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Clair v. Clair Appellant's Reply Brief Dckt. 39188

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

APPELLANT'S REPLY BRIEF

Appeal from the Magistrate Court of the Sixth Judicial District for Bannock County.

HONORABLE RICK CARNAROLI, Magistrate Judge, Presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

OTHER CITATIONS Page(s)

I.
STATEMENT OF THE CASE

The nature of the case and course of proceedings have been set forth in Appellants' Brief filed by Tracy Clair. Respondent, Charles Clair, has submitted his version of the nature of the case and course of proceedings in Respondent's Brief. Facts relevant to matters addressed in Respondent's Brief are set forth below.

In its Second Amended Judgment and Decree of Divorce, the magistrate court ordered a fixed physical custody arrangement based on Tracy living in Reno, Nevada, in a state other than Idaho, or in a community twenty-five (25) miles or more distant from Pocatello, Idaho and Charles living in Pocatello, Idaho. R., Vol. III, p. 478. The custody schedule provided that Tracy have Thanksgiving holiday in odd years, consisting of the Friday prior to Thanksgiving Day until the Friday that follows Thanksgiving Day. R., Vol. III, p. 479. Nothing in the Judgment addressed that fact when C.C attended school, he would most likely be required to attend school until the day before Thanksgiving, thus eliminating up to five days of Tracy's allotted time.

The custody schedule also provided that Tracy have the first portion of Christmas vacation in even-numbered years, and the second portion in odd numbered years, with the first portion staring on the day the child is released from school and ending on December 27 and the second portion staring on December 27 and ending on the day prior to when the child is to return to school. R., Vol. III, p. 479. Tracy was given every spring break from the day the child is

released from school until the Friday prior to the day the child returns to school. R., Vol. III, p 480. Thus, Tracy was only given an abbreviated Thanksgiving schedule and a portion of Christmas break, with no other holidays. Tracy was given no time with C.C. on Mother's Day, C.C.'s birthday on [redacted] or Tracy's birthday on [redacted]

II.

ADDITIONAL ISSUES PRESENTED ON APPEAL

Respondent's request for attorney fees and costs on appeal under Idaho Code §12-121 must be denied.

III.
ARGUMENT

STANDARD OF REVIEW

A. Respondent Incorrectly Asserts that Appellant Failed to Preserve Her Objection as to the Custody Schedule Recommended by Dr. Vereen.

Respondent has argued that Tracy Clair is barred from objecting to the magistrate's decision to exclude Dr. Vereen's testimony regarding a custody schedule because she failed to preserve the objection of Appeal. Respondent's Brief, p. 9. The trial record and Idaho legal authority, including case law and the Idaho Rules of Evidence clearly show this argument to be without merit.

Rule 103(b) of the Idaho Rules of Evidence provides as follows:

> (b) Record of offer and ruling. The Court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in

> question and answer form. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, **unless it clearly appears that the evidence is not admissible on any ground** or that the witness is privileged (emphasis added).

The following statements made by Judge Carnaroli made it explicitly clear that Dr. Vereen's recommended custody schedule **was not** going to come into evidence:

> We're in an area where we don't have a Supreme Court opinion on child custody evaluations and the foundation required to get those opinions in. We just don't have one in Idaho . . . .
>
> * * *
>
> It's not Dr. Vereen, it's that I don't have enough foundation to tell me that there is anyone on the planet who can render an expert opinion on what is in the best interest of a child or what a particular child custody and visitation should be based on the foundation I have. That would apply Dr. Lindsey, Steve Bezdeka, Virginia Allen or anybody else that would come in here. I'm just not sure that the state of counseling and psychology and child development, that whole conglomeration of disciplines that would look at a child and what's in the child's best interest from one stand point or another could come together and come up with a way, a formula by which to say, "So many days in one house. So many days in another," or what is in the global best interest of the child under a statute like Idaho has. So, based on the foundation we have so far, I can't get there from here.

Tr. p. 436, ll. 1 – 3, 21 – 25, p. 437, ll. 1 – 6.

In this case, it clearly appeared that Judge Carnaroli was not going to admit Dr. Vereen's testimony as to the ultimate custody issue **under any grounds**, and specifically, under I.R.E. 702.[1] There was absolutely no basis under I.R.E. 103(b) for Tracy's counsel to make an offer of proof, because Judge Carnaroli clearly and plainly ruled that the specific type of testimony,

[1] Tracy's counsel attempted to have the evidence of Dr. Vereen's recommended custody schedule admitted under I.R.E. Rules 701 and 704. Tr. p. 433, ll. 9-25. Judge Carnaroli rejected such argument. Tr. p. 435, ll. 3-18, 20-25, p. 436, 1-14, 18-25, p. 437, 1-6.

namely custody recommendations, would not be admitted. With the type of evidence precluded, an offer of proof as to the details of such evidence was not required. In sum, the requirements of I.R.E. 103 were met. Because the evidence was deemed inadmissible under any grounds, offer of proof was not required.

Charles cites to *State v. Young*, 136 Idaho 113, 120, 29 P.3d 949, 956 (2001) and *Morris v. Thomson*, 130 Idaho 138, 143, 937 P.2d 1212, 1217 (1997) for the proposition that an objection to a ruling to exclude evidence is not preserved for appeal without an offer of proof because the review court has no basis upon which to rule. Respondent's Brief, p. 7. In *State v. Young*, Edward Young asked the district court to exclude evidence of three contacts he had with his adopted daughter. The *Young* Court noted that neither Young nor the State argued or mentioned these incidents during the hearing on the motions in limine. The Young Court cited *Morris v. Thomson* and concluded, "absent an offer of proof **or** anything in the record showing that any of these contacts are relevant, the State has not preserved this issue for appeal"(emphasis added). *State v. Young,* 136 Idaho at 120, 29 P.3d at 956, citing *Morris* 130 Idaho 138, 937 P.2d 1212 (1997).

The facts in the case at hand are totally inapposite to the facts in *State v. Young*. Charles himself has pointed out in Respondent's Brief that his counsel "restated the significant portion of Dr. Vereen's custody recommendation verbatim during oral arguments before Dr. Vereen testified." Respondent's Brief, p. 10. The substance of Dr. Vereen's custody recommendations were at the heart of a lengthy debate before the trial court. Substantial discussions at trial

pertaining to the relevance and the admission of Dr. Vereen's custody recommendations certainly satisfy the requirements of *State v. Young* for the preservation of the appeal.

Even if this Court were to require a basis upon which the Court could rule regarding the exclusion of custody recommendation evidence in this case, that basis is readily apparent in the record. "To preserve error on a ruling excluding evidence the substance of the evidence must either be made known to the trial court by offer of proof, **or** must be apparent from the context in which questions were asked (emphasis added)." Craig E. Lewis, *Idaho Trial Handbook*, Lawyers Cooperative Publishing, 1995, §26.11, p. 297, citing I.R.E. 103(a)(2) and 103(b). Charles' counsel did indeed read into the trial court record Dr. Vereen's custody recommendations as follows:

> The parties should institute a parenting time plan that has the child in the care of Ms. Clair for four consecutive seeks followed by 2.5 consecutive weeks with Mr. Clair. This arrangement would allow the minor child consistent access to both parents on a regular basis and increase the opportunity for continuity and stability. The parties should focus on developing a parenting time arrangement that allows each party the opportunity for liberal time with the child.
>
> * * *
>
> Therefore, transitioning to a more shared model of parenting time should be considered as the child matures. While it would be advantageous for all parties involved to have parent/child contact occur with more regularity and less time between parenting opportunities the distance between homes and the travel involved would begin to strain both parties and has the potential for a negative impact on the minor child.
>
> Tr. p. 377, 17-23, 25, p. 378, ll. 1-4.

Furthermore, Tracy Clair testified regarding Dr. Vereen's recommendations as follows:

Q: I want to avoid getting into negotiations between the two lawyers, but just tell me today, do you have an opinion of what would be best for Colten?
A: Yes, My opinion is, I believe in Dr. Vereen's statement of the 65/35 custody split.

* * *

Q: Okay, but Dr. Vereen, in fact, proposed four weeks for you and two and a half weeks for Charles.
A: I guess so.
Q: Have you read his report?
A: Yes, I have.
Q: Is that what it says in the report?
A: Yes, it is.

Tr. p. 42, ll. 16-20, p. 43, ll. 20-25, p. 44, ll. 1.

The substance of Dr. Vereen's custody recommendations was certainly made apparent to the trial court through the testimony of Tracy Clair and the arguments of Charles' counsel in the trial record. Therefore, the substance of Dr. Vereen's recommendations were made very apparent in the court record and Charles' assertion that Tracy's objection was not preserved on appeal has no support in law or fact.

Charles argues 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. Respondent's Brief, p. 1, citing Tr., p. 8, ll. 6-9 (Sept. 7, 2011). This argument misstates the actual dicta provided by Judge Carnaroli, nearly two months after the trial, which reads as follows:

> Might have been more expeditious for your clients if I had allowed [Dr. Vereen's recommendations] in and done what I normally do, which is exactly what I did, I make up my own mind. I consider the experts opinion for what it's worth and

then make my own decision, which is what I did with or without the written report and the testimony in this one could have saved you an appellate issue.

Tr., p. 8, ll. 6-9 (Sept. 7, 2011).

It should first be noted that the last statement above is not even a properly structured sentence. It appears that Judge Carnaroli is suggesting that it would have been more expeditious for the parties if he had just let the opinions in because his procedures are consistent; he considers the opinions and then makes his own decision. The statements cannot be construed as a ruling by the magistrate court that Dr. Vereen's recommendations were irrelevant because the court would have reached the same conclusion without any opinions or testimony from Dr. Vereen. The vague dicta cited by Charles simply cannot be twisted to arrive at such a conclusion.

The fact of the matter is that on January 19, 2011, the magistrate court ordered that a custody evaluation be performed by Linwood Vereen, Ph.D. to determine the best custody arrangements of parties' minor child. It simply makes no sense for the magistrate court to order that custody arrangements be determined and then rule that such opinions are irrelevant. On the other hand, if the magistrate actually ruled that Dr. Vereen's opinions were irrelevant, as Charles claims, such finding would serve to doubly establish an abuse of discretion on the part of the magistrate in light of the court's January 19, 2011 Order.

Charles claims that 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 cumulative

due to the fact that his custody recommendations were already before the court through testimony. Respondent's Brief, p. 10. Again, this argument is misplaced. Tracy testified as to what she understood Dr. Vereen's custody recommendations were, but she did not testify as an expert on behalf of Dr. Vereen. Furthermore, Charles' counsel's recitation of Dr. Vereen's recommendations was included in argument and was not admitted as evidence. While Tracy's testimony and Charles' counsel's arguments provided the court with the basis of what Dr. Vereen's testimony was going to be, such statements were not admitted into evidence as opinion testimony under I.R.E. Rule 702. Given that Charles did not stipulate to the entry of Dr. Vereen's recommendations, only Dr. Vereen himself could have provided such opinions to the magistrate court for purposes of admission, pursuant to Rule 702.

Finally, Charles claims that the exclusion of Dr. Vereen's custody recommendation were was harmless because the magistrate followed Judge Vereen's recommendation by awarding 65% of custody if Tracy returned to Pocatello. Respondent's Brief, p. 10. This argument blatantly ignores the fact that Dr. Vereen never recommended less than 25% custody for Tracy if she didn't return to Pocatello.

B. The Magistrate Court Did Abuse its Discretion When it Excluded Dr. Vereen's Recommended Custody Schedule.

As Charles correctly points out, the magistrate court concluded that neither Dr. Vereen, nor any child custody evaluator could reliability determine what custody schedule is in the best interest of a child. Respondent's Brief, p. 14. Indeed, Judge Carnaroli stated:

> . . . there's really no standards out there in the field, you know, that [Vereen] can follow some formula to say two weeks in or two weeks in one week out is superior to one or the other because there's no empirical studies to back those kind of judgment calls being made up.
>
> Tr. p. 432, ll. 16-18.

Charles subsequently argues that "the magistrate court demonstrated that its decision to limit Dr. Vereen's testimony to matters regarding child development was an exercise in reason." Respondent's Brief, p. 17. Charles seems to selectively ignore the fact that he stipulated and agreed that a custody evaluation should be performed by Dr. Vereen for the purposes of determining the best custody arrangements for the parties' minor child. R., Vol. I, p. 71. If Charles truly concurred with the reasons behind Judge Carnaroli's exclusion of the custody recommendations, the question arises as to why he ever stipulated to allow Dr. Vereen to determine custody arrangements in the first place. Certainly, if custody determinations are unreliable for trial purposes, they should be equally unreliable for settlement purposes.

Charles cannot deny that the magistrate ordered Dr. Vereen to perform a custody evaluation to determine the best custody arrangements for the parties' minor child. R., Vol. I, p. 72. The magistrate court's abuse of discretion lies in that fact that the magistrate excluded the custody recommendation testimony based on the unreliability of the opinions rendered by disciplines assessing children's best interests after implicitly approving of the reliability of such disciplines and anticipated recommendations espoused by Dr. Vereen through its January 2011 order.

There is little purpose in a party stipulating to a custody evaluation if the evaluator's opinion simply will not be admissible in court under any circumstance. Simply put, if the custody evaluator's custody recommendations are of no importance to a court once made, then the court should not be communicating to the parties through an order that the evaluator's recommendations are of significance and may be relied upon. The contradictory positions taken by Charles and the Court diminished the validity of the Stipulation and Order and affected Tracy's substantial rights to have the recommendations considered by the Court.

Charles claims that "Tracy has 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." Respondent's Brief, p. 18. The fact is that Charles has not cited to any reported decision in the State of Idaho which addresses the admissibility of expert testimony for purposes of determining child custody arrangements.

Tracy has not argued that expert custody opinions are exempt from the requirements of Rule 702. Rather, Tracy asserts that there is no Idaho case authority which mandates the criteria and reliability standards under Rule 702 which the magistrate court required in the divorce/custody context. Charles relies upon *State v. Konechny*, 134 Idaho 410, 419-20, 3 P3d 535, 544-45 (Ct. App. 2000) for the premise that reliability requirements under I.R.E. 702 apply to methods that rely upon psychological knowledge. Respondent's Brief, p. 12. A close review of *Konechny*, however, reveals that this premise is certainly not as expansive as Charles asserts.

The *Konechny* Court found that the "Idaho Supreme Court has not defined a particular line of inquiry to determine whether sufficient indicia of reliability have been shown for admission of an expert's testimony, but instead has applied I.R.E. 702 on a case-by-case basis." *Konechny*, 134 Idaho at 417, 3 P3d at 542.

Konechny establishes that the standards enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) for determining the admissibility of expert testimony have not been adopted by the Idaho Supreme Court, *Daubert*-like approaches have been utilized to address a challenge to expert testimony. *Konechny*, 134 Idaho at 417-418, 3 P3d at 542-543. The *Konechny* Court discussed *State v. Merwin*, 131 Idaho 642, 962 P.2d 1026 (1998), which addressed the admissibility of expert testimony on pediatric head trauma. The *Konechny* Court found that the indicia of reliability identified in *Merwin* "included the close oversight and observation of the test subjects, the prospectivity and goal of the studies, and the subjection of the results to peer review." *Konechny*, 134 Idaho at 417, 418, 3 P3d at 542, 543.

The *Konechny* Court then discussed the challenge to expert testimony in *State v. Parkinson*, 128 Idaho 29, 909 P.2d 647 (Ct. App. 1996), involving the defendant's offer of expert testimony that he did not fit the psychological profile of a sexual offender. The *Konechny* Court found that in determining the reliability of the profile utilized by the defense expert, the *Parkinson* Court "looked for the foundational information about the individual characteristics and components that made up the profile, some description of the methodology by which the

profile was derived, how the profiling technique had been tested, some information about the accuracy of the profile in distinguishing between offenders and non-offenders, and evidence of the degree of acceptance of the profiling and assessment technique in the professional community." *Konechny*, 134 Idaho at 418, 3 P3d at 543.

The *Konechny* Court then found that in the context of a mental health professional's testimony that sexual abuse has occurred, the indicia of reliability standard requires a showing that the opinion was derived through application of some reliable methodology, that is a methodology that is reasonably accurate in distinguishing between children who have been sexually abused and those who have not." The *Konechny* Court also found that indicia of reliability standard in that case required that the expert bring to bear a level of skill or a scientific or technical approach that is beyond the scope of the average juror. *Id.*

Merwin, *Parkinson* and *Konechny* all demonstrate that the indicia of reliability standards utilized in addressing the admission of expert testimony under Rule 702 are crafted to assess the reliability of specific type of expert testimony sought to be admitted. Therefore, it is not reasonable to suggest that the indicia of reliability standards utilized in *Konechny* to determine the admissibility of a mental health professional's testimony regarding sexual abuse are relevant in a divorce/custody case where there are no allegations of abuse.

Testimony offered by experts on the best interests of a particular child has been considered to fall into a hybrid category, a mixture of science and opinion, to which the *Daubert* standard appears to control admissibility. Daniel A. Krauss and Bruce D. Sales, *The Problem of*

"Helpfulness" in Applying Daubert to Expert Testimony: Child Custody Determinations in Family Law as an Exemplar, American Psychological Association, March, 1999, 5 Psyc. Pub. Pol. and L. at 88. Kraus and Sales indicated that "when psychologists offer expert testimony on the bests interests of a particular child, "they are truly offering hybrid expert testimony, which is based partially on scientific research and partially on their less than scientific opinion." *Id.* at 89. Kraus and Sales then conclude that "the reliability, relevance, and helpfulness of this testimony are critical in determining its admissibility under Daubert."

In concluding that there was no child custody evaluator on earth, at this point in time, that could satisfy the requirements of Rule 702, the magistrate court failed to recognize the validity of the hybrid nature of the expert testimony which necessarily combined science and opinion. The magistrate attempted to assess the admissibility of Dr. Vereen's opinions by shoving the square peg of science and opinion into the round hole which will not accept less than scientific opinion. The problem lies in the fact that there is no Idaho case law which mandates that the "hole" of reliability standards automatically treat unscientific opinion as having no value.

Indeed, it appears from *Merwin*, *Parkinson* and *Konechny,* that this Court would have trial courts craft reliability standards for the admissibility of custody opinions which do not reject less than scientific opinions, but rather determine whether the opinion is derived from reliable methodology based on current status and development of methodology utilized by the various disciplines assessing the best interests of the child.

In this case, the magistrate court abused its discretion by utilizing indicia of reliability standards which do not accept or account for less than scientific opinions. If the court had crafted reliability standards which accepted the current development of methodology for assessing custody, the court would have admitted Dr. Vereen's custody arrangement opinions testimony. Dr. Vereen clearly and undisputedly established that the methodology which he utilized to arrive at his custody recommendations was the same methodology currently utilized in the local community of custody assessment professionals and that his opinions were of the type reasonably rendered and relied upon by experts in his particular field.

Tracy was entitled to have Dr. Vereen's custody opinions at least considered by the magistrate court. The evidence was relevant and was not excluded because Dr. Vereen was unqualified as an expert or failed to satisfy generally accepted foundational requirements for custody opinions. Tracy would have been allowed to enter evidence into the record that a qualified child custody expert had determined the best arrangements of the parties minor child, that the expert had determined that the parties should institute a parenting time plan that had the child in Tracy's care for four consecutive weeks and in Charles' care for 2.5 consecutive weeks, and that the professional had determined that such arrangement would allow the minor child consistent access to both parents on a regular basis and increase the opportunity for continuity and stability. The opinion testimony fully satisfied the requirements of the Court's Order Appointing of Custody Evaluator. It was an abuse of discretion for the court to refuse to hear

testimony to consider the opinions derived from the evaluation for which the expert was appointed.

C. The Trial Record Does Not Support The Magistrate Court's Custody Determinations

An abuse of discretion occurs when the evidence is insufficient to support a magistrate's conclusion that the interests and welfare of the children would be best served by a particular custody award or modification. *Nelson v. Nelson*, 144 Idaho 710, 713, 170 P. 3d 375, 378 (2007). It is also an abuse of discretion for the trial court to over emphasize any one factor. *Schultz v. Schultz,* 145 Idaho 859, 863, 187 P.3d 1234, 1238 (2008). In making its custody orders for the Clairs, the trial court abused its discretion by over emphasizing many factors in a light most favorable to Charles, resulting in biased and prejudiced custody decision against Tracy.

Charles cites *Bartosz v. Jones*, 146 Idaho 449, 453, 197 P.3d 310, 314 (2008) for the premise that 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. Respondent's Brief, p. 23. In *Bartosz*, the minor child was nearly ten years old at the time of trial. *Id.* The parents of the child permanently separated in 2001 and in 2004, the father discovered that the mother had moved to Hawaii with the child. The father filed a petition seeking primary physical custody of the child. The trial court awarded the parents joint legal and physical custody with the mother

having primary physical custody. The trial court prohibited either parent from moving the child's residence outside Ada or Canyon Counties without giving sixty days notice. *Id.*

After the trial court issued its initial custody order, the mother married and wanted to move back to Hawaii because her new husband, a U.S. army officer, had been transferred there. The father filed a petition to modify the original custody order. The mother filed an answer and counterpetition requesting that the court modify the initial order to permit her to move to Hawaii with the parties' minor child. *Id.*

The trial court found that the mother had also interfered with the child's relationship with her father when the mother moved the child to Texas and Hawaii, without informing the father. The *Bartosz* Court found that the trial court's findings relating to the mother's attempts to interfere with the father-daughter relationship were supported by substantial and competent evidence. *Bartosz,* 146 Idaho at 460, 197 P.3d at 321.

The *Bartosz* Court found that the magistrate's weighing of the Idaho Code §32-717 factors was not completely free of problems. *Bartosz,* 146 Idaho at 459, 197 P.3d at 320. The trial court found that the mother's decision to marry was self-serving, gave little regard to impact on the parties' minor child and the child's relationship to her father, and was an "end run" around the trial court's previous restriction against the mother moving. *Id.* The *Bartosz* Court found that the magistrate's findings were unsupported by the evidence and that there was no evidence suggesting that the mother intended to thwart the child's relationship with her father. *Id.*

In the case at hand, the magistrate court further found that, "[Charles] wants to continue to be a part of C.C.'s life rather than excluded by distance and the mother's whims." R., Vol. III, p. 403. The evidence of regarding Tracy's so-called "whims" and alleged unwillingness to share custody in no way compare to the interference exhibited by the mother in *Bartosz.* Furthermore, Tracy did not unilaterally move C.C. out of the state of Idaho, or lie about the reasons she left the state, as was the case with the mother in *Dymitro v. Dymitro*, 129 Idaho 527, 530, 927 P.2d 917, 920 (Ct. App. 1996). Charles certainly was aware of the whereabouts of Tracy and C.C. at all times.

The fact that Tracy wanted to move to Reno to be with family, work where she had previously worked , and further her career in teaching in no way establishes that Tracy wanted to place more distance between C.C.'s father in order to interfere with Charles' visitation. The leap which the magistrate made in order to conclude that Tracy's intended move was further evidence of her unwillingness to share custody, similar to the magistrate's findings in *Bartosz*, was **not** supported by the evidence.

Charles argues that the magistrate could infer that Tracy would likely not cooperate with Charles in sharing custody in part because Tracy only allowed Charles to visit with C.C. only when there was a court order. Respondent's Brief, p. 27. Such requests by Tracy **do not** constitute evidence that Tracy would refuse to cooperate with Charles. There was no custody order in place. Charles had just left Tracy with no job and no home. Tracy was reasonably concerned about the possibility that she would be left without C.C. also. Without a custody

order in place, Tracy had no guarantee that Charles would return CC. If C.C. wasn't returned, Tracy would then have had to file a motion, wait for a hearing date and have it heard.

Charles' decision to leave Tracy resulted in the parties living in different states, more than 700 miles apart. Charles had just taken on a new and demanding job and had moved to an area where C.C. had never lived. With an order, she could call an officer and have it enforced if Charles failed to return [redacted]Orders establishing visitation periods therefore served to ensure Charles' visitation rights, not interfere with them.

Charles also argues that the magistrate's findings of Tracy's unwillingness to share custody were supported in part because Tracy only allowed Charles two periods of court-ordered visitation with C.C. from July 8, 2010 until January 1, 2011. Respondent's Brief, p. 26. This argument may be true to some extent but certainly does not tell the full story. First of all, this is not accurate as Tracy allowed Charles three periods of court-ordered visitation with C.C. from July 8, 2010 until January 1, 2011. R., Vol. I. pp. 22. Charles fails to mention that his first visitation consisted of four days in Ely from July 24 through July 28. Charles also fails to mention that his first visitation in Idaho consisted of sixteen days, from September 11 through September 27, 2010, and that his second visitation period in Idaho consisted of twenty-two days, from December 11, 2010 to January 2, 2011. R., Vol. I, pp. 51 and 69. Regarding Charles' three week visits with C.C., Tracy testified, "I miss him terribly, but you know, he enjoys his dad. He loves what he does with his dad. So I encourage that." Tr., p. 573, ll. 9-11.

For the 124 day period, from September 1, 2010 until January 2, 2010, Charles had C.C. thirty eight (38) days, or 31% of the time. Given that the parties were over 700 miles apart when the majority of the visitation occurred, this amount of visitation is **not** evidence of an unwillingness to share custody on Tracy's part.

Until Tracy moves to within a 25 mile radius of Pocatello, the magistrate's Second Amended Judgment mandates that the parties follow the fixed physical custody arrangement based on Tracy permanently moving from the Pocatello area. R., Vol. III, p. 478. Utilizing this schedule, in 2011, the magistrate court allotted eight days visitation at Thanksgiving, November 18 -25, and six days during Christmas vacation, December 27 – January 2. Thus for the period of September 1, 2011, through January 2, 2012, the magistrate court allotted Tracy a total of 14 days, 11% of 124 day period.

The disparity between the amount of visitation Charles received from September 2010 to January 2011 and the amount of visitation Tracy was allotted from September 2011 to January 2012 aptly illustrates the court's abuse of discretion here. The magistrate court found Tracy to be a good parent. R., Vol. III, p. 427. The court found Tracy to have a good, loving, nurturing relationship with CC that need to be fostered and maintained. R., Vol. III, p. 425. The court awarded her 65% custody if only she would return to Pocatello. R., Vol. III, p. 427.

Ely Nevada is 707 miles from Moscow, Idaho and traveling time between the cities is approximately 11 hours and 33 minutes. Reno is 571 miles from Pocatello and the travelling time is 8 hours and 20 minutes. See http://www.mapquest.com. Given Charles had 31% of

visitation in 2010, it makes no sense that Tracy have only 11% of visitation in 2011 when the distance between the respective houses in 2011 is more than 130 miles less and the travel time is more than three hours less than in 2010.

Nothing in the record indicates that C.C. was required to return to Idaho to attend Grace Lutheran Preschool in the fall of 2011. School requirements did not necessitate his return. Furthermore, the magistrate's opinion that he didn't want C.C. bouncing back and forth and living out of a suitcase/travel bag living out of a suitcase certainly does not mandate a finding that Tracy only have C.C. 14 days out of a 124 day period. R., Vol. III, p. 422.

Granted, C.C. was not familiar with Reno but the magistrate failed to recognize that C.C. was not familiar with Moscow either when Charles moved from Pocatello. The court did not appear to consider any possible negative effects on C.C. in adjusting to Charles' new homes in both Moscow and Pocatello. Tracy planned to start a new job in Reno, but Charles had also started a new job in Moscow when he was given substantial visitation. These facts were apparently of little to no significance to the magistrate.

What does exist in the record is the magistrate court's bias against Tracy and its over-emphasis on Tracy's attempt to alienate C.C. from Charles by moving to Reno. The statements that "[Charles] wants to continue to be a part of C.C.'s life rather than be excluded by distance and the mother's whims" and "Twelve months gives [Tracy] time to decide if living in Reno is more important to her than being a regular presence in [redacted]fe in Pocatello", combined with the magistrate's groundless award of 11% custody to Tracy over a 4-month period in 2011 when

Charles got nearly three times that amount over the same period the year before, constitutes substantial and compelling evidence showing that the magistrate court did indeed abuse its discretion.

In Respondent's Brief, Charles reviewed the magistrate's findings regarding C.C.'s familiarity with Pocatello and unfamiliarity with Reno. Respondent's Brief, pp. 31-32. It is plain that the magistrate court over-emphasized the extent to which C.C. knew Pocatello. No evidence in the record established that C.C. actually "knew" Pocatello more than he knew Ely. Although he lived in Pocatello for the first three years of his life, C.C. lived in Nevada for the year immediately preceding the hearing, the year in which he was most cognitively developed. Thus, Charles' testimony that Pocatello was only community that C.C. has ever really known is not true and ignores the year that C.C. spent with his mother and his maternal grandparents in Ely. Respondent's Brief, p. 32.

Charles touts the magistrate court's findings that he sacrificed financially to "improve his access to and his ability to spend time with C.C." Respondent's Brief, pp. 33-34. However, the magistrate court over emphasized this factor primarily by failing to recognize any sacrifice Tracy went through to establish a new life for herself and C.C. after the separation.

The magistrate court placed no emphasis whatsoever on the situation which Charles placed Tracy in. Tracy's sacrifices in being displaced from a teaching position and not even being able to financially secure a home that she could call her own because of Charles' actions

should have been equally considered. The magistrate court abused its discretion by over emphasizing Charles' sacrifices and refusing to consider the sacrifices Tracy made.

The fact remains that when Charles moved to Pocatello, he was still more than five hours away from C.C. If Charles had truly sacrificed, he would have chosen to be next to his child in Nevada, rather than six hours away in Pocatello. It must also be noted that Charles chose to move back to Pocatello and be with the same woman he befriended prior to his separation and with whom he admitted he drew emotional support from. (Tr. p. 524, ll. 2-3). The court not only refused to acknowledge these facts, but attempted to discredit Tracy's attempts to show that Charles had reasons for moving back to Pocatello other than being closer to his son. R., Vol. III, p. 404, ¶48.

D. The Magistrate Court Did Not Reach its Decision Through an Exercise of Reason.

This Court has approved of trial courts considering move related factors in addition to the factors set forth in Idaho Code §32-717 when deciding relocation cases. Factors relevant in some relocation cases may be irrelevant in other and trial courts are free to consider factors unique to each case. *Bartosz,* 146 Idaho at 456, 197 P.3d at 317. In *Roberts v. Roberts*, 138 Idaho 401, 405, 64 P.3d 327, 331, this Court upheld the magistrate's consideration of non §32-717 factors, including the extent the move would enhance the economic, emotional, and educational well-being of the **custodial parent** and child.

Charles claims that Tracy's objections to the magistrate court's decisions focuses more on her best interests and whether she was going to be happy. Respondent's Brief, p. 34. Charles

further claims that "despite Tracy's disinterest in residing in Pocatello, C.C.'s bests interests was the magistrate's paramount concern." Respondent's Brief, p. 38. This position is contrary to the testimony which Charles gave at trial when he admitted that how happy Tracy was would have a definite impact on C.C. Tr. p. 347, ll. 13-18. Charles appears to now support and justify the magistrate court's position that the economic and emotional well being of C.C's mother, particularly in Pocatello, Idaho, has little, if anything, to do with the best interests of C.C.

The trial record is replete with evidence that a move to Pocatello would not enhance Tracy's economic and emotional best interests. The magistrate's ruling that C.C. would benefit the most by having his parents in close proximity to each other did constitute an exercise in reason. However, the court's decision to require Tracy to return to Idaho in order to maintain primary residency custody was not reasonable and exceeded the bounds of the court's discretion.

Tracy is aware of no case law precedent, and the magistrate court cited no such precedent, establishing that is it in the best interests of a minor child for his mother to move in close proximity to his father, where the Mother has no means of economic support other than her ex-husband, no family, no positive experiences in the community and no intention, past or present, to make the community her home.

Tracy submits that a true exercise of reason would include a thorough review of the effects that living in Pocatello would have **on all parties** in order to determine the best interests of the child. A conclusion that Charles and C.C. would benefit most if C.C. were in Pocatello, without considering the negative effects that Tracy's residence in Pocatello would have upon

C.C., falls short of a complete analysis required of the court in this area of custody determinations. Because the magistrate did not fully examine all aspects of the best interests of the child, his custody determinations did not result from a complete and thorough exercise of reason.

E. The Magistrate Court Abused its Discretion by Violating Tracy's Protected Liberty Interests.

Charles asserts that "any limitation the magistrate court's decision placed on Tracy's ability to travel is justified because . . . the court found it is C.C's best interests to remain living near Charles in Pocatello." Respondent's Brief, p. 39. Idaho case simply does not allow "any limitation" on travel for the sake of the best interests of the child.

The United States Constitution protects the fundamental right of U.S. citizens to travel from state to state and to reside in the state of their choice. *Bartosz,* 146 Idaho at 461, 197 P.3d at 322, citing *Jones v. Helms*, 452 U.S. 412, 418, 101 S.Ct. 2434, 2439, 69 L.Ed.2d 118, 124 (1981). Furthermore, the fundamental liberty interest of natural parents in the care custody, and management of their child is protected by the Fourteenth Amendment. *Santosky v. Kramer*, 455 U.S. 745 (1982).

State action forcing a citizen to choose between exercising her fundamental right to travel and another constitutionally protected right violates the right to travel unless it is justified by a compelling state interest. *Bartosz,* 146 Idaho at 462, 197 P.3d at 323 citing *Dunn v. Blumstein*, 405 U.S. 330, 342, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274, 284 (1972). The *Bartosz* Court held that

the best interest of the child standard is the most appropriate way to fairly balance parents' competing constitutional rights in relocation cases and is a compelling governmental interest. *Bartosz,* 146 Idaho at 463, 197 P.3d at 324.

The *Bartosz* Court reviewed *Ziegler v. Ziegler*, 107 Idaho 527, 533, 691 P.2d 773, 779 (Ct. App. 1985) in which a mother challenged a child custody award granting her primary physical custody and require the children to live within a 100 mile radius of Coeur d'Alene. *Bartosz,* 146 Idaho at 462, 197 P.3d at 323. The residency restriction was upheld on the ground that it was justified by the compelling government interest ensuring the best interests of the child. *Id.* The *Bartosz* Court also reviewed *Weiland v. Ruppel*, 139 Idaho 122, 125, 75 P.3d 176, 179 (2003), in which this Court rejected a similar challenge to a child custody award that granted a mother custody as long as she remained in Idaho. *Bartosz,* 146 Idaho at 463, 197 P.3d at 324. The *Bartosz* Court noted that in *Weiland*, it did not expressly adopt the rationale or holding of *Ziegler*, but noted that it was proper for the trial court to weigh the custodial parent's right to travel against the child's interest in maintaining a relationship with the other parent. *Id.*

The Court of Appeal's ruling in *Ziegler* has been characterized as holding that the child's best interests trump the parent's constitutional right. Nadine E. Roddy, *Stabilizing Families in a Mobile Society: Recent Case Law on Relocation of the Custodial Parent*, Separated Parenting Access & Resource Center, p. 2. Roddy comments that "[t]his approach reflects a poor understanding of and an insufficient regard for fact that the parent's right is a fundamental constitutional one. *Id.*

A residency restriction is necessary to serve a compelling government interest when it is the least restrictive way to achieve the government's objective. *Bartosz,* 146 Idaho at 463, 197 P.3d at 324, citing *Dunn*, 405 U.S. at 342, 92 S.Ct. at 1003, 31 L.Ed.2d at 284. The least restrictive means test applies to restrictions on the right to travel. *Id.*, citing *Dunn*, 405 U.S. at 342-343, 92 S.Ct. at 1003-4, 31 L.Ed.2d at 284-285.

The 25 mile radius of Pocatello restriction that the magistrate court imposed upon Tracy Clair in order to maintain primary custody if she moved before January 15, 2012 and 50/50 custody if moved before August 15, 2012 is unprecedented. See *Ziegler,* 107 Idaho at 533, 691 P.2d at 779 (100 mile radius); *Merrill v. Merrill*, 83 Idaho 306, 310, 362 P.2d 887, 891(1961) (Idaho Supreme Court affirmed district court's judgment awarding custody of children to appellant subject to reasonable rights of visitation by respondent; provided, if appellant should establish a residence outside of a 75-mile radius of Idaho Falls,--the established residence of respondent,--so as to render it impractical for him to exercise his reasonable rights of visitation, that then respondent should have the custody of the children for a two-month period during summer school vacations.)

Certainly, the 25 mile radius restriction was not the least restrictive means to balance Tracy's constitutional rights to travel with CC's interest in maintaining a relationship with Charles. In the September 30, 2011 hearing on Tracy's Motion to Stay, Tracy requested that the radius be extended in order for her to find work in Idaho. Transcript of Hearing on Defendant's Motion for Stay, p. 2, l. 25, p. 3, l. 1. Tracy's counsel argued:

> I understand the Court's position with regard t[redacted] being in Pocatello. Primarily if she can't find work in Pocatello, she needs to look for a broader area. And she is requesting that the broader area be extended to Twin Falls. So, Your Honor, we are asking that the Judgment be stayed to allow her to find work and get on her feet so she can move and in the alternative to at least extend the area and give her until December 24th to be able to move.

Transcript of Hearing on Defendant's Motion for Stay, p. 3, l. 1-6.

In answer to Tracy's requests, the Court responded:

> Here's what I've got. You're unable to find a job. . . . I'm not cold and uncaring, but you only began looking in Idaho after the decision came out. If you would have been playing both sides of the street and trying to find work, you might have had a choice between an Idaho job and a Reno job. And now you find yourself in a pickle.
>
> * * *
>
> And whatever you have for credit or savings, which I don't know that you'll have much, but part of the predicament you're in is your choice not to look for work in Idaho. I'm not going to amend the radius.

Transcript of Hearing on Defendant's Motion for Stay, p. 7, l. 11-14, 16-18.

The magistrate court's conclusions about Tracy's alleged failure to timely play both sides of the street are contrary to substantial and competent evidence in the record. Tracy testified at trial that several months prior to trial, she had looked for teaching positions in the Twin Falls area. Tr. p. 52, ll. 20-22. Tracy also testified at trial that she had checked the website in Pocatello and learned that there were no open teaching positions in Pocatello. Tr. p. 52, ll. 2-5. Despite the magistrate's representations that he was not cold and uncaring, his conclusions certainly indicated otherwise.

The magistrate's statement that Tracy might have had a choice between an Idaho job and a Reno job was nothing more than speculation on the part of the magistrate, and certainly disregarded the evidence in the record that she had looked for an Idaho job – prior to trial. The magistrate's imposition of an overly restrictive twenty-five mile radius and his stubborn refusal to reconsider the radius, despite the evidence in the record, constituted an abuse of discretion.

Tracy had a good faith motive for moving to Reno. Her reasons were sensible. From the time of the separation until the time of trial, Tracy had not found full-time work. She wanted and needed to secure full-time work in order to enhance the quality of her life and that of C.C. The move was not designed to frustrate Charles' visitation rights. The record clearly establishes that a move to Pocatello, on the other hand, would not have enhanced the quality of Tracy's life.

Each parent must be permitted to move on in life, and the child will benefit directly from an improvement in the custodial parent's life circumstances. *In re Marriage of Eaton*, 269 Ill. App. 3d 507, 646 N.E.2d 635 (1995). The magistrate court's decision allowed Charles to move on in his life and allow C.C. to benefit directly from an improvement in Charles' life circumstances. There is no evidence in the record establishing that a move back to Pocatello would not have allowed Tracy to move on in her life or result in improvements in Tracy's life circumstances which would benefit C.C. The magistrate's decision permitted Tracy to move on in her life *only* if she accepted a severely limited amount of visitation while living outside the Pocatello area. The distance between the parties did not mandate such a limited amount of visitation. Tracy's parental conduct did not mandate such a limited amount of visitation. Even

Charles' testimony at trial did not support such a limited amount of visitation. The magistrate's ultimate conclusions regard custody violated Tracy's protected liberty interests to locate where she could find work and improve her condition in order to benefit C.C. The unsupported custody determinations must be reversed.

F. Charles is Not Entitled to an Award of Attorney Fees and Costs Pursuant to Idaho Code §32-704 and I.A.R. 41 on Appeal.

Charles claims that he is entitled to an award of attorney fees because Tracy's appeal was brought frivolously, unreasonably, and without foundation. Charles's argument for attorney fees is itself **frivolously, unreasonable and without foundation** because Charles **blatantly** ignores recognize pertinent Idaho case law which does not support Charles' argument.

An award of attorney fees under Idaho Code §12-121 is not appropriate unless all of the claims brought are frivolous and are without foundation. *Management Catalysts v. Turbo West Corpac*, 119 Idaho 626, 630, 809 P.2d 487, 491 (1991). It is inappropriate to segregate claims in order to determine which were frivolously pursued. *Id.* If the case includes any triable issues, an attorney fee award under Idaho Code §12-121 is in appropriate. *Smith v. Angell*, 122 Idaho 25, 30, 830 P.2d 1163, 1168 (1992).

Tracy's challenge to the exclusion of Dr. Vereen's custody determination testimony is absolutely meritorious given that the magistrate court ordered Dr. Vereen to determine the best custody arrangements and then excluded his testimony of such arrangements on any grounds, thereby obliterating Tracy's substantial right to have the evidence considered. Tracy's challenge

is also meritorious on the grounds that the magistrate court failed to follow current Idaho case law in styling indicia of reliability standards based on the current methodology of the applicable disciplines and in failing to recognize that Dr. Vereen's opinions qualified for admission under such standards pursuant to I.R.E. 702. Finally, Charles argument that Tracy's challenge is precluded by her failure to make an offer of proof is without merit in and of itself because Charles failed to acknowledge the offer of proof standards in I.R.E. 103(b).

Tracy's appeal of the magistrate's decision on the grounds that it violated her liberty interests is certainly meritorious because the magistrate's 25 mile radius restriction is not supported by any case law. Tracy's appeal is meritorious because the magistrate's refusal to alter the radius based on Tracy's alleged pre-trial failure to look for an Idaho job is not supported by the evidence of the record. Finally, her appeal on this issue is meritorious because the record does not support a finding that such a severe restriction was in the best interests of C.C. in terms of Tracy's future improvement in her life circumstances.

Tracy's appeal is meritorious because the facts do not support a finding of such a severe restriction in the **amount of visitation** for Tracy if she stays in Reno. Tracy's appeal is meritorious because the magistrate court exceeded its discretion in ultimately denying Tracy of any right have C.C. on his birthday, her birthday, or Mother's Day in Reno.

Tracy has not asked this Court to overturn factual findings of the magistrate court that are **plainly** supported by **substantial** evidence, or second-guess the trial court's findings based on conflicting evidence. Tracy is asking this Court to overturn the magistrate's decisions in part

because the magistrate court over emphasized certain factors in its "best interests of the child" analysis. Particularly, the magistrate court over-emphasized Tracy's attempts to distance C.C. from Charles, Charles' sacrifices, and C.C's claimed familiarity with Pocatello.

Tracy has meritoriously demonstrated that her alleged interference with Charles' visitation from July, 2010 to January, 2011, pales in significance to the Court's groundless interference with Tracy's visitation from September 2011 to January, 2011. In sum, Charles attempts to show that he is entitled to attorney fees fail miserably in light of the evidence in the record.

As a final point, Tracy acknowledges Charles' arguments against Tracy's request for attorney fees under I.C. §32-704 and the findings of *Olson v. Montoya*, 147 Idaho 833, 839, 215 P.3d 553, 559 (Ct. App. 2009) (holding that Idaho appellate courts will not ordinarily order attorney fees under section §32-704 unless an award is essential to enable the exercise of appellate jurisdiction.) Section 32-704 provides in part:

> The court may from time to time after considering the financial resources of both parties and the factors set forth in section 32-705, Idaho Code, order a party to pay a reasonable amount for the cost to the other party of maintaining or **defending <u>any proceeding</u>** under this act and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment (emphasis added).

I.C. 32-704(3).

The argument for Tracy's request for attorney fees is readily apparent in the facts of the initial Appellant's Brief. The magistrate's decision left Tracy with little option but to pursue the

appeal even though the circumstances of the case left her with few economic resources, especially when compared to Charles' income, as evidenced in the record. On these grounds, Tracy seeks attorney fees.

IV.
CONCLUSION

The magistrate court's custody award in this matter must be reversed. In making its custody determinations, the magistrate court failed to give proper weight to all factors relevant to the determination of the minor child's best interests. The magistrate court abused its discretion by ordering a child custody schedule which promoted estrangement between the child and his mother, by violating the protected liberty interests of the mother, and by excluding an expert's opinion regarding custody which satisfied the requirements of I.R.E. 702. For these reasons, Tracy Clair reaffirms her request that the Court reverse the magistrate's order regarding custody of the parties' minor child.

DATED this 16th day of March, 2012.

Nick L. Nielson, Attorney for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of March, 2012, I submitted for mailing two true and correct copies of the above and foregoing **APPELLANT'S BRIEF** to the person(s) listed below:

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