12-21-2016

Geiger v. Elliot Appellant's Reply Brief Dckt. 44265

IN THE SUPREME COURT OF THE STATE OF IDAHO

SARAH MONIQUE GEIGER	)	
	)	
Respondent/Petitioner,	)	Docket Number No. 44265
	)	
v.	)	
	)	
BRANDON T. ELLIOT,	)	
	)	
Appellant/Respondent.	)	
	)	

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce regarding an appeal from a Magistrate Judge's decision

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The Honorable Chief Justice and Associate Justices of the Idaho Supreme Court

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COMES NOW, Appellant/Respondent, Brandon Elliot, by and through his attorney of record, Charles M. Stroschein of Clark and Feeney, LLP, and respectfully submits the *Appellant's Reply Brief* in response to the *Respondent's Brief.*

III.
ARGUMENT
A.
The Magistrate failed regarding the best interest of the child, the application of Idaho Code §32-717 and finding substantial and material changes of circumstance.

This is a unique case for the Court. The Magistrate failed to cite to I.C. §32-717 in his decision. What recent custody case has the Court seen in which the trial court did not cite to I.C. §32-717[1]? The best interest standard governs decisions regarding where a child resides. The standard is set out in I.C. 32-717. *Bartosz v. Jones*, 146 Idaho 449, 197 P.3d 310 (2008).

The next unique issue is that in the brief filed by Ms. Geiger, she does not cite to any evidence to support her position. There is no cite to the Transcript. There is no cite to the Exhibits. The Respondent simply cites to the pleadings filed by the parties, the decision of Judge Merica and the decision of Judge Brudie. Basically, the Respondent is saying the Court should uphold Judge Merica's decision because of Judge Merica's decision. Wouldn't one think that if there was

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[1] 32-717. CUSTODY OF CHILDREN -- BEST INTEREST. (1) In an action for divorce the court may, before and after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper in the best interests of the children. The court shall consider all relevant factors which may include:
(a) The wishes of the child's parent or parents as to his or her custody;
(b) The wishes of the child as to 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.

evidence to support Judge Merica's decision that the Respondent would have pointed out evidence from the transcript of the testimony of the witnesses or from the exhibits that were introduced to support the testimony of the witnesses. How many cases has the Court seen in which no reference to evidence is made to uphold a lower court decision? Again, the Respondent simply says Judge Merica's decision is right because Judge Merica says so and Judge Brudie's decision is right because Judge Brudie says so as opposed to Judge Merica's decision is right because of evidence from the witnesses or exhibits.

The Respondent's argument should be disregarded based on Idaho Appellate Rule 35(b)(6) which states:

> (6) Argument. The argument shall contain the contentions of the respondent with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon. (emphasis added)

In *Wood v. Sanders*, 150 Idaho 53 (2010), the Idaho Supreme Court stated: "Further, under IAR 35(a)(6), the argument section of the brief must contain 'citations to the authorities, statutes, and parts of the transcript and record relied upon.' I.A.R. 35(a)(6). Because Sanders' brief fails to comply with these standards, the Court declines to review her arguments." (emphasis added) *Woods*, Id at p. 58

Mr. Elliot's Appellant's Brief cited to the testimony of the witnesses and the exhibits that were introduced into evidence. Mr. Elliot has met his burden on this appeal.

The Magistrate did not reach his decision by an exercise of reason. Consideration of all of the substantial and material changes of circumstance, under the proper analysis, would have resulted in the child being placed with father and not continuing to be primarily placed with the mother.

The Respondent says that the Magistrate court decision contained a thorough analysis but yet does not cite to any evidence that supports that conclusory statement. Respondent's Brief, p. 10. In fact, the brief filed by the Respondent is simply a bunch of conclusory statements run together. There are no facts, no evidence and no exhibits to support those conclusions.

This is a case in which only Mr. Elliot seems to be worried about the rules. Ms. Geiger failed to go to the Court ordered Focus on Children Class. Tr., p. 32, Ll., 22-25; p. 33, Ll. 1-7 and Record, p. 98. Mr. Miles failed to comply with the Court's pretrial order regarding submitting exhibits a week before trial. Tr., pp. 51-52, p. 56; Record, p. 104. Mr. Miles did not seem interested in the rules regarding attorney fees on appeal. Record, pp. 252, 257. The District Court, in its analysis of the fees issue, did not seem to be interested in the rules or case law. Record, p. 363. The District Court also did not seem to be interested in actually finding out how the Supreme Court in *Lamont v. Lamont*, 158 Idaho 353, 347 P.3d 645 (2015) came to its decision. A review of the Magistrate decisions in *Lamont* and *Geiger/Elliot* tells the tale, as the *Lamont* Magistrate decision is substantially different than the one that was filed in Mr. Elliot's case by Judge Merica.

At the time of the hearing regarding the amount of attorney fees to be awarded, Counsel for Mr. Elliot reiterated the problems with the district court's attorney fee analysis and the fact that Mr. Miles filed a brief after the briefing schedule. Record, pp. 212, 328, 238. There was nothing that

allowed for Mr. Miles to file this sort of amended brief. Of course, the Court is now aware that the district judge reversed himself regarding attorney fees. See Order regarding fees attached to Motion to Augment the Record.

The Respondent is basically saying that the Magistrate can disregard I.C. §32-717. There is no case law to support such an argument. All family law cases that Counsel has reviewed in the past several years cite to I.C. §32-717. See *Bartosz v. Jones*, 146 Idaho 449, 197 P.3d 310 (2008).

In this case, the Respondent simply wants the Court to ignore the facts, evidence and I.C. §32-717. Idaho Code §32-717 requires the court to weigh factors against each other. *Suter v. Biggers*, 157 Idaho 542, 337 P.3d 1271 (2014). The Magistrate failed this requirement. The position of the Respondent is not supported by case law or the statutory scheme developed by the legislature or the rules developed by the Idaho Supreme Court. It is certainly telling that the Respondent did not feel comfortable citing to the actual evidence to support her argument regarding Judge Merica's decision. The actual evidence does not support Judge Merica's decision. See Mr. Elliot's first brief.

B.
Attorney Fees
1.
The Application of I.C. §12-121 and I.R.F.L.P., Rule 908.

The Respondent should have recognized the failure of the District Court in its decision regarding attorney fees. However, Respondent continued to argue in favor of attorney fees despite the fact that Mr. Miles' brief did not comply with the rules or case law regarding attorney fees on appeal to the district court. Record, p. 249. See District Order dated October 21, 2016, which was supplemented as part of the record.

In addition, the Respondent, in her brief, does not cite to evidence to support her argument which is frivolous, unreasonable, and without foundation. The respondent does not cite to the transcript. The respondent does not cite to the exhibits that were introduced into evidence. The respondent simply uses circular reasoning by citing the Magistrate decision to support the Magistrate's decision. When was the last time the Court received a brief in which a party failed to cite to the evidence? Simply saying Judge Merica was right because that is what Judge Merica wrote is frivolous, unreasonable and without foundation.

The Respondent has failed to comply with I.A.R. 35(b)(6) which states:

> (6) Argument. The argument shall contain the contentions of the respondent with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon. (emphasis added)

Mr. Miles failed to comply with I.A.R. 41 and I.A.R. 35(a)(5) and I.A.R. 35(b)(5). Record, p. 249. Mr. Miles filed a brief outside the briefing schedule which was objected to by the appellant. Record, p. 356. Ms. Seubert, in her Memorandum of Costs and Attorney Fees on Appeal, cited to the civil rules and failed to cite to the Family Law Rules. Record, p. 369. The same can be said for Mr. Miles in his affidavit. Record, p. 373. Mr. Elliot filed an Objection to the Memorandum of Attorney Fees and Costs. Record, p. 409. At no time did the Respondent acknowledge that Mr. Elliot was right in his assessment of what Mr. Miles did on appeal regarding attorney fees and the failure of the District Court with regard to attorney fees. A party should not keep arguing a point that is clearly wrong. In *State v. Victor Smith*, 120 Idaho 77, 813 P.2d 888 (1991) the Attorney

General's Office noted that the District Court got it wrong regarding the Illegal Drug Stamp Tax Act. Ms. Geiger should have told the District Court it was wrong.

The Court should note that instead of acknowledging the failures of the Court below, the Respondent continued to argue against the clear line of case authority and unambiguous appellate rules. The Respondent continues to argue that the Magistrate was correct even though the Respondent did not cite to any testimony or any exhibit to support the Magistrate's decision. Not citing to the evidence of the case is frivolous, unreasonable and without foundation and in violation of I.A.R. 35(b)(6).

The Respondent states as follows: "After a trial, the Magistrate court found a substantial change in circumstances had occurred and that it was in the best interest to expand a parent custodial time, but denied appellant's request to change primary custody of the child from Respondent to appellant." Respondent Brief, p. 1. The Respondent, in stating this, does not cite to the record to support where the Magistrate actually did make a finding that there was a substantial and material change of circumstance. What the Magistrate actually said was: "Nothing in TBE's life has substantially changed since the entry of the last decree." Record, p. 183. The magistrate, however, did make a change to the parenting plan by limiting Mr. Elliot's time with his son from every week to every other weekend.

The Magistrate also stated:

> "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 circumstance 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 that new work schedule would conflict with the parent sharing agreement. The Court does not deem this to be a material change in circumstance in and of itself."

Record, p. 185

One would think that the Magistrate would start off his analysis by noting there were substantial and material changes of circumstance. Once this determination is made then the court would look at the factors found in I.C. §32-717. As was argued above, Counsel for Appellant cannot find any cases in which the Court didn't address I.C. §32-717 in custody cases. Clearly, since the Respondent and the District Judge were happy to cite to *Lamont v. Lamont,* 158 Idaho 353, 347 P.3d 645 (2015), the Court may want to compare the Magistrates decisions in *Lamont* and *Geiger-Elliot*. There is a substantial difference. The *Lamont* Magistrate used I.C. §32-717 while Judgment Merica did not.

The Respondent simply wants the Court to disregard I.C. §32-717. However, case law is clear, appellant courts have determined that statutes are put in place for a reason and to simply ignore a legislative directive would be improper. See *Hoffer v. Sheppard*, Idaho Supreme Court Docket No. 42807 (September 28, 2016).

The Respondent does address, in a footnote, Family Law Rule 908 which is specific to the use of the standard formally applied to I.C. §12-121 in that there has to be a determination that a case was brought or pursued or defended frivolously, unreasonably or without foundation. This is not a case in which the Father, Mr. Elliot, simply wants the Court to second guess the Magistrate. The Magistrate did not use the proper standard set out by the legislature or prior case law regarding a

determination of substantial and material changes of circumstance and the application of what is in a child's best interests pursuant to I.C. §32-717.

If the Court continues to apply the old I.C. §12-121 standard, the Court should determine that the Respondent should have recognized the District Court's failure in its application of *Lamont* and its failure to apply case law and the appellate rules regarding attorney fees. In addition, the Court should recognize that not citing to any evidence to support an appellate argument is frivolous and unreasonable.

The Court on appeal, should determine that the Respondent is required to pay attorney fees and costs to Mr. Elliot because "justice so requires".

2.
I.C. §32-704 and §32-705 does Support the Award of Attorney Fees to Mr. Elliot

The trial court determined that Ms. Geiger made $36,233.60 a year for income. Record, p. 189. Ms. Geiger testified that she had a pay rate of $17.42 an hour and worked a 40-hour work week. Tr., p. 31, Ll 9-21. Ms. Geiger also indicated that her rate of pay would be based upon 52 weeks. Tr., p. 32, Ll 19-21. Ms. Geiger testified that she had substantial equity in her house and that she would be able to sell her house and get into another. Tr., p. 48, Ll 5-10. Ms. Geiger also testified that she was able to provide medical for the minor child and herself. Tr., p. 28, Ll 16-25.

I.C. §32-704 states:

> 3. 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 any

> proceeding 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. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name. (emphasis added)

The legislature does not put any limiting language in I.C. §32-704 which would limit its analysis with regard to proceedings under "this act". Clearly, a motion to modify custody and child support and an appeal are proceedings under "this act". *Bartosz v. Jones*, supra, Footnote 1[2]. Ms. Geiger had a house, with substantial equity, which she said she was going to sell and ultimately did. Her income was noted by the trial court at over $32,000 a year. There is nothing in the record that would show she could not pay Mr. Elliot's attorney fees and costs. The Respondent did not make a request for fees pursuant to I.C. §32-704.

IV.
CONCLUSION

Mr. Elliot met his burden with regard to the issues on appeal. The Magistrate Court abused its discretion by failing to apply I.C. §32-717. The Magistrate failed to take into account all of substantial and material changes that warranted a change of custody. The Magistrate did not make a finding that there had been a substantial and material change of circumstance for TBE despite all of the things that had changed with regard to his life with his father, involving a great home, great step-mom, great little brother, another little brother on the way, a whole new step-family and the

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[2] [1] By its terms, section 32-717 only applies to actions for divorce and to " children of the marriage," however, because no specific criteria govern custody orders for non-marital children, we have approved application of section 32-717 to situations where a child's parents are not, or have not been, married. See *Weiland*, 139 Idaho at 123, 75 P.3d at 177; *State v. Hart*, 142 Idaho 721, 723, 725, 132 P.3d 1249, 1251, 1253 (2006).

location of dad's house one block from school. While, on the other side, Mother's life was filled with instability and the use of others to help her parent. The Respondent's position has been frivolous. The Respondent should have told the District Court it was wrong in awarding attorney fees. The Respondent should have cited to at least some bit of evidence to support the Magistrate's decision on this appeal. It is pretty telling why the Respondent did not, as there is little evidence that supports the Magistrate's decision. Attorney fees and costs should be assessed against Ms. Geiger.

DATED this 19th day of December, 2016.

CLARK and FEENEY

By _____
Charles M. Strosklein, a member
of the firm. Attorney for the Appellant

I hereby certify on the 19th
day of December, 2016, a true
copy of the foregoing instrument
was: XX Mailed
____ Faxed
____ Hand delivered
____ Overnight mail to:

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By _____
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