient to sustain the magistrate court's finding of economic opportunity.

Joshua states that there "is nothing to suggest that Ms. Markwood will stop hindering and start promoting the beneficial daughter-father relationships that Dr. Wilson testified about." Appellant's Br. 31. Again, this runs counter to the magistrate judge's findings. He stated:

> I'm confident that Ms. Markwood recognizes the importance of the girls' relationship with Mr. Markwood, wants to nurture that, wants to facility [sic] that, and I'm confident that she and Mr. Hashizume will continue to facilitate that relationship. If I didn't think that, I wouldn't be -- I wouldn't be making this decision.

Tr. vol. IV, p. 781, L. 25-p. 782, L. 5. The evidence in support of this finding includes testimony by Amber, regarding her commitment to promoting a healthy father-daughter relationship. Tr. vol. IV, p. 699, L. 2-p. 700, L. 4. Mr. Hashizume testified to his view of the role of step-father and the need to promote the children's relationship with their biological father. Tr. vol. IV, p. 601, L. 4-p. 602, L. 1. In addition, Ms. Mackintosh testified to the fact that Amber invited her to a ballet recital with the girls, that they both attended and had a great time. Tr. vol. IV, p. 521, L. 24-p. 522, L. 6; see also Tr. vol. IV, p. 687, L.1-14 (Amber's testimony of the same event); Pl's Ex. 4 at 3 (photo of the event). All of this provides substantial and competent evidence that Amber will work to foster the girls' relationship with Joshua in the coming years.

Joshua has made a variety of claims regarding the magistrate judge's conclusions. He has argued that a few of them are not supported by substantial and competent evidence. This, as discussed, is incorrect. He has ignored the variety of factors on which the magistrate judge based his ruling and the evidence supporting those factors. And he has attempted to parse this Court's prior rulings while ignoring the underlying standard: whether the magistrate judge ruled after considering all relevant factors and was supported by substantial and competent evidence in doing so. Bartosz, 146 Idaho at 454, 197 P.3d at 315. Taken in total, while Joshua has provided citations to legal authority, the arguments advanced are not legal arguments, they are arguments asking this Court to substitute its judgment with regard to the weight of the evidence in place of the magistrate court. To the contrary, the magistrate judge's findings were reasoned, considered all of the factors put forward as relevant, and are each supported by substantial and competent evidence. The findings are, therefore, within the bounds of the magistrate court's discretion.

3. The magistrate judge did not overemphasize the prior custody agreement

i. Magistrate Judge Judge did not place undue emphasis on any single factor, and Joshua has not identified any factor that should have been considered but was not.

Joshua argues that the magistrate court's attention to the prior custody arrangement[3] constitutes an overemphasis that would constitute an abuse of discretion warranting reversal. This Court has stated that "[a]n overemphasis on any single factor is also an abuse of discretion."

[3] Actually, Joshua conflates two different pieces of evidence that the magistrate court considered, the flexibility of the parents' work schedule, and the extent to which the parents' contact with the children would change from the prior custody arrangement. Appellant's Br. 3 ("the Magistrate . . . relied upon the preexisting custody schedule **and** the work schedule of Ms. Markwood . . . .") (emphasis added). It is suggested below, infra at 34, that focusing on two different pieces of evidence serves to undercut any argument that overemphasis occurred.

Bartosz v. Jones, 146 Idaho 449, 458, 197 P.3d 310, 319 (2008) (citing Schultz v. Schultz, 145 Idaho 859, 863, 187 P.3d 1234, 1238 (2008)). However, the Court has repeatedly stated that "this Court will not make credibility determinations or replace the trial court's findings of fact by reweighing the evidence." Id. at 359, 197 P.3d at 320 (citing Nelson v. Nelson, 144 Idaho 710, 713, 170 P.3d 375, 378 (2007)); see also I.R.C.P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous. In the application of this principle regard shall be given to the special opportunity of the trial court to judge the credibility of those witnesses who appear personally before it."); Strain v. Strain, 95 Idaho 904, 905, 523 P.2d 36, 37 (1974) ("Questions of child custody are within the discretion of the trial court, and it has been repeatedly held that this Court will not attempt to substitute its judgment and discretion for that of the trial court except in cases where the record reflects a clear abuse of discretion by the trial court.") (citing I.C. § 32-705, Mast v. Mast, 95 Idaho 537, 511 P.2d 819 (1973); Bezold v. Bezold, 95 Idaho 131, 504 P.2d 404 (1972); Thomlinson v. Thomlinson, 93 Idaho 42, 454 P.2d 756 (1969); Larkin v. Larkin, 85 Idaho 610, 382 P.2d 784 (1963); Angleton v. Angleton, 84 Idaho 184, 198, 370 P. 2d 788, 796 (1962) ("Under the mandate of Rule 52 I.R.C.P., a reviewing court is to accept the trial court's findings of fact *unless clearly erroneous*, and if conflicting inferences may be drawn from the established facts, it is not within the province of the appellate court to substitute its judgment for that of the trial court.") (emphasis in original)).

Thus, a claim of overemphasis must go beyond a simple request to reweigh the evidence. Based upon the Court's analysis in cases where overemphasis has been argued to be an abuse of

discretion, there appear to be two main showings necessary for the Court to reverse a decision based on overemphasis.

First, the factor must be the primary consideration of the magistrate court. In Moye, the Court noted that, of the ten findings by the magistrate, six concerned the mother's health, two were basically irrelevant to the consideration of the court, and only two were relevant as to the status of the father. Moye v. Moye, 102 Idaho 170, 172 n.2, 627 P.2d 799, 801 n.2 (1981). In Bartosz, the Court rejected an overemphasis claim because, even though "some of the magistrate's findings could be construed as placing too much emphasis on Julie's motive for moving, these findings were only part of the magistrate's consideration of one factor." Bartosz, 146 Idaho at 459, 197 P.3d at 320. In Schultz, the Court again focused on the fact that "the **only** factor the court considered was the distance between the father and child created when Rhonda moved to Oregon." Schultz, 145 Idaho at 865, 187 P.3d at 1240 (2008) (emphasis added). Most recently, this Court has further limited the overemphasis analysis, stating that "[w]here every other factor in I.C. § 32-717(1) is neutral, there is nothing improper in basing the custody decision on only one factor if that factor is found to weigh in favor of one parent over the other." Schneider v. Schneider, __ Idaho __, 258 P. 3d 350, 360 (2011).

Based on these cases, the Court has been clear that the finding complained of must be more than simply a question of disagreeing with the magistrate's conclusion but an affirmative showing that the magistrate court abused its discretion by relying on a single factor where that factor should not be viewed as decisive. Were it otherwise, every appellant in a custody case could ask this Court to reweigh the evidence, couching that request in terms of overemphasis. As

noted above, supra at 29, this Court has repeatedly rejected that role. Joshua's argument falls squarely on the side of asking this Court to reweigh the evidence.

Joshua's argument also ignores the broad range of factors beyond the prior custody agreement that the magistrate judge considered. As discussed above, supra at 18-24, the magistrate judge considered each of the factors listed in I.C. § 32-717 and in Tropea v. Tropea, 665 N.E.2d 145 (1996). Indeed, Joshua's appellate brief acknowledges that the magistrate considered "what would happen if Mr. Markwood's schedule changed again and if Mr. Markwood's significant other was no longer living with him."[4] Appellant's Br. 8. These are different concerns, supported by different evidence, from the consideration of Joshua's work schedule or the preexisting custody order. His own brief acknowledges that the magistrate considered factors that go beyond the preexisting schedule that Joshua alleges was overemphasized. Of course, over the eighteen pages of transcript that include the magistrate judge's findings, he considered many more factors, from the character of the individuals involved to the economic opportunities and the living situations under each custody arrangement and found that many of those weighed in favor of allowing relocation. Tr. vol. IV, p. 768, L.5-p. 786, L. 7.

Second, in cases where the Court has found an overemphasis, the party challenging the decision has put forward considerations that were ignored by the magistrate. In Moye, the Court

[4] Joshua also argues that "the exact same speculation could be foisted [sic] on Ms. Markwood and her significant other . . . ." Appellant's Br. 8. Notably, the magistrate found that, even were Amber's family situation to change again she "is still setup, whether she stays in The Dalles or not, I mean, she has a very [sic] transferable job skills." Tr. vol. IV at 774.

based its finding of overemphasis on the conclusion "that all other relevant factors impacting upon the best interests of the children were not duly considered or, if they were, it was not so reflected upon the record." 102 Idaho at 172, 627 P.2d at 801. Likewise, the Court's decision in Schultz listed a variety of factors that the magistrate court ignored in favor of one dispositive factor. Schultz, 145 Idaho at 865, 187 P.3d at 1240. In Bartosz, the Court noted that the magistrate judge in that case "considered all of the factors listed in section 32-717 and other factors he deemed relevant." Bartosz, 146 Idaho at 458, 197 P.3d at 319. Based on the magistrate judge's "extensive findings" and the deferential standard of review, the Court affirmed the decision, despite the fact that it found some of the emphasis problematic. Id. at 559, 197 P.3d at 320. Nowhere in the body of his brief or in the conclusion, listing the relief sought, does Joshua specify any factor that the magistrate court should have considered but did not.[5]

Joshua's argument fails to meet either of the requirements for an overemphasis claim that this Court has applied in prior cases.

ii. By focusing on evidence that was properly considered, Joshua is merely asking this Court to reweigh the evidence.

Joshua's argument ignores the distinction between the factors (as enunciated in I.C. § 32-717(1) and Tropea) and the evidence in support of a given factor. There was simply no "factor" considered by the magistrate judge that considered on "the preexisting custody schedule and the work schedule of Ms. Markwood." Appellant's Br. 3. Rather, the prior custody agreement and

[5] Read in the most generous way possible, the Appellant's Brief might be viewed as arguing that the magistrate court failed to consider or failed to sufficiently consider the connections the children had in the Clarkston area. Appellant's Br. 9-10. The problems with this argument are discussed in detail above, supra at 23-24.

the parties' work schedules were evidence that was relevant to a variety of the factors including consideration of the character and circumstances of the individuals involved, the need to promote continuity and stability in the life of the children, Amber's reasons for seeking the move, and the need to preserve Joshua's relationship with the children. I.C. § 32-717(1)(e)-(f); Tropea, 665 N.E.2d at 151-52.

Joshua quotes seven points in the record that, he argues, collectively constitute overemphasis. In each case, the findings were relevant to the given factor and it is worth reviewing them in turn for two reasons. First, it indicates the extent to which Joshua ignores the context of these statements and the different ways that they were relevant to the magistrate court's findings. This simply was not an overemphasis. Second, it again illustrates how much of this appeal is based on a request for this Court to reweigh the evidence presented to the trial court.

Joshua cites to pages 764-65 of the transcript as his first example. Appellant's Br. 3-4 (citing Tr. vol. IV, p. 764, L. 11-p. 765, L. 3). The quotation he selects establishes that both parties had already agreed to joint physical and joint legal custody. This is obviously relevant to a decision in the case, given the presumption in favor of joint physical and joint legal custody in I.C. § 32-717B (and, relatedly, the concerns Justice Eismann expressed in his concurrence in Bartosz). Consideration of this agreement provided an important prerequisite for his decision but, notably, was not a finding in favor of either Amber or Joshua. Finally, despite the magistrate judge's reference to it as "a factor," it is not part of his assessment of the best interests of the children.

Joshua goes on to cite page 768 of the transcript. Appellant's Br. 4-5 (quoting Tr. vol. IV, p. 768, L. 7-19). The quotation discusses the prior custody agreement as a basis for finding that the wishes of the parents weighed in favor of allowing the move. As discussed above, supra at 19-20, this is relevant because a parent may make change his or her mind about an earlier agreement and the magistrate judge may evaluate both expressions of that parent's wishes in determining the weight of those wishes. Evans v. Sayler, __ Idaho __, 254 P. 3d 1219, 1223 (Idaho 2011).

Joshua's third and fourth quotations are from pages 773-75 of the transcript. Appellant's Br. 5-6 (quoting Tr. vol. IV at 773, L. 11-24; Tr. vol. IV, p. 774, L. 1-p. 775, L. 8). Both of these quotes come from a discussion of the parents' ability to provide "stability and continuity in the lives of the child[ren]." Tr. vol. IV at 773. Most importantly, these quotations are not discussing the preexisting custody schedule. In fact, they have nothing to do with the prior custody schedule whatsoever and, as such, serve to under-cut Joshua's argument that there was an overemphasis on any single factor.

Further, the magistrate judge's concerns are very relevant to the question of the parents' character and their ability to provide a stable life for the children. The quotes discuss the respective work schedules of the parents, the support that each parent's partner provides, and the ability, given a worst-case scenario, to maintain stability for the children. The magistrate judge had legitimate concerns that the children would have a stable home life in the event Ms. Mackintosh was no longer part of the relationship. E.g., R. vol. IV, p. 774, L. 21-23 ("The history has been somewhat sporadic in terms of his ability to spend -- spend time with the

children and be able to work with his work schedule."). This concern was supported by a significant amount of evidence, including evidence that Joshua introduced. See, e.g., Tr. vol. II, p. 174, L. 5-7, p 203, L. 17-p. 204, L. 20 (Testimony by Dr. Wilson regarding Joshua's past "significant emotional instability," "dependent qualities," and diagnosis of "dysthymic disorder"); Tr. vol. IV at 519, L. 14-p. 520, L. 25 (Ms. Mackintosh's testimony that she was the primary caregiver during two of three days on weekends when Joshua had custody). It is self-evident that a parent's work schedule and his or her ability to care for the children would be relevant in assessing the best interests of the children. The magistrate did not err in considering this evidence or in placing significant weight upon it.

Joshua's citation to pages 779-80 likewise ignores the context and import of the particular quotation he selects. Appellant's Br. at 9 (quoting Tr. vol. IV, p. 779, L. 20-p. 780, L. 9). It is not, contrary to Joshua's argument, a finding regarding "the weekday evening schedule." Appellant's Br. 9. Rather, it is a finding regarding the relationships that [PM] and [MM] had developed with Amber. Tr. vol. IV, p. 780, L. 1-4 (focusing on "continuity in terms of, you know, Ms. Markwood being more of a primary caretaker"). The magistrate judge was relying on the considerable testimony of Amber, Dr. Wilson, and the children's teachers in finding that Amber had been the predominant caregiver throughout the children's lives and made the logical inference that maintaining that connection would serve the children's interests. See, e.g., Tr. vol. II, p. 240, L. 24-p. 241, L. 24 (teacher's (Ms. Leendertsen) description of MM as eager and well-adjusted while living with Amber); Tr. vol. II, p. 242, L. 8-15 (teacher's (Ms. Leendertsen) description of Amber's involvement in MM's education); Tr. vol. II, p. 251, L. 19-p. 252, L. 8

(teacher's (Ms. Freeland) description of PM as well adjusted while living with Amber); Tr. vol. II, p. 252, L. 12-p. 253, L. 17 (teacher's (Ms. Freeland) description of Amber's involvement in PM education); Tr. vol. II, p. 221, L. 8-16, p. 223, L. 11-p. 224, L. 8 (Dr. Wilson's agreement that Amber has been the primary caregiver before and since the divorce and that changing that would cause disruption for the children); Tr. vol. IV, p. 653, L. 8-19, p. 657, L. 19-p. 658, L. 5, p. 659, L. 1-11 (testimony by Amber that she was the primary caregiver during the marriage and during the pending divorce). This has nothing to do with schedules, it has to do with continuing the relationships and parental bonds that the children had developed and that are crucial to their continued healthy development. Such an emphasis is appropriate. See Bartosz, 146 Idaho at 459, 197 P.3d at 320 (noting without objection the magistrate judge's consideration of whether the child "was likely psychologically and emotionally closer to [mother] due to [the mother's] status as [the daughter's] primary caregiver").

By contrast, Joshua's discussion of the children's "substantial connection to Clarkston" and "the friends and family in Clarkston and the surrounding area" are merely an attempt to relitigate the argument that he presented at trial. Appellant's Br. 9-10. However, he cannot legitimately argue that that the magistrate judge ignored his argument as Magistrate Judge Judge addressed it directly in his finding. Tr. vol. IV, p. 779, L. 22-p. 780, L. 9. Nor can he legitimately argue that the finding was fundamentally concerned with the parents' work schedules because, as discussed, it was not.

Joshua's next quotation comes from page 781 of the transcript. Appellant's Br. 10 (quoting Tr. vol. IV, p. 781, L. 16-19). The selected quotation is part of a discussion of the

rationale for Amber's move, supporting the magistrate court's finding that "she's relocating primarily because she's in love with Mr. Hashizume, there's a life offered for her and the children over there in -- in The Dalles that really seems fairly [idyllic], frankly." Tr. vol. IV at 781. First, it ignores the fact that the magistrate was not comparing Amber and Joshua. Rather, it was a finding that Amber was making this move for genuine reasons and was not using the move as a pretext for disrupting Joshua's relationship with the children. As such, it is very different from the discussion at pages 773-75 discussing the magistrate judge's concerns about Joshua's ability to provide consistency and stability in the event of a change in his relationship with Ms. Mackintosh. Second, this argument is centrally an attack on the sufficiency of the evidence for this finding rather than a claim of overemphasis. Appellant's Br. 10. ("There was no such evidence presented. Moreover there was no evidence that nurses have more control over their schedule . . . .").[6] The magistrate judge's finding is relevant, is supported by the evidence, and is not indicative of any overemphasis.

Finally, Joshua quotes page 786 of the transcript regarding the extent to which Joshua will continue to have frequent and continuing contact with the children if he allowed relocation. Appellant's Br. 11 (quoting Tr. vol. IV, p. 786, L. 1-7). The quotation is excerpted from a discussion of whether the move will "preserve the child's relationship with the noncustodial parent." Tr. vol. IV, p. 785, L. 23-25; see also Tropea, 665 N.E.2d at 741. Arguably, this is merely a restatement of the finding that the magistrate judge first made on pages 764-65. The

[6] Notably, substantial and competent evidence does exist for the magistrate judge's finding that Amber's schedule would enable her to be available for the children, as discussed supra at 21.

difference here is that it comes within the context of a factor that explicitly asks for a comparison to the preexisting relationship. It is also different because, unlike the magistrate judge's prior discussion, this is a finding in favor of Amber. Compare Tr. vol. IV, p. 764, L. 16-18 ("there's no -- nothing that -- that keeps me from making a finding that -- that joint legal and joint physical custody is appropriate in this case. That was already agreed to by the parties in the decree."), with Tr. vol. IV, p. 785, L. 25-p. 786, L. 4 (finding that the order would preserve the children's relationship with Joshua because it "does not change Mr. Markwood's contact with the children significantly from the current decree"). Given its relevance to a Tropea factor that the Court has previously agreed is appropriate, the presumption of I.C. § 32-717B, and the differences from the quotation on pages 764-65, there is no basis for a finding of overemphasis.

To summarize, Joshua has provided seven quotations from the record out of the magistrate judge's consideration of at least twelve factors and seven findings in favor of Amber. Two of these quotations address the preexisting custody agreement in relation to the presumption of joint custody stated in I.C. § 32-717B and are relevant to a finding that Joshua will continue to have frequent and continuing contact with the children. One deals with the fact that primary residential custody would need to be vested in one parent and that the parents had agreed to Amber as the primary residential parent previously. Two quotations are part of a single discussion of the respective stability of the parents and their ability to care for the children in the event of a worst-case scenario. One deals with the continuity of the emotional connections that Amber and the children had developed and one quotation addresses the rationale for Amber's

move. Given the relevance of each of these findings to different factors in I.C. § 32-717 and Tropea and their relevance to the decision, there is no basis for a finding of overemphasis.

To the contrary, throughout his argument, Joshua has ignored the substantial evidence supporting these findings, he has ignored the import of these findings to the different factors, he has ignored other evidence on which the magistrate court relied, and he has failed to show even how these quotations emphasize a single factor. The fact that some of these quotations use the common word "schedule" does not make them equivalent or overemphasized. Rather, Joshua is now attempting to relitigate the case, asking this Court to stress the evidence that he prefers, and hoping that this Court will second-guess the weight of the evidence presented and considered by Magistrate Judge Judge. At the risk of being repetitive, this Court has made it clear that this is not its role. E.g., Nelson, 144 Idaho at 713, 170 P.3d at 378.

4. Amber is entitled to attorney fees under Idaho Code § 12-121 and costs based on I.A.R. 40.

Under Idaho Code § 12-121, a court may award attorney fees on appeal to the prevailing party on appeal in a civil action. Danti v. Danti, 146 Idaho 929, 944, 204 P. 2d 1140, 1155 (2009); Nelson v. Nelson, 144 Idaho 710, 717, 170 P.3d 375, 382 (2007). Attorney fees can be awarded under the statute on appeal only if the appeal was brought or defended frivolously, unreasonably or without foundation. Allbright v. Allbright, 147 Idaho 752, 756, 215 P.3d 472, 476 (2009); Nelson, 144 Idaho at 718, 170 P.3d 383; Balderson v. Balderson, 127 Idaho 48, 54, 896 P.2d 956, 962 (1995). When the appellate court is invited simply to second-guess the decision and judgment of the trial court over the findings of fact, an award of attorney fees will

be considered justified. Crowley v. Critchfield, 145 Idaho 509, 514, 181 P.3d 435, 440 (2007); see also Anderson v. Larsen, 136 Idaho 402, 408, 34 P.3d 1085, 1091 (2001) (quoting Sun Valley Shamrock Res., Inc. v. Travelers Leasing Corp., 118 Idaho 116, 120, 794 P.2d 1389, 1393 (1990)). Where the law is well-settled and the appellant has made no substantial showing that the trial court misapplied the law, an award of attorney fees is appropriate. Nelson, 144 Idaho at 718, 170 P.3d at 383.

Joshua is seeking to second-guess the magistrate judge's opinion and his assessment of the evidence. From a plain reading of the magistrate judge's opinion, he recognized his discretion in the matter, exercised that discretion within the boundaries available to him, and based his findings on substantial and competent evidence. He applied the proper burden as enunciated in Roberts and considered all relevant evidence as mandated by I.C. § 32-717, making copious findings on the record detailing his reasoning. Idaho Rule of Civil Procedure 52 states that appellate courts are to respect the judgment of the magistrate judge who heard and saw the entire trial, not to reweigh the facts and substitute its judgment for that of the magistrate. That is precisely what Joshua's brief seeks. It is a long and detailed invitation to review each and every difference favoring Joshua's position and discounting virtually all factual determinations in Amber's favor. The legal issues Joshua raises are merely an attempt to avoid the deferential standard of review that is repeatedly set forth in this Court's prior case law.

"When deciding whether the case was brought, pursued, or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account." McGrew v. McGrew, 139 Idaho 551, 562, 82 P. 3d 833, 844 (2003) (citing Nampa &

Meridian Irr. Dist. v. Wash. Fed. Savings, 135 Idaho 518, 20 P.3d 702 (2001)). In the present case, Joshua has not only asked for a second bite at the apple, seeking to review the magistrate's findings of fact and weighing of the evidence, but a third bite at the apple, having failed to avail himself of his right of direct review by this Court under I.A.R. 12.1 and having sought review by the district court as well as this Court. This Court has repeatedly expressed concern over the costs of prolonged custody disputes for the parents and children involved. See, e.g., Idaho Dep't of Health & Welfare v. Doe, __ Idaho __, 249 P.3d 362, 363 (Idaho 2011) (noting "the concerns for both the children and the parents . . . that motivated our decision to adopt rules expediting [termination] appeals"); Nelson, 144 Idaho at 718, 170 P.3d at 383 (citing the duration and cost of litigation as a basis for assessing attorney fees). The combination of the nature of Joshua's case, asking this Court to substitute its judgment of the facts for that of the magistrate judge, and the additional time spent pursuing an appeal before the district court before simply restating those same issues before this Court, indicates the frivolous and unreasonable nature of this appeal.

Under such circumstances, an award of attorney fees is justified. The prevailing party in a civil appeal is entitled to costs as a matter of course. I.A.R. 40.

CONCLUSION

Amber Markwood respectfully requests that this Court affirm the decision of the district court which, in turn, affirmed the magistrate's decision permitting her to relocate with her children to The Dalles, Oregon, based upon the sound discretion and careful consideration contained in the Magistrate's findings, conclusion and order, announced from the bench on

January 25, 2011. Amber further respectfully requests an award of attorney fees and costs, should the Court affirm the magistrate court's decision.

DATED this 3rd day of January, 2012.

Linda Louise Blackwelder Pall

Linda Louise Blackwelder Pall

Attorney for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that six (6) true and correct bound copies, and one true and correct unbound, unstapled copy of the foregoing Respondent's Brief were lodged with the Idaho Supreme Court with two copies mailed, postage prepaid, to the following on the 3rd day of January, 2012:

Thomas J. Clark
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