12-5-2011

Vierstra v. Vierstra Appellant's Brief Dckt. 39005

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUSAN CHRISTINE VIERSTRA, Plaintiff – Appellant vs. MICHAEL GEORGE VIERSTRA, Defendant – Respondent	)	Supreme Court Case No. 39005-2011

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County, District Judge Michael R. Crabtree presiding and appeal from the Magistrate Division of the District Court of the Fifth Judicial District, Magistrate Judge Howard D. Smyser, presiding.

Attorney for Appellant
Lisa B. Rodriguez
Tyler Rands
Wright Brothers Law Office, PLLC
P.O. Box 226
Twin Falls, ID 83303-0226

Attorney for Respondent
James Bevis
Bevis, Thiry & Schindele, P.A.
P.O. Box 827
Boise, ID 83701-0827

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUSAN CHRISTINE VIERSTRA, Plaintiff – Appellant vs. MICHAEL GEORGE VIERSTRA, Defendant – Respondent	)	Supreme Court Case No. 39005-2011

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County, District Judge Michael R. Crabtree presiding and appeal from the Magistrate Division of the District Court of the Fifth Judicial District, Magistrate Judge Howard D. Smyser, presiding.

Attorney for Appellant
Lisa B. Rodriguez
Tyler Rands
Wright Brothers Law Office, PLLC
P.O. Box 226
Twin Falls, ID 83303-0226

Attorney for Respondent
James Bevis
Bevis, Thiry & Schindele, P.A.
P.O. Box 827
Boise, ID 83701-0827

I.

TABLE OF CONTENTS

II.

TABLE OF CASES AND AUTHORITIES

III.

STATEMENT OF THE CASE

A. Nature of the Case

This case arises out of the valuation of community property in the divorce of Susan Christine Parnell f/k/a Susan Christine Vierstra ("Susan") and Michael George Vierstra ("Michael," and collectively with Susan, the "Vierstras"). Susan timely appealed to the District Court from the Magistrate's *Amended Judgment and Decree of Divorce* (the "Amended Judgment") and from the Magistrate's *Order re: Post Trial Motions*, contending that the Magistrate abused its discretion by factoring $1,006,000 of potential future tax into its valuation of the Vierstra dairy when such potential future tax was neither immediate nor specific.

Susan further contended that the Magistrate erred when it failed to enforce the property division ordered by the *Judgment and Decree of Divorce* (the "Judgment") and the *Amended Judgment* by adjusting its valuation of the Vierstra dairy when the 2009 income taxes turned out to be less than one-tenth of the $1,006,000 anticipated by the *Original* and *Amended Judgments*. As a result of the Magistrate's errors, Susan has been deprived of approximately $460,000 of community assets, while affording a windfall to Michael in that same amount.

B. Course of Proceedings

Susan filed a *Complaint for Divorce* on September 19, 2008. A trial occurred on October 13-14, 2009 and on November 19, 20 and 24, 2009. One of the key issues in the divorce involved the valuation of the Vierstra dairy. Following the trial, the Magistrate entered its *Memorandum Decision* on January 7, 2010 followed by the *Judgment* on January 25, 2010,

which contemplated an award of the dairy to one of the parties and provided for an equalization payment to the other. The Magistrate entered an *Amended Judgment and Decree of Divorce* on April 29, 2010.

Both parties filed various post-trial motions. On February 8, 2010, the fourteenth (14th) day following the entry of the *Judgment*, Susan timely filed an *Objection to the Form of the Judgment and Decree of Divorce* ("Plaintiff's Objection"), which was later supported by a *Memorandum in Support of Plaintiff's Objection to the Form of the Judgment and Decree of Divorce* ("Memorandum in Support"), filed March 25, 2010. A contested hearing was held on the *Plaintiff's Objection* on April 27, 2010, after which the *Amended Judgment* was entered on April 29, 2010 in conformity with the changes ordered by the Court after hearing arguments by both parties.

While the *Plaintiff's Objection* was pending, Susan filed her *Motion to Petition the Court to Address the Adjustments* ("Motion to Adjust") on April 23, 2010 (R. at 921) and supporting affidavit. (R. at 911). The *Motion to Adjust* sought to enforce the automatic adjustment to the equalization payment due to her to reflect the actual 2009 tax amount as ordered by the *Original* and *Amended Judgments*. Instead of enforcing its previous judgments and automatically adjusting the valuation of the Vierstra Dairy, the Magistrate re-opened the issue and received additional testimony on the subject at the hearing on May 12, 2010, over Susan's objection. In the *Order re: Post Trial Motions* of May 18, 2010 (R. at 1000), the Magistrate now held that some tax would come due over the next several years, although it was without proof of the $1,006,000 tax liability amount. The effect of this order was to reverse and modify the

Magistrate's previous finding and order which had required automatic adjustment of the valuation of the Vierstra Dairy if the 2009 taxes turned out to be any different than $1,006,000.

Susan timely filed her *Notice of Appeal* from the *Amended Judgment* and *Order Re: Post Trial Motions* on June 10, 2010. Oral argument for Susan's appeal was held on January 21, 2011. On February 4, 2011, the District Court entered *sua sponte* its *Order for Supplemental Briefing Regarding District Court's Jurisdiction to Consider Appeal* ("Order for Supplemental Briefing"). The *Order for Supplemental Briefing* contained preliminary observations suggesting that (1) the tax issue did not appear to be timely appealed because that holding was not altered by the *Amended Judgment*; and (2) the Magistrate did not appear to have jurisdiction to hold the May 12, 2010 hearing which resulted in the *Order Re: Post Trial Motions*, thereby divesting jurisdiction from the district court to consider the conclusions therein.

After receiving additional briefing on those issues, the District Court entered its *Memorandum Opinion on Appeal* on June 9, 2011 concluding that it lacked jurisdiction to consider Susan's appeal from the *Amended Judgment* regarding the tax issues arising in the Magistrate's valuation of the Vierstra Dairy. The *Memorandum Opinion on Appeal* also concluded that the District Court had jurisdiction to consider Susan's appeal from the *Order Re: Post Trial Motions*, but that the Magistrate lacked jurisdiction to modify the *Judgment* regarding the valuation of the Vierstra Dairy. Therefore, the District Court concluded that the Magistrate could not consider Susan's *Motion to Adjust* and, accordingly, vacated paragraph 4 of the *Order Re: Post Trial Motions* which had denied Susan's motion to enforce the automatic adjustment.

On June 28, 2011, Susan filed a *Motion for Clarification* seeking guidance on the practical effect of the District Court's *Memorandum Opinion on Appeal*, which offered no instruction for the parties or the Magistrate going forward. The *Memorandum Opinion on Appeal* simply vacated the Magistrate's denial of Susan's *Motion to Adjust*. Following a hearing on the matter on July 11, 2011, the District Court took the matter under advisement. On July 13, 2011, the District Court entered its *Order Denying Motion for Clarification* by which the District Court refused to consider Susan's motion, holding that it was without jurisdiction to do so. Susan timely filed a notice of appeal to this Court on July 21, 2011.

Susan's notice of appeal sought review of the District Court's dismissal of her issues on appeal as well as her *Motion for Clarification*. Susan additionally sought review by this Court of the original issues raised on appeal concerning (1) the inclusion of future tax consequences in the Magistrate's valuation of the Vierstra Dairy and (2) the Magistrate's denial of Susan's *Motion to Adjust* seeking enforcement of the *Judgment* and *Amended Judgment*. By order dated November 2, 2011, this Court granted Michael's motion to dismiss these two issues as they were not directly addressed at length in the District Court's *Memorandum on Appeal*. Additionally, Susan no longer seeks relief from the District Court's denial of her *Motion for Clarification*. Accordingly, those issues are not addressed herein, except as they may relate to Susan's remaining issues on appeal.

C. Statement of Facts

Susan and Michael were married on July 31, 1988. (Tr. 11/20/09 Vol. III P. 182 L. 1-3). Susan filed for divorce on September 19, 2008. The Vierstra dairy has been in operation for over

twenty years and throughout the marriage. In 1987, before the parties' marriage, Michael declared bankruptcy (Tr. 11/24/09 Vol. I P. 89 L. 14-15). At the time of their marriage, Susan invested her separate funds into the dairy and Susan's father also helped the couple finance and expand the dairy. (Tr. 11/20/09 Vol. II P. 131 L. 19-24); Tr. 11/24/09 Vol. I. P. 82 L. 15-25). Throughout the dairy's entire existence, Susan and Michael worked on the dairy and built it from the ground up. By the time that divorce proceedings were brought, the parties had amassed a dairy, feed lot and farmland that were all owned by the parties.

The Vierstras used the cash method of reporting income and expenses to the I.R.S. (Tr. 10/14/09 Vol. II P. 143 L. 16-17). The cash method of accounting allowed them to recognize revenue on their tax return when they actually received it and deduct expenses when paid, as opposed to when the income was earned or the expenses were incurred. (Tr. 10/14/09 Vol. II P. 143 L. 19-21). In this manner, the Vierstras had the ability to control their tax liability, and whomever was awarded the dairy would also have the ability to "knock down their tax" by "simply getting prepaid inventory." (Tr. 10/14/09 Vol. II P. 169 L. 16-P. 170 L. 1; Tr. 10/14/09 Vol. II P. 169 L. 8-20).

At trial in the Fall of 2009, Michael presented expert testimony from Buckner Harris ("Harris") that approximately $1,006,000 in potential tax liability should be included in the valuation of the Vierstra dairy. (Tr. 11/20/09 Vol. I P. 58 L. 16-18). Specifically, Michael testified that if he did not buy feed in the current year to offset the dairy's income, he would have a tremendous tax consequence. (Tr. 11/20/09 Vol. III P. 231 L. 8-9).

After the trial concluded in the Fall of 2009, the Magistrate found that "more likely than not, the Vierstra dairy will incur a tax consequence for the year 2009" and that "the tax consequence to be those shown in Exhibit 801A [$1,006,000]." (*Memorandum Decision*, at 17, 19, R. at 561, 563). However, the Magistrate instructed that "[i]f no tax consequence occurs, or if the tax consequence is different from that shown [by Michael's exhibit], the parties shall adjust the valuations and equalizations accordingly." (*Memorandum Decision*, at 19, R. at 563) (emphasis added). The Magistrate reiterated these same findings and instructions in its *Amended Judgment and Decree of Divorce* which were prepared by Defendant's counsel. (*Amended Judgment*, at 6 ¶ 9, R. at 962).

Rather than the approximately $1,006,000 tax liability presented at trial in the fall of 2009, the actual 2009 taxes turned out to be approximately $85,000. (Tr. 05/12/10 Vol. I P. 64 L. 23-P. 65 L. 6).[1] Prior to that time, neither Susan nor Michael knew what the exact tax liability would be for 2009—and, by extension, the exact valuation of the Vierstra Dairy—therefore, there was nothing to appeal or adjust in accordance with the *Amended Judgment*. After the actual amount became known and Michael refused to adjust the equalization payment due to Susan according to the actual tax liability for 2009 as ordered by the *Judgment* and *Amended Judgment*, Susan filed the *Motion to Adjust*. Susan's *Motion to Adjust* sought to enforce the automatic adjustment contained in the Magistrate's prior orders. Such adjustment was necessary because inclusion of the $1,006,000 in income tax liability (instead of the actual amount of approximately $85,000) decreased the dairy's value by a corresponding amount, meaning the

[1] The transcripts from the hearing on post-trial motions do not provide line numbers. For the Court's ease of reference, line numbers have been manually counted and provided for the Court's review.

equalization payment due to Susan was significantly less than the equalization payment would have been had the Magistrate used the actual 2009 income tax liability in its calculations.

At the conclusion of the hearing on post-trial motions, the Magistrate made limited oral findings on the potential tax liability. (Tr. 05/12/10 Vol. II P. 196 L. 6). In connection with its ruling, the Magistrate expressed understandable concern that it did not want to run the risk of disturbing Michael's financing and his corresponding equalization payment to Susan out of the proceeds of such financing:

> I've never thought, to be honest with you, that either party would be able to finance this. . . . It turns out that Mike Vierstra does have a chance to finance this. The key ruling that I make today will determine, I suppose, whether that happens or not. . . .

(Tr. 05/12/10 Vol. II P. 196 L. 21-25). The Magistrate then found that it did not believe that either value provided by the two parties was realistic:

> I just don't [sic] that this thing actually has a value of- of the One Million, so it is the Eighty Thousand or is it the One Million, because I have to pick one of the two and I honestly don't believe that either one of those numbers is what should be ordered by the Court, but that's the evidence I have been given.

(Tr. 05/12/10 Vol. II P. 197 L. 6-9) (emphasis added). The Magistrate then selected Michael's characterization of the tax liability in order to protect the pending financing and invited the parties to seek review of his decision by the appellate courts (at which time the financing would be complete):

> I also think the parties are better protected by my ruling that way. . . . I find that by the preponderance of the evidence, it's the One Million Dollars. I would also say this. By the choice I've made today, if I'm wrong on [sic] an appellate court will tell me and there will be Four Hundred Thousand Dollars more ordered down the road to be paid to Susan. If I'm right, then I made the right decision today and

> any appeals was [sic] wasted time. . . . But the other thing that would happen is that if we sell it in today's market, I'm not too sure that either of these two people would serve [sic] by it.

(Tr. 05/12/10 Vol. II P. 197 L. 10-18) (emphasis added).

The Magistrate issued its *Order re: Post Trial Motions* on May 18, 2010, which refused to enforce the automatic adjustment, thereby altering its previous orders contained in the *Judgment* and *Amended Judgment*. The Magistrate acknowledged that to do otherwise would cause Michael's financing to fall through and that it would be "unwise for the Court to cause the sale of the dairy because it would result in less money paid to both parties." (*Order re: Post Trial Motions*, at 4 ¶ 4, R. at 1003-04). Following the Magistrate's *Order re: Post Trial Motions*, Michael's financing of the dairy closed on May 27, 2010, at which time Michael made an equalization payment to Susan of approximately $380,000, which amount was approximately $460,000 less than he would have been required to pay had the Magistrate enforced its prior orders by implementing the automatic adjustment.

IV.

ISSUES PRESENTED ON APPEAL

Whether the District Court erred by dismissing Susan's appeal from the *Order Re: Post Trial Motions* entered by the Magistrate Court on May 18, 2010 for lack of jurisdiction?

Whether the District Court erred by dismissing the appeal from the *Amended Judgment* entered on April 29, 2010 for lack of jurisdiction?

Susan is entitled to costs and attorney's fees on appeal pursuant to Idaho law, including I.A.R. 40, I.A.R. 41 and I.C. § 12-121.

V.

ARGUMENT

A. Standard of Review

When reviewing a decision of the district court acting in its appellate capacity, this Court directly reviews the district court's decision. *Mackowiak v. Harris*, 146 Idaho 864, 865, 204 P.3d 504, 505 (2009). If substantial and competent evidence supports the magistrate's findings of fact, the magistrate's conclusions of law follow from those findings, and the district court affirms the magistrate, this Court affirms the district court's decision as a matter of procedure. *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008). A question of jurisdiction is fundamental and should be addressed prior to considering the merits of an appeal. *Ratkowski v. Ratkowski*, 115 Idaho 692, 693, 769 P.2d 569, 570 (1989).

A trial court's disposition of community property is reviewed for an abuse of discretion. *Chandler v. Chandler*, 136 Idaho 246, 249, 32 P.3d 140, 143 (2001). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). In evaluating a Magistrate's exercise of discretion, an appellate court "examine[s] the 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." *Crump v. Bromley*, 148 Idaho 172, 173, 219 P.3d 1188, 1189 (2009).

B. Whether the District Court erred by dismissing Susan's appeal from the *Order Re: Post Trial Motions* entered by the Magistrate Court on May 18, 2010 for lack of jurisdiction?

One of the issues presented to the District Court concerned whether the Magistrate erred by failing to enforce the *Judgment* and *Amended Judgment* as written by automatically adjusting the valuation of the Vierstra Dairy based on the actual 2009 tax figures. Both the *Judgment* and *Amended Judgment* contain the following language:

> The court finds the tax consequence to be incurred by Vierstra Dairy in 2009 is as shown on Exhibit 801(a) [$1,006,000]. The court finds that it is more likely than not that Vierstra Dairy will incur the tax consequence. The party who receives the dairy will timely pay said taxes to the State of Idaho and the Internal Revenue Service. If no tax consequence occurs, or if the tax consequence is different from that shown in Exhibit 801(a), the parties **shall** adjust the valuations and equalizations accordingly. If necessary, the parties can petition the court to address the adjustments. The court orders the parties to timely file tax returns and other filings concerning the Vierstra Dairy.

(*Judgment*, at 6 ¶ 9, R. at 602; *Amended Judgment*, at 6 ¶ 9, R. at 962) (emphasis added). The actual tax liability for 2009 was only $85,172, not $1,006,000. Therefore, Susan attempted to enforce that provision in accordance with its terms. Michael refused to adjust the equalization payment on his own initiative and pay the actual amount due to Susan. Subsequently, Susan's *Motion to Adjust*, which sought to judicially enforce the terms of the *Judgment* and *Amended Judgment*, was denied by the *Order Re: Post Trial Motions*.

Susan timely appealed this issue to the District Court which dismissed on jurisdictional grounds. The District Court acknowledged that it had jurisdiction to consider Susan's appeal of

this issue, but nevertheless dismissed Susan's appeal holding that the Magistrate "lacked jurisdiction to modify the tax liability and valuation of the Vierstra Dairy." (*Memorandum Opinion on Appeal*, at 9, R. at 1244). This holding was erroneous.

1. Susan's *Motion to Adjust* sought enforcement of the *Judgment* and *Amended Judgment*, not modification.

The District Court misconstrued the nature of Susan's *Motion to Adjust* as well as the Magistrate's order regarding the valuation of the Vierstra Dairy contained in the *Judgment* and *Amended Judgment*. The District Court analyzed only the invitation to the parties to "petition the court to address the adjustments," if necessary. Then it determined that between Susan's *Motion to Adjust* and the invitation to petition the court, if necessary, there was nothing investing the Magistrate with jurisdiction to modify the judgment. However, in analyzing Susan's *Motion to Adjust* to determine whether it qualified as an I.R.C.P. 60(b) motion,[2] the District Court even observed that the *Motion to Adjust* "sought enforcement of the [automatic adjustment] language contained in the Judgment." (*Memorandum Opinion on Appeal*, at 8, R. at 1242) (emphasis added).

This Court has held that "[i]n the absence of an appeal from an original decree of divorce the property divisions portions of that decree are final, *res judicata*, and no jurisdiction exists to modify property provisions of a divorce decree." *McBride v. McBride*, 112 Idaho 959, 961, 739 P.2d 258, 260 (1987). However, this Court also recently held that "this is an entirely separate

[2] In Susan's *Supplemental Brief* to the District Court on the jurisdictional issues raised by the *Order for Supplemental Briefing*, Susan proposed that the *Motion to Adjust* could be interpreted as either a Rule 60(b) motion investing the Magistrate with jurisdiction, or alternatively, as purely a motion to enforce which would require imposition of the automatic adjustment, as contained in the *Judgment* and *Amended Judgment*, as written.

inquiry from whether the court has jurisdiction to *enforce* [property provisions]." *Borley v. Smith*, 149 Idaho 171, 178, 233 P.3d 102, 109 (2010) (emphasis in original). Indeed, this Court noted that "[t]he McBride Court appears to indicate that a party to a property settlement agreement that is not merged may seek court enforcement where the other party has failed to carry out the terms of the agreement." *Id.* at n.2.

In *Borley*, two parties were divorced pursuant to a *Judgment and Decree of Divorce* with an attached *Property Settlement Agreement*. Subsequently, the wife filed a *Motion to Divide an Omitted Asset* concerning the division of certain convertible notes and stock allocations awarded to husband by virtue of his employment with United Airlines. The dispute centered on whether such benefits were unintentionally omitted from the *Property Settlement Agreement* or how such benefits should be divided under that agreement. This Court held that the *Property Settlement Agreement* had not merged into the *Decree* and, therefore, the magistrate lacked jurisdiction to modify that agreement. *Borley*, 149 Idaho at 177, 233 P.3d at 108. However, as noted previously, the Court's inquiry did not end there.

The Court next analyzed the content of the wife's *Motion to Divide an Omitted Asset*. In so doing, the Court held that "a mislabeled claim may be treated according to its substance." *Id. quoting Carroll v. MBNA America Bank*, 148 Idaho 261, 268, 220 P.3d 1080, 1087 (2009). Even though the wife's motion was proffered as a motion to divide an omitted asset (which would require a modification of the property agreement), "the thrust of the inquiry" occasioned thereby "was primarily directed toward interpreting the court-approved Agreement to determine whether the assets in question were divided therein." *Id.* Therefore, as pertaining to the magistrate's

jurisdiction to interpret and enforce the terms of the decree and property settlement agreement, the Court held:

> It certainly had the jurisdiction to do so under *Idaho Code section* 32-713, which provides that the court, in rendering a decree of divorce, must make an appropriate order for the disposition of the community property. The court has the power under *Idaho Code sections* 1-1603 and 1-1901, to enforce its orders. In this case, because we find that the assets in question—the convertible notes and stock allocations—were community property at the time of the divorce and divided pursuant to the Agreement, the magistrate court had jurisdiction to interpret and enforce the terms of the Agreement.

Id. (emphasis added).

Just as in *Borley*, Susan's *Motion to Adjust* did not seek a modification of the *Judgment* or *Amended Judgment*, but rather, it sought enforcement of the mandatory adjustment. This was even observed by the District Court, however it then failed to implement the proper analysis. If Susan were granted the relief requested by her motion, neither the *Judgment* nor *Amended Judgment* would have changed. The relief requested by Susan had already been provided in the Magistrate's previous orders which were both drafted by Michael's counsel—which should foreclose any argument by Michael on appeal that the *Judgment* and *Amended Judgment* should be construed in any way contrary to their plain language. In *Borley*, this Court observed that:

> It should be noted that Borley was the party who drafted the Decree for the court to sign. Thus, it seems disingenuous for Borley to now claim that the very document she drafted is ambiguous and subject to an interpretation at odds with the language she wrote in the Decree.

Borley, 149 Idaho at n. 1 (emphasis added).

The *Judgment* and *Amended Judgment* both provide that "the tax consequence to be incurred by Vierstra Dairy in 2009 is as shown on Exhibit 801(a) [$1,006,000]. . . . If no tax

consequence occurs, or if the tax consequence is different from that shown in Exhibit 801(a), the parties **shall** adjust the valuations and equalizations accordingly." (*Judgment*, at 6 ¶ 9, R. at 602; *Amended Judgment*, at 6 ¶ 9, R. at 962) (emphasis added). The term "shall" is a mandatory term. *See Mihalka v. Shepherd*, 145 Idaho 547, 553, 181 P.3d 473, 479 (2008). Therefore, if the taxes for 2009 turned out to be different than the approximately $1,006,000 figure upon which the magistrate relied, the parties had a mandatory obligation to adjust the valuation accordingly. The effect of the *Judgment* and *Amended Judgment* was to require Michael to supply the valuation deficiency to Susan as soon as the 2009 taxes were affirmatively ascertained. He did not comply with this order and Susan was left with no option but to seek enforcement.

The facts of this case are nearly identical to the situation presented in *Borley*, except in *Borley* the property allocation was included in the *Property Settlement Agreement*, whereas in this case, the property allocation was included directly in the *Judgment* and *Amended Judgment.* In both cases, the property in question was community property that was subject to a final adjudication and allocation pursuant to a divorce decree. Additionally, the actual value could not be determined until the occurrence of future events. In *Borley*, the husband did not earn a vested interest in all of his convertible notes and stock options through United Airlines until after completing a period of continued employment after the decree and *Property Settlement Agreement* were entered. In this case, the Magistrate's valuation of the Vierstra Dairy could not be ascertained until the 2009 tax liability was determined because the actual amount due in taxes for 2009 was not known at the time of trial but was speculated by the parties. In both cases, the spouses filed post-judgment motions to address the necessary adjustments once the future

contingencies had been ascertained. Accordingly, just as in *Borley*, Susan's motion must be treated as one seeking enforcement, not modification. The District Court correctly observed that Susan's *Motion to Adjust* sought enforcement, but then failed to apply the *Borley* analysis and remand for the Magistrate to implement and enforce the provisions of the *Judgment* and *Amended Judgment.*

The irony in the Magistrate's actions, and the District Court's holding on appeal, is that by denying Susan's motion seeking enforcement of the automatic adjustment, the Magistrate modified the property allocation of the *Judgment* and *Amended Judgment.* The District Court effectively blessed this modification while at the same time dismissing Susan's appeal on the grounds that the Magistrate had no jurisdiction to modify the property allocations. The District Court should have focused on Michael's failure to bring any motion or appellate procedure vesting the Magistrate with jurisdiction to modify its previous order. Susan wanted the *Judgment* and *Amended Judgment* enforced, but the Magistrate reconsidered the issue over Susan's objection and modified its previous order *sua sponte* without any motion to modify properly before it. Accordingly, the Magistrate did not have jurisdiction to modify its previous order and should have enforced it, as written. The District Court erred by analyzing Susan's *Motion to Adjust* as a motion for modification and dismissing it for lack of jurisdiction instead of analyzing Susan's motion as one seeking enforcement, as the District Court even acknowledged, and requiring the Magistrate to implement the automatic adjustment under the *Borley* analysis.

2. The automatic adjustment contained in the *Judgment* and *Amended Judgment* was not erroneous.

Part of the District Court's analysis in the Memorandum Opinion on Appeal appears to question, but not explicitly condemn, the language of the automatic adjustment and the invitation to petition the Magistrate to address the adjustments contained in the *Judgment* and *Amended Judgment*. After quoting this language, with emphasis on the invitation to petition the Magistrate to address the adjustments, the District Court observed:

> This language appears to contemplate a procedure for post-judgment modification of the property division portions of the Judgment. It does not refer to a specific statute, rule or case law that would authorize post-judgment property and debt division and allocation. It is not clear whether the Magistrate contemplated a separate procedure for the modification of the property division portions of the Judgment.

(*Memorandum Opinion on Appeal*, at 7, R. at 1242). It is unclear to what extent, if any, this observation factored into the District Court's holding that the "Magistrate lacked the jurisdiction to modify the tax liability and valuation of the Vierstra Dairy." (*Memorandum Opinion on Appeal*, at 9, R. at 1244). To the extent it played any role in the District Court's analysis, it was clearly erroneous.

As noted above, the reasoning underlying the District Court's language quoted above was based on a fundamental misconstruction of the nature of what the Magistrate had ordered and what Susan was seeking to accomplish. The language of the *Judgment* and *Amended Judgment* ordering an automatic adjustment and inviting the parties to petition the court, if necessary, was not a procedure for post-judgment modification. Rather it was a procedure for post-judgment implementation and enforcement. As discussed at length above, the automatic adjustment was

set in stone. Nothing would have changed through Susan's motion or the Magistrate's invitation to bring such a petition. The *Judgment* and *Amended Judgment* provide that the valuation of the Vierstra Dairy shall be reduced by the 2009 taxes. The value ordered by the Magistrate of the Vierstra Dairy can best be summarized as follows:

[Net Value] = [Gross Pre-Tax Value (as found by Magistrate)] – [actual 2009 tax liability]

At the time of the *Judgment* and *Amended Judgment*, the Magistrate believed the 2009 tax liability to be $1,006,000. However, its orders provide that regardless of what it found at that time, the actual valuation would incorporate only the actual 2009 tax liability that came due. That liability was later ascertained to be only $85,172, thus triggering the implementation of the automatic adjustment. This automatic adjustment could then be enforced by the Magistrate without a separate proceeding, or the necessary jurisdiction attendant to such proceeding. *See Borley*, 149 Idaho at 178, 233 P.3d at 109 (holding that there is no need for the parties to seek relief in a separate action when a post-judgment motion seeks interpretation and enforcement). Indeed, before bringing the *Motion to Adjust*, Susan first sought to have Michael make payment of the amount owed to her under the adjusted calculation. It was not until it became apparent that such payment was not forthcoming that Susan deemed it necessary to "petition the court to address the adjustments."

Trial courts in proceedings involving the division of community property frequently order that property be subject to future sale, refinance or other conditions upon the occurrence of future events, or sometimes even without any future requirements attached. *See, e.g., Devine v. Cluff*, 111 Idaho 476, 725 P.2d 181 (Ct. App. 1986) (analyzing, in part, the effect of a provision

contained in a judgment causing automatic forfeiture of a property easement based on a party's failure to obtain a survey within six months of the judgment). Additionally, the issues in *Borley* revolved around the division of assets that were contingent at the time the decree and *Property Settlement Agreement* were entered. Once the husband's vested interest in those assets was ascertained post-judgment, this Court ultimately determined that those assets that were specifically included in the *Property Settlement Agreement's* equal division between the spouses (the convertible notes) should be valued and divided according to that agreement. *See Borley*, 149 Idaho at 187, 233 P.3d at 118.

Even in the present case, the actual value of the Vierstra Dairy was not the only provision relative to that item of community property that was left to future contingencies. Neither the *Judgment* nor the *Amended Judgment* explicitly provided who would be awarded the Vierstra Dairy or what the exact value would be. However, fixed procedures were put in place to determine both the identity of the purchaser and the price. Susan was given the first right of refusal. If she did not exercise that right, a procedure was put into place whereby Michael could purchase the Dairy. If he did not exercise that right, it would be sold to a third party. Just as the identity of the purchaser was not expressly ordered, but rather fixed to the occurrence or nonoccurrence of certain events, the price was also fixed at the amount found by the court subject to the determination of the actual value of the 2009 taxes. If the 2009 tax liability were $2,000,000, Michael might have argued that Susan owed him her share of that liability. Likewise, as is the case, if the tax turned out to be only $85,000, Michael owes Susan half of the difference. No modification was necessary in order for those procedures to take effect. The

valuation and distribution of the Vierstra Dairy was fixed as of the date of the *Amended Judgment* and neither party sought a modification of those provisions.

Accordingly, the District Court erred by construing the Magistrate's orders and Susan's *Motion to Adjust* as inviting modification of the property valuation and allocation, even while acknowledging that Susan's motion merely sought enforcement. Because the property valuation and allocation concerning the Vierstra Dairy was fixed, the Magistrate had jurisdiction to implement and enforce the automatic adjustment contained in its prior orders. The District Court's holding that the Magistrate lacked jurisdiction to entertain Susan's motion seeking enforcement of the *Judgment* and *Amended Judgment* was erroneous.

C. Whether the District Court erred by dismissing the appeal from the *Amended Judgment* entered on April 29, 2010 for lack of jurisdiction?

Susan timely appealed from the *Amended Judgment* arguing that the Magistrate erred by including a speculative tax liability in its valuation of the Vierstra Dairy that was not immediate and specific. The District Court dismissed Susan's appeal of this issue holding that it lacked jurisdiction to consider the appeal because Susan failed to timely appeal this issue from the *Judgment*. In doing so, the District Court held that none of the intervening motions by the parties tolled the time period for filing a notice of appeal. Because the tax liability portion of the *Judgment* remained unchanged in the *Amended Judgment*, the District Court held that the 42-day time period for filing a notice of appeal of that issue ran from the entry of the *Judgment*. The District Court's dismissal of Susan's appeal of this issue was erroneous.

The District Court had jurisdiction to consider the erroneous inclusion of the speculative tax liability in the valuation of the Vierstra Dairy contained in the *Judgment* and subsequently in the *Amended Judgment.* If the *Judgment* was a final order in the case, then according to I.A.R. 14(a), the time for filing a notice of appeal terminated upon the timely filing of the *Plaintiff's Objection* and began to run anew from the entry of the order resolving the issues raised by the *Plaintiff's Objection.* That order was the *Amended Judgment.* Accordingly, Susan timely appealed the issue of the speculative tax liability from the *Amended Judgment.*

Alternatively, if the *Judgment* was not final because it provided for automatic adjustment of the valuation if the 2009 taxes varied from the amount of $1,006,000, then the *Order re: Post Trial Motions*, with its refusal to adjust the valuation and equalization payment after the 2009 taxes turned out to be only $85,000, served as the operative order that finally adjudicated the parties' claims for relief requested by the pleadings. Accordingly, if the *Judgment* was not final, Susan has also timely appealed the tax issue from the *Order re: Post Trial Motions.*

Furthermore, no individual issues were certified as final in the *Judgment.* Accordingly, the *Judgment* as a whole can only be considered a final judgment if it resolved all of Susan and Michael's claims for relief. Idaho Appellate Rule 11 allows for an appeal as a matter of right from final judgments, as defined by I.R.C.P. 54(a). Rule 54(a) defines "Judgment" as:

> [A] separate document entitled Judgment or Decree. A judgment shall state the relief to which a party is entitled on one or more claims for relief in the action. Such relief can include dismissal with or without prejudice. A judgment shall not contain a recital of pleadings, the report of a master, the record of prior proceedings, courts legal reasoning, findings of fact, or conclusions of law. A judgment is final if either it has been certified as final pursuant to subsection

(b)(1) of this rule **or** judgment has been entered on **all** claims for relief, except costs and fees, asserted by or against all parties in the action.

(Emphasis added). "Until all claims for relief in this lawsuit have been resolved by entry of a judgment, there is no final judgment." *Harrison v. Certain Underwriters at Lloyd's, London*, 149 Idaho 201, 206, 233 P.3d 132, 137 (2010) *citing In re Universe Life Ins. Co.*, 144 Idaho 751, 755, 171 P.3d 242, 246 (2007); *Piske v. Freeman*, 143 Idaho 832, 833, 153 P.3d 1178, 1179 (2007); I.R.C.P. 54(b). "The judgment sought is a final determination of a claim or claims for relief in the lawsuit." *Spokane Structures, Inc. v. Equitable Investment, L.L.C.*, 148 Idaho 616, 619, 226 P.3d 1263, 1266 (2010).

The claims relevant to the property distribution raised by the pleadings were (1) "[t]hat the Court equitably divide the community property and debts," (*Complaint for Divorce*, at 6, R. at 22); and (2) "[t]he net community estate after considering taxes should be equally divided," (*Answer to Complaint and Counterclaim*, at 3, R. at 35). Concerning the tax liability, the *Judgment* provided:

> The court finds the tax consequence to be incurred by Vierstra Dairy in 2009 is as is shown on Exhibit 801(A) [$1,006,000]. The Court finds that it is more likely than not that Vierstra Dairy will incur the tax consequence. The party who receives the dairy will timely pay said taxes to the State of Idaho and the Internal Revenue Service. If no tax consequence occurs, or if the tax consequence is different from that shown in Exhibit 801(a), the parties **shall** adjust the valuations and equalizations accordingly. If necessary, the parties can petition the court to address the adjustments. The court orders the parties to timely file tax returns and other filings concerning the Vierstra Dairy.

Id. at ¶ 9 (emphasis added). Regardless of whether the above-described language contained in the *Judgment* (as drafted by Michael's counsel) was or was not a final judgment, the District Court had jurisdiction to consider Susan's appeal.

1. If the *Judgment* was final, I.A.R. 14 provides that the *Plaintiff's Objection* (filed February 8, 2010) extended the appeal deadline for 42 days following the entry of the *Amended Judgment* (entered on April 29, 2010) that resolved the *Plaintiff's Objection*.

One manner to extend the time for filing an appeal following a final judgment is to file a timely objection or motion following the entry of the decree. Idaho Appellate Rule 14(a) provides, in relevant part:

> The time for an appeal from any civil judgment or order in an action is terminated by the filing of a timely motion which, if granted, could affect any findings of fact, conclusions of law or any judgment in the action . . . in which case the appeal period for all judgments or orders commences to run upon the date of the clerk's filing stamp on the order deciding such motion.

(Emphasis added).

The Idaho Court of Appeals has considered the effect that objections to a judgment have on the time for filing a notice of appeal. The Court has held:

> The district court's judgment awarding damages in this case was filed on October 1, 1997. Both parties filed motions objecting to portions of the judgment. These motions did extend the time to appeal from the October 1, 1997 judgment because they could have "affect[ed] . . . findings of fact, conclusions of law or . . . [the] judgment in the action." I.A.R. 14(a). The district court issued an order on November 4, 1997, denying these motions. As of that date no further motions were pending that could affect the damage award. The time to appeal from the judgment for damages therefore began to run on November 4, 1997.

Walton, Inc. v. Jensen, 132 Idaho 716, 719, 979 P.2d 118, 121 (Ct. App. 1999). In such cases, the 42-day period for filing a notice of appeal is terminated upon filing of an objection to a

judgment and begins to run anew, upon the issuance of an order resolving the motion. *See Floyd v. Bd. of Comm'rs of Bonneville County, Idaho*, 137 Idaho 718, 52 P.3d 863, (2002). *See also E. Idaho Health Servs. v. Burtenshaw*, 122 Idaho 904, 841 P.2d 434 (1992) *overruled on other grounds by Floyd v. Bd. of Comm'rs of Bonneville County, Idaho*, 137 Idaho 718, 52 P.3d 863 (2002); *Thompson v. Pike*, 122 Idaho 690, 838 P.2d 293 (1992); *Sinclair Mktg. v. Siepert*, 107 Idaho 1000, 1006, 695 P.2d 385, 391 (1985) ("The time before the post-judgment motion does not accumulate with the time after disposition. Rather, the time commences anew after the disposition of the timely post-judgment motion.").

In *Cecil v. Gagnebin*, 146 Idaho 714, 202 P.3d 1 (2009), the Idaho Supreme Court directly addressed the application of I.A.R. 14(a) to the time for filing a notice of appeal from a final judgment. In that case, a judgment was entered on March 8, 2007, based upon a stipulated settlement between the parties. When the trial court discovered that one of the parties had not signed the stipulation, it later granted summary judgment to Cecil and entered an amended judgment to that effect on April 30, 2007. On May 8, 2007, Cecil filed a motion to correct the amended judgment based on an incorrect boundary line description. On May 14, 2007, the trial court entered an order granting costs and attorney's fees to Cecil. Then, on June 12, 2007, the trial court entered its second amended judgment correcting the boundary line description. Gagnebin filed a notice of appeal on July 20, 2007.

One of the issues on appeal in *Cecil* concerned whether the Supreme Court had jurisdiction to consider Gagnebin's appeal from the award of costs and attorney's fees to Cecil since Gagnebin's notice of appeal was filed 67 days after the entry of that order. The Idaho

Supreme Court held that it did have jurisdiction to consider the issue. The Court reasoned that according to I.A.R. 14(a), the filing of the *Motion to Amend the Amended Judgment* on May 8, 2007, "terminated the running of the time for appeal, and it did not begin to run until the order deciding the motion was filed. The motion was decided by the district court when it filed the second amended judgment on June 12, 2007." *Cecil*, 146 Idaho at 719, 202 P.3d at 6.

According to the *Cecil* decision and the plain language of I.A.R. 14(a), there is no requirement that the intervening motion or objection be related to any specific finding of fact, conclusion of law, or judgment that is ultimately appealed. Rather, the plain language of the rule, as supported by applicable case law, provides that the 42-day time period for filing a notice of appeal from a final judgment is terminated, and not simply paused, by "the filing of a timely motion which, if granted, could affect any findings of fact, conclusions of law or any judgment in the action." I.A.R. 14(a) (emphasis added).

This analysis is in harmony and clearly distinguishable from *State v. Payan*, 128 Idaho 866, 920 P.2d 82 (Ct. App. 1996), cited in the District Court's *Memorandum Opinion on Appeal*. In *Payan*, there was no relevant, timely motion or objection filed that invoked I.A.R. 14(a). Several months after entry of the judgment, the district court entered an amended judgment which added a provision granting Payan credit for time served. Payan argued that his untimely appeal from the judgment was made timely by the subsequent entry of the amended judgment. The Court of Appeals held that the mere issuance of an amended judgment, with nothing more, and "which did not alter any of the terms from which Payan now appeals, did not serve to extend the period for filing an appeal or begin that period anew." *Id.* at 868, 920 P.2d at 84. However,

the Court acknowledged that if Payan had filed a timely I.C.R. 35 motion for a reduction of sentence, he could have extended the time for filing an appeal pursuant to I.A.R. 14. *See also State v. Ciccone*, 150 Idaho 305, 308, 246 P.3d 958, 961 (2010) *citing* I.A.R. 14(a) (emphasis added) ("Similarly, a party's motion capable of affecting the judgment may extend the 42-day period, but only if such motion is filed within 14 days of the judgment.").

In this case, on February 8, 2010, the fourteenth (14th) day following the entry of the *Judgment*, Susan timely filed the *Plaintiff's Objection* (R. at 728), which was later supported by a *Memorandum in Support*, filed March 25, 2010. (R. at 889). The *Memorandum in Support* provided (1) objections to various factual findings in the *Judgment*; (2) objections to various redundant and unnecessary references to prior orders; (3) objections to the inclusion of various one-sided statements from the Magistrate's *Memorandum Decision*; (4) an objection to the excessive length of the *Judgment*; and (5) a request to quash the *Judgment* in its entirety and request that it be replaced in its entirety with a proposed replacement *Judgment and Decree of Divorce*, attached to the *Memorandum in Support*, to be entered *nunc pro tunc*. A hearing was held on *Plaintiff's Objection* on April 27, 2010, after which the *Amended Judgment* was entered on April 29, 2010 in conformance with the Court's decision on *Plaintiff's Objection*.

The *Plaintiff's Objection* and the *Memorandum in Support* clearly implicate the provisions of I.A.R. 14(a). The lengthy list of objections to various facts contained in the *Judgment*, together with the objections to the form of the *Judgment* and the request to quash the *Judgment* and replace it in its entirety, if granted, would have affected "any findings of fact, conclusions of law or any judgment in the action." I.A.R. 14(a) (emphasis added). The District

Court's *Memorandum Opinion on Appeal* appears to hold that a Rule 59(e) motion must seek to "correct legal and factual errors occurring in proceedings before it." (*Memorandum Opinion on Appeal*, at 4, R. at 1239). The District Court bases its analysis on the case of *Straub v. Smith*, 145 Idaho 65, 71, 175 P.3d 754, 760 (2007), in which this Court notes that Rule 59(e) can be used to correct legal and factual errors. According to the District Court, because the *Plaintiff's Objection* did not sufficiently highlight specific factual or legal errors, it could not be construed as a motion to alter or amend the judgment which would terminate the time for filing a notice of appeal. This holding was erroneous.

The *Plaintiff's Objection* raised several issues with factual findings contained in the *Judgment* and, notably, requested to quash the *Judgment* in its entirety. At that point, the status of the *Judgment* itself was in question. Any appeal at that point, of any issue, would have been premature until the operative final order in the case was issued and the time for altering or amending that order had run. This is precisely the value behind I.A.R. 14(a). It allows all uncertainty regarding the form and substance of the final order to settle prior to the running of the time for filing a notice of appeal. At the time of the *Plaintiff's Objection*, neither party knew exactly what the final order would look like. The fact that little ultimately changed in the *Amended Judgment*, which was entered after a contested hearing on the matter, is of little consequence. The time for filing an appeal was, therefore, terminated until that objection was resolved by a file-stamped order. A hearing was held on the *Plaintiff's Objection*, and the order that followed from that hearing was the *Amended Judgment*. Thus, Susan's timely *Notice of*

Appeal from the *Amended Judgment* is effective as to all the findings, conclusions, and judgments contained therein.

Additionally, the District Court confused the rules regarding termination of the time for filing a notice of appeal in the criminal versus the civil context. The District Court held that "[i]f an amended judgment is entered that does not change a particular disposition in an original judgment, the time for appeal on that disposition [sic] issue begins on the date of the original judgment." (*Memorandum Opinion on Appeal*, at 5, R. at 1240). In support of this proposition the District Court cited to *Payan* and *Ciccone*—two criminal cases. These cases are distinguishable from this case, however, because of differences in the criminal and civil rules. Pursuant to the Idaho Rules of Civil Procedure, various post-trial motions can be brought that stop the time for appeal including a motion to reconsider under Rule 11, a motion for a new trial under Rule 59(a), or a motion to alter or amend a judgment under Rule 59(e). The criminal rules do not provide the same post-trial motions that toll the time for appeal as in civil cases except for I.C.R. 35 (which the appellate court in *Payan* specifically noted was not filed within the 14 day period required to toll the time for appeal). In Ciccone, this Court even noted that "a party's motion capable of affecting the judgment may extend the 42-day period, but only if such motion is filed within 14 days of the judgment." *Ciccone*, 150 Idaho at 308, 246 P.3d at 958. The *Plaintiff's Objection* that was filed in this case was styled as a motion to alter or amend the judgment under Rule 59(e) and which was filed within the applicable 14 day time period. As such, the time for appeal was tolled until the entry of the *Amended Judgment*.

2. If the *Judgment* was a final order, Susan may still appeal directly from any post-trial order.

Both the *Judgment* and the *Amended Judgment* provide for a mandatory adjustment in the valuation of the Vierstra Dairy if the 2009 taxes turned out to be different than $1,006,000. After the 2009 taxes were determined to be less than one-tenth of that amount, Susan moved to make the adjustment. What resulted was the *Order re: Post Trial Motions*. An appeal as a matter of right may be taken from "any order made after final judgment." I.A.R. 11(a)(7) (emphasis added). *See also Callaghan v. Callaghan*, 142 Idaho 185, 191, 125 P.3d 1061, 1067 (2005) ("The contempt order in this case was made after entry of the final judgment in the case. It was therefore clearly appealable as a final order . . . ."). As noted in Section A above, the District Court acknowledged that it had jurisdiction to consider Susan's appeal from the *Order Re: Post Trial Motions* as pertaining to her appeal from the denial of her *Motion to Adjust*. However, the District Court erred by not considering Susan's appeal of the speculative tax issue through that order as well.

By the *Order Re: Post Trial Motions*, the Magistrate refused to make the adjustment required by the *Judgment* and *Amended Judgment*. Instead the order erroneously found that the $1,006,000 speculative tax would "more likely than not" occur rather than applying the law and finding the immediate and specific actual tax liability for 2009. Accordingly, as noted previously, the *Judgment* and *Amended Judgment* were effectively modified by the Magistrate's denial of Susan's *Motion to Adjust*. The inclusion of the speculative tax amounts fully ripened when the Magistrate changed its stance from the tax coming due in 2009 (as contained in the

Judgment and *Amended Judgment*) to the tax possibly coming due in the next three years. That is an entirely different issue that, by itself, can give rise to Susan's appeal of the tax issue. There was no speculation in the Magistrate's order that the value of the Vierstra Dairy be reduced by the actual 2009 taxes. Speculation was introduced into the Magistrate's analysis when it shifted from a $1,006,000 tax liability in 2009, or whatever the actual 2009 tax liability turned out to be, to a $1,006,000 tax liability due sometime over the next several years. The Magistrate was not presented with a motion to modify the *Judgment* or *Amended Judgment* justifying such a deviation and it did not have substantial and competent evidence for its conclusions, but altered its previous orders, at least in part, due to a concern for Michael to continue his refinancing. From that erroneous reasoning, Susan can appeal the inclusion of a speculative tax into the valuation of the Vierstra Dairy that is neither immediate and specific nor supported by substantial and competent evidence.

Additionally, prior to the *Order re: Post Trial Motions*, there was nothing for Susan to appeal. Any erroneous analysis contained in the *Judgment* or *Amended Judgment* had been mitigated by the automatic adjustment. Susan knew the tax would not approach the $1,006,000 figure based on the Vierstra Dairy's tax history and that the issue would resolve itself. Susan abided by the *Judgment* and *Amended Judgment* and sought the automatic adjustment to the dairy valuation based on the correct 2009 tax liability. Her request to enforce the *Judgment* and *Amended Judgment* was denied. The fact is, the *Order re: Post Trial Motions* finally adjudicated the rights of the parties relating to their claims of relief requested in the initial pleadings. Susan had not suffered any loss until this substantive and erroneous adjudication deprived her of nearly

$500,000 of her rightful share of community property. Susan may appeal, as of right, from the order causing that deprivation as it relates specifically to the expanded inclusion of the speculative tax liability. Accordingly, the District Court erred by dismissing her appeal of this issue from the *Order Re: Post Trial Motions*.

3. If the *Judgment* was not a final order, then the *Order re: Post Trial Motions*, from which Susan appealed within 42 days, served as the final adjudication of the parties' claims.

If the above-referenced portions of the *Judgment* did not serve as a final determination of the parties' claims, then "the forty-two day period to file a notice of appeal begins to run once an order is entered that resolves all issues, grants all relief to which the prevailing party is entitled other than attorney fees and costs, and brings an end to a lawsuit." *Goodman Oil Co. v. Scotty's Duro-Bilt Generator, Inc.*, 148 Idaho 588, 591, 226 P.3d 530, 533 (2010) (emphasis added). In this case, if the *Judgment* was not final, then the order that ended the lawsuit and finally adjudicated the parties rights respecting the dairy operation and the effect of any speculative tax amounts was the *Order re: Post Trial Motions* entered May 18, 2010. That order did not allow for alterations or adjustments in the future. It unequivocally provided for the valuation and distribution of the property with finality, thereby ending any issues regarding the purchase right and the inclusion of the speculative tax in the valuation of the dairy. Thus, the District Court had jurisdiction to review the Magistrate's erroneous inclusion of the speculative tax liability in its valuation of the Vierstra Dairy through Susan's timely appeal of the *Order re: Post Trial Motions*, because it was clearly filed within 42 days of that order.

VI.

COSTS AND ATTORNEY'S FEES ON APPEAL

Susan requests her costs incurred in filing this appeal pursuant to Idaho law, including I.A.R. 40, and all reasonable attorney's fees incurred in pursuing this appeal pursuant to Idaho law, including I.A.R. 41 and I.C. § 12-121. Attorney fees under I.C. § 12-121 are appropriate if an appeal has been brought or defended frivolously, unreasonably, or without foundation. *See Crowley v. Critchfield*, 145 Idaho 509, 514, 181 P.3d 435, 440 (2007). In this case, Susan has sought enforcement of the *Judgment* and *Amended Judgment* as prepared by Michael. The plain language of those orders provides that Susan is entitled to the relief she has requested and provides that Michael should have provided the deficiency on his own accord upon the filling of the 2009 tax returns. He refused to abide by that order, which unreasonable refusal has caused enormous expense on Susan's part to seek implementation and enforcement of the Magistrate's orders. Such continued judicial intervention would have been unnecessary had Michael originally complied with the order. His actions leading to the filing of Susan's *Motion to Adjust* and the subsequent filing of this appeal, as well as his defense of this appeal have been frivolous, unreasonable or without foundation. Accordingly, should this Court determine that Susan is the prevailing party on appeal, Susan respectfully requests that this Court award her costs and attorney's fees incurred herewith.

VII.

CONCLUSION

The District Court erred by dismissing Susan's appeal from the Magistrate's denial of her *Motion to Adjust* on the grounds that the Magistrate lacked jurisdiction to consider any modification. The District Court misconstrued Susan's motion and the Magistrate's invitation for the parties to petition the court to address the adjustments, if necessary, as contemplating post-judgment modification. To the contrary, the automatic adjustment and Susan's *Motion to Adjust* contemplated implementation and enforcement of a final order valuing and dividing a community property asset. The District Court acknowledged that Susan's *Motion to Adjust* sought enforcement, but dismissed on jurisdictional grounds contrary to this Court's holding in *Borley*. Accordingly, Susan requests that this Court remand to the District Court with instructions to enter an order requiring the Magistrate to enforce the automatic adjustment contained in the *Judgment* and *Amended Judgment*.

The District Court also erred by dismissing Susan's appeal of the speculative tax issue from the *Amended Judgment* and the *Order Re: Post Trial Motions*. If the *Judgment* was final, the District Court had jurisdiction to consider Susan's appeal either (1) because the filing of the *Plaintiff's Objection* terminated the time for filing a notice of appeal until the entry of the *Amended Judgment* pursuant to I.A.R. 14(a); or (2) because the *Order Re: Post Trial Motions* and the Magistrate's refusal to enforce the *Judgment* and *Amended Judgment* modified those orders, allowing Susan to appeal the speculative tax issue as of right from the *Order Re: Post Trial Motions* pursuant to I.A.R. 11(a)(7). If the *Judgment* was not final, then the *Order re:*

Post Trial Motions served to finally adjudicate the parties' claims contained in the pleadings. In which case, Susan's appeal was timely. In any event, the District Court erred by dismissing Susan's appeal from the tax issue for lack of jurisdiction. Susan respectfully requests that this Court remand to the District Court with instructions to consider Susan's issue that the Magistrate's finding of a $1,006,000 tax liability over the next several years was too speculative to be considered in the valuation of the Vierstra Dairy.

Oral argument is requested.

DATED this 5th day of December, 2011.

WRIGHT BROTHERS LAW OFFICE, PLLC

By: Lisa B. Rodriguez
Lisa B. Rodriguez
Attorney for Appellant Susan Vierstra

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of December, 2011, I caused a true and correct copy of the foregoing document to be served, pursuant to I.R.C.P. 83(v), upon the following person in the following manner:

James Bevis
Bevis, Thiry & Schindele, P.A.
249 3rd Avenue East
P.O. Box 827
Boise, ID 83701-0827

[X] U.S. Mail, Postage Prepaid
[ ] Express Mail
[ ] Hand Delivery
[ ] Facsimile Transaction

Tyler Rands for Lisa Rodriguez