3-1-2012

Clair v. Clair Respondent's Brief Dckt. 39188

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHARLES MALCOLM CLAIR, JR.,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	**SUPREME COURT**
	)	**DOCKET NO. 39188-2011**
TRACY JO CLAIR,	)	
	)	
Defendant/Appellant.	)	
	)	
	)	

RESPONDENT'S BRIEF

Appeal from the District Court of the Sixth District for Bannock County, Magistrate Division

HONORABLE RICK CARNAROLI, Magistrate Judge, Presiding

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STATEMENT OF THE CASE

Respondent's Statement of the Facts

Respondent Charles Clair ("Charles") and Appellant Tracy Clair ("Tracy") were married on November 19, 1993 in Ely, Nevada. (R., Vol. III, p. 391, ¶ 4.) The parties had a child together ("C.C."), who was born in Reno, Nevada on [redacted] (*Id.*) Approximately one month later, in June of 2007, the parties moved to Pocatello, Idaho because Charles began a residency with the Family Practice Residency Department at Idaho State University. (*Id.*) Charles has been licensed as a medical doctor in Idaho since July of 2008. (Tr., Vol. II, p. 234, L. 10-22.)

The parties resided in Pocatello until they separated in June of 2010. (R., Vol. III, p. 390, ¶¶ 1-2.) Charles moved to Moscow, Idaho where he accepted a job as a physician at Moscow Family Medicine. (*Id.*) Around the same time Tracy moved to Ely, Nevada and resided with her parents. (*Id.*; R., Vol. II, p. 391, ¶ 4.) C.C. resided primarily with Tracy in Ely from the time the parties separated until the trial. (R., Vol. III, p. 391 at ¶ 5.)

After their separation, Tracy limited Charles's access to C.C. and she made visitation more difficult than necessary. (*Id.* at p. 392, ¶ 9) Charles resided in Moscow from July 8, 2010 until January 1, 2011, yet Tracy only allowed him two periods of visitation from September 11 to September 27, 2010, and from December 11 or 12, 2010 to January 2, 2011. (Tr., Vol. II, p. 236, L. 1-10.) Charles tried to negotiate for more visitation time, but Tracy refused. (*Id.* at L. 11-15.) Additionally, Tracy would not make informal visitation arrangements, and she only allowed Charles to visit C.C. when a court order was in place. (*Id.* at L. 9-15.) Tracy also required Charles to sign

a promise that he would return C.C. to her before Tracy would relinquish custody. (Tr., Vol. I, p. 172, L. 16-22; Tr., Vol. II, p. 238, L. 1-3.)

As a result of these visitation difficulties, Charles resigned his position at Moscow Family Medicine and moved back to Pocatello in January 2011 so he could be more involved in C.C.'s life. (R., Vol. III, p. 390, ¶ 2.) Charles accepted a position at the Family Practice Residency Department at Idaho State University. (*Id.*) However, Charles had to make significant sacrifices to move back to Pocatello. Charles had to return a $40,000.00 signing bonus that he received to work at Moscow Family Medicine. (*Id.* at p. 401, ¶ 39.) Charles also gave up student loan forgiveness in the amount of $223,000.00 because he did not qualify since he no longer worked at Moscow Family Medicine. (*Id.*) Additionally, Charles gave up an annual salary of $225,000.00 in Moscow to take the position in Pocatello where his annual salary is $156,000.00. (*Id.*) Charles also offered to pay more child support than the Idaho Child Support Guidelines required to assist Tracy so she could reside in Pocatello. (*Id.* at p. 394, ¶ 17.) Even after Charles returned to Pocatello, which was closer to Ely than Moscow, Tracy proposed a visitation schedule where Charles would not see C.C. for periods of ten weeks or more between visits. (Tr., Vol. II, p. 295, L. 21-23.)

Charles intends to remain in Pocatello. (R., Vol. III, p. 393, ¶ 16.) Charles also wants C.C. to reside primarily with him in Pocatello. (*Id.* at p. 394, ¶ 17.) Although C.C. has no family members in the Pocatello area, he is familiar with neighbors and has friends in Pocatello. (*Id.* at p. 399, ¶ 32; R., Vol. III, p. 400, ¶ 36.) Charles also has firm plans and connections in Pocatello to assist with raising C.C., including a childcare provider that C.C. has known for years. (R., Vol. III,

p. 399, ¶ 32.) Charles also arranged his work schedule to be flexible to assist with childcare and to maximize his time with C.C. (*Id.* at ¶ 33.)

In contrast, during the trial Tracy accepted a teaching position in Reno, Nevada, and she wanted to move there and bring C.C. with her. (*Id.* at p. 393, ¶ 15.) However, Tracy had no firm plans for caring for C.C. in Reno. (*Id.* at p. 399, ¶ 32.) C.C. has several extended family members who reside in Nevada, but those he knows best, C.C.'s maternal grandparents, live three hours away from Reno in Ely. (*Id.* at p. 400, ¶ 35.) C.C. is not familiar with his other family members in Reno and Carson City, Nevada because C.C. has not lived in Reno since he was one month old. (*Id.*)

After the parties filed for divorce, they stipulated to an order for Dr. Linwood Vereen to perform a custody evaluation. (*Id.* at p. 398, ¶ 28.) The stipulated order did not require Dr. Vereen to submit a report to the magistrate court, nor was Dr. Vereen appointed as the court's expert witness. (R., Vol. III, p. 398, ¶ 28.) The parties also did not stipulate to allow Dr. Vereen to testify as an expert witness. (*Id.* at ¶ 29.) Consequently, Tracy had to qualify Dr. Vereen as an expert witness during the trial. (*Id.*; Tr., Vol. III, p. 382, L. 17-19.) The magistrate court subsequently did not allow Dr. Vereen to testify regarding a custody schedule and the best interests of C.C. because Tracy failed to lay a sufficient foundation as required by Rule 702 of the Idaho Rules of Evidence. (R., Vol. III, P. 398, ¶ 29; Tr., Vol. III, p. 437, L. 4-6.) The magistrate court suggested that Tracy provide an offer of proof of the testimony that she intended to elicit from Dr. Vereen. (Tr., Vol. III, p. 424, L. 6-7; Tr. Vol. III, p. 435, L. 23-25.) However, Tracy never provided an offer of proof.

Dr. Vereen was allowed to testify regarding child development. (Tr., Vol. III, p. 422-23, L. 22-24, 1-2; Tr., Vol. III, p. 435, L. 15-17.) The parties also stipulated to admit a redacted version of Dr. Vereen's report into evidence that included all of his report except his recommended custody schedule. (Tr., Vol. III, p. 543, L. 12-18; R., Vol. III, p. 510, Def. Ex. 3.)

Despite the limitation the magistrate court placed on Dr. Vereen's testimony, his custody recommendation came before the court during the trial. (Tr., Vol. III, p. 377-78, L. 11-25, 1-4.) Tracy testified to Dr. Vereen's recommended custody schedule that until C.C. begins school in August 2012, Tracy would be the primary caregiver, having sixty-five (65%) of the time, and Charles having thirty-five (35%) of the time. (Tr., Vol. I, p. 42, L. 4-8, 19-20; Tr., Vol. I, p. 43, L. 2-24.) Dr. Vereen further recommended a custody schedule with Tracy having custody for four consecutive weeks and Charles having custody for two and one-half weeks. (Tr., Vol. III, p. 377-78, L. 17-25, 1-13.) Under this recommendation, the parties would have to exchange custody during the middle of the work week. Tracy's counsel also stated Dr. Vereen's custody recommendation during oral arguments before Dr. Vereen testified. (Tr., Vol. III, p. 379, L. 4-6.) Charles's counsel even read verbatim significant portions of Dr. Vereen's unredacted report regarding the recommended custody schedule. (*Id.* at p. 377-78, L. 10-25, 1-4.)

At the conclusion of the trial, the magistrate court found that Charles's testimony was more credible than Tracy's testimony. (R., Vol. III, p. 403, ¶¶ 45-46.) The magistrate court also found that Tracy was not likely to share C.C. with Charles if she moved to Reno, and the move would damage C.C.'s relationship with Charles. (*Id.* at ¶ 45; R., Vol. III, p. 404, ¶ 47; R., Vol. III, p. 420.)

Charles had proposed a shared custody plan for the first year where the parties would exchange C.C. every three weeks if Tracy lived in Reno. (R., Vol. III, p. 394, ¶ 17.) However, the magistrate court rejected Charles's proposal to alternate custody during the first year because the frequent travel would not be in C.C.'s best interests. (*Id.* at p. 421.)

The magistrate court concluded that it would be in C.C.'s best interests to have both parents residing near each other to promote frequent and continuing contact. (*Id.* at p. 420.) However, since Tracy intended to move to Reno, the magistrate court concluded that it would be in C.C.'s best interests to reside primarily in Pocatello with Charles and Charles would have custody of C.C. seventy-five percent (75%) of the time. (*Id.* at p. 420-22.)

The magistrate court set out alternative shared custody arrangements in the event that Tracy decided to reside in Pocatello in the future. If Tracy returned to Pocatello before January 15, 2012, then C.C. would reside primarily with her for sixty-five percent (65%) of the time. (*Id.* at p. 422.) This custody arrangement was similar to Dr. Vereen's recommendation. If Tracy returned to Pocatello between January 15, 2012 and August 15, 2012, then C.C. would reside with Tracy and Charles equally in a fifty-percent (50%) shared custody arrangement. (*Id.* at p. 420-21.) However, Charles would retain custody seventy-five percent (75%) of the time if Tracy returned after August 15, 2012 unless she proved that a substantial and material change of circumstances occurred. (*Id.* at p. 423.) The magistrate court concluded that it would be unfair to C.C. to change the custody arrangement if Tracy returned after one year. (*Id.*) The magistrate court concluded that one year was

reasonable in light of Tracy's potential employment and housing obligations in Reno. (*Id.*) The magistrate court ordered C.C. to reside with Charles beginning August 28, 2011. (*Id.*)

RESPONDENT'S ISSUES PRESENTED ON APPEAL

1. Did Tracy fail to preserve her objection to the exclusion of Dr. Vereen's recommended custody schedule when she did not provide an offer of proof regarding the content of the excluded portion of his report and testimony?

2. Did the magistrate court properly exercise its discretion in determining custody when the court considered the relevant factors as they relate to the best interests of the child?

3. Did the custody order prohibiting C.C. from moving to Reno with Tracy violate Tracy's right to travel when it is in C.C.'s best interests to reside in Pocatello?

4. Is Charles entitled to an award of attorney fees pursuant to Idaho Code § 12-121 and Rule 41 of the Idaho Appellate Rules when Tracy's appeal was brought frivolously, unreasonably and without foundation?

ARGUMENT

I. TRACY FAILED TO PRESERVE HER OBJECTION TO THE EXCLUSION OF DR. VEREEN'S RECOMMENDED CUSTODY SCHEDULE BECAUSE SHE DID NOT PROVIDE AN OFFER OF PROOF REGARDING THE CONTENT OF THE EXCLUDED REPORT AND TESTIMONY

A. Standard of Review

No objection can be made regarding a decision to exclude evidence unless a substantial right is affected and the proponent of the evidence makes an offer of proof. Rule 103(a)(2), Idaho Rules of Evidence. An objection to a ruling to exclude evidence is not preserved for appeal without an offer of proof because the reviewing court has no basis upon which to rule. *State v. Young*, 136 Idaho 113, 120, 29 P.3d 949, 956 (2001); *Morris v. Thomson*, 130 Idaho 138, 143, 937 P.2d 1212, 1217 (1997); *see also In re C.F.*, 2006 Ohio 88 at ¶ 11 (Ohio App. 2006) (holding that a trial court did not err in excluding testimony in a proceeding to terminate parental rights because the party calling the witnesses did not provide an offer of proof to show the prejudicial effect of the excluded testimony).

Furthermore, for evidentiary objections that have been properly preserved, decisions regarding the admissibility of expert testimony may only be overturned if the trial court abused its discretion. *J-U-B Engineers, Inc. v. Security Insurance Co. of Hartford*, 146 Idaho 311, 315, 193 P.3d 858, 864 (2008). "To determine whether the trial court abused its discretion, this Court inquires whether the trial court: (1) correctly perceived the issue as discretionary, (2) acted within the

boundaries of its discretion, and (3) acted consistently with the applicable legal standards and reached its decision by an exercise of reason." *Id.*, 193 P.3d at 864.

Even if a trial court's decision to exclude evidence is incorrect, the decision will not be overturned if the error was harmless. *Bailey v. Sanford*, 139 Idaho 744, 749-50, 86 P.3d 458, 463-464 (2004). "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Rule 61, Idaho Rules of Civil Procedure. The erroneous exclusion of evidence is harmless if the excluded evidence is irrelevant or cumulative. *Bailey*, 139 Idaho at 50, 86 P.3d at 464.

Tracy alleges that the magistrate court "abused its discretion by requiring Dr. Vereen to base [h]is opinions on criteria not yet adopted in the State." (Appellant Br. 44 (alteration added).) However, Tracy has not challenged the magistrate court's finding that "[Dr. Vereen] was neither appointed as the court's expert, nor ordered to provide a report to the Court of his findings and recommendations." (R., Vol. III, p. 398 ¶ 28.) Nor has Tracy challenged the magistrate court's finding that "[t]he parties did not stipulate that he could offer opinion testimony as an expert witness . . .." (*Id.* at ¶ 29.) Thus, the only issue Tracy alleges regarding the exclusion of Dr. Vereen's testimony is whether the magistrate erred in deciding that Tracy failed to lay a proper foundation to admit Dr. Vereen's opinions about a custody schedule. Tracy further alleges that, "[h]ad Dr. Vereen been allowed to testify as to such custody determinations, additional inquiries and responses would have no doubt followed which would have provided additional useful information to the magistrate

court to make its final decisions." (Appellant Br. 45.) These issues will be discussed below in reverse order.

B. Tracy Did Not Make an Offer of Proof During the Trial

In this case, Tracy is barred from objecting to the magistrate court's decision to exclude Dr. Vereen's testimony regarding a custody schedule because she failed to preserve the objection for appeal. During the trial the magistrate court noted that this was the first time in its experience a party had objected to a custody evaluator's recommendation regarding a specific custody schedule. (Tr., Vol. III, p. 383, L. 8-12.) The magistrate court gave Tracy multiple opportunities to lay an adequate foundation to admit Dr. Vereen's testimony regarding his recommended custody schedule. (Tr., Vol. III, p. 433, L. 4-5; Tr. Vol. III, p. 436, L. 6-7, 12.) Additionally, on two occasions the Magistrate Court suggested that Tracy provide an offer of proof if Dr. Vereen's testimony was excluded. (Tr., Vol. III, p. 424, L. 6-7; Tr. Vol. III, p. 435, L. 23-25.) However, Tracy never provided an offer of proof regarding the content of Dr. Vereen's unredacted report and his excluded testimony.

Consequently, Tracy cannot prove that a substantial right was violated because the Court has no basis on which to rule regarding the testimony Tracy intended to elicit from Dr. Vereen. In other words, Tracy can provide no proof regarding what "other useful information" Dr. Vereen would have provided during the trial that would have resulted in a different custody arrangement. The Court would have to speculate what effect, if any, additional excluded testimony or recommendations from Dr. Vereen would have had on the outcome. Thus, Tracy's objection to the magistrate court's decision to exclude Dr. Vereen's testimony was not preserved for appeal.

Even if the magistrate court erred when it limited Dr. Vereen's testimony, the error was harmless because Dr. Vereen's testimony would have been irrelevant and cumulative. Tracy testified that Dr. Vereen had recommended Tracy and Charles share custody of C.C. with Tracy having sixty-five percent (65%) of the time and Charles having thirty-five percent (35%) of the time until the child starts school in August of 2012. (Tr. Vol. I, p. 42, L. 4-8, 19-20; Tr. Vol. I, p. 43, L. 2-24.) Charles's counsel also re-stated the significant portion of Dr. Vereen's custody recommendation verbatim during oral arguments before Dr. Vereen testified. (Tr. Vol. III, pp. 377-78, L. 17-25, 1-4.) Additionally, Charles's counsel acknowledged during a post-trial hearing that Dr. Vereen's custody recommendation was before the magistrate court. (Hrg. Tr., p. 3, L. 15-20 (Sept 7, 2011).) Tracy even acknowledged that Dr. Vereen's custody recommendation was before the magistrate court. (Appellant Br. 18.) Thus, Dr. Vereen's testimony was cumulative because Dr. Vereen's custody recommendation was already before the magistrate court before the court awarded custody.

Furthermore, Dr. Vereen's testimony was irrelevant because the magistrate court made the same decision regardless of whether Dr. Vereen's report and testimony had been admitted. (Hrg. Tr., p. 8, L. 6-9 (Sept 7, 2011).) Specifically, the magistrate court stated that it considered Dr. Vereen's opinion and then the court made its own decision. (*Id.*) More importantly, the magistrate court's custody award followed Dr. Vereen's recommendation, at least in part, because the court awarded custody to Tracy sixty-five percent (65%) of the time if she returned to Pocatello before January of 2012. (R., Vol. III, p. 420.) Accordingly, the magistrate court's decision to limit Dr. Vereen's testimony was harmless because it did not affect the outcome.

C. Even if Tracy's Objection Was Preserved, the Magistrate Court Did Not Abuse its Discretion When it Excluded Dr. Vereen's Recommended Custody Schedule

"The admissibility of expert testimony is a matter committed to the discretion of the trial court and this Court will not overturn its ruling absent an abuse of that discretion." *J-U-B Engineers, Inc.*, 146 Idaho at 315, 193 P.3d at 864. Expert witness testimony is admissible if a witness is qualified as an expert, and the testimony will assist the trier of fact to understand the evidence or determine a fact in issue. *Weeks v. Eastern Idaho Health Services*, 143 Idaho 834, 838, 153 P.3d 1180, 1184 (2007) (citing Rule 702, Idaho Rules of Evidence). In contrast, opinions that are speculative, conclusory, or unsubstantiated by facts are not admissible because they do no assist the trier of fact. *Id.*, 153 P.3d at 1184; *J-U-B Engineers, Inc.*, 146 Idaho at 316, 193 P.3d at 865. Similarly, testimony of an opinion on an issue which the trier of fact is qualified to determine by drawing from the facts and using common sense and normal experience is inadmissible because it does not assist the trier of fact. *Chapman v. Chapman*, 147 Idaho 756, 760, 215 P.3d 476, 480 (2009).

A trial court has a duty to act as a gatekeeper to ensure that the methods an expert witness relies upon are reliable. *State v. Konechny*, 134 Idaho 410, 417, 3 P.3d 535, 543 (Idaho App. 2000). A methodology must have sufficient indicia of reliability for an opinion based on the methodology to be admissible. *Weeks*, 143 Idaho at 838, 153 P.3d at 1184. If the reasoning or methodology underlying an opinion is not sound, then the opinion does not assist the trier of fact. *Id.* Thus, the

focus of the inquiry regarding expert witness testimony is on the principles and methodology used and not on the conclusions. *Id.*, 153 P.3d at 1184.

The reliability requirements under Rule 702 apply to methods that rely upon specialized psychological knowledge. *See, e.g., State v. Konechny*, 134 Idaho at 419-20, 3 P.3d at 544-45. For example, in *State v. Konechny*, the trial court allowed the prosecution to present two expert witnesses to testify regarding their opinion that two children had been sexually abused by a defendant. *Id.* at 413, 3 P.3d at 538. The Idaho Court of Appeals held that the trial court abused its discretion in allowing the experts to testify because the methods utilized by the experts were not reliable since there was no foundational testimony to describe the methodology or tools the witnesses used to reach their conclusions. *Id.* at 419-20, 3 P.3d at 544-45. The Court noted that "[t]he court's function is to distinguish scientifically sound reasoning from that of the self-evaluating expert, who uses scientific terminology to present unsubstantiated personal beliefs." *Id.* at 417, 3 P.3d at 543. The Court noted that when considering testimony of mental health professionals, the testimony must have an indicia of reliability to prove that the methods used were reasonably accurate in distinguishing between children that have been abused and those that have not. *Id.* at 418, 3 P.3d at 544.

In a child custody proceeding, an expert witness must present independent evidence of reliability and cannot rely on a mere assertion that a method is reliable. *See, e.g., In the Interest of J.B.*, 93 S.W.3d 609, 625 (Tex. App. 2002). For example, in *In the Interest of J.B.*, a trial court allowed an expert witness to testify about the results of a parental assessment wherein the expert opined that it was in a child's best interest to terminate the mother's parental rights. *Id.* at 622-24.

The Texas Court of Appeals held that the trial court abused its discretion when admitting the expert's testimony because, although the expert testified generally that the methods he relied upon were common practice in the field, the expert "offered no specific, independent sources to support the reliability of his methodology." *Id.* at 625.

In addition to being reliable, there must be a connection between specialized knowledge and the conclusions a witness draws from the knowledge. *State v. Parkinson*, 128 Idaho 29, 35, 909 P.2d 647, 653 (Idaho App 1996); *General Electric Co. v. Joiner*, 522 U.S. 136, 147 (1997). In other words, an opinion is not admissible merely because it is made by an expert witness. *General Electric Co. v. Joiner*, 522 U.S. at 146. For example, in *General Electric Co. v. Joiner*, a trial court ruled that expert witness testimony was inadmissible because it was based on "subjective belief or unsupported speculation." *Id.* at 140. In affirming the trial court the United States Supreme Court stated that "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.* at 146-47 (internal citations omitted).

Similarly, in *State v. Parkinson*, the trial court refused to allow a defendant to present testimony from a psychologist and a former FBI agent that the defendant did not fit the profile of a sex offender. *State v. Parkinson*, 128 Idaho at 32, 909 P.2d at 650. The Idaho Court of Appeals affirmed the trial court based on two reasons. *Id.* at 33, 909 P.2d at 651. First, the Court found that the use of sexual offender profile evidence has been rejected in most jurisdictions because it is not generally accepted and does not aid the trier of fact. *Id.*, 909 P.2d at 651. Second, the Court found that even if such profile evidence was generally admissible, the trial court did not abuse its discretion

in ruling that an inadequate foundation was shown regarding the methodology as applied to the defendant. *Id.* at 33, 909 P.2d at 651. The Court noted that there was no evidence provided regarding the reliability of the tests performed, and there was no evidence to support a connection between the methods used and the conclusions. *Id.* at 35, 909 P.2d at 653.

In this case, the magistrate court did not abuse its discretion when it evaluated the methods Dr. Vereen used to form an opinion regarding a recommended custody schedule. The magistrate court conducted a thorough evaluation of the methodology used during custody evaluations, and based on the evidence provided, concluded that Dr. Vereen, or any custody evaluator, could not reliably determine what custody schedule is in the best interest of a child. (Tr., Vol. III, p. 436, L. 22-24.) Specifically, the magistrate court concluded that Tracy presented no evidence of research to demonstrate the reliability of opinions regarding custody schedules. (*Id.* at p. 432, L. 15-18.) The magistrate court also concluded there was no evidence to demonstrate that the methods used to conduct a custody evaluation could be applied to the specific facts of this case. (*Id.* at L. 19-23.) Additionally, the magistrate court found that insufficient evidence had been presented regarding standards and criteria for conducting custody evaluations. (*Id.* at p. 421, L. 1-4.) All of these findings support the magistrate court's conclusion that Dr. Vereen's opinions regarding a custody schedule would not be helpful in determining a custody arrangement in this case. *See Coffey v. Coffey*, 661 N.W.2d 327, 342 (Neb. Ct. App. 2003) (citing a law review article that expressed concern regarding the ability of attorneys and experts in psychology to render opinions regarding custody schedules).

The evidence in the record supports the magistrate court's findings that Tracy failed to present a sufficient foundation to demonstrate the reliability of the methods Dr. Vereen relied upon. Dr. Vereen outlined the factors he considered when conducting the custody evaluation and the procedures he followed. (Tr., Vol. III, p. 398-400, L. 13-19, 21-3, 15-18, 21-2; Tr. Vol. III, p. 401, L. 1-10.) However, contrary to the expert witness in *In re G.B.*, there was no independent evidence presented to show that considering those factors and following those procedures would allow Dr. Vereen, or anybody, to form a reliable opinion regarding what custody schedule was in C.C.'s best interests.

Additionally, similar to the shortcomings of the proposed expert witnesses in *State v. Parkinson* and *General Electric Co. v. Joiner*, there was no evidence to bridge the analytical gap between the methods Dr. Vereen applied and the reliability of the opinions he formed. To the contrary, Dr. Vereen's testimony cast doubt on the methodology of custody evaluations in terms of rendering custody opinions. For example, although Dr. Vereen testified that research in the field of custody evaluations has increased in the past few years, he acknowledged that research in the field has been limited. (Tr. Vol. III, p. 401, L. 21-24.) Tracy even acknowledged in her brief that "despite many years of clinical experience and despite the existence of practice guidelines from many professional bodies, most clinicians would readily accept that there is a *paucity* of relevant research evidence on which to base the practice of child custody evaluations." (Appellant Br. 44 (internal citation omitted) (emphasis added).)

Despite Dr. Vereen's testimony that research has been increasing, he offered no testimony regarding what the current research reveals about the reliability of the methodology used to form reliable opinions about custody schedules. The only testimony that Dr. Vereen provided regarding what the literature in the field says was that joint custody is in a child's best interest if both parents are capable, and attachment results more from the person who is the primary caregiver rather than the gender of the caregiver. (Tr. Vol. III, p. 422, L. 13-16; Tr. Vol. III, p. 428, L. 9-11.) However, both of these issues deal with child development, which the magistrate court allowed.

Dr. Vereen's testimony also raised doubts about whether his opinions would assist the trier of fact to determine a specific custody schedule in this case. For example, Dr. Vereen testified that he has not been able to find an answer to the question of how long a child should be away from a parent. (Tr., Vol. III, p. 400, L. 18-22.) Without this information it is uncertain whether Dr. Vereen could make a reliable custody determination in this case when the parents want to live a great distance apart. Thus, any opinions Dr. Vereen formed about what specific custody schedule would be in C.C.'s best interests would likely be pure speculation and not helpful to the magistrate court. Accordingly, even if research exists that could demonstrate the reliability of the methods used to render opinions regarding custody schedules, the magistrate court did not abuse its discretion in concluding that Tracy failed to lay a proper foundation in this case.

Tracy's argument that the magistrate court erred when it made a custody determination on its own has no merit. A trial court may make a custody decision and determine what is in a child's best interest without the assistance of an expert witness. *Drinkall v. Drinkall*, 150 Idaho 606, 613,

249 P.3d 405, 412 (Idaho App. 2011) ("Idaho law does not require the testimony of a psychologist, a doctor, a teacher or any particular witness in order to establish that a change in [a] shared custody schedule would be in the best interest of a child.") (alterations added). To the contrary, the magistrate court specifically noted that "Dr. Vereen certainly has education, experience, and training that this Court does not have in the areas of child development and attachment, particularly in the area of children age zero to six." (Tr., Vol. III, p. 421, L. 16-19.) The magistrate court noted that those types of opinions would be useful, but an opinion regarding which weeks C.C. would go to each parent would not be useful because the court can make this decision. (*Id.* at p. 421-22, L. 22-25, 1-7.) Thus, contrary to Tracy's argument, the magistrate court demonstrated that its decision to limit Dr. Vereen's testimony to matters regarding child development was an exercise in reason. *See Lukens v. Botnen*, 587 N.W.2d 141, 146 (N. D. 1998) (holding that testimony from a psychologist regarding child development generally is helpful to a trial court in making a custody determination).

Tracy's argument that the magistrate court erred because Dr. Vereen followed criteria while conducting custody evaluations is also unfounded. Although Dr. Vereen testified that the field is moving towards developing standards, he also testified there are currently no standards for conducting custody evaluations in the Sixth District or within the state. (Tr. Vol. III, p. 406, L. 14-16; Tr., Vol. III, p. 402, L. 13-14). Even if Dr. Vereen followed established criteria and procedures while conducting his custody evaluation, criteria and procedures by themselves do not establish the reliability of a field of study. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 151 (1999) ("Nor . . . does the presence of *Daubert's* general acceptance factor help show that an expert's

testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.")

Furthermore, Tracy's other arguments are without merit. Specifically, Tracy argues that the "[s]tate of Idaho has not . . . required scientific data for the admission of the ultimate opinions regarding custody arrangements," and "the magistrate demanded criteria which have not yet been recognized by Idaho as necessary for the admissibility of custody determinations." (Appellant Br. 44.) However, Tracy provided no authority that expert witness opinions regarding custody schedules, or any other matter relating to child custody, are not subject to the requirements of Rule 702. To the contrary, the magistrate court has discretion to determine not only whether evidence is reliable, but also how to test the reliability of expert witness testimony. *Kumho Tire Co.*, 526 U.S. at 152. Courts in other states have also applied the reliability standards under Rule 702 to methods used to form opinions regarding child custody. *See, e.g., In re G.B.*, No. 07-01-00210-CV (Tex. App., Seventh Dist., Amarillo Oct. 10, 2003) (evaluating the reliability of psychological and substance abuse assessments); *See, e.g., In the Interest of J.B.*, 93 S.W.3d 609 (evaluating the reliability of a parenting assessment); *A.J.B. v. M.P.B.*, 945 A.2d 744 (Pa. Super. 2008) (evaluating the reliability of testimony regarding an opinion of the effect of frequent pornography use on parent's fitness as a parent); *In re C.F.*, 2006 Ohio 88 at ¶ 11 (evaluating the reliability of a custody evaluator's opinions). Additionally, although recommendations from custody evaluations have been frequently admitted into evidence in the Sixth District, as the magistrate court explained, up to this

point it has been based on stipulations between the parties. (Tr., Vol. III, p. 383, L. 9-12; Appellant Br. 36.)

Tracy even acknowledged that there has been a debate in Idaho regarding the validity of child custody evaluator opinions. (Appellant Br. 44.) Dr. Vereen also candidly acknowledged there is a debate in the field regarding whether a custody schedule can be determined through custody evaluations. (Tr. Vol. III, p. 422, L. 12-17.) Current literature on the subject of custody evaluations also raises concerns regarding to what extent custody evaluators can render reliable opinions regarding what custody schedule is in a child's best interest. *See, e.g.*, Mary Shea Huneycutt, *Trying to Fit a Square Peg Into a Round Hole? Applying Idaho Rules of Evidence and Procedure to Child Custody Evaluations*, 54 The Advocate 10, Oct. 2011, at 28. Other commentators believe that custody evaluators should not render opinions regarding specific custody plans because there is no reliable way to evaluate competing plans or to determine what is in a child's best interest. *See, e.g.*, Timothy M. Tippins & Jeffrey P. Wittman, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 Fam. Ct. Rev. 2, April 2005 193-222. Additionally, other commentators have noted that using psychological testing is not reliable to render custody opinions because such tests were developed for diagnoses and treatment and not to answer legal questions. *See, e.g.*, John A. Zervoloulos, Robinson/Daubert *and Mental Health Testimony: The Sky is Not Falling*, 64 Tex. B.J. 350, April 2001, at 352. Accordingly, the magistrate court did not abuse its discretion by limiting Dr. Vereen's testimony to matters regarding child development.

II. THE MAGISTRATE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DETERMINED CUSTODY BECAUSE THE COURT CONSIDERED THE RELEVANT FACTORS AS THEY RELATE TO THE BEST INTERESTS OF THE CHILD

A. Standard of Review

"Custody determinations are committed to the sound discretion of the trial court." *Schneider v. Schneider*, 151 Idaho 415, 420, 258 P.3d 350, 355 (2011). Consequently, the standard of review for a trial court's custody determination is whether the trial court abused its discretion. *Roberts v. Roberts*, 138 Idaho 401, 403, 64 P.3d 327, 329 (2003). A trial court does not abuse its discretion when it (1) recognizes the issue is one of discretion, (2) acts within the outer limits of its discretion and consistently with applicable legal standards, and (3) reaches its decision through an exercise of reason. *Id.*, 64 P.3d at 329. "The question is not whether this Court would have awarded custody in the manner that the magistrate did, but rather, whether the award was an abuse of discretion." *Dymitro v. Dymitro*, 129 Idaho 527, 531, 927 P.2d 917, 921 (Idaho App. 1996).

The weight and credibility of evidence is the province of the trial court. *Gustaves v. Gustaves*, 138 Idaho 64, 67, 57 P.3d 775, 778 (2002). "The trier of fact is in a unique position to make determinations of credibility and to discern the import of the testimony." *Dymitro*, 129 Idaho at 531, 927 P.2d at 920. A trial court's findings of fact will be upheld if they are supported by substantial and competent evidence and they are not clearly erroneous. *Bartosz v. Jones*, 146 Idaho 449, 459, 197 P.3d 310, 320 (2008). Thus, Idaho appellate courts have been highly deferential to trial court custody determinations. *Id.* at 458, 197 P.3d at 320; *see also Weiland v. Ruppel*, 139

Idaho 122, 125, 75 P.3d 176, 179 (2003) ("[A]n underlying principle in each of these cases is that appellate courts will affirm the findings of trial courts if they are supported by the evidence.")

The record indicates the magistrate court specifically recognized that custody determinations are within the court's discretion. (R., Vol. III, pp. 411, 417, 418, 429.) Additionally, Tracy does not allege that the magistrate court did not recognize its discretion to determine custody. Thus, this element will not be discussed further.

B. The Magistrate Court Applied the Applicable Legal Standards

The best interests of a child is the primary consideration in any court decision affecting children. *Roberts*, 138 Idaho at 403–04, 64 P.3d at 329-30. "This court has emphasized that the personal desires of the parent and even the wishes of a minor child must yield to the paramount consideration of what is best for the child's ultimate good." *Posey v. Bunney*, 98 Idaho 258, 263, 561 P.2d 400, 405 (1977). Consequently, a trial court is required to provide for the best interests of a child as the court deems necessary and proper. *Dymitro*, 129 Idaho at 528, 927 P.2d at 919.

A trial court must consider all relevant factors when making a child custody determination. *Bartosz*, 146 Idaho at 454, 197 P.3d at 315; Idaho Code § 32-717. The factors listed in Idaho Code § 32-717 are not exhaustive or mandatory, and the trial court is free to consider other relevant factors in awarding custody. *Bartosz*, 146 Idaho at 454-55, 197 P.3d at 315-16. Idaho Code § 32-717 gives a trial court wide discretion to make custody decisions that are in the best interest of a child so long as it does not consider irrelevant factors, does not assign too much weight to any particular factor,

and bases its findings of fact on substantial and competent evidence. *Schneider*, 151 Idaho at 425, 258 P.3d at 360.

There is a presumption that frequent and continuing contact with both parents is in the best interests of a child. Idaho Code § 32-717B. Applying this presumption can be problematic when both parties are good parents and they want to live at a great distance apart. *King v. King*, 137 Idaho 438, 445, 50 P.3d 453, 460 (2002). As this Court stated previously, "[e]xcept in cases where a parent is not fit, [relocation] decisions are never easy." *Id.*, 50 P.3d at 460. Idaho Code § 32-717B does not require that a child spend equal time with both parents. *Id.* at 445 n. 5, 50 P.3d at 460 n. 5. Thus, a trial court does not abuse its discretion "as long as each of the parents has significant periods of time in which the child resides with or is under the care and supervision of that parent." *Id.*, 50 P.3d at 460 n. 5; *Milliron v. Milliron*, 116 Idaho 253, 257, 775 P.2d 145, 149 (Idaho App. 1989).

This Court has previously decided cases involving trial court decisions that revert custody to a non-moving parent if the moving parent moves far away from the non-moving parent. *See, e.g., Bartosz*, 146 Idaho 449, 197 P.33 310; *Dymitro*, 129 Idaho 527, 927 P.2d 917; *Ziegler v. Ziegler*, 107 Idaho 527, 691 P.2d 773 (Idaho App. 1985); *Roberts*, 138 Idaho 401, 64 P.3d 327; *Weiland v. Ruppel*, 139 Idaho 122, 75 P.3d 176. A significant factor in these cases is which parent is more likely to promote a positive relationship and frequent and continuing contact with both parents. *Bartosz*, 146 Idaho at 460, 197 P.3d at 321; *Dymitro*, 129 Idaho at 530, 927 P.2d at 920; *Ziegler*, 107 Idaho at 534, 691 P.2d at 780; *Roberts*, 138 Idaho at 405, 64 P.3d at 331; *Weiland*, 139 Idaho at 125,

75 P.3d at 179; *see also In re Doe*, 149 Idaho 669, 674, 239 P.3d 774, 779 (2010) ("Sole legal custody with Father also gives the child his best chance for a proper, 'joint custody' relationship with both of his parents.").

While considering this factor, a trial court may consider a child's ability to continue to have a relationship with the non-moving parent if the other parent is allowed to move with the child. *Roberts*, 138 Idaho at 405, 64 P.3d at 331. Along the same lines, a trial court may consider the harm a child may suffer by moving away from a parent when it appears likely the moving parent will not share custody. *Weiland*, 139 Idaho at 125, 75 P.3d at 179. For example, in *Bartosz*, a mother filed a petition to modify custody because she wanted to move with a child to Hawaii. *Bartosz*, 146 Idaho at 453, 197 P.3d at 314. The trial court found that the mother had interfered with the father's relationship with the child, and the father was more likely to foster a positive relationship with the mother than vice versa. *Id.* at 459-60, 197 P.3d at 320-21. Thus, the trial court found that it was in the child's best interest to remain in Idaho where his father resided. *Id.* at 453, 197 P.3d at 314. Consequently, the trial court awarded primary physical custody to the mother so long as she remained in Idaho, but primary custody would revert to the father if the mother moved to Hawaii. *Id.*, 197 P.3d at 314. This Court held that the trial court did not abuse its discretion because it considered the factors identified in Idaho Code § 32-717, and it considered other factors relevant to the move. *Id.* at 456, 197 P.3d at 317.

A trial court may also consider a party's motive for moving a child away from the other parent in contrast to efforts the non-moving parent made to strengthen a relationship with a child.

Weiland, 139 Idaho at 125, 75 P.3d at 179; *Dymitro*, 129 Idaho at 530, 927 P.2d at 920. For example, in *Weiland*, a mother filed for a change in custody so she could move with her son to Portland, Oregon to seek employment and because her parents resided in Oregon. *Weiland*, 139 Idaho at 122-23, 75 P.3d at 176-77. The trial court questioned the mother's intentions for the move because her mother resided three hours away from Portland. *Id.* at 125, 75 P.3d at 179. The trial court refused to grant the petition to modify because "the adverse impact upon the child's relationship with his father will outweigh any potential benefits he might receive by virtue of his mother's relocation to Portland." *Id.*, 75 P.3d at 179. This Court held the trial court did not abuse its discretion because it considered the relevant factors and supported its conclusion with the facts in evidence. *Id.*, 75 P.3d at 179.

Similarly, in *Dymitro*, a mother moved to Ohio with her child without notifying the father. *Dymitro*, 129 Idaho at 528, 927 P.2d at 918-19. In contrast, the father had a sincere wish to have custody with the child, and he went to great lengths to improve his parenting skills. *Id.* at 530, 927 P.2d at 920. Although the trial court found that both parents were able to provide suitable custody for the child, the court awarded custody to the father because he was more likely to promote contact with the mother than vice versa. *Id.*, 927 P.2d at 920. The Idaho Court of Appeals held that the trial court did not abuse its discretion. *Id.* at 530, 927 P.2d at 920. The Court specifically noted that "[the mother's] actions in removing her son from Idaho and, in the magistrate's evaluation, holding him hostage, reflected badly on her overall integrity, as did lying about the reasons she left the state." *Id.* at 530, 927 P.2d at 920.

These cases also indicate that the fact a moving parent has spent more time with a child than the non-moving parent is not a dispositive factor. *See, e.g., Bartosz*, 146 Idaho at 454, 197 P.3d at 314. For example, in *Bartosz*, the trial court found the mother had been the child's primary caregiver, yet concluded the other factors which favored keeping the child in Idaho to be near the father outweighed the mother's status as the primary caregiver. *Id.* at 459, 197 P.3d at 320. Similarly, in *Weiland*, the trial court found that the child's mother had been a primary caregiver for the child, and it was in the child's best interest to reside primarily with the mother. *Weiland*, 139 Idaho at 124, 75 P.3d at 178. However, similar to *Bartosz*, the trial court concluded that the other factors which favored keeping the child in Idaho to have frequent contact with the father outweighed the mother's status as the primary caregiver. *Id.*, 75 P.3d at 178.

In this case, the magistrate court did not abuse its discretion when it decided that C.C. would reside primarily with Charles if Tracy moved to Reno. The magistrate court acted within the applicable legal standards in awarding custody because the magistrate court considered the factors identified in Idaho Code § 32-717 and other relevant factors to determine that it was in C.C.'s best interests to reside in Pocatello and not Reno. Specifically, the magistrate court considered the parties' willingness to share parenting time, Tracy's motives for moving to Reno, C.C.'s familiarity with Reno and Pocatello, and the sacrifices that Charles made by moving from Moscow to Pocatello. Each of the factors will be discussed separately below.

The Parties' Willingness to Share Parenting Time

Since Tracy expressed her intent to move to Reno, yet both parties wanted C.C. to live primarily with them, the magistrate court considered the likelihood that each parent would promote frequent and continuing contact with the other. (R., Vol. III, p. 404 ¶ 47; R., Vol. II, p. 405 ¶ 51.) The magistrate court found that Tracy had not shown a desire to share C.C. with Charles. (R., Vol II, p. 404 ¶ 47; R. Vol. II, p. 405 ¶ 51.) The magistrate court also found that "[t]he mother has limited the father's access to the child and has made arranging visits between father and son more difficult than it should have been." (R., Vol. III, p. 392 ¶ 9.) Thus, the magistrate court was justifiably concerned about Tracy's conduct because she wanted to move further away from Charles. (*Id.* at p. 425-26.) The magistrate court also found that Tracy's conduct would impact the parties' ability to have frequent and continuing contact with C.C. because a move to Reno would put more distance between C.C. and Charles and make it more difficult for Charles to be involved in C.C.'s life. (*Id.* at p. 404 ¶ 47.)

In contrast, the magistrate court found that Charles "is genuinely interested in making sure that the child has frequent access to both parents and in sharing custody and in providing financial, educational and emotional support for the child." (*Id.* at p. 427.) The magistrate also specifically found that :

> The difficulties the father experienced and endured trying to see his son during the pendency of these proceedings is testimony to the mother's resistance to fostering a relationship between father and son. It is also a testimony to the father's commitment to be a parent to C.C. He could have given up, but chose not to.

(*Id.* at p. 405 ¶ 50.)

Substantial evidence supports the magistrate court's findings of fact. For example, Charles testified that he was in Moscow from July 8, 2010 until January 1, 2011, but Tracy only allowed him two periods of court-ordered visitation with C.C. (Tr., Vol. II, p. 236, L. 1-10.) Charles testified that he tried to negotiate more time with Tracy, but she refused. (*Id.* at L. 11-15.) Additionally, Charles testified that he did not begin his job in Moscow until August 2, 2010, but Tracy would not allow C.C. to visit him in Moscow during that time . (*Id.* at p. 237, L. 5-14.) Charles testified that Tracy only allowed Charles to visit C.C. in a hotel room in Ely before he started his job in Moscow. (*Id.* at L. 13-16.)

Furthermore, Tracy testified that she only allowed Charles to visit with C.C. when there was a court order. (Tr., Vol. I, p. 172, L. 12-22; Tr., Vol. II, p. 236, L. 9-15.) Tracy testified that she made Charles sign a paper that indicated when he would return C.C. from a visit to Moscow. (Tr., Vol. I, p. 172, L. 16-22; Tr., Vol. II, p. 238, L. 1-3.) Tracy also testified she was afraid that Charles would not return C.C. (Tr., Vol. I, p. 172, L. 16-22.) Additionally, Tracy testified that she wants to know when Charles takes C.C. out of Pocatello because she is afraid something could happen to him. (*Id.* at p. 70, L. 9-23.) However, Charles testified that he never threatened not to return C.C. to Tracy. (Tr., Vol. II, p. 238, L. 4-6.) Thus, the magistrate court could infer that Tracy would not likely cooperate with Charles in the future to share custody time.

In contrast, Charles testified that he proposed sending a custody calendar back and forth with C.C. that he could share with both parents. (Tr., Vol. III, p. 486, L. 20-23.) Charles also testified

that he sent an email to Tracy that described C.C.'s daily routines. (*Id.* at p. 528, L. 7-9.) However, Tracy did not respond to the email. (*Id.* at p. 529, L. 10-11.) Charles also testified that Tracy is reluctant to share information with him. (*Id.* at p. 509, L. 20-21.) Additionally, Charles testified that he believes frequent and regular contact with both parents is in C.C.'s best interest. (Tr., Vol. II, p. 238, L. 8-10; Tr., Vol. II, p. 241, L. 24-25.) More importantly, Charles testified that he was concerned about Tracy's well-being if he did not return C.C. to her. (Tr., Vol. II, p. 238, L. 13-16.)

Dr. Vereen also provided testimony to support the magistrate court's findings of fact. For example, Dr. Vereen testified that during his custody evaluation he saw evidence that Charles loves C.C. and was working to provide consistency and stability between the homes. (Tr., Vol. III, p. 449, L. 22-23; Tr., Vol. III, p. 465, L. 20-22; Tr., Vol. III, p. 481, L. 4-5.) Dr. Vereen also testified that Charles focused on maintaining a relationship with C.C. (Tr., Vol. III, p. 472, L. 2, 10-12.) More importantly, Dr. Vereen testified that he believed Charles had been attempting to co-parent despite the long distance between the parties. (*Id.* at p. 473, L. 1-6.)

Tracy's Motives for Moving to Reno

In considering the willingness of the parties to promote frequent and continuing contact, the magistrate court also questioned Tracy's motives for moving to Reno. (R., Vol. III, p. 404 ¶ 47; R., Vol. III, p. 405 ¶¶ 50-51.) The magistrate court was concerned because of Tracy's willingness to take C.C. to Reno where he does not know his child care providers or his preschool, and her willingness to take C.C. further away from not only Charles but C.C.'s maternal grandparents in Ely. (R., Vol. III, p. 426.) After the parties had been separated over a year, Tracy hired a private

investigator to determine whether Charles was having an affair. (*Id.* at p. 404 ¶ 48.) Based on these findings it was reasonable for the magistrate court to infer that "[t]he mother's actions and desire to move further away demonstrate either a conscious or unconscious willingness to diminish the relationship that C.C. has and can have with his father." (*Id.* at p. 405 ¶ 51.)

The magistrate court also found that Tracy was not believable in her testimony that she wanted to share C.C. with Charles. (Id. at ¶ 50.) The magistrate court found that Tracy minimized Charles's role as both a parent and provider and magnified her role as the primary caregiver and her support for Charles during medical school. (*Id.* at pp. 403-04 ¶ 46.) The magistrate court also found that Tracy was not as complimentary of Charles's parenting abilities. (*Id.*) Additionally, the magistrate court found that Tracy was less credible because she contradicted herself. (*Id.*)

In contrast, the magistrate court found that Charles was more credible during the trial. (*Id.* at p. 406 ¶ 45.) The magistrate court also found that Charles was "genuine and honest about himself, about his failings and his conduct in many respects." (*Id.* at pp. 404-05 ¶ 49.) More importantly, the magistrate court found that Charles is a good father and trying to find a way to share time with Tracy. (*Id.*) Dr. Vereen also saw positive qualities in Charles regarding his parenting and wanting to spend quality time with C.C. (*Id.*)

Substantial evidence supports the magistrate court's findings regarding Tracy's motives. For example, Tracy referred to Charles as a "slime ball" in Facebook postings, and Tracy accused Charles of trying to "weasel in an extra week to his visitation." (Tr., Vol. II, p. 228, L. 9-14; Tr., Vol. II, p. 230, L. 7-13.) Dr. Vereen testified that Tracy's derogatory statements about Charles could

be harmful to C.C. (Tr., Vol. III, p. 484, L. 2-24; Tr., Vol. III, p. 485, L. 12-17.) Tracy also blamed Charles for difficulties in co-parenting. For example, during her testimony, Tracy believed that Charles was not willing to negotiate with her regarding visitation time. (Tr., Vol. II, p. 221, L. 3-5; Tr., Vol. II, p. 233, L. 1-2.) Tracy also blamed Charles for problems that C.C. had been having regarding sleeping, toileting and relating to other household members. (Tr., Vol. I, p. 65, L. 20-24.)

The evidence also suggests that Tracy had not moved past the breakdown of the parties' marriage. For example, Tracy testified that she cannot forgive Charles for the things he has done. (*Id.* at p. 116, L. 19-21.) Charles also testified that people had contacted him and informed him that Tracy hired a private investigator to conduct surveillance of him; and Tracy contacted his friend's ex-husband regarding the parties' divorce. (Tr., Vol. III, p. 536-37, L. 19-25, 1-10.) Thus, the court could reasonably infer that Tracy was involving other people in dealing with her problems over the pending divorce.

Tracy argues that the magistrate court's factual findings were incorrect because there was no evidence that Tracy decided to move to Reno to intentionally interfere with Charles's ability to be a part of C.C.'s life. (Appellant Br. 33.) Tracy also asserts that Reno is not more important to her than being regularly involved in C.C.'s life. (*Id.*) However, these arguments have no merit because it is within the magistrate court's province to determine the credibility and significance of conflicting testimony and to make reasonable inferences from the evidence. Consequently, as in most contested divorce cases, the parties may see the facts differently, but the magistrate court's findings were not clearly erroneous based on the evidence presented.

C.C.'s Familiarity with Reno and Pocatello

Another factor the magistrate court considered was C.C.'s familiarity with Reno and Pocatello, the two possible locations where C.C. would reside. (R., Vol. III, p. 425.) The magistrate court concluded that C.C. has stronger ties to Pocatello than Reno. (*Id.* at p. 426.) The magistrate court found that C.C. has not spent time in Reno since he was approximately one month old. (*Id.* at p. 400 ¶ 35.) In contrast, the magistrate court found that C.C. resided in Pocatello for most of his life, and that is where Charles currently resides. (*Id.* at p. 425.) The magistrate court also concluded that C.C. knows Ely and Pocatello as his home, but not Reno. (*Id.* at p. 425-26.)

The magistrate court also concluded that moving C.C. to Reno would not promote continuity and stability in his life. (*Id.* at p. 427-28.) The magistrate court found that Tracy's plans for Reno were not in place at the time of the trial. (*Id.* at p. 399 ¶ 32.) Specifically, the magistrate court found that "[a]t the time of trial, she had no idea where she would be living in Reno, or where C.C. would attend pre-school or daycare during the next school year, or where he would attend school in the fall of 2012." (*Id.* at p.393 ¶ 15.) The magistrate court concluded that Tracy offers "speculative possibilities of easy adjustments to a new community, with different family members, new relationships, in a new home, in a new neighborhood, in a new child care, in a new preschool, and with new friends, all far distant from the people and places he has known." (*Id.* at p. 428.) The magistrate court also found that Tracy would be working full-time in Reno, so C.C. would have to adjust to being cared for by strangers and being away from Charles and C.C.'s grandparents. (*Id.* at pp. 426, 428.) Additionally, the magistrate court found that C.C. was familiar with his maternal

grandparents in Ely after residing with them for a year. (*Id.* at p. 400 ¶ 34.) However, the magistrate court was not sure how often C.C.'s maternal grandparents would visit him in Reno because his grandfather was ill. (*Id.* at ¶ 35.)

In contrast, the magistrate court found that residing in Pocatello would promote stability in C.C.'s life. (*Id.* at p. 428.) For example, the magistrate court found that Charles intends to remain in Pocatello, he has a full-time faculty position at Idaho State University, he is purchasing the home that he has been renting in Pocatello, and the home is three blocks from an elementary school. (*Id.* at p. 393 ¶ 16.) C.C.'s maternal grandparents also visited C.C. frequently in Pocatello before the parties separated. (*Id.* at p. 400 ¶ 34.)

The facts support the magistrate court's conclusion that the promise of stability in Reno "does not outweigh the reality that the child will be in a stable known environment in Pocatello, Idaho, a place C.C. knows as home." (*Id.* at p. 428.) For example, Charles testified that Pocatello is the only community C.C. has really known. (Tr., Vol. II, p. 243, L. 23-25.) Charles also testified that C.C. was two or three weeks old when he moved to Pocatello, and he lived there for three years. (*Id.* at L. 24-25.) Additionally, Charles testified that he and C.C. have a lot of friends and support in Pocatello. (*Id.* at L. 25.) C.C. also has a long-time day care provider in Pocatello. (*Id.* at p. 244, L. 1-3.)

In contrast, Tracy's testimony cast doubt on the stability of her potential living situation in Reno. For example, Tracy testified that she was offered a position in Reno during the trial. (Tr., Vol. III, p. 594, L. 9, 17-19.) However, Tracy had no firm plans regarding when she was going to

move to Reno. (Tr., Vol. II, p. 244, L. 17-18.) Instead, Tracy testified that she did not intend to finalize her plans until the divorce is resolved. (Tr., Vol. I, p. 62, L. 6-7; Tr., Vol. I, p. 94, L. 10-12; Tr., Vol. I, p. 135, L. 2-3.) Tracy also testified that she argues with her sister-in-law in Reno, and she is not close with her cousins in Carson City. (Tr., Vol. I, p. 56, L. 12-24.) Tracy testified that she has not seen her family in Carson City for years and they do not know C.C. (*Id.* at L. 4-7.) Thus, the magistrate court's factual findings were not clearly erroneous because C.C.'s potential living arrangements in Reno were unknown.

The Sacrifices Charles Made by Returning to Pocatello from Moscow

The magistrate court also considered the sacrifices that Charles made when he gave up his job in Moscow and moved to Pocatello. (R., Vol. III, p. 419.) The magistrate court found that Charles sacrificed financially to be a part of C.C.'s life. (*Id.* at p. 401 ¶ 39; R., Vol. III, p. 419.) Specifically, the magistrate court found that Charles made the move to Pocatello to "improve his access to and his ability to spend time with C.C." (R., Vol. III, p. 419.) The magistrate court also concluded that the alternative custody arrangements were proper in light of the efforts Charles has made to be the primary caregiver and to establish routines. (*Id.* at p. 423.) Similar to the father in *Dymitro*, this factor is relevant because it demonstrates Charles's commitment to putting C.C.'s needs above his own. Thus, this was a proper factor for the magistrate court to consider in light of Tracy's desire to move C.C. further away from Charles because one parent should not have to make all of the sacrifices to make co-parenting possible.

The magistrate court's findings are supported by substantial evidence. For example, Charles testified that he had to repay the signing bonus that he received to work at Moscow Family Medicine. (Tr., Vol. II, p. 255, L. 3-5.) Charles also testified that he gave up student loan forgiveness in the amount of $30,000.00 per year because he no longer qualified since he did not work at Moscow Family Medicine. (Tr., Vol. II, p. 257, L. 17-20.) Additionally, Charles testified that he was willing to pay more child support than was required if Tracy were to move to Pocatello. (*Id.* at p. 244, L. 5-8.) In contrast, Tracy's objection to the magistrate court's decisions focuses more on her best interests and whether she was going to be happy. (Appellant Br. 34 ("The song titled 'When Mama Ain't Happy, Ain't Nobody Happy' is an appropriate description of the effects of the magistrate's decision.").) Accordingly, the magistrate court's factual findings are not clearly erroneous because they are supported by substantial evidence.

C. The Magistrate Court Reached its Decision Through an Exercise of Reason

The magistrate court had a difficult decision to make in this case because both parents sought physical custody of C.C. during the school year beginning August 2012. The magistrate court concluded that "[b]oth parents have good, loving, nurturing relationships with their child that needs to be fostered and maintained." (R., Vol. III, p. 425.) The magistrate court also concluded that "C.C. does reasonably well in the care of both of his parents." (*Id.*) Additionally, the magistrate court realized that both parents' relationships with C.C. would likely be harmed if they both did not live in Pocatello. (*Id.* at p. 420.) Thus, it was reasonable for the magistrate court to conclude that "it is

in the best interests of the minor child to remain in Idaho under a shared custody arrangement with both of his parents." (*Id.* at p. 418.) It was also reasonable for the magistrate court to conclude that it would be in C.C.'s "best interests to have both parents living in near-by communities which would allow C.C. frequent contact and the opportunity to maintain healthy bonds and relationships with both parents." (*Id.* at p. 420.) However, the magistrate court had to consider alternative custody arrangements because Tracy expressed her desire and intention to move to Reno, and the magistrate court could not limit where Tracy may reside. (*Id.*) Thus, the magistrate court had to decide whether C.C. should reside in Pocatello or Reno and, unfortunately, one party was likely to be disappointed with the magistrate court's decision.

The magistrate court's findings indicate that the court's decision was an exercise in reason in light of these difficult circumstances. For example, the magistrate court considered the distance between the parties in making its custody determination. (*Id.* at pp. 419, 425.) However, the magistrate court tried to mitigate the effects of the distance by providing multiple alternatives if Tracy returned to Pocatello at different times in the future. (*Id.* at p. 420.)

It was also reasonable for the Court to conclude that if Tracy remained in Reno, then Charles should have custody for seventy-five percent (75%) of the time because of the logistical difficulties involved with frequent travel between Pocatello and Reno and the impact frequent travel would have on C.C. (*Id.* at pp. 421-22.) Tracy even acknowledged that she and C.C. do not like to sit still, so they do not do well in cars. (Tr., Vol. III, p. 602, L. 3-5.) Thus, some form of unequal custody arrangement was necessary because it was simply not possible for the parties to exercise equal

parenting time so long as Tracy resides in Reno and Charles resides in Pocatello. There is no dispute that the child needs to reside primarily in one community because he begins school in August of 2012.

Furthermore, it was also reasonable for the magistrate court to award more custody time to Tracy if she returned to Pocatello sooner rather than later. The magistrate court awarded Tracy with sixty-five percent (65%) of the custody time if she returned to Pocatello before January 15, 2012. (R., Vol. III, p. 422.) Obviously, joint custody would be possible if both parties resided in or near Pocatello. However, the magistrate court considered how a change in custody would impact C.C. if Tracy returned to Pocatello, and the court concluded that it would be difficult for C.C. to switch from living primarily with Tracy after becoming settled with Charles for more than five months. (*Id.* at p. 423.) As the magistrate court noted, "the longer she is apart from C.C., the more difficult transition will likely be for the child to an equal shared custody arrangement." (*Id.* at p. 423-24.) Thus, the magistrate concluded that an equal fifty percent (50%) custody was in C.C.'s best interests if Tracy returned after five months. (*Id.* at p. 423.)

Consequently, it was reasonable for the magistrate court to limit the alternative custody arrangements for up to one year in the future. (*Id.*) Once again, the magistrate court concluded that it would not be in C.C.'s best interest to change custody schedules after one year without showing that a substantial and material change of circumstances has occurred. (*Id.*) Otherwise, C.C.'s life would be not be stable if the custody schedule automatically reverted so C.C. would live primarily with Tracy if she returned to Pocatello at any time in the future. As the magistrate court stated,

"[t]he child's daily routines will be established and the continuity and stability of his life disrupted if the mother can return whenever she wants after a year and demand equal shared custody." (*Id.* at p. 424.) A court does not have to consider endless alternatives when it awards custody to one parent if the other parent chooses to move because the parties can seek a modification in the future if there is a substantial and material change of circumstances. *Ziegler*, 107 Idaho at 535, 691 P.2d at 781. Accordingly, the magistrate court's custody award was reasonable under the circumstances before the court.

Tracy's argument that the magistrate court intended to punish Tracy for wanting to move to Reno is unfounded. In considering whether a trial court's decision punishes a parent, the relevant issues are whether a parent's conduct is detrimental to a child, and whether the custody award is in the best interest of a child. *In re Doe*, 149 Idaho at 672, 237 P.2d at 777. As stated above, the magistrate court found that it was in C.C.'s best interest to reside in Pocatello because of concerns that Tracy was not willing to share C.C. with Charles, and concerns about Tracy's motives for moving to Reno. However, the magistrate court has a responsibility to do what is necessary and proper to promote C.C.'s best interests, even at the expense of Tracy's desire not to reside in Pocatello. Thus, the magistrate court had no choice but to award custody in such a way that would allow C.C. to reside in Pocatello since that is what the court found was in C.C.'s best interests.

There is also no evidence the magistrate's order was intended to punish Tracy for wanting to move to Reno. To the contrary, the magistrate court specifically stated "[t]he court does not and will not fault the mother for moving to improve her life, to increase her happiness by bringing her

closer to her family, and to advance her career opportunities." (R., Vol. III, p. 433.) The magistrate court also indicated that it did not matter who was at fault for the living arrangements leading up to the court's decision. (*Id.* at p. 420.) More importantly, the magistrate court rejected Charles's proposed custody arrangement for C.C. wherein the parties would share custody equally until C.C. started school in August of 2012 because the court did not believe it was in C.C.'s best interests due to the frequent travel over long distances. (*Id.* at p. 421.) Accordingly, despite Tracy's disinterest in residing in Pocatello, C.C.'s best interests was the magistrate court's paramount concern.

III. THE CUSTODY ORDER PROHIBITING C.C. FROM MOVING TO RENO WITH TRACY DID NOT VIOLATE TRACY'S RIGHT TO TRAVEL BECAUSE IT IS IN C.C.'S BEST INTERESTS TO RESIDE IN POCATELLO

The law regarding the conflict between the best interests of a child and a parent's right to travel is well settled in Idaho. *See, e.g., Bartosz*, 146 Idaho 449, 197 P.3d 310; *Dymitro*, 129 Idaho 527, 927 P.2d 917; *Ziegler* , 107 Idaho 527, 691 P.2d 773; *Roberts*, 138 Idaho 401, 64 P.3d 327; *Weiland*, 139 Idaho 122, 75 P.3d 176. A child's best interest is a compelling state interest that will justify infringing on a parent's ability to travel when such infringement is the least restrictive alternative. *Bartosz*, 146 Idaho at 462, 197 P.3d at 323. Accordingly, a trial court does not improperly interfere with a custodial parent's right to travel when the court orders custody to revert to a non-moving parent when it is in the child's best interest. *Id.*, 197 P.3d at 323.

The relevant facts in *Bartosz*, *Weiland*, *Roberts*, *Dymitro*, and *Ziegler* are substantially the same as the facts in this case. For example, in *Bartosz*, a mother who had been the primary caregiver

filed a petition to modify custody because she wanted to move with the child to Hawaii. *Id.* at 454, 197 P.3d at 315. The trial court found that it was in the child's best interest to remain in Idaho where his father resided. *Id.*, 197 P.3d at 315. The trial court awarded primary physical custody to the mother so long as she remained in Idaho, but primary custody would revert to the father if the mother moved to Hawaii. *Id.*, 197 P.3d at 315. This Court held that the custody order did not improperly restrict the mother's right to travel because the best interest of the child was a compelling state interest. *Id.* at 464, 197 P.3d at 325. Additionally, this Court held that restricting where the child resides was the least restrictive alternative because the mother could still travel outside the state temporarily as long as it did not interfere with the father's custody time, and the mother could move from Idaho if she chose to give up primary custody. *Id.*, 197 P.3d at 325.

In this case, the magistrate court's decision did not improperly infringe upon Tracy's right to travel. Tracy's right to travel freely is implicated by the magistrate court's decision because it requires C.C. to remain in Pocatello. Nonetheless, any limitation the magistrate court's decision placed on Tracy's ability to travel is justified because, as discussed above, the court found it is in C.C's best interests to remain living near Charles in Pocatello. Similar to the alternative custody orders in *Bartosz*, the magistrate's decision provides the least restrictive infringement on Tracy's right to travel because it does not prevent Tracy from living anywhere, and it does not prevent Tracy from temporarily traveling outside of Idaho with C.C. Additionally, allowing Tracy to move C.C. to Reno would similarly infringe on Charles's fundamental right to maintain a relationship with C.C. *See Doe v. Dept. of Health & Welfare*, 137 Idaho 758, 760, 58 P.3d 341, 343 (2002) ("[A] parent has

a fundamental liberty interest in maintaining a relationship with his or her child.") (alterations added). The magistrate court considered these competing interests in its decisions. (R., Vol. III. p. 433.) Thus, since C.C. has to live somewhere, the magistrate court used the least restrictive alternative to promote C.C.'s best interests when it ordered that C.C. will reside primarily in Pocatello.

Tracy's argument that the magistrate court's decision improperly infringed on her right to travel because it essentially ordered her to reside in Pocatello has no merit. Tracy cited *Allbright v. Allbright*, 147 Idaho 752, 215 P.3d 472 (2009), to support her argument. However, *Allbright* is distinguishable from this case, and the other relocation cases cited above, because the trial court in *Allbright* specifically ordered the mother to reside near the child. *Id.* at 753, 215 P.3d at 473. In contrast, in this case the magistrate court did not limit where Tracy can reside. (R., Vol. III, p. 433.) Tracy even acknowledged that "the magistrate court did not expressly order that Tracy could not continue to live in Nevada." (Appellant Br. 31.) Accordingly, the magistrate court did not improperly infringe on Tracy's right to travel by choosing one of two possible locations where C.C. will reside.

IV. CHARLES IS ENTITLED TO AN AWARD OF ATTORNEY FEES PURSUANT TO IDAHO CODE § 12-121 AND RULE 41 OF THE IDAHO APPELLATE RULES BECAUSE TRACY'S APPEAL WAS BROUGHT FRIVOLOUSLY, UNREASONABLY AND WITHOUT FOUNDATION

Under Idaho Code § 12-121 and Rule 41 of the Idaho Appellate Rules, a prevailing party is entitled to an award of attorney fees when the appeal was brought or pursued frivolously,

unreasonably, or without foundation. *Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 145 Idaho 208, 218-19, 177 P.3d 955, 965-66 (2008). An appeal of a divorce proceeding is brought without foundation when the appealing party merely "disputed the trial court's factual findings by pointing to conflicts in the evidence." *Krebs v. Krebs*, 114 Idaho 571, 576, 759 P.2d 77, 82 (Idaho App. 1988). "An appeal should do more than invite the appellate court to second-guess the trial court on conflicting evidence." *Id.*, 759 P.2d at 82. Additionally, a prevailing party is entitled to attorney fees when "the law in the area is well-settled, and [the appealing party] has made no substantial showing that the district court misapplied the law." *Blaser v. Cameron*, 121 Idaho 1012, 1018, 829 P.2d 1361, 1367 (Idaho App. 1991) (alterations added).

In this case, Charles is entitled to an award of attorney fees because Tracy's appeal was brought frivolously, unreasonably, and without foundation. Although there is currently a debate regarding the reliability of custody evaluator recommendations, Tracy's appeal of the magistrate court's decision to exclude Dr. Vereen's testimony is frivolous and unreasonable in this case. First, Tracy never properly preserved the issue for appeal because she did not make an offer of proof of the testimony that she intended to elicit from Dr. Vereen. The magistrate court even recommended that Tracy provide an offer of proof on two occasions. (Tr., Vol. III, p. 424, L. 6-7; Tr. Vol. III, p. 435, L. 23-25.) Additionally, Dr. Vereen's recommendation was before the magistrate court during the trial through testimony and a verbatim reading of the significant portions of his unredacted report during oral argument. (Tr. Vol. I, p. 42, L. 4-8, 19-20; Tr. Vol. I, p. 43, L. 2-24; Tr. Vol. III, pp. 377-

78, L. 10-25, 1-4.) Thus, Tracy had no reasonable basis for appealing the magistrate court's decision because any error the court committed was obviously harmless.

Tracy's appeal of the magistrate court's custody decision was also frivolous because she merely asked this Court to second-guess the magistrate court's factual findings. Tracy's only claim of error was to point to conflicts in the evidence. For example, Tracy challenged the magistrate court's finding that she did not deliberately intend to move to Reno to create difficulties for Charles. (Appellant Br. 33.) However, as the Idaho Court of Appeals has stated, "[w]hen a trial court's findings are supported by substantial evidence, the mere existence of other conflicting evidence does not establish that the findings are clearly erroneous." *Krebs*, 114 Idaho at 576, 759 P.2d at 77. Additionally, the factors the magistrate court considered were well supported by extensive case law involving similar circumstances. Thus, Tracy did not make a clear showing of error, so the Court had no reason to "invade the trial court's domain." *Id.*, 759 P.2d at 77.

Furthermore, Tracy's claim that the magistrate court improperly infringed upon her right to travel is unfounded because the law in that area is well-settled. The only authority that Tracy cited to support her claim was *Allbright*. (Appellant Br. 29-31.) However, *Allbright* was clearly distinguishable from this case because the magistrate court did not order Tracy to reside near C.C. To the contrary, the magistrate court specifically found that it could not order where Tracy may reside. (R., Vol. III, p. 420, 433.) Thus, the magistrate court's decision was well supported by extensive case law that deals with the right to travel in similar circumstances.

Lastly, Tracy is not entitled to an award of attorney fees because she failed to provide any argument for why she is entitled to attorney fees. An appellate court "will not consider a request for attorney fees on appeal that is not supported by legal authority or argument." *Capps v. FIA Card Services, N.A.*, 149 Idaho 737, 745, 240 P.3d 583, 591 (2010). Merely citing to a statute that authorizes attorney fees is insufficient to support a claim for attorney fees. *Id.* at 746, 240 P.3d at 592. Additionally, an original award for attorney fees under Idaho Code § 32-704 is only available "upon a showing that such action is necessary to the exercise of appellate jurisdiction." *Stewart v. Stewart*, 143 Idaho 673, 681, 152 P.3d 544, 552 (2007). "It is the policy of this Court, however, to leave the award of attorney fees to the trial court . . .." *Id.*, 152 P.3d at 552. Thus, claims for attorney fees under Idaho Code § 32-704 should generally be submitted to the trial court. *Olson v. Montoya*, 147 Idaho 833, 839, 215 P.3d 553, 559 (Idaho App. 2009)

The only statement that Tracy provided in support of an award of attorney fees was "Tracy Clair has been required to appeal the magistrate court's decision and therefore request (sic.) attorney fees on appeal pursuant to I.C. 32-704." (Appellant Br. 45.) However, Tracy has pursued this appeal so far without an order from the magistrate court awarding her attorney fees under Idaho Code § 32-704. Accordingly, Tracy is not entitled to an award of attorney fees because she did not support her request with any argument to show why an award of attorney fees was necessary for the Court to exercise its appellate jurisdiction. *See Olson v. Montoya*, 147 Idaho at 839, 215 P.3d at 559. Accordingly, Charles is entitled to an award of attorney fees pursuant to Idaho Code § 12-121 and Rule 41 of the Idaho Appellate Rules.

CONCLUSION

For the reasons outlined above, the Respondent respectfully requests that the Court affirm the magistrate court's decision and award him costs and attorney fees.

DATED this 27th day of February, 2012.

Frederick F. Belzer

Thomas D. Smith

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 27th day of February, 2012, I caused a true and correct copy of the forgoing, by hand delivery, in accordance with Idaho Rules of Civil Procedure, to the following person:

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