11-23-2016

Geiger v. Elliott Respondent's Brief Dckt. 44265

IN THE SUPREME COURT FOR THE STATE OF IDAHO

SARAH MONIQUE GEIGER,	)	
	)	SUPREME COURT
Respondent/Petitioner,	)	DOCKET NO. 44265
	)	
v.	)	Dist. Ct. Case No. CV 2011-02416
	)	
BRANDON T. ELLIOTT,	)	
	)	
Appellant/Respondent.	)	
	)	

RESPONDENT'S BRIEF

Appeal from the Magistrate Division of the District Court
of the Second Judicial District for Nez Perce County

Honorable Kent J. Merica, Magistrate Judge, Presiding;
Honorable Jeff M. Brudie, District Judge, Presiding in Appellate Capacity.

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A. NATURE OF THE CASE

This is a modification action involving child custody and child support. Appellant moved to modify custody. After a trial, the Magistrate Court found a substantial change in circumstances had occurred and that it was in the best interests to expand Appellant's custodial time, but denied Appellant's request to change primary custody of the child from Respondent to Appellant. On appeal, the District Court upheld the Magistrate Court's decision. Appellant now appeals.

B. COURSE OF PROCEEDINGS

The parties stipulated in open court to entry of a child custody, visitation and support order on March 21, 2012. R., p. 57. A corresponding *Order re: Custody, Visitation and Child Support* was entered on April 23, 2012. R., pp. 57-73.

On March 16, 2015, Appellant filed a *Motion to Modify an Order, Judgment or Decree* seeking to modify the 2012 Order. R., pp. 74-97. Respondent filed her *Answer and Counterclaim* on April 27, 2015. R., pp. 107-116. Appellant filed his *Reply to Counterclaim* on May 7, 2015. R., pp. 117-126. Trial was held on June 26, 2015 before Magistrate Judge Kent J. Merica. Trial Tr.; Exh. 1-5, 500-507, 509, 511. The Magistrate Court issued its *Findings of Fact, Conclusions of Law and Order* on August 17, 2015. R., pp. 177-191. A corresponding *Judgment Regarding Modification of Visitation, Custody and Child Support* was entered on October 16, 2015.

Appellant timely filed his *Notice of Appeal* to the District Court on November 23, 2015. R., pp. 203-211. The District Court heard oral appellate argument on April 21, 2016 and issued its decision affirming the magistrate court's decision on May 12, 2016. Dist. Ct. Tr., pp. 1-43; R., pp. 359-365. The District Court further concluded that Appellant had pursued the appeal in a manner that was frivolous, unreasonable and without foundation and awarded attorney fees to Respondent and against Appellant pursuant to Idaho Code Section 12-121. R., p. 364. Respondent filed a *Memorandum of Costs and Attorney Fees on Appeal* and supporting affidavits on May 25, 2016. R., pp. 369-380. On October 21, 2016, during the pendency of this appeal to the Idaho Supreme Court, the District Court reversed and vacated its May 12, 2016 Order as it related to the attorney fee award.[1]

Appellant filed this appeal on June 8, 2016. R., pp. 381-385.

C. FACTUAL BACKGROUND

Appellant and Respondent shared a residence prior to their son TBE's birth on December 1, 2010 until on or around December 1, 2011, but were never married. R., p. 178. Under the stipulated *Order re: Custody, Visitation and Child Support* entered on April 23, 2012, the parties were awarded joint legal and physical custody of the child under a custodial sharing schedule with Respondent designated as the child's primary residential parent and Appellant entitled to custodial time structured around his work schedule that averaged eight overnights per month. R., pp. 57-73, 178.

At the time of the modification trial in June 2015, Respondent had resided with TBE in the same home in Lewiston, Idaho for 3 years. R., p. 179.

[1] Respondent has filed a *Motion to Augment the Record* seeking to add the District Court's October 21, 2016 *Order on Attorney Fees and Costs* to the record of this appeal. Said Motion is unopposed.

Between entry of the 2012 order and the June 2015 modification trial, Appellant's work schedule had changed to where it came into conflict with the custodial sharing terms of the April 23, 2012 Order. R., p. 178. In light of Appellant's change in work schedule, "[t]he parties now have work schedules that in essence mirror one another's schedule." R., p. 179. Appellant's new work schedule consisted of 10-hour work days on Mondays through Thursdays. R., p. 178. At the time of trial, Respondent's work schedule was Monday through Thursday from 5:30 a.m. to 4:00 p.m. *Id.*

Both parties acknowledged friction and some problems due to lack of communication and similar issues. R., p. 181. Despite this friction, the parties had successfully adjusted the custodial sharing schedule prior to trial in order to accommodate Appellant's change of work schedule. R., p. 179.

Appellant began dating Erica Wilcoxson in 2011. R., p. 180. Appellant and Ms. Wilcoxson (now Appellant's wife) began sharing a residence in December 2012. *Id.* Appellant's and Ms. Wilcoxson's son [redacted] was born in May 2013 and was 2 years old at the time of the modification trial. *Id.* Ms. Wilcoxson was pregnant with her and Appellant's second child at trial. *Id.* Ms. Wilcoxson is a stay-at-home parent except for part-time work done out of her home as a hairstylist in evenings and on weekends in order not to conflict with Appellant's work schedule. *Id.*

At the time of trial, TBE was 4 years old. R., p. 181. His parents and all witnesses described him as being well-adjusted and a bright, loving child, who had been accepted without reservations into their homes, including Ms. Wilcoxson's extended family. *Id.* The Magistrate Court found that the child loves both families and is a happy content child. *Id.*

IV. ADDITIONAL ISSUE PRESENTED ON APPEAL

1. Whether to award Respondent her attorney fees and costs incurred in this appeal from District Court pursuant to I.C. § 12-121.

V. ARGUMENT

A. STANDARD OF REVIEW

Since this appeal arises from a decision of the district court affirming a decision of the magistrate division, the Court shall review the magistrate's decision independently, with due regard for the decision of the district court acting in its appellant capacity. *Hoskinson v. Hoskinson,* 139 Idaho 448, 454, 80 P.3d 1049, 1055 (2003) (citing *Stevens v. Stevens,* 135 Idaho 224, 227, 16 P.3d 900, 903 (2000); *Keller v. Keller*, 130 Idaho 661, 663, 946 P.2d 623, 625 (1997)). The magistrate's findings of fact will be upheld if they are supported by substantial and competent evidence. *Id.* (citing *Worzala v. Worzala*, 128 Idaho 408, 411, 913 P.2d 1178, 1181 (1996), *Smith v. Smith*, 124 Idaho 431, 436, 860 P.2d 634, 639 (1993)).

The determination of the custody of minor children is committed to the sound discretion of the trial court. *Levin v. Levin*, 122 Idaho 583, 586, 836 P.2d 529, 532 (1992). A trial court does not abuse its discretion if it (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)). "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." *Lamont v. Lamont*, 158 Idaho 353, 356, 347 P.3d 645, 648 (2015) (quoting *Nelson v. Nelson*, 144 Idaho 710, 713, 170 P.3d 375, 378 (2007)).

B. THE MAGISTRATE COURT DID NOT ABUSE ITS DISCRETION IN MAKING ITS CUSTODY DECISION.

Appellant argues on this appeal that the magistrate court abused its discretion regarding the best interests of the child, the lack of the application of the factors found in Idaho Code Section 32-717, and the substantial and material change of circumstances. Appellant's Brief at 17. For the reasons discussed below, the magistrate did not abuse its wide discretion.

1. The magistrate properly perceived the custody determination before it as an issue of discretion.

The first prong of "abuse of discretion" analysis is whether the trial court correctly perceived the issue as one of discretion. *Hoskinson v. Hoskinson*, 139 Idaho 448, 454, 80 P.3d 1049, 1055 (2003).

Here, the magistrate court correctly recognized that the custody determination before it was an issue of discretion stating:

> In matters of child custody and parent time with children, the trial court is vested with broad discretion to fashion an arrangement that is fair and equitable to the parties, and, is in the best interests of the children.

R., p. 182 (citing *Peterson v. Peterson*, 153 Idaho 318, 321, 281 P.3d 1096, 1099 (2012)).

As such, analysis of this first prong does not support a finding of abuse of discretion.

2. The magistrate acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it.

i. No abuse of discretion lies where the magistrate court does not specifically discuss the non-mandatory factors from I.C. § 32-717.

It is well settled under Idaho law that in determining the custody of a minor child, the child's welfare and best interest is of paramount consideration. *Shumway v. Shumway*, 106 Idaho 416, 679 P.2d 1133 (1984); *Empey v. Empey*, 78 Idaho 25, 296 P.2d 1028 (1956); *Maudlin v. Maudlin*, 68 Idaho 64, 188 P.2d 323 (1948). This Court has discussed the "best interests" standard as follows:

> Idaho Code § 32-717 provides a directive for the trial court to determine the best interest of the children when making a custody decision. The statute sets forth non-exclusive factors to aid in making its determination. Idaho Code § 32-717 states in this respect:
>
> (1) In an action for divorce the court may, before and after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper in the best interests of the children. **The court shall consider all relevant factors which <u>may</u> include**:
>
> (a) The wishes of the child's parent or parents as to his or her custody;
> (b) The wishes of the child as to his or her custodian;
> (c) The interaction and interrelationship of the child with his or her parent or parents, and his or her siblings;
> (d) The child's adjustment to his or her home, school, and community;
> (e) The character and circumstances of all individuals involved;
> (f) The need to promote continuity and stability in the life of the child; and
> (g) Domestic violence as defined in section 39-6303, Idaho Code, whether or not in the presence of the child.
>
> **This list of factors is not exhaustive <u>or mandatory</u> and courts are free to consider other factors that may be relevant.**

Lamont v. Lamont, 158 Idaho 353, 359, 347 P.3d 645, 651 (2015) (emphasis added) (citations omitted).

Appellant argues that the Magistrate Court and District Court erred by the trial court having "never noted the importance of I.C. § 32-717 and the district court seems to have totally denied the factors set out in I.C. § 32-717 are meaningful or relevant at all" and "is basically saying one factor from I.C. § 32-717 was sufficient in the analysis of the issues of custody and the child's best interests and parent-sharing involving TBE." Appellant's Brief at 25, 26. Because the I.C. 32-717 factors are not mandatory, it was not an abuse of the magistrate court's wide discretion to omit express reference to the factors, or to weigh the evidence in a different fashion than advocated for by Appellant. It was well within the magistrate court's discretion to consider the positive parenting attributes of Respondent that are noted by Appellant as well as the overall circumstances of each parent. Appellant's Brief at 24.

Appellant points to later custody decisions written by Judge Merica as proof that the magistrate court had "[seen] the error of his way from the *Elliot* case by substantially changing the format of his decisions after *Elliott*," without authority or discussion on this separate case's significance or bearing on the case on appeal. Appellant's Brief at 24-25. No significance or bearing is readily apparent.

As such, this argument is without merit, no reversible error has been shown, and the magistrate court's decision should be affirmed.

ii. The magistrate did not abuse its discretion by overemphasizing any factor.

Appellant argues that the magistrate court abused its discretion by overemphasizing the need to promote continuity and stability in the life of the child. Appellant's Brief at 25-26. An overemphasis of a single factor is an abuse of discretion. *Schultz v. Schultz*, 145 Idaho 859, 865, 187 P.3d 1234, 1240 (2008); *Moye v. Moye*, 102 Idaho 170, 172, 627 P.2d 799, 801 (1981). No

such overemphasis has been shown or is supported by a reasonable reading of the magistrate court's decision.

In the *Schultz* case, this Court concluded that the only factor the trial court had considered was the distance between the father and child created by the mother's relocation from Idaho to Oregon. 145 Idaho at 865, 187 P.3d 1240. In doing so, the trial court failed to consider the mother's wishes for the child, the history of domestic violence in the child's presence, the father's failure to make attempts to visit the child in Oregon, or the stability and community support available to the mother in Oregon. *Id.* Further, the *Schultz* trial court failed to make findings or otherwise decide the issue of whether the habitual domestic violence present overcame the presumption in favor of joint custody. *Id.* In addition, this Court concluded that the *Schultz* trial court had incorrectly applied its holding in *Hopper v. Hopper*.[2] *Id.* This Court concluded that the failure to recognize and evaluate these factors constituted an abuse of discretion. *Id.*

In the *Moye* case, the magistrate court found that the mother's physical health was improperly overemphasized where 6 of the 10 findings of fact contained in the trial court's order addressed the mother's physical health. 102 Idaho 170, 173 fn.2, 627 P.2d 799, 802 fn.2 (1981). This Court concluded that the trial court had overemphasized the mother's physical condition and not given due consideration of all other relevant factors impacting the best interests of the children, or at least failed to reflect such consideration on the record, which was an abuse of its discretion. *Id*. at 172, 627 P.2d at 801.

Here, the magistrate court made four pages of findings of fact, which describe in detail the history of the parents' relationship, the history of changes in each parent's work schedules, the parents' efforts to work together to accommodate these work schedule changes, the history of

[2] 144 Idaho 624, 167 P.3d 761 (2007).

Appellant's relationship with Ms. Wilcoxson, each parent's home, Ms. Wilcoxson's work schedule, the child's relationship with Ms. Wilcoxson and his younger brother Easton, the child's relationship with Ms. Wilcoxson's extended family and Respondent's mother, co-parenting challenges between the parties, the child's adjustment to daycare, the expectation that the child attend preschool the next academic year, and child's general disposition. R., pp. 178-181. The magistrate court further discussed its "best interests" analysis for nearly 6 pages. R., pp. 182-187. In said analysis, the Court identified 13 specific and diverse points through which the magistrate court concluded that it was in the best interests of the child for Respondent to retain primary residential custody of the child with expanded time to Appellant. *Id*.

No reasonable reading of the trial court's analysis supports the conclusion that any single factor was over-emphasized. Instead, the District Court was correct when it concluded that "[Appellant's] argument was in essence only that the magistrate should be second guessed and a different answer reached in his favor. His conclusory assertions are not enough to overcome the magistrate's thorough discussion and discretionary findings." R., p. 364. Likewise, Appellant's argument and conclusory assertions to this Court are insufficient to support a finding of abuse of discretion. As such, the magistrate court's ruling should be affirmed.

iii. The magistrate court did not abuse its discretion in finding that a substantial and material change of circumstances had occurred, but did not support the requested custody change.

Appellant states that the magistrate court erred in its analysis about the substantial and material change in circumstance. Appellant's Brief at 17, 23. It is well settled that a child custody order of a minor child may not be modified unless there has been a material, permanent and substantial change in circumstances subsequent to entry of the original decree which would indicate that a modification is in the best interests of the child. *Posey v. Bunney*, 98 Idaho 258, 261, 561 P.2d 400, 403 (1977). Whether a change in conditions is "material" or "substantial"

depends upon the impact of the change on the children. *Doe v. Doe*, I.S.C. Docket No. 43920 (Nov. 2, 2016).

Here, the magistrate court reasoned that a change in a parent's work schedule can be substantial enough to justify "a change in the parent-sharing arrangement so that each party continues to have meaningful time with their child(ren)," but "does not equate to a material change of circumstances that would justify changing custody." R., p. 185. This conclusion is certainly within the outer boundaries of the magistrate court's discretion and consistent with the legal standards applicable to the specific choices available to it. As such, no abuse of discretion has been shown and the magistrate court's ruling should be affirmed.

3. The magistrate reached its decision by an exercise of reason.

The third prong of the "abuse of discretion" analysis is whether the trial court reached its decision by an exercise of reason. *Hoskinson v. Hoskinson*, 139 Idaho 448, 454, 80 P.3d 1049, 1055 (2003). Here, the magistrate court's decision contains a thorough "best interest" analysis that is consistent with its factual findings. R., p. 182-187.

No reasonable reading of the magistrate court's conclusions support the determination that said analysis fails to constitute an exercise of reason. As such, no abuse of discretion has been shown, and the magistrate court's decision should be affirmed.

C. THE ISSUE OF ATTORNEY FEES AWARDED BY THE DISTRICT COURT IS NO LONGER AT ISSUE.

In its May 12, 2016 Order, the District Court awarded attorney fees to Respondent and against Appellant pursuant to Idaho Code Section 12-121 on the basis that Appellant pursued his appeal to District Court in a manner that was frivolous, unreasonable, and without foundation. R., p. 364. Appellant filed this appeal on June 8, 2016, and included argument in support of reversal of the May 12, 2016 attorney fee award in his Appellant's Brief dated September 28,

2016. App. Br., § VI(A), pp. 18-22. On October 21, 2016, the District Court reversed and vacated its May 12, 2016 Order as it related to the attorney fee award due to Respondent's inclusion of her attorney free request in the conclusion to her Amended Respondent's Brief, rather than as a separate issue raised in her original response brief. *Order on Attorney Fees and Costs*.

Based on said reversal, the District Court's award of attorney fees to Respondent is no longer at issue in this case.

D. APPELLANT IS NOT ENTITLED TO ATTORNEY'S FEES ON APPEAL.

Appellant has requested an award for fees and costs against Respondent pursuant to Rules 35(b)(5), 35(b)(6) and 41(a) of the Idaho Appellate Rules, and Idaho Code Sections 12-121, 12-123, 32-704 and 32-705.

Appellant makes his request based on the assumption that he will be the prevailing party in this appeal. Appellant's Brief at 36. Appellant should not prevail for the reasons discussed above. See supra § V(B).

Even if Appellant were to prevail in this appeal, the relevant rules of the Idaho Appellate Rules that Appellant cites to set forth the appropriate mechanism through which attorney fees must be sought on appeal, but do not provide an independent basis for such an award. I.A.R. 35(b)(5), 35(b)(6), and 41(a). Such requests must be supported by statute. Appellant cites to four statutes, Idaho Code Sections 12-123, 12-121, 32-704 and 32-705, none of which support an award of attorney fees to Appellant in this appeal.

1. I.C. 12-123 does not support an award of attorney fees to Appellant.

Idaho Code Section 12-123 provides a means through which a party may be sanctioned for frivolous conduct in a civil case. It is well settled that it does not apply on appeal to this

Court. *Cummings v. Stephens*, 2016 Opinion No. 97 (Sept. 12, 2016) (quoting *Bird v. Bidwell*, 147 Idaho 350, 353, 209 P.3d 647, 650 (2009)). As such, even if Appellant is found to be the prevailing party on this appeal, Appellant's request for an award of attorney fees pursuant to Idaho Code Section 12-123 should be denied.

2. I.C. 12-121 does not support an award of attorney fees to Appellant.

Until the recent *Hoffer v. Shappard* decision, I.S.C. Docket No. 42087 (Sept. 28, 2016), awards of attorney fees on appeal pursuant to Idaho Code Section 12-121 have been "permitted for a prevailing party when the Court determines that an appeal was brought, pursued or defended in a manner that was frivolous, unreasonable or without foundation." *Lamont v. Lamont*, 158 Idaho 353, 362, 347 P.3d 645, 655 (2015) (quoting *Clair v. Clair*, 153 Idaho 278, 291, 281 P.3d 115, 128 (2012)). Appellant criticizes Respondent for errors related to the District Court's attorney fee award, which ultimately led to its reversal. Appellant's Brief at 36. In light of said reversal, those oversights have no bearing on the appeal to this Court. See supra § V(C). Appellant's surviving criticisms are of the magistrate's decision, not of any action by Respondent. Appellant's Brief at 36. Appellant provides no argument on how this Court may conclude that Respondent has defended this appeal in a manner that was frivolous, unreasonable or without foundation. See *Lamont*, 158 Idaho at 362, 347 P.3d at 655. As such, even if Appellant is found to be the prevailing party on appeal, Appellant's request for an award of attorney fees pursuant to Idaho Code Section 12-121 should be denied.

[3] The rule set forth in *Hoffer v. Shappard* relating to application of Idaho Code Section 12-121 will become effective on March 1, 2017 and have prospective effect. As of the writing of this Brief, oral argument in this case has not been calendared. This Brief is written under the assumption that the "frivolous, unreasonable or without foundation" standard will be applied to this case. In support of this assumption, Respondent notes that while this Court has amended Rule 54(e), Idaho Rules of Civil Procedure rescinding subsection 2 of that Rule effective March 1, 2017, no amendment to Rule 908 of the Idaho Rules of Family Law Procedure has been made as of the writing of this Brief. Rule 908, Idaho Rules of Family Law Procedure states in relevant part: "Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation[.]"

3. I.C. 32-704 and 32-705 do not support an award of attorney fees to Appellant.

Appellant cites to Idaho Code Sections 32-704 and 32-705 as a basis for an attorney fee award in this appeal against Respondent. Appellant's Brief at 36.

Idaho Code Section 32-705 governs spousal maintenance awards in a divorce setting. As this is not a divorce action and does not involve spousal maintenance, Respondent assumes that Appellant's reference to this statutory section is due to Idaho Code Section 32-704(3)'s reliance upon the factors found in Idaho Code Section 32-705 as the applicable standard in determining financial need, and does not argue for its use as an independent basis to support his attorney fee request.

Idaho Code Section 32-704 allows for an award of fees based on financial need. *Hentges v. Hentges*, 115 Idaho 192, 197, 765 P.2d 1094, 1099 (Ct.App. 1998). Appellant did not request attorney fees to either the magistrate judge or district court under Idaho Code Section 32-704. R., pp. 74-97, 133-136, 137-152, 163-176, 203-211, 215-248, 290-337. The findings related to income are insufficient to support an award of attorney's fees under Idaho Code Section 32-704. R., pp. 178-180. Based upon the insufficiency of the record to support an award under Idaho Code Section 32-704, even if Appellant is found to be the prevailing party on this appeal, Appellant's request for an award of attorney fees under this statute should be denied.

E. THE COURT SHOULD AWARD RESPONDENT HER ATTORNEY'S FEES ON THIS APPEAL.

Respondent makes her request for fees and costs against Appellant pursuant to Idaho Code Section 12-121. As discussed above, this Brief is written under the assumption that the "frivolous, unreasonable and without foundation" standard for purposes of Idaho Code Section 12-121 will apply in this case. See supra § V(D), fn. 3. That standard has been met in this case. The District Court correctly found as follows:

> [Appellant's] argument was in essence only that the magistrate should be second guessed and a different answer reached in his favor. His conclusory assertions are not enough to overcome the magistrate's thorough discussion and discretionary findings. This Court, like the Idaho Supreme Court in *Lamont*, is unconvinced that there were genuine issues of law or fact raised, and therefore finds that this appeal was pursued in a manner that was frivolous, unreasonable, and without foundation.

R., p. 364. Appellant similarly seeks to second guess the magistrate court's discretionary decision in the appeal to this Court, and as such his pursuit of this appeal is frivolous, unreasonable and without foundation. See supra § V(B). As such, good cause exists for this Court to award Respondent her costs and fees pursuant to Idaho Code Section 12-121.

VI. CONCLUSION

For these reasons, Respondent Sarah Geiger respectfully requests that this Court affirm the Magistrate Court's decision as upheld by the District Court, and further enter an award of attorney's fees and costs incurred on this appeal from District Court against Appellant and in Respondent's favor.

DATED this 23 day of November, 2016.

JONES, BROWER & CALLERY, P.L.L.C.

Karin Seubert

KARIN SEUBERT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing *RESPONDENT'S BRIEF* were, this 23 day of November, 2016, e-mailed and hand-delivered to:

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Karin Seubert

KARIN SEUBERT

Appendix A:
Findings of Fact, Conclusions of Law and Order dated Aug. 17, 2015

Clerk's Record, pages 177-188 (Child Support Worksheets and Supplemental Order Regarding Parental Responsibilities excluded from this Appendix)

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

SARAH MONIQUE GEIGER, Plaintiff, vs. BRANDON TOM ELLIOT, Defendant.	CASE NO. CV 2011-2416 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above matter came on for hearing on 26th day of June, 2015. Both parties were present with their respective attorneys. The Court having considered the evidence and exhibits presented to the court at trial and the matter been finally submitted with the filing of the rebuttal closing argument on July 28, 2015, the Court now makes its decision.

COURSE OF PROCEEDINGS

The plaintiff filed a Complaint for Paternity, Custody, Visitation and Support on December 6, 2011. A temporary custody order was entered on December 22, 2011. The parties reached an agreement for temporary matters on January 18, 2012. Trial was set for March 21, 2012. At the time of the trial, the parties reached an agreement as to all issues and an Order Regarding Custody, Visitation, and Child Support encompassing the parties' agreement was filed on April 23, 2012.

FINDINGS OF FACT

The parties were never married, however, they did reside together for a period of time before and after the birth of their son TBE, on December 1, 2010. They separated from living with each other approximately December 1, 2011. The parties reached an agreement with regard to custody and parent time which was entered in the record on April 23, 2012, as found in the Order Regarding Custody, Visitation, and Child Support. As a result of that order, the plaintiff was designated the primary residential parent for TBE. The defendant worked a staggered schedule which allowed him to have a block of four (4) days off from work, commencing on a different day each week. Pursuant to the agreement, the defendant was to have TBE from 6:00 AM on the 2nd day of his time off from work until 5:00 PM the 3rd day of his time off from work. He was to have this amount of time each and every week. This resulted in eight (8) overnights per month on average for Mr. Elliot.

On March 16, 2015, the defendant[1] filed a motion to modify the Order Regarding Custody, Visitation, and Child Support, entered April 23, 2012. In the filing, the defendant alleges that he was offered a new job with a Monday to Thursday schedule consisting of 10-hour work days. This new job schedule conflicted directly with the custody and visitation schedule of the parties' April 23, 2012 stipulated order. As a temporary solution, Mr. Elliot has TBE every three (3) out of the four (4) weekends per month.

The plaintiff, Sarah Geiger, is employed by Vista Outdoors, formerly known as ATK. She has worked there on the assembly line for nine (9) years. She earns $17.42 per hour and works 40 hours a week. Her schedule is Monday through Thursday from 5:30 AM to 4:00 PM.

[1] In order to avoid confusion the, Court may refer to the parties as plaintiff and as defendant in this decision. Technically, the defendant is the "petitioner" for this proceeding.

She and TBE live in a modest home in Lewiston. It is a two-bedroom one-bath home which she is buying. She has lived there for three (3) years. TBE has primarily resided with her his entire life. She never married the defendant and is not involved with any particular person as far as the Court is aware.[2]

The prior court Order Regarding Custody, Visitation, and Child Support of April 23, 2012, was an agreed arrangement between the parties. It was consistent with the defendant's work schedule at Clearwater Paper. It provided weekly contact for Mr. Elliot with his son in conjunction with his work schedule. As noted previously, the defendant would spend two (2) full days and nights with his son each week. Mr. Elliot testified that in addition to that he would make additional time to spend with TBE. The defendant changed his employment position at Clearwater Paper so that he no longer works a rotating shift. The parties now have work schedules that in essence mirror one another's schedule. As noted, the parties have adjusted on an informal basis Mr. Elliot's time with TBE to accommodate the change of schedule.

Mr. Elliot has been employed at Clearwater Paper since 2007. He presently works as a training coordinator on one of the paper machines at the company. For 2014, Mr. Elliot reported a total of wages in the amount of $67,089.00. No testimony or evidence was presented by either party as to whether or not Mr. Elliot's new position as a training coordinator resulted in an increase in wages. In looking at respondent's Exhibit 500, the Court cannot discern what Mr.

[2] No evidence or reference to a significant other was brought forward during the course of the trial.

Elliot's gross earnings today would be. Therefore, the Court will utilize last year's tax return for purposes of calculation of child support.[3]

Mr. Elliot began seeing Erica Wilcoxon in the winter of 2011. They have known each other for approximately eleven (11)-years and actually dated when Ms. Wilcoxon was 15-years-old. They started having a serious relationship and spring of 2012. In December of 2012, Ms. Wilcoxon purchased a home in Lewiston. Mr. Elliot moved in with her at the time of purchase as Ms. Wilcoxon testified at trial. She described her house is a nice three-bedroom, two-bath, home in a quiet neighborhood with a large fenced yard. They are surrounded with very nice neighbors and they are only blocks away from Ms. Wilcoxon's mother.

In May of 2013, Mr. Elliot and Ms. Wilcoxon had a child together. It was a boy, Easton and he is 2-years-old. Easton and TBE are very close to one another and enjoy a very rich brotherly relationship. Ms. Wilcoxon is pregnant with another boy and is due to deliver the child in September. Mr. Elliot and Ms. Wilcoxon plan to be married in November of this year.

Ms. Wilcoxon is a hairstylist and operates a styling salon out of her home. Her shop is located in an outbuilding on the property. She schedules her appointments in the evenings and on weekends. She does this to correspond with Mr. Elliot's work schedule. This allows her to be a stay-at-home mom to her son Easton and also allows her to provide child care for TBE. Ms. Wilcoxon and Mr. Elliot testified that TBE has integrated well with Ms. Wilcoxon. TBE spends time with her and of course with his brother Easton. TBE has been accepted fully into Ms. Wilcoxon's extended family and he enjoys his interactions with them.

[3] The Court does not consider it to be the function of the Court to try to decipher exhibits. Counsel should present to the Court some explanation of the exhibit so that the Court can make a reasoned decision with regard to the financials of the parties. For example, on respondent's Exhibit 500 there are categories under the earnings that the Court is unsure whether or not they should be included for purposes of determining gross wages. There are references to "Retro-RPM", "Holiday-HPN", and "Premium OTP-PR2" that have no explanation as to whether or not they should be included in gross wages.

For her part, Sarah Geiger indicates that she does not have any objection to TBE spending time with Ms. Wilcoxon even when Mr. Elliot is not at home. In fact Ms. Wilcoxon has regularly picked up TBE from the day care in order to have him at her home with her and Easton. This does not mean there have not been incidents of friction. The parties testified of situations because of a lack of communication between Mr. Elliot and/or Ms. Wilcoxon. Ms. Geiger also noted there have been some problems. Both parties acknowledged at trial that this was a challenge for them.

TBE is 4-years-old. Both parties and all witnesses described TBE as being well-adjusted and a bright, loving child. Both parties and all witnesses testified that TBE has been accepted without reservation into their homes, whether it is TBE's extended family, or the "adopted" extended family of Ms. Wilcoxon. It is evident from the description of the parties and the exhibits submitted to the Court that TBE loves both families and is a happy content child. TBE's day generally starts at 5:00 AM or shortly thereafter. Ms. Geiger takes him to Tender Care Day Care in Lewiston. Ms. Geiger describes TBE as being very well adjusted to this day care setting. He enjoys being there. He has friends at the day care. Ms. Geiger reports that he will begin pre-school there in the fall of 2015.

Ms. Geiger's mother, Susan Geiger, spends several days a month with TBE. Susan Geiger lives outside of Orofino Idaho, but comes to Lewiston on a regular basis to work as an "insurance biller". She testified that she will spend nights in Lewiston with her daughter and with TBE on a regular basis. She describes Sarah Geiger as doing very well being a mother. She describes her daughter as doing a very good job raising TBE. She also describes TBE as being very close with his mother. She has frequent one-on-one time with TBE. It is not uncommon for TBE to come with her to her home and spend time with her and her husband, TBE's grandfather.

CONCLUSIONS OF LAW

Change of Custody

In matters of child custody and parent time with children, the trial court is vested with broad discretion to fashion an arrangement that is fair and equitable to the parties, and is in the best interests of the children. See *Peterson v. Peterson*, 153 Idaho 318, 321 (2012). If a trial court acts within the outer bounds of its discretion and reaches a parent-time decision with the exercise of reason, such decision will be upheld on any subsequent appeal. *Id.* The appellate courts will not set aside the findings of the trial court, even if the evidence presented at trial is conflicting, so long as the findings of the trial court are based upon substantial competent evidence.

In situations such as the case at bar, the Court does not want to become a micromanager of all issues that surface between separated parents. This calls for restraint by the parties and also by the Court when considering changes to custody and parent-time decisions after the original judgment is entered. The overall goal of the court is to bring about continuity and stability as much as possible in the lives of the children. See e.g. *Stockwell v. Stockwell*, 116 Idaho 97 (1989); *Ford v. Ford*, 108 Idaho 443 (1985); and, *McGriff v. McGriff*, 140 Idaho 642 (2004).

To avoid continuous relitigation of custody matters, the Idaho courts developed a standard that provides that a petitioner must show material, permanent, and substantial changes in circumstances which require the court to change or modify custody and the Court must do so if it is in the best interests of the child. See *Poesy v. Bunny*, 98 Idaho 257 (1977). In *Posey* the court discusses at length the standard regarding modification of existing child custody decrees. As the court notes, the trial court is to look at changes in circumstances which have a nexus with

the best interests of the child. If there is no nexus, then the change of custody is not in the child's best interest. See *Poesy* generally.

The issue of custody modifications was re-examined by our Supreme Court in *McGriff v. McGriff, supra.* The court determined that the "best interests of the child must take precedence in any analysis regarding the material change in circumstances. This, *Poesy* emphasizes, 'is the controlling consideration in all custody proceedings.' *Id.* at 642. As noted by the court in *McGriff, supra.*, *Levin v. Leven*, 122 Idaho 583 (1992), and in *Poesy, supra.*, the "threshold question is whether a permanent substantial change in circumstances has occurred."

In evaluating the matter, this Court concludes that this record does not show a substantial, material change of circumstances since the entry of the last custody order on April 23, 2012, that would justify changing custody from Ms. Geiger to Mr. Elliot. Since the entry of the last order regarding custody, there have not been substantial changes in the life of TBE as is noted by the following points:

- TBE is living in the same house with his mother.
- TBE and Ms. Geiger have lived there for over three (3) years.
- TBE has primarily resided his mother during his young life.
- Ms. Geiger has provided appropriate parenting to TBE.
- Ms. Geiger has seen to his medical needs.
- Ms. Geiger has arranged child care.
- Ms. Geiger has devoted her personal time to providing an appropriate environment for TBE.

Nothing in TBE's life has substantially changed since the entry of the last decree.

- TBE has continued to have on-going parental time with his father, Mr. Elliot.
- Mr. Elliot is living with Ms. Wilcoxon in a residence that for all intents and purposes is probably the only residence that TBE knows of with his father. This might be a change of circumstance, but it is not a substantial change. Ms. Wilcoxon purchased the home in December of 2012, and Mr. Elliot moved into the home at the same time Ms. Wilcoxon did. TBE has been a part of this relationship since the spring of 2012. Again, nothing has changed substantially since the entry of the last order. TBE has benefited from the relationship of Mr. Elliot and Ms. Wilcoxon and the Court anticipates he will continue to do so in the future. This might be considered a change of circumstance, however, TBE has had this relationship for most of the time since the last order.[4]
- TBE is attending day care at Tender Care Day Care. He has done this for all intents and purposes since birth. This has been a good opportunity for TBE. He enjoys his time there.
- TBE has a close relationship with his maternal grandparents. During Ms. Geiger's parent time, TBE enjoys frequent contact with his grandmother. Susan Geiger testified that she will spend afternoons with TBE two (2) to three (3) times a week. This has taken place for substantial periods of time, and again is a positive influence for TBE. Again, this is not a change of circumstance since the last order.
- Since the entry of the Order Regarding Custody, Visitation, and Child Support on April 23, 2012, Mr. Elliot has had access to TBE at times other than his parent time.

[4] The Court does not wish to minimize the value of Ms. Wilcoxon's home with TBE. The Court is certain that it is positive and of benefit to him. The focus of the analysis by the Court is TBE's relationship with his parents and what changes in circumstances necessitate the Court to change parental custody.

There has been no material change in this relationship in the last two and a half (2½) years. Based on the evidence presented, it appears Ms. Geiger has been very receptive to Mr. Elliot and Ms. Wilcoxon to have TBE above and beyond the agreed-upon parent time. This is not a change of circumstance the Court would consider supporting a change of custody. Rather, this is cooperative and collaborative parenting which should be encouraged in all parent-sharing relationships.

- Mr. Elliot presented to the Court a lifestyle with Ms. Wilcoxon that promotes appropriate care and a positive development and environment for TBE. The Court lauds Mr. Elliot for his parenting skills and appropriate goals for him and his family. This, however, is not a change of circumstance that would justify a change of custody. TBE is benefiting from this in the current parenting schedule and will continue to do so without a disruptive change of custody between the parties.

In Mr. Elliot's Motion to Modify an Order, Judgment or Decree filed on March 16, 2015, he asserts that the substantial and material change of circumstances with respect to child custody was a change of job assignments at his employer which resulted in a new work schedule of Mondays through Thursdays. Further, that the new work schedule would conflict with the parent-sharing arrangement. The Court does not deem this to be a material change in circumstance in and of itself. The record that was presented to the Court does not equate to a material change of circumstance that would justify changing custody. A new work schedule typically will not represent a circumstance that requires the Court to alter the custodial arrangement between parties. Such a change certainly justifies a change in the parent-sharing arrangement so that each party continues to have meaningful time with their child(ren).

Currently, the parties are working the same schedule-Mondays through Thursdays. The hours are slightly different but essentially the parties have the same work schedule. Once Mr. Elliot changed positions at his employment, he could no longer exercise the schedule contained in the April 23, 2012, Order Regarding Custody, Visitation, and Child Support. The parties agreed to replace the previous parent-sharing time schedule with Mr. Elliot exercising three (3) weekends per month. This is not a positive arrangement for the parties and TBE. Both parties said as much at the trial. Such a schedule requires multiple changes in parent time every week and obviously this does not lead to stability and continuity for TBE. As noted in the joint custody provisions of Idaho Code §32-717B(2) "joint physical custody shall be shared by the parents in such a way to assure the child a frequent and continuing contact with both parents but does not necessarily mean . . . the child should be alternating back and forth over certain periods of time between each parent." The Court concludes that TBE will benefit from blocks of time with each parent because it will provide "a continuing relationship with both parents [which] is in the child's best interest." *Schultz v. Schultz*, 145 Idaho 859, 865 (2008).

The Court concludes that the parties shall continue to have joint legal and physical custody subject to the following parent sharing:

1) Brandon Elliot shall have parent time every other Wednesday to Sunday, commencing and ending at 5:00 PM.

2) Sarah Geiger shall have parent time at all other times.

3) Brandon Elliot shall continue to have the right to schedule work-related care for TBE with his fiancée Erica Wilcoxon during Ms. Elliot's parent time, so long as such care is

agreed upon by Ms. Geiger and, further, it does not conflict with Ms. Geiger's arrangements with her mother Susan Geiger and/or activities at pre-school.[5]

4) The parties stated that they were satisfied with the holiday schedule contained in the prior Order Regarding Custody, Visitation, and Child Support of April 23, 2012. The Court will honor that representation, however, the Court anticipates that as TBE develops and matures he will be capable of spending additional blocks of time with the parties. The parties should consider negotiating a schedule that will anticipate summer vacation from school, a division of the time for Christmas/New Year's Day release from school, alternating spring break release from school, and the Thanksgiving Day release from school. Hopefully, by doing that, they will minimize the need to return to court.

Child Support

The Court concludes that the annual income for Sarah Geiger for purposes of child support is $36,233.60 ($17.42 per hour x 40 hours x 52 weeks).

The parties each carry medical insurance on TBE through employment and stated that they will continue to do so. Ms. Geiger's health coverage shall continue to be the primary coverage.

The Court concludes Mr. Elliot's annual income for purposes of child support is $67,089.00, and Mr. Elliot retains the right to claim TBE for income tax purposes.

The Court has attached as Exhibit A child support summaries and worksheets which are included by reference here and incorporated as if fully set forth.

[5] The Court encourages the parties to remain flexible with this arrangement. It is certainly in TBE's best interests to have on-going contact with his siblings and to continue his relationship with his grandmother Susan Geiger. Hopefully, the parties can reach an agreement because this is part of the balancing parents need to do to promote continuity and stability for their children.

Appendix B:
Opinion and Order on Appeal dated May 12, 2016

Clerk's Record, pages 359-365

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

SARAH M. GEIGER, Respondent/Petitioner, v. BRANDON T. ELLIOT, Appellant/Respondent.	CASE NO. CV11-2416 OPINION AND ORDER ON APPEAL

This matter is before the Court on Defendant Brandon Elliot's appeal of the magistrate court's Findings of Fact and Conclusions of Law and Order and the subsequent Judgment Regarding Modification of Visitation Custody and Child Support.[1] Sarah Geiger was represented by Manderson Miles. Brandon Elliot was represented by Charles Stroschein. The Court heard oral argument on the matter April 21, 2016. The Court, having read the briefs submitted by the parties, and having heard oral argument of counsel, and being fully advised in the matter, hereby renders its decision.

PROCEDURAL HISTORY

On December 6, 2011, Sarah Geiger filled a complaint for paternity, custody, visitation, and support of her child, TBE. After Geiger and Brandon Elliot entered into mediation, an agreement was reached noting that Elliot was the father of TBE and agreeing that the parties

[1] *Findings of Fact and Conclusions of Law and Order*, entered by the Hon. Kent J. Merica on August 17, 2015. Judgment regarding custody entered on October 16, 2015.

would have joint legal and physical custody. On April 23, 2012 an *Order Re: Custody, Visitation, and Child Support* (hereinafter "custody agreement") was entered adopting the agreement reached by the parties. Pursuant to that agreement, Geiger would be the primary residential parent. Elliot had a block of four days off from work each week and he would have TBE from 6 a.m. on his second day off to 5 p.m. on his third day off every week.

On March 16, 2015, Elliot filed a Motion to Modify the custody agreement asserting that his new job conflicted with the current agreement in place, thus there was a substantial and material change in circumstance requiring modification of the custody agreement. With his motion, Elliot filed a parenting plan which sought to modify the existing custody agreement by granting each parent physical custody of TBE every other week.

A hearing was held on the matter on June 26, 2015, after which the magistrate issued his Findings of Fact and Conclusions of Law and Order on August 17, 2015. The magistrate found that Elliot moving in with his then girlfriend Ms. Wilcoxon did not amount to a substantial change as Elliot and Wilcoxon were a couple at the time the original custody order was entered. The magistrate also did not find that Elliot's change in work schedule was a material change of circumstances that would justify a change in custody; however, he did agree that such change justified a revision to the parent-sharing arrangement.[2] The magistrate concluded that Elliot would have physical custody of TBE every other Wednesday through Sunday commencing and ending at 5 p.m. On November 23, 2015, Elliot filed this appeal.

STANDARD OF REVIEW

"A trial court's findings of fact will not be set aside unless clearly erroneous, which is to say that findings that are based upon substantial and competent, although conflicting, evidence will not be disturbed on appeal." *DeChambeau v. Estate of Smith*, 132 Idaho 568, 571, 976 P.2d

[2] *Findings of Fact*, at 8-9.

922, 925 (1999). The credibility and weight to be given evidence is in the province of the trial court, and this Court liberally construes the trial court's findings of fact in favor of the judgment entered. *Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 760, 992 P.2d 751, 755 (1999). However, when the issue is one of law, this Court exercises free review of the trial court's decision. *Wilkins v. Wilkins*, 137 Idaho 315, 318, 48 P.3d 644, 647 (2002). A trial court's child custody decision will not be overturned absent an abuse of discretion. *Suter v. Biggers*, 157 Idaho 542, 546, 337 P.3d 1271, 1275 (2014).

> A trial court does not abuse its discretion as long as the court recognizes the issue as one of discretion, acts within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reaches its decision through an exercise of reason. When the trial court's decisions affect children, the best interests of the child is the primary consideration.

Lamont v. Lamont, 158 Idaho 353, 356, 347 P.3d 645, 648 (2015)(internal citations omitted).

ANALYSIS

1. Magistrate's Order

Elliot asserts that the magistrate abused his discretion when rendering his decision on Elliot's motion by ignoring facts, case law, and Idaho Code.[3] It is clear from the record that magistrate was aware that this issue was one within his discretion.[4] The decision reached by the magistrate was well within the broad outer limits of that discretion. Therefore, the only issue before this Court is whether the magistrate reached its decision through exercise of reason.

The crux of Elliot's argument is that the magistrate failed to recognize several substantial and material changes of circumstance, and did not follow the case law and factors set out in I.C. §32-717.[5] I.C. §32-717 states in pertinent part:

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[3] *Appellant's Amended Reply Brief*, at 12.
[4] *Findings of Fact*, at 6.
[5] *Appellant's Amended Reply Brief*, at 9.

> In an action for divorce the court may, before and after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper in the best interests of the children. The court shall consider all relevant factors which may include: (a) The wishes of the child's parent or parents as to his or her custody; (b) The wishes of the child as to his or her custodian; (c) The interaction and interrelationship of the child with his or her parent or parents, and his or her siblings; (d) The child's adjustment to his or her home, school, and community; (e) The character and circumstances of all individuals involved; (f) The need to promote continuity and stability in the life of the child; and (g) Domestic violence as defined in section 39-6303, Idaho Code, whether or not in the presence of the child.

Elliot asserts that if the magistrate had applied the factors set forth in I.C. §32-717 there would have been an entirely different decision.[6] However, the factors listed in I.C. §32-717 are not intended to be exclusively considered above any others. The Idaho Supreme Court in interpreting that statute has held:

> The statute gives trial courts wide discretion in making custody determinations, but it requires them to consider all relevant factors when evaluating the best interest of the child. Relevant factors may include the parents' wishes for the child's custody; the child's wishes; the interrelationship and interaction of the child with his or her parents and siblings; the extent the child has adjusted to his or her school, home, and community; the circumstances and character of the persons involved; the need to promote continuity and stability in the child's life; and domestic violence. This list of factors is not exhaustive or mandatory and courts are free to consider other factors that may be relevant.

Bartosz v. Jones, 146 Idaho 449, 454, 197 P.3d 310, 315 (2008)(internal citations omitted).

The magistrate acknowledged that Elliot had changed jobs and that he now lived with Ms. Wilcoxon but did not find these changes to be substantial. The magistrate court ultimately found that there had not been a substantial change in circumstances that would justify changing custody from Geiger to Elliot. In reaching that conclusion, the magistrate laid out an extensive number of factual findings that he found supported that decision.[7]

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[6] *Appellant's Amended Reply Brief*, at 10.
[7] *Findings of Fact*, at 7-9.

Elliot now asks this Court to second guess the findings of the magistrate and determine that the factors weigh in his favor.

> When reviewing the magistrate court's findings of fact, this Court will not set aside the findings on appeal unless they are clearly erroneous such that they are not based upon substantial and competent evidence. Even if the evidence is conflicting, findings of fact based on substantial evidence will not be overturned on appeal.

Lamont, at 356, 347 P.3d at 648.

In arguing that the magistrate's findings were erroneous, Elliot offers little more than argument that his interpretation of the evidence is right and the magistrate's is wrong. Elliot does not meet his burden to prove that the magistrate's decision was not based on substantial and competent evidence. The record before this Court indicates the contrary; the magistrate weighed the relevant factors, and then - through clear exercise of reason- made a determination based upon the best interest of the child. [8]

In light of the record before this Court, Elliot's argument that the magistrate ignored, or didn't properly consider certain factors, fails to meet his burden to show the magistrate abused his discretion. Therefore, the decision of the magistrate court is affirmed.

2. Attorney's Fees

Geiger asserts that Elliot's argument is frivolous and without foundation and requests that she be awarded costs and attorney's fees pursuant to Appellate Rule 41 and I.C §12-121.[9] "An award of attorney fees on appeal pursuant to I.C. § 12–121 is permitted for a prevailing party when the Court determines that an appeal was brought, pursued, or defended in a manner that was frivolous, unreasonable, or without foundation." *Lamont v. Lamont*, 158 Idaho 353, 362, 347 P.3d 645, 654 (2015). The decision to award attorney's fees under I.C. §12-121 is at the

[8] The magistrate noted that TBE had primarily resided with Geiger for the past 3 years; that Geiger has seen to his medical needs; arranged child care; and provided appropriate parenting for TBE.
[9] *Amended Respondent's Brief*, at 9.

discretion of the Court. *Jim & Maryann Plane Family Trust v. Skinner*, 157 Idaho 927, 342 P.3d 639, 647 (2015).

In this custody-modification proceeding, the magistrate recognized and applied the correct legal standards and properly reached a conclusion in the best interests of TBE. This case, like most custody decisions submitted to magistrates, presented itself as a multiple choice examination with more than one possible correct answer, but no obviously wrong one. In such a situation, it is impossible to find that the magistrate abused his discretion in upwardly adjusting the parenting time for Elliot but not changing custody of TBE.

Elliot's argument was in essence only that the magistrate should be second guessed and a different answer reached in his favor. His conclusory assertions are not enough to overcome the magistrate's thorough discussion and discretionary findings. This Court, like the Idaho Supreme Court in *Lamont*, is unconvinced that there were genuine issues of law or fact raised, and therefore finds that this appeal was pursued in a manner that was frivolous, unreasonable, and without foundation. Accordingly, this Court awards Geiger's costs and fees incurred on appeal.

ORDER

IT IS HEREBY ORDERED that the decision of the magistrate court is AFFIRMED. IT IS FURTHER ORDERED that Geiger's motion for costs and fees is GRANTED.

Dated this 12 day of May 2016.

JEFF M. BRUDIE, District Judge