7-25-2014

Suter v. Biggers Appellant's Reply Brief Dckt. 41976

IN THE SUPREME COURT OF THE STATE OF IDAHO

EMILY E. SUTER,

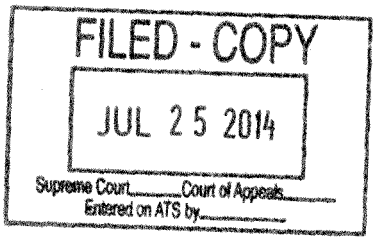
Plaintiff-Appellant.

vs.

JEFFREY C. BIGGERS,

Defendant-Respondent.

Docket No. 41976-2014
Gem County No. CV 13-299



REPLY BRIEF OF APPELLANT EMILY SUTER ON EXPEDITED APPEAL

On Appeal from the Third Judicial District, County of Ada

The Honorable Jayme L. Sullivan, Presiding

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I. THIS APPEAL IS PROPERLY BEFORE THE COURT

Respondent Jeff Biggers argues a jurisdictional defect bars consideration of this appeal. That argument is without merit, because of Rule 17(e)(2), Idaho Appellate Rules.

A. All Parties Believed the February "Decree" to Be the Final Order.

The trial court's proceedings resulted in Findings of Fact and Conclusions of Law issued January 28, 2014. R. Vol. III, pp. 404-415. The trial court then issued a "Third Modified Decree" on February 10, 2014. R. Vol. III, p. 422, which the parties considered to be the final order in the case.

Consistent with that view, Emily timely applied for and was granted leave to pursue an expedited direct appeal, first by the Magistrate, and then by the Supreme Court, by order entered April 2, 2014, under Rule 12.1, Idaho Appellate Rules. Emily properly filed her Notice of Appeal and Amended Notice of Appeal with the Supreme Court on April 16, 2014, under Rule 12.2(a)(2), Idaho Appellate Rules.

B. After the Appeal Was Proceeding, the Supreme Court Remanded for an Amended Decree, Which Was Timely Entered.

On May 14, 2014, the Supreme Court issued an Order Remanding to Magistrate Court, stating, "If the THIRD MODIFIED DECREE is a final judgment, it must not contain reference to prior proceedings as required by Idaho Rules of Civil Procedure 54(a) . . . ."[1]

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[1] The "Third Modified Decree" entered February 10th, contained a preamble which stated: "A Petition to Modify was filed. A Trial was held. Findings of Fact and Conclusions of Law have been entered separately. For the reasons set forth therein . . . ."

Following that Remand Order, and within the seven (7) days allotted by the Remand Order, the trial court entered its "Amended Third Modified Decree," together with a "Final Judgment" on May 16, 2014, R. Vol. III, pp. 44-461.

C. Emily Was Not Required to File Another Notice of Appeal.

Respondent Jeff argues the "Amended Third Modified Decree" and "Final Judgment" dated May 16, 2014, required another Notice of Appeal to be filed. He says the failure to file another notice is jurisdictional and renders this appeal invalid.

Idaho Appellate Rule 17(e)(2), entitled "Premature Filing of Notice of Appeal," states:

> "A notice of appeal filed from an appealable judgment or order before formal written entry of such document shall become valid upon the filing and the placing the stamp of the clerk of the court on such appealable judgment or order, without refiling the notice of appeal."

Under this rule Emily was not required to submit another notice of appeal. The decree appealed from originally in this matter was intended, and believed, to be final by all parties, and the trial court. The remand and entry of the "Amended Third Modified Decree" a month later merely served to correct the preamble of the previous decree to comply with Rule 54, Idaho Rules of Civil Procedure.

Many appellate decisions in Idaho have allowed cases to go forward on appeal in similar circumstances. For example, in *Weller v. State*, 146 Idaho 652, 200 P.3d 1201, (Ct. App. 2009), the Court considered a case where a notice of appeal was filed before any order had been entered on a request for post-conviction relief. The district court had merely issued a "notice of intent to dismiss." The state urged dismissal of the appeal, but the Court found:

> The adoption of I.A.R. 17(e)(2) indicates "a policy of judicial fairness, preserving appeals for determination on their merits rather than penalizing litigants for their eagerness in seeking appellate review." *State v. Gissel,* 105 Idaho 287, 290, 668 P.2d 1018, 1021 (Ct. App. 1983). The mistiming of the notice of appeal in this case caused no prejudice to the State."

Weller, supra, 146 Idaho at 655, 200 P.3d at 1204.

The May 16, 2014 "Amended Third Modified Decree" constitutes the final order in this case, but the previously filed Amended Notice of Appeal permits this case to be considered on the merits under Idaho law.

II. THE TEMPORARY ORDER AFFECTED CUSTODY RIGHTS WITHOUT EVIDENCE, ANALYSIS, FINDINGS, OR CONCLUSIONS TO SUPPORT IT

The Magistrate heard the motion for temporary orders on August 21, 2014.[2] Respondent Jeff argues the temporary order entered in August "did not address issues of custody" but merely "maintain[ed] the status quo." But in fact, similar to *Schultz v. Shultz,* 145 Idaho 859, 187 P.3d 1234 (2008), the temporary order here summarily ordered the custodial parent to relocate the children in her custody back to the Emmett area, months after she'd lawfully moved to Lake Fork. The trial court's decisional process was flawed—it took no evidence and didn't engag in a reasoned analysis of the best interests, but simply required the children to attend schools in a county where neither party resided.

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[2] A stipulation to augment the transcript to include the verbatim transcript of the short hearing on August 21, 2013, has been filed pursuant to Rule 30, I.A.R. Citations below are to that as "Tr. Vol. Supplemental"

A. The Temporary Order Granted Relief Neither Party Had Requested, and Focused on Only One Factor, and Seriously Impacted Custody.

Jeff's motion for temporary orders on August 21st, 2013 sought physical custody, on a temporary basis, so "the minor children [could] be immediately enrolled in and attend school in the Emmett School District while residing with their father, the Defendant." R. Vol. II, p 268-269 ("*Motion for Temporary Orders and Notice of Hearing*" filed August 16, 2013) (emphasis added).

The only evidence supporting Jeff's motion was the affidavit of Jeff's attorney, which consisted almost entirely of hearsay statements about what counsel had said and heard in a chambers conference with the previous magistrate originally assigned to the case, Tyler Smith, who had recused himself. R. Vol. II, p. 271-274.

The opposing Affidavit of Emily Suter, however, detailed the address change as of June 1, 2014, when she and her family had moved to Lake Fork, after the boys had completed their school year. R. Vol. II, p. 291. It was undisputed that Jeff's visitation for the summer had proceeded without incident between Emily's residence in Lake Fork, and Jeff's residence in Sweet – the parties simply changed the "exchange point" from near Black Canyon Dam, to Smith's Ferry, making only about an eight mile difference in Jeff's drive to pick up the boys. R. Vol. II, p. 292; Tr. Vol. II, p. 396, l. 12 - p. 398, l. 22.[3]

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[3] The record both from Emily's affidavit filed in August 2013, and in the testimony at trial, was uncontradicted that before June 2013, when Emily and her family were in Letha, the parties exchanged the boys for Jeff's four-days-a-month visitation outside Emmett, near Black Canyon Dam, a drive of about 20 miles for Jeff from his ranch above Sweet; after June 2013, the parties exchanged at Smith's Ferry, a drive of between 20 and 28 miles from Jeff's ranch, depending on the route. R. Vol. II, p. 292; Tr. Vol. II, p. 396, L. 12 - p. 398, L. 23.

Also included in Emily Suter's affidavit were details of the children's adjustment to the Lake Fork and McCall communities, Boy Scouts, church activities, reading programs, football camp, and their closeness with their siblings, all things which were subsequently confirmed at the trial. R. Vol. II, p. 292; Tr. Vol. II, pp. 376-377; p. 380, L. 5-19; p. 384, L. 11-22.

On August 21, 2013, the trial court heard arguments of counsel, and stated it was ordering the children to return and attend school in Emmett, but was not "switching custody." Tr. Vol. Supplemental, p. 16, L. 22. This was arguably the worst of all possible options available to the Court; it was certainly something neither party had asked for. The impact on Emily's exercise of custody was significant: it required her to physically relocate back to the Emmett area, essentially dividing her family into two pieces, while her husband remained, with the other two children, stayed employed with his full-time position at Brundage Mountain. Tr. Vol. II, p. 401, L. 2; p. 278, L. 6-7. As a result, Emily and the boys lived out of suitcases during the school year, staying with her parents in north Ada County, and commuting to Emmett and back to Valley County on weekends. Tr. Vol. II, p. 272, L. 1-12; p. 276, L. 7- p. 277, L. 19; p. 278, L. 6-7.

Granting relief that neither party asks for may certainly be within a trial court's discretion in determining the best interests of the child. But granting such relief without analysis, findings or conclusions, suggest the order was not arrived at by an exercise of reason. Here, the supplemental transcript[4] of the hearing shows the trial court did mention Idaho Code

[4] Stipulation to Augment with supplemental transcript filed July 25, 2014.

Section 32-717, and states, "the status quo is in the best interests of the children pending...further litigation . . . the kids are 11 and 8...they've always attended school in Emmett...I am ordering that they continue to attend school in Emmett." Tr. Vol. Supplemental, p. 16, L. 10-15.

But after some further argument by counsel, the Court concluded by saying, "I'll leave that up to Ms. Suter whether she wants to relocate, or she wants to have the minor children reside with Mr. Biggers so they may in fact attend the Emmett School District pending further resolution in this matter." Tr. Vol. Supplemental, p. 18, L. 25-p. 19, L. 4. (Emphasis added).

So, as the trial court admitted, this is really not a *status quo* order – at the time of the hearing Emily and her family had lived in Lake Fork, in Valley County, for almost three months. The trial court even tells Emily she must relocate or lose custody, saying it's "up to [Emily]" whether she wants to relocate back to Emmett, or turn over primary custody to Mr. Biggers. *Id.* A custodial *status quo* involves much more than just school attendance. It might be reasonable to order kids returned to their prior schools if a parent has moved beyond a specific limit set in a custody order, if for example Emily had moved beyond the permitted "100-mile" distance in the Decree, or if she'd moved far from any formal school, and had no skills for home schooling – if the only alternative to going back to a former school was no schooling at all. But here, the family had moved from rural Gem County to near McCall, to an arguably much better school system.[5] The trial court didn't consider anything other than

[5] In her findings the trial court found the evidence to show McCall schools had better test scores, and McCall's elementary was marginally better rated than Shadow Butte Elementary, but states "there is no evidence that the boys would do better in school in McCall or that McCall could cater to the boys in ways in which the Emmett School system cannot." This finding, in addition to

school attendance. The great impact on the family system and sibling relationships, the potential impact on the new employment which Mr. Suter had obtained in Valley County, the substantial and beneficial adjustment of the children in Valley County over the months since going there— evidence was before the court on all these factors in Emily's Affidavit and all of it was unrebutted.

The exercise of discretion requires an exercise of reason, and needs to reflect a consideration of "all relevant factors impacting the custody decision." *Schultz, supra*, 145 Idaho at 863, 187 P.3d 1238. This was unquestionably a custody decision – the trial court explicitly contemplated forcing Emily to return to the Emmett Valley or give up custody of the boys. But clearly there was only one factor considered or mentioned, that of the court's view the children must return to Emmett schools because "they've attended there all their lives." In response, Emily's counsel pointed out that in fact (as was later demonstrated at trial, Tr. Vol. I, pp. 103, L. 10 - p.104, L. 6) the children had not attended Emmett schools "all their lives," but had in fact attended schools in Sweet, and Horseshoe Bend as well; and, in addition, the fact that Jeff Biggers lives in Boise County, not Gem County (a fact which was in the record since the Order Modifying Decree entered October 2011, R. Vol. I, p. 91).

B. Rule 65(g) Does Not Make Consideration of the Best Interests "Inapplicable."

Jeff argues that a consideration of the children's best interest factors was "inapplicable" in the temporary order hearing because the magistrate "did not address

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many others, shows again the trial court's shifting of the burden to Emily to prove a "move case" burden under *Roberts v. Roberts*, 138 Idaho 401, 64 P.3d 327 (2003) rather than require Jeff to prove that a complete change in custody was in the best interests of the children. R. Vol. III, p. 415.

custody" and Emily failed to request an evidentiary hearing. As noted above, custody was at the heart of what the trial court did in the temporary order, and Rule 65(g) does not remove the decisional standards for entering discretionary decisions about children's best interests.

Jeff suggests that Emily should have requested an evidentiary hearing to cross-examine the adverse party's affiants. But the only "affiant" adverse to Emily in the temporary order, was the attorney serving as counsel for Jeff Biggers. And the only "evidence" presented in the affidavit of counsel were representations of in-chambers discussions with a prior judge on the case, which are not evidence at all. R. Vol. II, p. 271-274. To form a valid basis for a custody order, statements in affidavits must be on personal knowledge and "shall set forth such facts as would be admissible in evidence." Rule 56(e). The statements of an attorney about what a different judge may or may not have said in a chambers conference is not a valid basis for deciding the best interests of a child.

Moreover, whether an evidentiary hearing was requested or not bears not at all on the issue of whether a valid exercise of discretion has occurred in the trial court's temporary order. The trial court forced Emily to leave her home in Valley County so the kids could return to Emmett schools, but did not order any additional time for the children's father beyond his four-days-a-month visitation. Rule 65(g) permits prohibitive or mandatory orders "as are just" but the order in this case was punitive, not "just." Without a reasoned consideration of best interest factors, it's not rational to: 1) force the children to return to schools in a county where none of the parties reside any longer, 2) force Emily to give up primary custody unless she returns the children to the those schools, or 3) impose a choice

which has only two consequences – either the children lose the continuity of their established custodial home in Valley County or uproot them completely and move them to Boise County with Dad, for no reason other than to keep them in the same schools as the previous year.

III. EVERY CASE INVOLVING A PARENTAL CHANGE OF LOCATION IS NOT A "RELOCATION CASE"

Jeff, who lives in Boise County, says this was a 'relocation' case and the trial court properly placed a 'relocation' burden of proof on Emily for leaving Gem County (requiring her to prove going to Valley County was in the best interests of the children). He states that Emily had no "right" to move the family to Valley County. Jeff's position misstates Idaho law, and would turn every case involving a minor parental change of address into a burden-shifting "relocation" case.

A. The Language of the Parties' Order Should Mean Something.

The trial court does not analyze or comment on the language of the parties' stipulated divorce decree about relocation, but analyzes the case as a relocation, which essentially renders the terms of the order meaningless:

> 10. RELOCATION BY PARENT
>
> We agree that a move by either parent of more than 100 miles from Sweet, ID 83670 will make this plan impractical or unworkable. Therefore, neither parent will make such a move with a child without our mutual agreement or a decision by the court that it is in the child's best interest to move.

Decree of Divorce entered Mar. 29, 2011, Exh. A. (Amended Parenting Plan), R. Vol. I, p. 59. (emphasis added).

If Emily's move to Valley County with the kids was within the allowable distance set forth in the order, that means it also was within the clear the terms of the second sentence of this Order— which provides "neither parent will make such a move with a child without...agreement or a decision of the court..." The corollary to this provision is a move within the allowable radius does not require permission or a court decision on best interest. Yet, the trial court (both at the tempoary Orders hearing, and at trial) ignores this corollary and regards Emily as having the same burden as when she'd asked to move to Coeur d'Alene— to prove that the move, in and of itself, was in the children's best interest. The trial court's conclusions thus read like a competition between Emmett and McCall:

> "The same factors Judge Cockerille relied on in denied [sic] the move in October 2012 are still controlling at the time of [this] trial approximately a year later. Although Emily's move to McCall is most certainly in her and Clint's best interest, but not the boys [sic] as previously discussed....
> ....
> "There is no evidence of what, if any, educational opportunities are available to the boys in McCall that are not in Emmett...There is no evidence that the boys would do better in school in McCall or that McCall could cater to the boys in ways in which the Emmett school system cannot.
> ....
> "This Court echoes Judge Cockerille's findings just over a year ago that the boys' adjustment to their home in the Emmett area, school, and family favors the Emmett area...and the need to promote continuity and stability in the life of the boys likewise favors the Emmett area...For the forgoing reasons...this Court finds that it is not in the boys' best interests to move to McCall, Idaho."

Tr. Vol. III, p. 414-416.

This approach, of regarding even the most incremental moves as "relocations" means a *Roberts* burden-shifting would occur in nearly every custody modification. This largely explains the commonly held view around Idaho that there is a 'presumption' against

relocations.[6] Whether characterized as a 'presumption' or not, the effect of this 'burden shift' is to require custodial parents to repeatedly re-litigate their children's best interests based almost completely on comparisons of towns, schools, and communities, which almost always will favor the familiar, and disfavor the new, as was obviously the case here. This approach means the court, as here, overemphasizes the perceived "continuity and stability" factor of a familiar or prior environment, rather than the more substantial questions of nurturing, emotional well-being, and bonding with a primary caretaker or established custodian.

B. Jeff never proved, and the trial court never found, that the move made the existing custody Plan unworkable or impractical.

The trial court clearly viewed this "relocation" of the kids out of Gem County as burdening Jeff's relationship with the children. But the impact the court focused on was on times Jeff had been seeing the children outside of his custodial time, rather than his exercise of custody under the order. The trial court concluded:

> "Emily's move impacts the current visitation schedule by changing the exchange location, lengthening the commute time of the p arties for the exchange, and impacts Jeff's not scheduled visitation with the boys....
> ....
> "Should the boys' primary residence be McCall during the school year, such constant and continual contact with Jeff outside of the custodial agreement would diminish due to distance, logistics, and practicality. The move is not in the boys' best interest as is [sic] would negatively impact their relationship with their father."

Tr. Vol. III, p. 411-413.

Jeff clearly regarded the 100-mile limitation as having significance. In his own "Supplemental Petition for Modification" of the parenting plan, filed in March 2013, Jeff

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[6]Based on a recent comment of a Magistrate Judge in a rural Idaho county to this writer.

included a specific request that the permissible distance for "Relocation by Parent" be changed from 100 miles to "a 25 mile radius." R. Vol. II, p. 218. (emphasis added). Both parties seemed to understand the 100-mile provision as meaning what it said—that whatever burden might result from a move withi n that radius, would be deminimus and not require re-litigation of the children's best interests. Yet, the trial court viewed it otherwise.

The trial court recognizes an "impact" on the current custody plan, citing the change in the exchange location (by eight miles) and longer commute.[7] But the focus was clearly, as the above quote demonstrates, on the burden for Jeff on non-custodial times. Under the decree, and under Idaho law, the focus for relocations is on the effect on the existing custodial order or plan, rather than on what a non-custodial parent does outside that plan. *See, e.g., Osteraas v. Osteraas*, 859 P.2d 948, 124 Idaho 350 (1993)("geographical relocation...such that the custody decree cannot be followed as previously entered..."); *Roberts, supra,* ("before moving in violation of a previous custody arrangment."); *Clair v. Clair,* 153 Idaho 278, 281 P.3d 115 (2012)("...a unilateral move by one parent out of state...").

Our system of family law depends on some basic principles, which include giving weight and signficance to custody Decrees, which are presumed to be in the child's best interest, until modified. The focus on non-custodial times which Jeff was able to pursue with the children here (mainly because he doesn't have regular employment, Tr. Vol. II, p. 362, L. 23- p. 363, L.6) relegates the existing custodial schedule to near-irrelevance. The fact is that

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[7]While the commute for the kids to and from parental exchanges increased, the trial court never comments on kids' commute to school from Jeff's house (the effect of Jeff's residence in Boise County being at least 20 miles from the children's schools) compared to the close proximity of the McCall schools by bus to Emily's home in Lake Fork.

only a year before this case, Jeff's custodial time was reduced by Judge Cockerille, to four overnights per month, in a decision which Jeff repeatedly trumpets now, albeit for other reasons. That custody schedule was impacted in only the most minimal way by Emily's move to Valley County, yet the trial court entered no findings or analysis reflecting consideration about that, or about the children's commute from Jeff's ranch to school (a 40 mile round trip to Emmett), or about the rodeos, brandings, and other activities which were significant to the children occurring during Jeff's regular visitation and vacation times under the existing court order, and were not significantly impacted by the residence in Valley County. Indeed, the trial court's focus on the non-custodial times which were affected by the move to Valley County was to the exclusion of nearly all other factors in this case. Treating this case as a 'relocation' resulted in a skewing of the burden of proof, a narrow focus on only the comparison of two rural Idaho counties, and the children's long-time custodial relationships and bonds being disregarded. Such a process is counter to Idaho law, and sows seeds of mischief for stable custody relationships for the slightest residential moves.

As the Court is *Markwood* commented:

> "Joshua also asks this Court to adopt an "overarching rule" that "relocation must be weighed against the status quo of the preexisting order" because, he argues, a child's primary custodial parent would otherwise always be allowed to relocate with the child. We find no merit in this contention. Under Joshua's proposed rule, relocation of children with a relocating parent would be disfavored because it disrupts the status quo, even when maintaining the status quo is not an option, as is the case here. It would be irrational and pointless for the court to weigh relocation against an alternative that does not exist. The "overarching rule" established by Idaho law is that a court making a custody determination is to be guided by the best interests of the child."

Markwood, supra, 152 Idaho 756, 763, 275 P.3d 1271, 1278. The trial court's focus on keeping a supposed "status quo" for these children which essentially did not exist was error.

CONCLUSION

Appellant asks that the trial court's orders be vacated and the matter remanded for retrial or that Respondent's petition to modify be dismissed.

RESPECTFULLY SUBMITTED this 25 day of July, 2014.

BAUER & FRENCH

By _____
Charles B. Bauer, Attorneys for Plaintiff-Appellant

CERTIFICATION OF SERVICE

I hereby certify that on the 16 day of July, 2014, two true and correct copies of the foregoing was served upon:

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