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Peterson v. Peterson Respondent's Brief Dckt. 39178

IN THE SUPREME COURT OF THE STATE OF IDAHO

RUSSELL PETERSON, Plaintiff/Appellant, vs. LAURA KNIGHT PETERSON, Defendant/Respondent.	)	Docket No. 39178-2011 Jefferson County Case: CV-2009-750

RESPONDENT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho,
In and for Jefferson County

Honorable Robert L. Crowley, Presiding

SWAFFORD LAW, P.C.
Trevor L. Castleton, Esq.
525 Ninth Street
Idaho Falls, Idaho 83404

(208) 524-4002
(208) 524-4131 (facsimile)

Attorney for Appellant

DUNN LAW OFFICES, PLLC
Amelia A. Sheets, Esq.
477 Pleasant Country Lane
P.O. Box 277
Rigby, ID 83442
(208) 745-9202
(208) 745-8160 (facsimile)

Attorney for Respondent

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I. STATEMENT OF THE CASE

Appellant appeals the magistrate's Decree of Divorce, entered on August 19, 2011, with regard to the award of custody and visitation of the parties' minor children. The August 19, 2011 Decree of Divorce awarded, subsequent to a three-day trial, the submission of final argument by both parties, and pursuant to the magistrate's July 28, 2011 Memorandum Decision (including Findings of Fact and Conclusion of Law) the following: joint legal and joint physical custody of the minor children to the parties, with primary physical custody in Respondent and secondary physical custody in Appellant as they (1) agree, or (2) in the alternative, alternate weekends, alternate holidays (as defined in the Decree of Divorce), and one-half summer each year. (R., Vol. 2, pp. 403-412).

A. FACTUAL EVENTS AND PROCEDURAL HISTORY

The parties were married in Salt Lake City, Utah, on December 27, 1993. (R., Vol. 1, p. 1). The parties have five children, namely E.M., born [redacted] W.R., born [redacted] T.T., born [redacted] and twins, G.A.. and J.K., born [redacted] (R., Vol. 1, p.1).

During the marriage, the family relocated: They lived in South Carolina (1995-1998), then Provo, Utah (1998-1999), then Shelley, Idaho (1999-2004), and finally Rigby, Idaho (2004-present). (R., Vol. 2, p. 388).

The parties experienced marital difficulties during the marriage. An action for divorce was filed in 2002. (Tr., p. 380, ll. 12-14; Tr., p. 50., ll. 24-25). During the pendency of the 2002 divorce action, the parties exchanged the children for visitation in Malad, Idaho,

when Appellant was in Idaho and Respondent was in Utah. (Tr., p. 499, ll. 10-13); (R., Vol., 2, p. 389).

The parties reconciled in 2003, the divorce action was dismissed, and the parties had their three youngest children between 2005 and 2007. (R., Vol. 1, p. 2).

On or about June 28, 2009, Appellant was arrested for Indecent Exposure and Public Nuisance. (R., Vol. 1, p. 74-75). Appellant was the sole wage earner for the family, including at the time of his arrest. (Tr., p. 44, ll. 1-4). Respondent was a stay-at-home mother during the marriage. (Tr., p. 58, ll. 13-17). As a result of Appellant's arrest, he resigned from his employment. (Tr., p. 134, ll. 8-17).

The present divorce action was filed by Appellant on or about August 6, 2009, in Bonneville County, Idaho. (R., Vol. 1, pp. 1-6). Regarding his prayer for custody of the parties' children, Appellant requested the following relief: "Plaintiff requests that both parents have joint legal and physical custody of the minor children." (R., Vol. 1, p. 2). Venue was transferred to Jefferson County, Idaho, the county of Respondent's residence, on August 17, 2009 (R., Vol. 1, pp. 49-50). On February 2, 2010, the magistrate heard various Motions, *inter alia*, Respondent's Motion for Custody Evaluation, A Motion for Continuance of Trial and Return of Children, and Objections to various Motions. (R., Vol. 1, p. 175). On February 19, 2010 and March 5, 2010, the court heard argument and testimony encompassing Respondent's Motion for Temporary Orders. (R., Vol. 1, pp. 201-203). Pursuant to said hearing, the magistrate entered temporary custody orders: joint legal and joint physical custody of the minor children to the parties, with primary physical custody in Respondent and parenting time in Appellant consisting of two evenings per week and

alternate weekends from Friday through Sunday. (R., Vol. 1, pp. 201-202). The magistrate further awarded Respondent the exclusive possession of the marital residence during the pendency of the divorce, and ordered Appellant to vacate the home and reside in a three-bedroom apartment to be paid for by Respondent's brother. (R., Vol. 1, pp. 201-202). Appellant instead moved into an RV, which he parked adjacent to the marital residence. (R., Vol. 2, p. 387).

The trial in the instant matter encompassed three days: March 2, 2011 (R., Vol. 2, pp. 287- 291), March 31, 2011 (R., Vol. 2, pp. 298-308), and June 13, 2011 (R., Vol. 2, pp. 332-335). Counsel for both parties submitted written argument subsequent to trial. (R., Vol. 2, pp. 337-354; pp. 355-378). The Decree of Divorce was entered in this matter on August 19, 2011, (R., Vol. 2., pp. 403-411), pursuant to the magistrate's July 28 2011 Memorandum Decision (R., Vol. 2, pp. 379-401).

1. Portions of Appellant's Recited "Procedural History" Were Decided in Earlier Court Proceedings and are Moot to the Present Appeal.

Appellant's Brief, p. 7, contains several allegations related to service of the Complaint and Summons upon Respondent, as well as unfounded statement(s) alleging Respondent's "intentions." Appellant claims that the magistrate did not take this information into account when conducting its findings. Respondent respectfully submits the issues surrounding the Writ of Assistance, Ex Parte Order, and accompanying pleadings were encompassed in and resolved by the magistrate court during a contempt issue that was heard and dismissed by the court in a 2010 proceeding in this matter. The record encompassing the instant appeal reflects the prior resolution of these issues:

Q: All right. The Complaint in this matter the record will show was filed on August 7th of 2009. You obviously are the Plaintiff. Russ, can you tell the Court the basis or the reason for your filing initially for divorce that we're Here on trial for today?

A: Yes. On August 6th Laura had told me that she was moving to Utah with the children the very next day. My filing for divorce was as a last recourse to prevent that from happening.
MS. SHEETS: Your Honor, we'd object to any line of that questioning regarding that proposed move or any contempt action thereon. The contempt motion's been dismissed by the Court in an earlier order. We think it's not relevant. (Tr., p. 47, ll. 22-25; p. 48, ll. 1-11).

...
THE COURT: I'll allow it, but I will not allow it as it might pertain to any contempt issue. I think that's behind us and over with.
MR. CASTLETON: And I withdrew that for the record, so I will comply with that order, Your Honor, and I don't intend to revisit that again. (Tr., p. 48, ll. 20-25).

Respondent thus respectfully states that including any references to the issues outlined in paragraph A.1 herein are not part of the present appeal.

2. Appellant's Post-Decree Affidavits are not Properly Part of the Present Appeal.

Respondent respectfully submits that Appellant's various affidavits filed after the entry of the Decree of Divorce, including, but not limited to, his affidavit filed in conjunction with his Motion for Permissive Appeal to this Court, contain hearsay and unsubstantiated allegations and are not part of the record to be considered by this Court for purposes of the pending Appeal.

II. ATTORNEY FEES ON APPEAL

Respondent respectfully asserts and requests she is entitled to attorneys fees on appeal pursuant to Idaho Code §§ 12-120, 12-121, 32-704, and 32-705; pursuant to Idaho

Appellate Rules Rule 40 and Rule 41; Idaho Rules of Civil Procedure Rule 54, as well as any and all other applicable statutes and Rules.

III. STANDARD OF REVIEW

A. LEGAL STANDARD.

1. The Standard of Review in the Present Matter is an "Abuse of Discretion" Standard.

As stated *supra,* this is a permissive appeal to this Court, as allowed by Rule 12.1 of the Idaho Appellate Rules. Case law is instructive on the appropriate standard of review in the present matter:

> This case is on Direct permissive appeal from a decision of a magistrate affecting the custody of minor children; therefore, this Court is directly reviewing the magistrate's decision without the benefit of a district court appellate decision. In custody disputes, the awarding of custody of minor children rests within the discretion of the trial court whose decision will not be overturned absent an abuse of discretion. (*Roberts v. Roberts,* 138 Idaho 401, 403, 64 P.3d 327 (Idaho 2003), citing *Koester v. Koester,* 99 Idaho 654, 657, 586 P.2d 1370, 1373 (1978); *See also* (*Hopper v. Hopper,* 144 Idaho 624, 167 P.3d 761, 763 (Idaho 2007)).

2. The "Abuse of Discretion" Standard is a Three-Part Test.

If the magistrate's decision meets the following three criteria, there is no abuse of discretion:

> In general, a trial court does not abuse this 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. (*Id*).

3. Disputed Evidence Does not Effect the Integrity of the Magistrate's Findings.

A reviewing Court will not disturb the magistrate's findings of fact even if evidence is in dispute; said disputed evidence is seen in light of the judgment entered:

> It is the province of the trier of fact to weigh conflicting evidence and testimony and to judge the credibility of witnesses. The trial court's findings of fact in a court tried case will be upheld if they are supported by substantial and competent evidence, even if the evidence is conflicting and will be liberally construed in favor of the judgment entered. (*Hopper v. Hopper*, 144 Idaho 624, 167 P.3d 761, 763 (Idaho, 2007), citing *State v. Hart*, 142 Idaho 721, 723, 132 P.3d 1249, 1251 (2006). (Other internal cites omitted)).

4. The Court Applies the "Best Interest" Standard in Review of the Magistrate's Order.

The Court, in its review of the magistrate decision, conducts an analysis as to whether the court appropriately kept the best interest of the children as its paramount concern. *Roberts* illustrates this standard:

> Further, in any court decision affecting children, the best interests of the child should be the primary consideration. (*Roberts*, at 403- 404, citing *Cope v. Cope*, 98 Idaho 920, 921, 576 P.2d 201, 202 (1978)).

Further, "[f]indings pertaining to custody are relevant so long as they bear an appropriate nexus to the best interests of the child standard." (*Id.*, at 405, citing *Roeh v. Roeh*, 113 Idaho 557, 558, 746 P.2d 1016, 1018).

5. Case Law Defines "Competent Findings."

The reviewing Court will not disturb the magistrate holding below if it is supported by competent evidence:

> Findings are competent, so long as they are supported by substantial, albeit possibly conflicting, evidence. (*Id.*, citing *Lickley v Max Herbold, Inc.*, 133 Idaho 209, 2011, 984 P.2d 697, 699 (1999)).

6. The Magistrate Must Make Findings Pursuant to Idaho Code § 32-717.

There is no abuse of discretion if the court below acts consistently with the law applicable to the case at bar. In review of a custody award, this Court must thus hold that the magistrate properly conducted a I.C. § 32-717 analysis. (*Id.*, at 406).

I.C. § 32-717 outlines the non-exhaustive factors that the magistrate Court correctly applies regarding a decision in the best interest of the children:

> 32-717. Custody of children – Best interest. – (1) In an action for divorce the court may, before and after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper in the best interests of the children. The court shall consider all relevant factors which may include:
> (a) The wishes of the child's parent or parents as to his or her custody;
> (b) The wishes of the child as to her 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. (Idaho Code § 32-717).

7. The Magistrate May Also Properly Consider Other Factors Outside Idaho Code § 32-717.

A court may also consider factors not outlined in Idaho Code § 32-717 in its analysis of the best interest of the child, including whether relocation is in the best interests of the child(ren). "Courts may consider factors not enumerated in § 32-717 when deciding whether to permit a relocation." (*Bartosz v. Jones*, 146 Idaho 449, 197 P.3d 310, 316 (Idaho 2008), citing *Roberts v. Roberts*, 138 Idaho at 405, 64 P. 3d at 331)).

In *Bartosz*, this Court affirmed the magistrate's holding that it was not in the best interest of the minor child for her to relocate with her mother to Hawaii. Although the custody evaluator in *Bartosz* recommended the move, the magistrate, after conducting a §32-717 analysis, as well as an analysis of the *Roberts* "other factors," discussed *infra*, declined to allow the move. This Court found no abuse of discretion and affirmed the magistrate's holding.

Roberts v. Roberts involved a permissive appeal to this Court wherein there was an appeal from the magistrate's decision prohibiting the mother's move to Boise, Idaho (from Cassia and/or Minidoka County). In *Roberts*, the magistrate conducted an analysis of the § 32-717 factors, as well as other factors used by California and New York courts to determine whether the relocation was in the best interest of the children. (*Roberts*, at 405). These factors consist of the following: (1) The extent of the child's contact with his or her parents; (2) the parents' motives for relocating or opposing relocation; (3) the impact the move would have on the child's relationship with a noncustodial parent and extended

family, and (4) the extent the move would enhance the economic, emotional and educational well-being of the custodial parent and the child. (*Bartosz v. Jones*, 146 Idaho 449, 197 P.3d 310, 316 (Idaho 2008)).

8. There is no Presumption Against Relocation in Idaho Law.

This Court has previously ruled that, upon *a modification from an existing custody order*, the party seeking permission to relocate has the burden to show relocation is in the children's best interest. (*See, Roberts*, at 405). However, Idaho law does not impose a presumption against relocation *per se*, but instead looks to ensure that both parties have frequent and continuing contact with their child(ren):

As this Court held in *Bartosz*:

> Idaho law *does not impose a presumption against relocation... An award of joint physical custody must assure that the child has 'frequent and continuing contact with both parents' but this 'does not necessarily mean the child's time with each parent should be exactly the same in length nor does it necessarily mean the child should be alternating back and forth over certain period of times between each parent.'* (I.C. § 37-7-717(B)). (*Bartosz*, 197 P.3d 310, 317, citing *Roberts*, 138 Idaho at 404 (other internal citations omitted) (emphasis added)).

Further, when the magistrate awards joint physical custody, this does not mean a party cannot relocate:

> *....The presumption in favor of joint custody is not equivalent to a presumption against a custodial parent relocating with a child.* As discussed above, the best interest of the child standard governs relocation decisions. (*Id.)*(emphasis added).

9. The Magistrate Court is not Bound by Expert Testimony; Thus it is not an Abuse of Discretion When the Magistrate Declines to Follow the Recommendations of the Custody Evaluation.

"The determination of whether expert testimony will assist the trier of fact 'lies within the broad discretion of the trial court.'" (*Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 245 P.3d 992, 1004 (Idaho 2010), citing *Sliman v Aluminum Co., of America*, 112 Idaho 277, 285, 731 P.2d 1267, 1275 (1986)).

Numerous Idaho custody cases reflect the decision of the magistrate, as part of its "best interest" analysis, to decline to follow the recommendation of the custody evaluator. For example, in *McGriff v. McGriff*, 140 Idaho 642, 99 P.3d 111 (2004), the custody evaluator, Dr. Corgiat, recommended that custody and visitation of the parties' two daughters not be altered. (*McGriff*, 140 Idaho at 644). The magistrate substantially altered the father's parenting time; said finding was not disturbed on appeal. (*Id.*, at 654).

Further, in *Bartosz*, the home study evaluation recommended that the mother be allowed to move with the child to Hawaii. (*Bartosz*, at 314). This Court affirmed the magistrate's holding was in the best interest of the child to remain in Idaho. (*Id).*

10. The Magistrate's Decision to Follow All, Part, or None of a Custody Evaluator's Recommendation is Part of the Three –Part Discretion Analysis.

The three-part test of discretion lies when determining whether or not expert testimony has been subject to a purported abuse of discretion:

> In determining whether the district court has abused its discretion, this Court must determine whether the district

> court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of that discretion consistent with applicable legal standards; and (3) reached its decision through the exercise of reason. (*Kuhn*, 245 P.3d 992, 1004) (Internal citation(s) omitted).

11. Idaho Code § 32-717B Encompasses the Issue of Sole vs. Joint Custody.

I.C. § 32-717B encompasses the definition of joint custody vs. *sole* custody:

> 32-717B. Joint custody. – (1) 'Joint custody' means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents. *The court may award either joint physical custody or joint legal custody or both as between the parents or parties as the court determines is for the best interests of the minor child or children.* If the court declines to enter an order awarding joint custody, the court shall state in its decision the reasons for denial of an award of joint custody.
> (2) 'Joint physical custody' means an order awarding each of the parents significant periods of time in which a child resides with or is under the care and supervision of each of the parents or parties.
> *Joint physical custody shall be shared by the parents in such a way to assure the child a frequent and continuing contact with both parents but does not necessarily mean the child's time with each parent should be exactly the same in length nor does it necessarily mean the child should be alternating back and forth over certain periods of time between each parent.*
> The actual amount of time with each parent shall be determined by the court.
> (3) 'Joint legal custody' means a judicial determination that the parents or parties are required to share the decision-making rights, responsibilities and authority relating to the health, education and general welfare of a child or children.
> (4) Except as provided in subsection (5), of this section, absent a preponderance of the evidence to the contrary, there shall be a presumption that joint custody is in the best interests of a minor

child or children. (Idaho Code § 32-717B)(emphasis added).

IV. ARGUMENT

1. SUMMARY

Respondent will demonstrate herein that the magistrate did not abuse its discretion in its custody order. The magistrate recognized the issue as one of discretion. The magistrate conducted a thoughtful and thorough analysis of I.C. § 32-717 to determine a custody order in the best interest of the Peterson children. In addition, the magistrate considered and made findings pursuant to the supplemental factors regarding best interest found in *Roberts* and *Bartosz*. The magistrate made its decision based upon an exercise of reason and analysis of the evidence offered at trial.

In addition, Respondent will show that the magistrate did not abuse its discretion in declining to order the custody recommended in the evaluation. Respondent will further demonstrate that the court was not required to order equal physical custody; but instead correctly followed § 32-717B in fashioning an order that assured both parties frequent and continuous contact with the children.

Finally, Respondent will show that the magistrate acted within its discretion by allowing Respondent to move to Utah with the children. The magistrate correctly determined that said move is in the best interest of the children by its application of an extensive § 32-717 and "other factors" analysis.

A. THE MAGISTRATE DID NOT ABUSE ITS DISCRETION IN AWARDING PRIMARY PHYSICAL CUSTODY TO RESPONDENT.

1. The Magistrate Recognized that the Issue of Custody was one of Discretion.

The magistrate made conclusions of law regarding the discretionary nature of the award of custody of the Peterson children:

> 1. Questions of child custody are within the discretion of the trial court. *Posey v. Bunney*, 98 Idaho 258, 561 P.2d 400 (1977). (R., Vol. 2, p. 389).

2. The Magistrate Acted Within the Outer Limits of its Discretion and Consistently With the Legal Standards Applicable to the Available Choices.

The magistrate, in its Memorandum Decision, conducted a thorough analysis of all factors contained in Idaho Code § 32-717 "best interest" standard. (R., Vol. 2, pp. 384-388). In addition, the magistrate completed competent findings regarding the children, using the supplemental factors outlined in *Roberts*. Regarding the *Roberts* factors, the magistrate's findings and conclusions encompassed its analysis of (1) The impact moving the children would have on the children's non-custodial parent and extended family; (2) The extent a move to Utah would enhance the economic, emotional and educational well-being of the custodial parent and children, and (3) the effect a move to Utah would have on the children's relationship with their extended family. (R., Vol. 2, p. 389). In consideration of these factors, the court found the following:

> (1) Regarding the impact of a move on Appellant: The magistrate made findings that (a) upon entry of the divorce, the parties will no longer be residing together, and, of necessity, time with one or both parents will be reduced; (b) the parties had previously experienced exchanging the children in Malad, Idaho, and (c) the relocation of Respondent to Utah

would not hinder Appellant's alternate weekend, alternate holiday, and half-summer parenting time allocated to Appellant. (R., Vol. 2, p. 389).

Further, the custody order is nearly identical to the temporary orders, with the exception of weekday parenting time. (R. Vol. 1, p. 205).

(2) Regarding the extent the move to Utah would enhance the economic, emotional, and educational well-being of the children and Respondent: The magistrate made findings as follows: (a) Respondent and the children would live rent free in the paternal grandfather's home (R., Vol. 2, p. 389); (b) Respondent could continue to be a stay-at-home mother, while at the same time working part-time for her brother (R. Vol. 2, p. 389); (c) the emotional support available from Respondent's extended family (and the lack of the same in Idaho) was significant (R., Vol 2, p. 389); and (d) the educational opportunities available to Respondent to better herself and the children financially in Utah was in the best interest of the children (R., Vol. 2, p. 389).

(3) Regarding the effect a move would have on the children's relationship with their extended family: The magistrate made the following findings: the Utah move would allow the children to have access to Respondent's family, and Appellant's family would have access to the children during his parenting time (R., Vol. 2, p. 389).

3. The Magistrate Reached its Decision Regarding Custody Through an Exercise of Reason.

Roberts defines the test for "exercise of reason." The *Roberts* magistrate "acted within his discretion by considering factors relevant to the best interests of the child analysis and his findings support his ultimate decision, demonstrating the decision was reached by an act of reason." (*Roberts*, at 404).

The magistrate in the instant case also reached his findings by act of reason. The magistrate, "considered the testimony and demeanor of the parties and witnesses, the evidence and the arguments/briefs of the parties." (R., Vol. 2, p. 379). The magistrate conducted an extensive analysis, applying the evidence at trial to the § 32-717 factors and the *Roberts* factors. (R., Vol. 2, pp. 384-389). The findings made by the magistrate clearly support its ultimate decision to award joint legal and joint physical custody of the children to the parties, with primary physical custody in Respondent and secondary custody in Appellant.

B. THE MAGISTRATE GAVE APPROPRIATE WEIGHT TO THE CUSTODY EVALUATION IN THIS CASE.

The magistrate had the discretion to give weight to the custody evaluation as it deemed appropriate as part of its analysis of the best interest of the children, as discussed in *Kuhn* herein. The magistrate utilized the evaluation as one part of the evidence presented at trial, and incorporated the evaluation extensively in its analysis and discussion of the § 32-717 and *Roberts* factors.

Appellant attempts to argue that the magistrate abused its discretion because it "largely ignored Dr. Walker's Comprehensive Custody Evaluation." (Appellant's Brief, p. 18). Appellant attempts to claim that the magistrate abused its discretion because it did not award 50/50 custody:

> The magistrate disregarded Dr. Walker's recommendations of joint physical custody with a parenting plan allowing the children equal time with both parents. (Appellant's Brief, p.18).

Idaho Code § 32-717B and case law dictate that the magistrate was not required to award equal custody to the parties, but rather to ensure that the custody order assures that both parents have frequent and continuing contact. *Bartosz* held that "frequent and continuing" does not mean 50/50: " this [frequent and continuing] 'does not necessarily mean the child's time with each parent should be exactly the same in length nor does it mean the child should be alternating back and for the over certain period of times between each parent.'" (*Bartosz*, at 317). In addition, contrary to Appellant's assertion, the magistrate was not required to make findings, pursuant to § 32-717B, outlining the reasons why it declined to award "joint custody." The "decline" of "joint custody" outlined in §32-717B encompasses a denial of joint custody via ordering *sole* custody to one party, and thus is not applicable to the instant case.

Appellant further attempts to argue that the magistrate abused its discretion in awarding primary physical custody to Respondent because it gave "limited" visitation to Appellant. In fact, the magistrate awarded Appellant every other weekend, equal sharing of holidays and parenting time each summer, essentially the same as its Temporary Orders. As evidenced by the extensive findings of fact, and the application of the evidence at trial to

the appropriate legal standard, the magistrate found that the custody it awarded was in the best interest of the children.

Appellant also attempts to claim that the custody order is inappropriate, in that the magistrate did not award him two evenings during each week. (Appellant's Brief, p. 17). The magistrate did not abuse its discretion in declining to order two evenings each week to Appellant, given the problematic nature of exchanging the children for an evening in Malad, Idaho. As stated herein, the magistrate, as part of its analysis regarding the best interest of the children, held that it was in their best interest to be allowed to move to Utah with Respondent.

Appellant goes on to claim that the magistrate abused its discretion because of the number of times the report was mentioned:

> The magistrate mentioned Dr. Walker's report merely four times in his Memorandum Decision. He reviewed: 1) Dr. Walker's report pertaining to the children's wishes to remain in Idaho; 2) the report's reference to the children's attachment to Laura; 3) the report's reference to Russell's activity with the children; and 4) Russell's agreement to the report's recitation of Laura's strengths.
>
> No other mention was made of Dr. Walker's opinion or her recommended parenting plan. (Appellant's Brief, p. 18-19).

The magistrate, as evidenced by its findings, gave the appropriate attention and weight to the custody evaluation in that it discussed, evaluated and weighed the custody evaluation as part of its detailed "best interest" analysis.

Some examples of the magistrate conducting a reasoned analysis with respect to the recommendations of the evaluation include:

(a) The wishes of the child's parent or parents as to his or her custody:

Plaintiff wishes to have legal and physical custody awarded to the parties jointly with the children being with plaintiff for two (2) overnights per week and alternating weekends from Friday until Monday morning when plaintiff would take the children to school. The children would be with the defendant at all other times. The plaintiff does not want the plaintiff to be permitted to move more than twenty (20) miles from Rigby. Although he does not now agree to do so, the plaintiff has previously told the defendant that he would move to Utah if she moved there with the children. (R., Vol. 2, p. 384).

The magistrate discussed and weighed the custody evaluation as part of its analysis regarding Idaho Code § 32-717(b):

(b) The wishes of the child as to his or her custodian:

According to the report (Plaintiff's Exhibit 1) of Ruby Walker (custody evaluator), the children prefer to remain in their current schools with friends, their church, and activities in the Rigby area. The plaintiff testified that he has heard the children, on June 12, 2011, speak about their desires and has heard nothing to suggest the children feel differently than set forth in Ruby Walker's report.

The defendant testified that she has heard the children say things different from that which is set forth in Ruby Walker's report.

The court did not hear from the children, indirectly. The court is unclear regarding the children's current desires.
(R.,Vol. 2, p. 385).

1. The Magistrate Appropriately Reviewed and Weighed Dr. Walker's Report Regarding Appellant's "Strengths".

Appellant attempts to argue that the magistrate committed error in that it did not take into account Appellant's "strengths:"

> Dr. Walker's report noted numerous positive, confirming findings that Russell is a good, involved father, which were not mentioned in the magistrate's findings and decision. (Appellant's Brief, p. 20).

The magistrate, by contrast, in fact made extensive findings, including an analysis of the evaluation, regarding Appellant's "strengths":

> The children get along well with each other and the children interact well with both parents. The court finds, as set forth in Ruby Walker's Report: 'The emotional attachment is strong with all the children and their mother, Laura. She has been the primary caregiver and is very close to all the children. Particularly, E and G demonstrate a primary attachment with their mother, Laura. As W ages, he and Russell do more camping and outdoor adventures and will continue to become more attached to Russell. T is attached to both. He loves to go with dad and do activities with him. The twins are obviously more attached to Laura at this time due to her primary care. They played primarily with the older children, especially E and G. (R., Vol. 2, p. 385-386).

The magistrate made further findings regarding Appellant's strengths, quoting from the evaluator's report, and the disputed testimony of the parties:

> Further, the court finds, as set forth by Ruby Walker: 'Russell does interact with the children when he is home and on the weekends when they do camping, hiking or interacting at home.
> He did take one month off when the twins were born and helped in their care.'
>
> Since the plaintiff's arrest and filing of this divorce, he has spent more time with the children than he did before. (R., Vol. 2, p. 386).

It is clear from the findings in this matter that the magistrate arrived at its order regarding custody by applying the applicable legal standard and by way of reason, evaluating the the totality of the evidence, including the custody evaluation.

In summary, the magistrate did not abuse its discretion by declining to enter a custody order in accordance with the custody evaluator's recommendation. The magistrate

was not obligated to follow the recommendations of the evaluator. The magistrate instead conducted a thoughtful and thorough analysis of all of the testimony and evidence offered at the three (3) day trial, including the evaluation. The magistrate found, by act of reason, that it was in the best interest of the minor children that they be placed in Respondent's primary care, and allowed to move to Utah with Respondent. This holding was reached after an analysis of the factors of I.C. § 32-717 and the supplemental factors of *Roberts* and *Bartosz*. Because the court found that it was in the best interest of the minor children that Respondent be awarded primary physical custody and be allowed to move to Utah, the magistrate could not have entered the parenting plan recommended by Dr. Walker, which included almost half-time, including evenings during the week.

Finally, Appellant is correct:

> Russell does not argue that a magistrate must adopt the findings and recommendations of a court-appointed custody evaluator as a matter of law. (Appellant's Brief, p. 23).

2. "Overwhelming Evidence" Does not Exist, Requiring the Magistrate to Adopt the Evaluator's Proposed Custody.

Appellant asserts that the magistrate should have adopted the recommendations of the custody evaluator, because there is "overwhelming evidence that it should be entered." (Appellant's Brief, p. 26).

By contrast, there is substantial evidence in the record that demonstrate the magistrate's custody order is in the best interest of the children.

Some examples of the evidence presented at trial as follows:

A. Respondent is Primary Caregiver:

> Laura's strengths as a mother are: she is willing to stay home with the children; is often very caring and warm with the children; children are attached to her; and overall she has been a good mother. (R., Vol. 2, p. 287).

B. Appellant's Loss of His Employment due to his Conduct:

> Q: ....this came on the heels of your being terminated for your employment attendant with some criminal charges that have been filed against you; correct?
> A: That's true. (Tr., p. 49, ll. 7-11).

And:

C. Appellant's Time Spent with the Children:

The magistrate made findings regarding Appellant's time with the children:

> Since the plaintiff's arrest and filing of this divorce, he has spent more time with the children than he did before. (R., Vol. 2, p. 386).

While the amount of time plaintiff spent with the children was in dispute at trial, the integrity of said findings should not be disturbed if said findings are made on the basis of disputed evidence. (*See, Hopper v. Hopper*, 167 P.3d 761, 763).

D. Conflict.

The record contains, and the magistrate made substantial findings, regarding the substantial evidence of conflict between the parties:

First, Appellant revealed, without consent from Respondent, her confidences revealed to Appellant. Appellant betrayed the trust of his wife by traveling to Utah, at the end of the 2010, for the purpose of meeting with Respondent's father to tell him Respondent's confidential information. (Tr., p. 115, ll. 2-25- p. 116, ll. 1-14).

In Appellant's words:

> Q: Were you in court when Mr. Knight, your father-in-law, was testifying?
> A: Yes.
> Q: And he was asked questions about a conversation that you had had with him; were you here for that?
> A: Yes.
> Q: Was the context of that conversation, that was the past abuse – I'm using it in quotes, but is that the context of part of the conversation you had with Mr. Knight as he described it?
> A: Yes.
> ...
> Q: You broke her confidence by telling her father about that subject, right?
> A: Yes. (Tr., p. 171, ll. 25- p. 172, l. 10); (Tr., p. 173, ll. 2-4).

Second, Appellant took and copied Respondent's and their daughter's journals, without their permission. (Tr., p. 280, ll 24-25 – p. 281, ll. 1-15); (Tr., p. 287, ll. 12-25; p. 288, ll. 1-19); (Tr., p. 362, l. 18- p. 364, l. 18).

Appellant reveals his reasons for copying E's journal:

> E is...very private and so she doesn't volunteer information, and given the magnitude of her turmoil over this as disclosed in her journals, yes, I thought that was very appropriate and needful for me as her parent to have some insight into what was going on. (Tr. p. 275, ll. 1-8 and ll. 18-23).

Appellant, himself, reveals his thought process, in that he tries to justify the invasion of the daughter's privacy by what he found out in her journals.

Third, (as the magistrate found), by previous temporary court order, the plaintiff was ordered to remove himself from the family home...The plaintiff then placed an RV (in which he resided) next to the house...After a few weeks, the plaintiff resumed residing in

the family home. (The parties have disperate explanations on how this came to be). (R., Vol. 2, p. 387).

Fourth, Appellant filed the divorce in retaliation for Respondent wanting to leave town with the children. (Tr., p. 47, 11. 22-25; p. 48, 11. 1-6).

Fifth, Appellant acknowledged the stress in the marriage. (Tr., p. 59, ll. 12-15); Appellant attributed the stress in the marriage to his "same-sex attraction", and stated that his "same sex attraction" is stressful only because Respondent dwelled on it. (Tr., p. 59, ll. 21-25- p. 60, ll. 1-2). Respondent testified that Appellant's "same sex attraction" was the source of great conflict in the marriage. (Tr., p. 378, l. 1- p. 381, l. 20).

Sixth, Appellant did not involve Respondent in the financial aspects of their marriage. He didn't inform her of the significant tax refund proceeds which he spent without her knowledge or consent. (Tr., p. 614, 11. 4-25; p. 615, 11. 1-14). He closed a credit card to which Respondent had previously had routine access, without telling her. (Tr., p. 139-, ll. 17-25- p. 140, ll. 8). Appellant transferred a large amount of cash out of a bank account routinely used by Respondent, without telling her. (Tr., p. 140, ll. 9-25- p. 141, ll.1-23).

Seventh, Respondent testified that she felt like Appellant wore her down and that she did not want to reconcile, but felt that she "gave up" and entered into a sexual relationship with him for a couple of weeks. (Tr., p. 385, 11. 10-25; p. 386, 11. 1-3); (Tr., p. 175, ll. 16-25).

Eighth, as of the time of trial, the parties were not speaking or communicating at all while in the home. (Tr., p. 176, ll. 1-25); (Tr., p. 402, ll. 13-25).

The magistrate summarized the evidence of conflict in its findings:

> The parties have not spoken to each other for much of the time since the plaintiff resumed residing of the home. Substantial conflict exists between the parties and the parties are experiencing considerable stress. (R., Vol. 2, p. 387).

Ninth, there is further substantial testimony that Appellant consistently made choices in direct contradiction to the best interests of the children. For example, he let the home telephone be terminated on at least one occasion. (Tr., p. 150, ll. 16-25; p. 151, ll. 8-10).

Tenth, according to Respondent's testimony, Appellant's actions had caused a rift in the community where Respondent and the children reside, including but not limited to, the children's parties, social activities, school functions, the fact that neighborhood children do not come over to play, and that Appellant was excommunicated from his church. (Tr., p. 399, l. 6- p. 402, l. 12).

C. APPELLANT IS MISPLACED IN HIS CLAIM THAT RESPONDENT MUST REBUT THE PRESUMPTION OF JOINT CUSTODY.

Appellant attempts to discuss a purported duty of Respondent to overcome the "favor of joint custody". Appellant is misplaced in his reliance on Idaho Code § 32-717B in this regard, as Idaho Code § 32-717B deals with joint custody vs. sole custody, and does not hold that "frequent and substantial contact" equals "equal parenting time".

The magistrate, in fact, awarded joint legal custody to the parties:

> It is in the best interest of the minor children of the parties, that the parties be awarded the joint legal custody of the minor children. (R., Vol. 2, p. 391).

Further, the magistrate advised:

> It is in the best interest of the minor children of the parties that the parties be awarded the joint physical custody of the children, with primary physical custody being awarded to the defendant, subject to the right of the plaintiff to exercise secondary physical custody with the children . . . (R.,Vol. 2, p. 391).

Respondent was not required to rebut any presumption of "joint custody" in this case. The parties each requested joint legal and joint custody, and the magistrate granted joint legal and joint custody. Respondent prayed for primary physical custody, Appellant merely prayed for joint legal and joint physical custody.

Simply because the custody evaluation recommended substantially equal physical custody, it does not follow that Respondent has a duty to rebut this proposition. Further, as discussed herein, the magistrate entered its order for custody based upon the totality of the evidence, *including* the custody evaluation.

D. THE MAGISTRATE DID NOT ABUSE ITS DISCRETION IN ITS I.C. § 32-717(e) CHARACTER FINDINGS.

Appellant claims that the magistrate abused its discretion in that it purportedly made improper character findings pursuant to I.C. § 32-717(e). By contrast, substantial evidence and testimony was submitted at trial regarding the character of the parties, including, but not limited to, the conflict between the parties.

As recounted in Appellant' Brief, Respondent offered testimony as to her concerns about joint custody:

> Q. Do you feel that that the two of you can effectively co-parent your children, communicate and co-parent your children as outlined per [Dr. Walker's] evaluation...?

A. No.
Q. And why not?
A. Well, you'd have to be able to talk, first of all, and not argue..... He does not respect me, I do not respect him. There is nothing there except for—it's just—just misery (Tr. p. 414, L. 6-18). (emphasis added) (Appellant's Brief, p. 26-27).

Appellant claims the court made inappropriate findings regarding the issue of Appellant, disclosing without permission of Respondent, her "secret", to her father, and that the court made an inappropriate finding regarding Appellant's taking, without permission, the oldest daughter's diary.

The magistrate, by contrast, (as discussed *supra*), found the revelation of said "secret" and the taking of the daughter's diary without her permission important. This conduct could very reasonably reveal information about: (1) Appellant's character; (2) his interaction and the conflict between the parties; and/or, (3) his treatment of the children.

Needless to say, the parties are in dispute with respect to these and other issues. However, pursuant to case law, the findings of the court will not be disturbed even if the evidence related to said findings is in dispute. (*See, Hopper v. Hopper*, 167 P. 3d 761, 763).

The magistrate made competent findings, supported by substantial evidence, regarding the § 32-717(e) factors. The magistrate, with respect to character of the parties, found the following:

> She [Respondent] was abused by one of her brothers as a young girl. Defendant shared this information plaintiff in confidence, and he then, without the knowledge of and without authorization, disclosed this information to defendant's father. Defendant's father had not previously been aware of this. The defendant has been in counseling since April, 2010. (R., Vol. 2, p. 387).

Further, the magistrate made findings regarding Appellant's taking, without permission, Respondent's and the daughter's journal:

> During earlier divorce proceedings between the parties (2002-2003), the plaintiff, without authorization, copies portions of the defendant's journal.... In August or September, 2009, the plaintiff also copied and read the journal of the parties' child, E. *This was done without the authorization or the prior knowledge of E.* In approximately, April, 2010, plaintiff [Appellant] told E that he had read her journal. E has not kept a journal since plaintiff [Appellant] told her that he had read her journal. *The impact upon E of the plaintiff's [Appellant's] violation of her privacy in relation to her journal is of concern to the court.* (R., Vol. 2, p. 387) (emphasis added).

Appellant's Brief further discusses information about character, and apparently reveals Appellant's motive for the unauthorized disclosure (of Respondent's confidence):

> Q. Okay. You had not talked to him [Respondent's father] previously about this [the abuse issue], correct?
> A. No. I'd always honored her confidence *until she was trying to move the children down closer to this toxic influence that's never been dealt with.* (Tr. p. 257, L. 1-15) (emphasis added).

As previously stated, the parties' high conflict was evident and obvious to the magistrate:

> Substantial conflict exists between the parties and the parties are experiencing considerable stress. (R., Vol. 2, p. 387).

In fact, the evidence of the conflict between the parties, and the court's concerns regarding the same, is replete through the magistrate's findings:

> 1. Although he does not agree to do so, plaintiff has previously told defendant he would move to Utah if she moved there with the children. (R., Vol. 2, p. 384).

2. The plaintiff has struggled with the same-sex attraction since prior to the marriage to the parties. This has caused conflict in the marriage from the beginning, at times being more serious, than others. In June, 2009, the plaintiff was arrested and charged with indecent exposure, in associating with his solicitation of an off-duty male police officer....This has caused the defendant great concern as to the impact this will have, and, in her perspective, has had, on associations by others with family members. (R., Vol. 2, p. 386).

3. The defendant has not kept a journal since then. (R., Vol. 2, p. 387).

E. THE MAGISTRATE ACTED WITHIN ITS DISCRETION IN ALLOWING RESPONDENT TO RELOCATE WITH THE CHILDREN TO UTAH.

The magistrate acted within its discretion holding that it is in the best interest of the minor children that they be allowed to move to Utah with Respondent.

As discussed herein, Appellant attempts to claim that the magistrate ignored the custody recommendation against Respondent moving with the children. In fact, the magistrate acted within its discretion, made findings in accordance with the applicable law, and made its findings by act of reason.

The magistrate, as discussed herein, analyzed the wishes of the parents and the children as to the custody of the children, as required by § 32-717(a) and (b).

The magistrate also conducted an analysis and made substantial findings regarding I.C. § 32-717(c), the interaction in a relationship of the children with his or her parent or parent(s) and his or her siblings. In fact, the magistrate quoted from the custody evaluation as part of its findings in this regard. The magistrate found that Respondent is the primary

caregiver in terms of time and Appellant did interact with the children. More telling, the amount of time Appellant spent with the children increased after the filing of the divorce and Appellant's arrest.

The magistrate found that the children were well-adjusted to home, school, and community as applicable to their ages, pursuant to its analysis of the requirements of I.C. § 32-717(d).

As described *supra*, the magistrate conducted a thorough and appropriate analysis of the "character" element of I.C. § 32-717(e). The court made substantial findings regarding the conflict of the parties, Appellant's same-sex attraction and the resulting problems and conflict in the marriage, Respondent's emotional issues, the revelation of Respondent's confidence to her father, as well as the unauthorized printing and reading of Respondent's and minor child's journal; these issues and more were all of significance to the magistrate and formed an integral part of its reasoning regarding the order for custody.

Further, from the testimony and evidence submitted to the court, the court found that financially neither party could afford to maintain the home after the divorce, and that while Respondent would not have financial resources should she stay in the Rigby, Idaho area, she could "be a stay at home mother" (while earning income, mostly in the home) should she move to Utah. (R., Vol. 2, p. 388).

In fact, substantial evidence was offered by Respondent uncontroverted by Appellant, regarding the better financial environment for the children in Utah:

Respondent's brother testified that he will employ Respondent part-time, allowing her to continue to be a stay-at-home mother. (Tr., p. 104, ll. 14-25 – p. 105, ll. 1-24).

Respondent's father testified that Respondent and the children will live with him in his home in the Salt Lake City area. (Tr., p. 109, ll. 15-25).

Respondent's father testified that he will provide for Respondent's and the children's needs. (Tr., p. 110, ll. 3-11).

The magistrate, in its discussion of I.C. § 32-717(f), found (regarding continuity and stability in the life of the children), that while continuity and stability were important in the lives of the children, they had in fact moved multiple times:

> Continuity and stability are important in the lives of the children. The family has lived, however, in South Carolina (1995-1998), Provo, Utah (1998-1999), Shelley, Idaho (1999-2004), and Rigby, Idaho (2004 to present). (R., Vol. 2, p. 388).

The magistrate appropriately found that, as part of the substantial findings, that any domestic violence, as outlined in I.C. § 32-7-717(g) was not applicable.

The magistrate made additional findings regarding the best interest of the children. As discussed herein, the magistrate applied the facts of this case to the following: 1) The impact moving the children would have on the children's relationship with a non-custodial parent and extended family; 2) the extent a move to Utah would enhance the economic, emotional and educational well being of the custody parent and children; and, 3) the effect that a move to Utah would have on the children's relationship with their extended family. (R., Vol. 2, p. 389).

The magistrate, in its analysis of the impact moving the children would have on the children's relationship with a non-custodial parent and extended family, pointed out the obvious, in that, although Appellant seems to argue to the contrary, that the parties will not

be living at the same residence after the divorce:

> At the conclusion of this divorce action, the parents will not be residing in the same residence. Accordingly, the time spent by one or both of the parents with the children will, of necessity, be reduced. (R., Vol. 2, p. 389).

Further, the magistrate found that the parties had prior experience with exchanging the children in Malad.

> ...the parties have preciously worked out visitation arrangements during their earlier (2002-2003) divorce proceedings wherein they exchanged the children in Malad, Idaho (at Burger King). (R., Vol. 2, p. 389).

Additionally, the magistrate made findings that Appellant will have the children for substantial periods of time:

> A non-relocating parent could have the children with him/her on weekends, holidays, on other important days during summers. (R., Vol. 2, p. 389).

The magistrate also made extensive findings regarding the best interest of the children economically should a move take occur:

> If defendant were to move to Utah with the children, would enhance defendant's economic situation, in light of the fact that she and the children could live rent free in defendant's father home. Defendant could essentially be a stay-at-home mother with the children, while earning income in her home, by performing secretarial services for her brother. The defendant could eventually pursue her educational pursuits in the ultrasound field in Utah. In Utah, the defendant and children would have emotional support from extended family. (R., Vol. 2, p. 389).

In summary, by applying the appropriate legal standards and making its findings by way of reason, the magistrate found that it is in the best interests of the minor children that they be allowed to move to Utah with Respondent.

F. THE MAGISTRATE ACTED WITHIN ITS DISCRETION REGARDING APPELLANT'S "DRASTIC CHANGE" ARGUMENT.

Appellant attempts to argue that the magistrate abused its discretion regarding the custody order, in that the evaluator claimed: "[to] change this [Appellant's time with the children] in any drastic manner will have a detrimental effect upon the children." (Appellant's Brief p. 36).

As discussed by the magistrate, both parties may have daily contact with the children when they are in the course of a marriage and living in the same family home. This, of necessity, must change with children of divorce. (R., Vol. 2, p. 389). Respondent does not believe that Appellant urges this Court to have the parties continue to reside together after divorce.

The magistrate was correct in the finding, after divorce, of necessity, one parent is going to have less time then he or she would during the pendency of a marriage. (R. Vol., 2, pg. 389).

The assertion of "drastic change" is simply unfounded, and not supported in the report. The evaluation report gave no information as to any effect on the lesser time that Appellant would have on the children. The magistrate appropriately gave weight to the entirety of the custody report, including but not limited to, the unsupported that a change in "any drastic manner will have a detrimental effect upon the children."

Indeed, given Appellant's assertions in this regard, it would appear that he would urge this Court to hold that a magistrate can never enter any custody order other than 50/50 physical custody. If this Court were to follow Appellant's reasoning, than no court would ever be acting in the best interest of children if one parent was awarded alternate weekends, summers and alternate holidays.

G. THE MAGISTRATE ACTED WITHIN ITS DISCRETION REGARDING THE CHILDREN'S FRIENDS AND SOCIAL ACTIVITIES.

Although Appellant would urge this Court to find that the magistrate made false findings regarding the children's friends and social activities, the court indeed made findings regarding the children's interaction with friends and social activities:

> The children are well adjusted to their home, school (as applicable) and community (as applicable to their ages). (R., Vol. 2, p. 386).

This was one of the elements thoroughly analyzed by the court in its findings of the best interest of the children, as required by I.C. § 32-717, as discussed herein.

H. APPELLANT IS INCORRECT IN HIS ASSERTION THAT RESPONDENT LIVED IN UTAH PREVIOUSLY.

Appellant attempts to argue that because Respondent "never resided" in Utah, that the magistrate's findings regarding the previous exchange of the children is invalid, or that said finding was made in an abuse of discretion.

It is clear from testimony at trial, the parties had exchanged the children in Utah. (See Tr. pp. 496, 497, 498, 499).

The magistrate's findings regarding the transportation issue never found that Respondent lived in Utah. By contrast, the magistrate found the following:

> ...the parties have previously worked out visitation arrangements during their earlier (2002-2003) divorce proceedings wherein they exchanged the children in Malad, Idaho (at Burger King). (R. Vol. 2, p. 389).

I. THE MAGISTRATE ACTED WITHIN ITS DISCRETION IN ITS FINDINGS REGARDING THE ECONOMIC BENEFIT OF THE MINOR CHILDREN AND RESPONDENT RELOCATING THE CHILDREN TO UTAH.

The magistrate reviewed and weighed the substantial evidence and testimony regarding the economic benefit to the minor children and correctly ruled that the Respondent should be allowed to relocate as discussed *infra*.

Regarding Respondent's purported financial needs, Appellant asserts that the magistrate abused its discretion because there was no evidence regarding Respondent's financial needs. (Appellant's Brief, p. 46). Respectfully, substantial testimony reflected that all of her financial needs would be met between her father helping and working. Said needs did not need to be outlined in the evidence and testimony presented.

Contrary to Appellant's assertion, Respondent does not have an affirmative duty to "prove" that she would be on welfare if she stayed in the state of Idaho. The magistrate weighed all of the evidence of the benefit to the minor children financially would she be able to move. Further, as part of its analysis for the best interest of the children regarding relocation to Utah, the magistrate was not required to find whether Respondent had pursued or not pursued employment opportunities in Idaho.

As discussed herein, the testimony was presented, uncontroverted, that the children would be able to reside rent free in the home of the maternal grandfather. (Tr. p. 100, ll. 3-5). Testimony was offered that the children had substantial relationship with their maternal grandfather, uncles and had been to and stayed at their homes many times. (Tr., p. 111, ll. 6-12); (Tr., p. 373, l. 25-p.375, l.3). Respondent had employment opportunities available to her and she would be able to work out of the home and be able to continue to be a stay-at-home mother. (Tr. p. 375, ll. 4-23) (R., Vol. 2, p. 389). Further, Respondent would be able to pursue employment opportunities in the ultrasound field in Utah. (Tr. p. 210, l. 19-p.213, l. 8).

The magistrate further weighed the issue that the oldest children, by nature of the moves of the family, have been transient since birth; the parties moved four (4) times during the pendency of the marriage. (R., Vol. 2, p. 388).

V. ADDITIONAL ISSUES ON APPEAL

Respondent respectfully submits that Appellant's Affidavits filed in support of his Appeal, as well as any evidence or testimony involving Contempt hearing(s) previously dismissed by the magistrate, are not part of the appeal herein and should not be considered by this Court.

VI. CONCLUSION

The magistrate in this case did not abuse its discretion in ordering that the parties have joint legal and joint physical custody of their five children, with primary physical custody in Respondent and secondary physical custody in Appellant. Nor did the magistrate abuse its discretion in finding that it is in the best interests of the minor children that they be allowed

to live in Utah with Respondent. The magistrate's findings support his ultimate ruling, as required by *Roberts*.

The record in this case makes it clear that the magistrate recognized the issue of custody as one of discretion. The magistrate made its findings by way of analysis of the applicable law, § 32-717, and the *Roberts* "other factors."

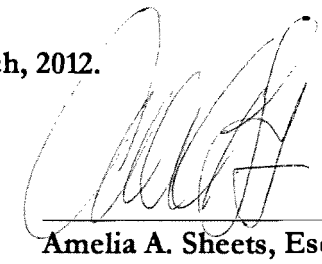
There is no presumption against relocation in this case, and the magistrate correctly made substantial findings that moving to Utah was one of the factors in the best interest of the children.

Finally, and most importantly, the magistrate weighed all of the evidence presented at trial, including the custody evaluation. The magistrate was not required to follow the custody evaluation. The findings of the magistrate are supported by substantial evidence, as reflected in its thoughtful and thorough analysis of the "best interests" standards discussed herein.

While some of the magistrate's findings may have been made pursuant to evidence disputed by the parties, the magistrate's holding should not be disturbed, given the competency of the findings.

In summary, as the magistrate acted within its discretion in its award of custody, and for the reasons stated herein, Respondent respectfully requests that this Court affirm the magistrate's custody and visitation orders.

DATED this 2 day of March, 2012.



Amelia A. Sheets, Esq.
DUNN LAW OFFICES, PLLC
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2 day of March, 2012 true and correct copies of the foregoing were delivered to the following persons(s) by:

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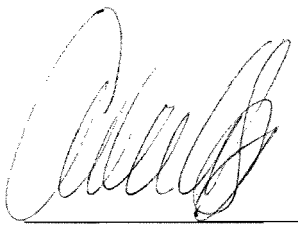

Amelia A. Sheets, Esq.
DUNN LAW OFFICES, PLLC
Attorney for Respondent

Trevor L. Castleton, Esq.
525 Ninth Street
Idaho Falls, ID 83404
Attorney for Appellant