7-1-2014

Garner v. Garner Appellant's Brief Dckt. 41898

Richard B. Eismann, ISB # 557
Ryan Martinat, ISB #8789
Eismann Law Offices
3016 Caldwell Blvd.
Nampa, Idaho 83651-6416
Telephone: (208) 467-3100
Facsimile: (208) 466-4498
RBE/4

Attorneys for the plaintiff/appellant

IN THE SUPREME COURT OF THE STATE OF IDAHO

MONICA E. GARNER, Plaintiff and Appellant, -vs- CHRISTOPHER C. GARNER, Defendant and Respondent.	)	Supreme Court Docket No. 41898-2014 Payette County No. 2010-586

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Third Judicial District for Payette County, to the Supreme Court of the State of Idaho

The Honorable D. Duff McKee, Senior Judge, Presiding

Richard B. Eismann
Ryan Martinat
Eismann Law Offices
3016 Caldwell Boulevard
Nampa, ID 83651

Attorneys for Plaintiff/Appellant

Anne-Marie Kelso
Payette County Prosecutor's Office
Payette County Courthouse
1130 Third Avenue North, Rm. 105
Payette, ID 83661-2473

Attorney for Defendant/Respondent

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATEMENT OF THE CASE

On June 3, 2010, the plaintiff-appellant, Monica Gross formerly known as Monica Garner ("Monica" hereafter), filed for divorce from the defendant-respondent, Chris Garner ("Chris" hereafter). On June 28, 2010, Chris filed his answer and counterclaim. Monica was represented by Mr. Stan Welsh of the firm Cosho Humphrey. Chris was represented by Mr. Kelly Whiting. The parties were both represented by their respective counsel throughout the divorce proceeding, including the signing of the Stipulation for Entry of Judgment which was filed on October 26, 2010.

On October 26, 2010, a Judgment was entered pursuant to the stipulation divorcing Monica and Chris. Two children were born of the marriage, namely B.G. born o[redacted] and K.G. born o[redacted]

On September 9, 2010, the parties entered into a Parenting Plan which is attached to the judgment which includes a custody schedule agreed to by the parties. The custody schedule provides as follows:

> **School Schedule**: The children will reside with Mother and spend every other weekend with Father from Friday after school until Monday to school and each Wednesday from after school until Thursday to school, if there is not school on Thursday the exchange is at 7:30 a.m. at Mother's residence. If there is not school on Friday the exchange time is at 3:45 p.m. at Mother's residence. If there is not school on Monday the exchange time is at 11:00 a.m. at Mother's residence.

....

> **Summer Schedule**: Summer will be divided equally from the first Friday school is out until seven days before school resumes. Each parent will rotate having the children every two weeks. Mother will commence the rotation. Mother and Father will exchange the children every other Friday at 6:00 p.m.

Under the custody schedule, Chris' percentage of overnights in a year was approximately 40%.

The Judgment modified the custody schedule in the Parenting Plan and provides as follows:

> 2. **PARENTING PLAN**: Attached hereto, and by reference incorporated herein, is a Parenting Plan. The parties shall comply with all terms of the Parenting Plan with the following changes:
>
> > 2.01 Under School Schedule, Christopher's weekend shall end on Sunday at 7:00 p.m. instead of Monday morning and the Wednesday visit shall end Wednesday evening at 8:30 p.m.

Thus, the custody provision in the Judgment modified the custody provision in the Parenting Plan by taking away from Chris three overnight periods of custody every two weeks—i.e. the Wednesday overnight period every week and the Sunday overnight period every other week. The custody provision in the Judgment reduced Chris' percentage of overnights in a year to approximately 22%.

On October 26, 2010, an Affidavit Verifying Income was filed, which set the parties' child support guideline annual income at $47,142.00 for Chris and $54,677.00 for Monica.

Under the custody schedule in the Parenting Plan where Chris had approximately 40% of the overnights in a year, Chris' child support obligation should have been set at a total of $147.00 per month according to the Idaho Child Support Guidelines ("Guidelines" hereafter). The $147.00 support total does not account for the tax dependency exemptions for the two children.

Under the custody schedule in the Judgment where Chris had approximately 22% of the overnights in a year, Chris' child support obligation should have been set at a total of $720.08 per month according to the Guidelines. Again, the $720.08 support total does not account for the tax dependency exemptions for the two children.

The child support provision in the Judgment provides, in part, as follows:

> 4. **CHILD SUPPORT**: Commencing November 1, 2010, and on the first day of each month thereafter, Christopher shall pay to Monica child support in the amount of $50.00 per month until [redacted] reaches the age of eighteen (18).

The Judgment provides no description of how the $50.00 child support was calculated. The Judgment does not state why there was a deviation from the child support amount of $720.08 under the Guidelines.

Despite the child support obligation of $720.08 per month that should have been set according to the Guidelines under the custody schedule in the Judgment, Chris' child support obligation was set at a total of $25.00 per month per child. Since the entry of the Judgment on October 26, 2010, Chris has saved $670.08 per month which he should have paid under the Guidelines.

It was not a simple matter of oversight or miscalculation that led to the drastically deficient amount of child support in the Judgment. If that were so, Monica could have simply filed a motion under I.R.C.P. 60(a) to correct a clerical mistake or under I.R.C.P. 60(b) for mistake or inadvertence. Monica willingly admits that the child support deficiency was part of an agreement that was made between Monica and Chris. Essentially, Monica agreed to a reduced amount of child support in order to obtain an increased amount of custody of the children. The parties' agreement is reflected by the provision in the Judgment which modifies the custody schedule in the Parenting Plan and the provision in the Judgment setting child support at a grossly inadequate level of $25.00 per month per child.

The Parenting Plan also provided as follows:

- Chris and Monica would both pay $600.00 per year for school clothes for the children;
- Chris and Monica will contribute $30.00 per month for school lunches for the children;
- In even years Monica will purchase school supplies in odd years Chris will purchase school supplies; and
- Other school costs such as class fees, yearbooks, and activity cards will be split equally between Monica and Chris.

On November 7, 2012, Monica filed the Plaintiff's Motion in the Form of a Complaint to Modify the Judgment. Monica sought to modify the child support order to reflect the actual custody schedule in the Judgment rather than the custody schedule listed in the Parenting Plan and also to reflect the current incomes of the parties.

On November 20, 2012, Chris filed a Motion to Dismiss Plaintiff's Motion in the Form of a Complaint to Modify the Judgment (Motion for Judgment on the Pleadings) ("motion to dismiss" hereafter), which argued that there had been no substantial and material change in circumstances since the entry of the Judgment on October 26, 2010.

On January 23, 2013, Monica filed the Plaintiff's Motion/Objection to Deny Defendant's Motion to Dismiss Plaintiff's Motion in the Form of a Complaint to Modify Judgment. Monica argued that her modification action should be allowed to proceed on several grounds.

The first ground was, as explained above, that the child support fixed in the judgment in the amount of $25.00 per month per child was grossly disproportionate to the child support that should have been awarded under the Guidelines in the amount of $720.08 per month. In support of the first grounds of her modification, Monica argued that rules contained within the Guidelines were not followed in setting the original child support amount. Moreover, Monica cited Sections 1-5 of the Guidelines in her objection to Chris' motion to dismiss arguing that the Guidelines provide the substantial and material change in circumstances.

The second ground argued by Monica was that equity must intervene to modify child support orders not in conformity with the Guidelines. The trial court sits as both a court of law and a court of equity. Monica argued that equity must intervene to modify the grossly inadequate child support order entered in this case.

The third ground for Monica's modification action was that there had been a substantial and material change of circumstances supporting a modification of child support because Chris' yearly gross income had increased by $3,462.00 since the entry of the Judgment on October 26, 2010. By adding Chris' additional income, Chris' current child support should be $761.50 before accounting for the tax exemptions.

On February 26, 2013, Chris' motion to dismiss came on for hearing and the trial judge ruled as follows:

> Ms. Garner has filed an action asking the Court to modify this based on child support calculations and demonstrating as a bootstrap argument that the application of all of the standards with these income numbers would show that the child support is adequately – or an inadequate number. **It's grossly inadequate.**
>
> And Mr. Eismann points to the child support rules as grounds for modification but he's missing the point. He's missing the same point that Mr. Garner missed in the last action and that is there is no material change in circumstance.
>
> ....
>
> And so in this instance without meeting the threshold, **I'm granting the motion of the defendant. The matter is dismissed. I found it was brought without any basis**. This record is clear. The income was there to begin with and, you know, I suppose had a different legal tact been made at the time that Mr. Garner filed his action, the whole matter could be addressed. I'd suggest if either one of you like the positions you're in, you might want to consider mediation.
>
> Hrg. Transcr. 9: 9-15 & 10: 12-20 (Feb. 26, 2013) (emphasis added).

On March 1, 2013, Chris filed a Motion for Attorney Fees and a Memorandum of Costs and Affidavit of Anne Marie Kelso requesting $1,012.50 in attorney fees pursuant to Idaho Code § 12-

121 and I.R.C.P. 54. On March 15, 2013, Monica filed the Plaintiff's Motion to Disallow Costs and the Affidavit of Plaintiff re: Objection to Memorandum of Costs. The grounds of Monica's motion were as follows:

- Monica did not file and pursue her modification action frivolously, unnecessarily or without foundation;
- The trial court did not analyze Section 5 of the Idaho Child Support Guidelines; and
- The trial court did not use its equitable powers to change a "grossly inadequate" child support provision of the judgment.

The issue of attorney's fees was submitted to the trial judge without a hearing. On May 15, 2013, the Order Granting Attorney's Fees was entered, which states "Based upon the oral findings of the court, IT IS HEREBY ORDERED that Defendant's Motion for Attorney's Fees is hereby *GRANTED* in the amount of ONE THOUSAND TWELVE DOLLARS AND FIFTY CENTS ($1012.50)." Thus, Chris was awarded the full amount of attorney's fees requested by him.

On March 29, 2013, Monica appealed the trial judge's decision to the District Court. On December 30, 2013, the parties presented oral argument to the District Court Judge Duff McKee on Monica's appeal. On January 15, 2014, District Judge McKee's Memorandum Decision was filed, which affirmed the trial court's decision to grant Chris' motion to dismiss. District Judge McKee specifically found at pages seven through eight of his Memorandum Decision as follows:

> I conclude that the court below did not err in dismissing plaintiff's motion to modify child support because no material change in circumstances had been shown.
>
> The established child support was fixed by agreement of the parties, with the assistance of counsel, and was approved and incorporated into the judgment and decree that was entered in this matter in November of 2012(sic) [October 26, 2010]. There was no challenge to the child support level at the time the stipulation was

> offered, no motion or action for relief from the decree after its entry, and no appeal from the decree.
>
> The well-established law in Idaho is that while the court does have continuing jurisdiction over the matter of child support, once support is fixed by final decree of a court it is subject to modification only upon a showing of permanent and substantial change in circumstances.

Thus, District Judge McKee agreed with the trial judge in holding that a substantial and material change of circumstances had not occurred, which thereby required dismissal of Monica's modification action. In District Judge McKee's Memorandum Decision, he awarded attorney's fees to Chris pursuant to Idaho Code § 12-121 on the appeal to the District Court. District Judge McKee remanded to the magistrate court the issue of the amount of attorney's fees to be awarded.

On January 24, 2014, Chris filed a memorandum of costs. On February 4, 2014, Monica filed her objection to Chris' memorandum of costs. In Monica's objection, she argued that certain charges were unnecessary, that certain charges were not separately identified by date, and that certain costs were discretionary. On February 24, 2014, a hearing was held on Chris' memorandum of costs and the court awarded attorney's fees to Chris.

On June 13, 2014, the Order Granting Attorney's Fees was filed. Monica appeals from this award of attorney's fees in addition to other issues presented herein.

ISSUES PRESENTED ON APPEAL

1. Did the district judge err in affirming the decision of the magistrate court to dismiss a

motion to modify a child support provision of a judgment of divorce which was entered pursuant to the agreement of both parents but which fails to comply with the Guidelines when there is a substantial difference between the child support agreed to by the parents and the child support calculated by applying the Guidelines?

2. Did the district judge err in affirming that the trial court acted within the boundaries of its discretion in entering an order dismissing Monica's petition to modify child support on the grounds that the parties agreed to the judgment of divorce fixing a child support amount that could not be modified because there was no material and substantial change in circumstances?

3. Did the district judge err in affirming the magistrate court's decision when both the magistrate court and the district judge did not consider the claim for equitable relief to modify a child support amount fixed by the judgment of divorce so that the child support complies with the Guidelines?

4. Did the district judge err if affirming the trial court's decision when the trial court failed to consider the meaning of Section 5 of the Guidelines and whether such section can supply the material and substantial change of circumstances when it provides, in part, as follows: "The amount of child support provided for under these Guidelines may constitute a substantial and material change of circumstances for granting a motion for modification of child support obligations."?

5. Did the district judge err in his interpretation of Section 5 of the Guidelines.

6. Does Chris's increase in annual income from $47,142.00 when the judgment of divorce was entered on October 26, 2010, to $50,604.00 when Monica's complaint to modify child support was filed (an increase of $3,462.00 or 7%), standing alone or coupled with the fact that the child support fixed by the judgment of divorce is substantially lower than the child support would have been if the Idaho Child Support Guidelines had been applied or coupled with any other fact or facts in this case constitute a material and substantial change in circumstances?

7. Is the child support calculated under the Guidelines for the benefit of the children?

8. Do parents enter into an enforceable contract if they both approve a judgment of divorce providing an amount of child support which is substantially less that the amount of child support which would be calculated by applying the Idaho Child Support Guidelines?

9. Did the district judge err in affirming the trial court's award of attorney's fees pursuant to Idaho Code § 12-121?

10. Did the district judge err in awarding attorney's fees pursuant to Idaho Code § 12-121 on the appeal to the district court?

ATTORNEY'S FEES ON APPEAL

Monica is not requesting attorney's fees on appeal. As explained below, Monica is appealing from the attorney's fees that have been awarded to Chris by the magistrate court and the district court. Monica's appeal of the attorney's fees awards is based on three basic grounds. The first ground is that this is a new area of law that has not been addressed by Idaho's appellate courts. The second ground is that Monica believes that Section 5 of the Guidelines allows for a modification of child support in her case. The third ground is that even if current law supports Chris' position, Monica asks for a good faith modification or extension of existing law. For these reasons, Monica does not request attorney's fees on appeal. The opposition of Chris on this appeal could not be termed to be frivolous.

ARGUMENT

1. Standard of review on appeal from District Court.

In *State Dept. of Health and Welfare v. Slane*, 155 Idaho 274, 277, 311 P.3d 286 (2013), the Idaho Supreme Court explained the standard of review on appeal from the district court sitting in its appellate capacity as follows:

> In an appeal from a judgment of the district court acting in its appellate capacity over a case appealed to it from the magistrate court, we review the judgment of the district court. *In re Estate of McKee,* 153 Idaho 432, 436, 283 P.3d 749, 753 (2012). We exercise free review over the issues of law decided by the district court to determine whether it correctly stated and applied the applicable law. *Kennedy v. Schneider,* 151 Idaho 440, 442, 259 P.3d 586, 588 (2011). With respect to the magistrate court's findings of fact that are challenged in the district court, we review the district court's decision as to whether those findings were supported by substantial and competent evidence. *Id.*

This case essentially comes down to the issue of whether the standard for modifying child support, requiring a substantial and material change in circumstances, is the only standard to modify child support given the distinct circumstances involved in this case. Chris, the trial court and the district judge have all stated that Monica's motion to modify child support must be dismissed because Monica has failed to prove a substantial and material change of circumstances. Monica argues that child support must be modified in this case to correct a "grossly inadequate" child support award that is in violation of Idaho public policy. Monica cites and argues several theories of how child support could be modified as were explained in the appeal to the district court and in this appeal as explained in detail below.

2. Agreements between parents exchanging child support for custodial time regularly occur and are in violation of the clear public policy that parents must support their children.

Before getting into the legal arguments of Monica's case, it is helpful to understand the problem presented herein and the frequency with which this problem is encountered in the trial courts. Setting a child support amount is a common problem in all cases wherein child support is an issue. Child support becomes even more problematic when child custody is also at issue because child custody directly affects child support.

It is common knowledge that child custody and child support have been used by parties as bargaining tools. In our office, we have witnessed this bargaining since 1950. A common scenario is where one parent is somewhat disinterested in a majority of time with that parent's children.

However, once that parent realizes that child support will be higher because the other parent has the majority of time with the children, the parent makes a disingenuous effort to get more time with the children. Now the bargaining begins with one parent using custody and the other parent using child support. A compromise is often made whereby the parents agree to a child custody schedule and also agree a child support amount that is not based on the Guidelines.

This case is perhaps one of the most extreme examples of such bargaining as is shown by the differences between the Parenting Plan of September 8, 2010 and the Judgment that was entered on October 26, 2010. Monica agreed to give up all but a small fraction of the child support she was due under the Guidelines in exchange for raising her custodial time with the children from 60% of the overnights to 78% of the overnights in a year. Chris agreed to give up 18% of his overnight custodial time with the children in order to obtain a "grossly inadequate" child support figure of $25.00 per month per child.

Lawyers for the parties also play a part in this bargaining. Whether the bargaining actually occurs through the lawyers, or through the parties, or through a mediator for the parties, the lawyers ultimately end up with the agreement that must be put into a judgment. The lawyers often prepare a written stipulation or put the agreement on the record in order to get a judgment entered. The lawyers have a duty to follow Idaho law pertaining to all issues including child support.

As explained at length below, the Guidelines and Idaho Code § 32-706(5) require that when there is going to be a deviation from the amount of support recommended under the Guidelines, there must be a record made of the reasons for deviating from the amount of child support recommended by the Guidelines. Lawyers regularly fail to create such a record in writing or by verbal stipulation on the record and thereby fail to follow Idaho law.

The trial courts are the last line of defense to prevent the disregard of Idaho law found in the Guidelines and Idaho Code § 32-706(5). However, trial courts regularly enter judgments that deviate from the amount of child support recommended by the Guidelines without creating a record of the reasons for deviating.

The trial courts are under pressure from the parties and the parties' lawyers to approve the agreement exchanging custody for child support. If the trial courts refused to approve agreements exchanging custody for child support, it is likely that many more cases would head to trial which in turn creates a heavier case load for the trial courts. Thus, when faced with an agreement exchanging custody for child support, the trial courts faces both external pressure from the parties and lawyers and faces internal pressure to avoid a heavier case load with additional trials.

The duty of the trial court to make a record of the reasons for deviating from the Guidelines is not a difficult burden. However, the trial court is placed in a precarious position when creating such a record. Idaho Code § 32-717 and the supporting case law establish a duty upon the trial court to

do what is in the best interest of the children. If a trial court were to create a record of the parties' agreement to exchange custody for child support, such a record would conclusively show that the trial court has not fulfilled its duty to do what is in the best interests of the children. It cannot be argued that it is best for the children to live primarily with one parent that bears the majority of the financial burden of raising the children without significant financial help from the other parent in the form of child support.

The public policy of Idaho is that children are best off when both parents are contributing financially to the children. This public policy is reflected in Sections 4(a) and 4(d) of the Guidelines as follows:

> (a) Both parents share legal responsibility for supporting their child. That legal responsibility should be divided in proportion to their Guidelines Income, whether they be separated, divorced, remarried, or never married.
> ....
> (d) Rarely should the child support obligation be set at zero.... There shall be a rebuttable presumption that a minimum amount of support is at least $50.00 per month per child.

Thus, the trial court cannot place an agreement on the record to eliminate one parent's obligation of child support without disclosing a violation of public policy.

Child support and child custody cases are often complicated, emotional, hotly contested, and expensive. Unfortunately, parties, lawyers, and trial courts regularly take the course of least resistance by making and enforcing agreements exchanging custody for child support without creating a record as to why the Guidelines were not followed. It is the dirty little secret of family

law cases that nobody wants to acknowledge or discuss. But this is a prevalent problem that must be corrected by Idaho's appellate courts because the best interests of the children are at stake. This issue is not about what is best for the parties, the lawyers, or the trial court. This issue is about what is best for the children involved both in this case and in future cases. Child custody must not be allowed to essentially be sold to gain a lower child support figure.

Idaho's Legislature enacted to solve this problem by enacting Idaho Code § 32-706(5) which requires a record to be made when a child support amount deviates from the amount of child support recommended by the Guidelines. The Idaho Supreme Court has acted to solve this problem by incorporating the language of Idaho Code § 32-706(5) into Section 3 of the Guidelines. However, the trial courts and lawyers have not followed the rules laid out in Idaho Code § 32-706(5) and the Guidelines. Thus, Idaho's appellate courts must address and correct this problem through case law.

3. Without allowing Monica to modify child support, Monica has no reasonable alternative to correcting the grossly inadequate child support.

If this appeal is not successful, Monica and her children are stuck with the grossly inadequate child support amount of $25.00 per child per month until there is a substantial and material change in income. There are only two scenarios where Monica can modify child support and neither of them are a reasonable solution to her problem. The first scenario, which was suggested by the trial court,

is to go to mediation with Chris. The second scenario is to wait for a substantial and material change in circumstances. Each scenario is discussed below.

Under the first scenario, if Monica were to attempt to go to mediation to resolve the issue of child support with Chris, Monica would be completely at the mercy of Chris. Monica has no bargaining power and Chris has all of the bargaining power. Chris has strenuously fought all of Monica's attempts to modify child support. Thus, we can infer that Chris would be unwilling to increase his child support above $25.00 per child per month.

Given that Chris has thus far been unwilling to increase his child support obligation, Chris' motive in mediation would likely be to keep his child support at or below the current level. Since each party's percentage of custody directly affects the amount of child support, Chris could just demand enough custody time to keep his child support at or below the current level. Such a custody schedule would be close to an equal split of custody.

In mediation, Monica would have only two options. The first option would be to reject Chris' demand and to continue receiving only $25.00 per child per month. The second option would be to accept Chris' offer and thereby reduce Monica's custodial time with her children. Thus, Monica's options are to either remain in her current situation or to give up time with her children.

The second scenario is for Monica to wait until there is a change in circumstances to modify child support. This likely means that Monica would have to wait until Chris' income rises to a level that is considered a substantial and material change in circumstances. However, now that Chris is on notice that a substantial and material change in his income could allow a modification of child support, Chris will likely avoid any increases in his income.

From Chris' perspective, any potential raise in income would have to outweigh the cost of the increase in his child support. If the proposed raise in income did not outweigh the increase in child support, then Chris would likely reject the raise in income.

Chris currently pays $50 per month in child support. Chris' child support should be set at approximately $761 at his current income level. Consequently, Chris saves $711 per month in child support for a total yearly savings of $8,532. Assuming there are 40 hours in a work week and 52 weeks in a year, there are a total of 2080 work hours in a year. Dividing Chris' total savings in child support of $8,532 by the number of work hours in a year results in $4.10 per hour. Thus, unless Chris received a pay raise of $4.10 per hour or more, Chris would lose money.

Moreover, the above calculations do not account for taxes. Chris' theoretical pay raise would be taxed. Chris would likely need a raise of well over $5.00 per hour to make any potential pay raise worth it financially.

The point in the above hypothetical situations is to show the situation that Monica faced prior to this modification action and the situation she faces if this modification action is ultimately dismissed. Monica has no reasonable option to correct her situation. Monica either continues to incur the brunt of the financial responsibility or she gives up custodial time with her children. Those are her only options if the trial court's decision to dismiss her motion to modify is affirmed.

4. The Guidelines provide the solution to the problem of deviations from the Guidelines in setting child support.

As has been argued at all levels of this case, Section 5 of the Guidelines provides the path to correct the grossly inadequate child support in this case. Section 5 of the Guidelines provides as follows:

> **Section 5. Modifications.** The amount of child support provided for under these Guidelines may constitute a substantial and material change of circumstances for granting a motion for modification for child support obligations. A support order may also be modified to provide for health insurance not provided in the support order.

Chris, the trial court, and district judge have all either ignored or misinterpreted Section 5 of the Guidelines as requiring a substantial and material change of circumstances in order to modify child support. However, a plain reading of the first sentence in Section 5 shows otherwise.

The first sentence in Section 5 is structured so that the amount of child support can provide or constitute the substantial and material change of circumstances which can then justify a modification. To say it another way, the sentence is a conditional sentence with three parts.

The first part of the sentence is the first condition that must be satisfied—i.e. "the amount of child support provided for under these Guidelines." If a party proves a change in the amount of child support, then that condition is satisfied.

The second part of the sentence is a second condition giving the trial court some discretion—i.e. "may constitute a substantial and material change of circumstances." Thus, if a party proves a change in the amount of child support to satisfy the first condition, then the trial court has discretion to decide whether the amount of the change is substantial and material. The trial court must have discretion because not all changes in the amount of child support would be substantial and material. A change in the amount of child support of $5.00 per month is likely not substantial and material. However, a change in the amount of child support of $500.00 per month is likely substantial and material. The second condition provides the trial court with discretion as to what amount is a substantial and material change and what is not.

The third part of the sentence is the result if the first two conditions are satisfied—i.e. "for granting a motion for modification for child support obligations." Thus, if a trial court finds that the amount of child support has changed and if the court finds that the amount of such change is substantial and material, then child support shall be modified to comply with the Guidelines.

Chris, the trial court, and the district judge would interpret the sentence in a way that is directly contrary to the language used in the sentence. Chris, the trial court, and the district judge apparently

believe that there must be a substantial and material change in circumstances from the time that the last child support order was entered to the time the motion to modify is filed. However, Section 5 of the Guidelines makes no mention of the circumstances of the parties at the time of the last child support order as compared to the circumstances of the parties at the time of filing the motion to modify. Section 5 of the Guidelines refers to the "amount of child support provided for under these Guidelines." The only reasonable interpretation of that phrase is that a trial court must look at the amount of child support currently ordered and compare that amount to the amount of child support that should be provided under the Guidelines.

The trial court failed to address the issue of the applicability of Section 5 of the Guidelines and instead relied solely on the standard of a substantial and material change of circumstances to modify child support. However, the district judge addressed Section 5 of the Guidelines as follows:

> Plaintiff relies upon Section 5 of the Idaho Child Support Guidelines, I.R.C.P. 6(c)(6), which provides that "the amount of child support provided for under these Guidelines **may** constitute a substantial and material change of circumstances for granting a motion for modification for child support obligations" (emphasis added). I think the only consistent way to read this provision is that the adoption of the rule could be a "change in circumstance" if the amount of support under the rule differed from an existing level of child support. Further if the guidelines as a whole are amended up or down, the event of such amendment might constitute a change supporting modification.

The district judge cites no authority for his interpretation of Section 5. The absence of authority is likely because there is no authority by an Idaho appellate court on the interpretation of Section 5 of the Guidelines. This issue is an issue of first impression before Idaho's appellate courts.

Since there is no authority governing the interpretation of Section 5, statutory construction and public policy should be used to interpret Section 5. As stated above, the clear public policy of Idaho is that parents have a duty to provide financial support to their children. Given that public policy, Section 5 of the Guidelines should be interpreted to allow for a modification of child support when the amount of the existing child support order is substantially and materially different from the amount of child support calculated under the Guidelines.

Moreover, the district judge's decision renders Section 5 nearly obsolete. The district judge interprets Section 5 of the Guidelines as providing a route for pre-Guideline child support orders to be modified after the adoption of the Guidelines. The Guidelines were originally adopted and became effective on July 1, 1993, which is over twenty years ago. Child support usually ceases when a child turns eighteen years of age. Thus, there are no child support orders in effect from prior to the adoption of the Guidelines because any child involved in a pre-Guidelines child support order is now above the age of eighteen.

Under the district judge's interpretation of Section 5 of the Guidelines, Section 5 is no longer relevant. However, Section 5 remains a part of the Idaho Rules of Civil Procedure and it should not be disregarded. Section 5 must have some continuing meaning if it remains in effect. Monica argues that the meaning of Section 5 is to allow a modification of child support when the amount of child support currently ordered differs from the amount of child support stated in the Guidelines.

In this case, the Guidelines allow for a modification of child support based on a change in the amount of child support that Chris should pay. Chris's current child support is set at a total of $25.00 per month per child. At the time of divorce, the child support should have been set at $720.08 per month. In Monica's motion to modify child support, Monica alleged that Chris' annual gross income had increased by $3,462 from the time the judgment was entered on October 26, 2010, to a total annual gross income of $50,604.00. When accounting for Chris' additional income, Chris' current child support obligation should now be $761.50 per month (without accounting for the dependency exemption).

Chris' current child support obligation is $50.00 per month. Using Chris' current income, his child support obligation should be $761.50 (again, this does not account for the dependency exemption). Therefore, Chris is saving $711.50 per month in child support by not paying under the Guidelines ($761.50 - $50.00 = $711.50). Since the amount of child support provided for by the Guidelines is currently $711.50 greater than what Chris is currently paying, there is obviously a change in the amount of child support which may satisfy the condition of a substantial and material change in circumstances for a modification.

The trial court specifically found that Chris' child support obligation was "grossly inadequate" on February 26, 2013. However, the trial judge incorrectly tied the modification of child support to a change in the circumstances of the parties' income rather than a change in the amount of child support. Therefore, the trial court abused his discretion and district judge's decision to affirm the

trial court's ruling was error. This case should be remanded with instructions to modify the child support in accordance with the Guidelines.

5. **Child support is for the benefit of the children and cannot be waived by the parents.**

By trumpeting the standard that there must be a substantial and material change of circumstances in order to modify child support, Chris, the trial court and the district judge fail to realize who is harmed by the lack of child support, and that is Monica and Chris' children. Chris, the trial court and the district judge all want to enforce an agreement that never should have been made, that never should have been accepted by the trial judge handling the parties' divorce, and that is void as against public policy as to child support to be paid in the future.

California courts have recognized that child support is for the benefit of the children and that right cannot be abrogated by an agreement of the parents incorporated into a judgment. In the case of *In re Marriage of Alter*, 171 Cal.App.4th 718, 722, 89 Cal.Rptr.3d 849 (2009), a mother and father entered into a marital settlement agreement which stated that child support was to be "absolutely non-modifiable downward." The marital settlement agreement was incorporated into a judgment.

In *Alter,* the court stated that parents cannot divest the court of its duty to set child support nor can the parents divest their children of the right to support as explained as follows:

> The Family Code allows parents to make an agreement pertaining to child support; but such an agreement is always "subject to approval of the court." (§ 4065, subd. (a).) This is not a question of first impression. Our Supreme Court explained over 30 years ago: "When a child support agreement is incorporated in a child support

> order, the obligation created is deemed court-imposed rather than contractual, and the order is subsequently modifiable despite the agreement's language to the contrary." (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 947, 126 Cal.Rptr. 805, 544 P.2d 941.) More recently, this court has emphasized: "It is true that parties may settle their disputes over child support by agreement. **This state has a 'strong policy favoring settlement of litigation' over family law disputes.** [Citation.] ... **But such agreements, to the extent that they purport to restrict the court's jurisdiction over child support, are void as against public policy.** [Citations.] **Children have the 'right to have the court hear and determine all matters [that] concern their welfare and they cannot be deprived of this right by any agreement of their parents.'** [Citation.] **Thus, these agreements are not binding on the children or the court, and the court retains jurisdiction to set child support irrespective of the parents' agreement.**" (*In re Marriage of Bereznak* (2003) 110 Cal.App.4th 1062, 1068–1069, 2 Cal.Rptr.3d 351 (*Bereznak*).)
> (emphasis added)

Several points can be drawn from the quotation above in *Alter* as follows:

- Settlement of litigation over family law disputes is favored by strong public policy;
- However, settlement agreements attempting to restrict a court's power to modify child support are in violation of public policy and are thereby void;
- Children have an absolute right to have the court determine issues concerning their welfare;
- Agreements between parents attempting to prevent a modification of child support are not binding on the children or the court.

The factual pattern in this case is very similar to that in *Alter*. In both cases, the parties entered into a contractual agreement prior to divorce. In both cases, the parties' agreement was incorporated in a judgment. In both cases, a party is attempting to enforce the terms of the judgment to prevent a modification of child support. In *Alter*, the judgment specifically stated that child support was "absolutely non-modifiable downward." In this case, there is no language in the judgment attempting to restrict the modification of child support, which is even more favorable to Monica's position to modify child support.

The maxims announced in *Alter* and set forth in the bullet points above should also be applied in this case. Chris must not be allowed to use the judgment as a shield to prevent the modification of child support because it is in violation of public policy and is void. The children in this case have an absolute right to have a court determine the child support issue which concerns their welfare. This case should be remanded with instructions to modify child support in accordance with the Guidelines.

In *Kost v. Kost*, 757 A.2d 952, 954 (2000), the Superior Court of Pennsylvania rejected an argument similar to that made by Chris in this case regarding a change in circumstances and explained as follows:

> ¶ 4 On appeal Father contends the mother failed to show a change of circumstances justifying support, and questions whether mother is entitled to seek support when she promised not to and when she did not immediately seek review of the order approving of their agreement.
>
> ¶ 5 In support of his argument Father cites to *Koller v. Koller*, 333 Pa.Super. 54, 481 A.2d 1218, 1220 (1984) which provides:
>
> > [W]hen the agreement adequately provides for the needs of the children and spouse and has been recently entered into under court approval, unless a change of circumstances can be shown, there is no justification for ignoring the agreement.
>
> Father refers to this passage to demonstrate that an increase in support was not warranted because Mother failed to demonstrate a change of circumstances. However, Father ignores the introductory language which prefaces by referring to an agreement which "adequately provides for the needs of the children." *Id.* In this case the guideline ranges recommended a support amount for Son which was 75% more than Father was currently paying under the agreement. Where the amount agreed upon differs from the guideline range so significantly, it must be presumed

> that the agreement entered by the parties does not provide fair and just support for the child. In such a situation Father should bear the burden of establishing that the figure suggested by the guideline is not necessary for the child's support. The trial court correctly noted that neither party may bargain away a minor's child's right to adequate support. *Miesen v. Frank*, 361 Pa.Super. 204, 522 A.2d 85 (1987). The courts will see to it that a child receives adequate support and will not waiver from that duty simply because Mother agreed to a certain amount and also agreed not to seek an increase in that amount. The trial court was fully justified in considering Mother's request for an increase and we perceive no abuse of discretion in setting the amount of support at the guideline range.

As explained in *Kost*, child support cannot be bargained away by a parent. If the parents make a bargain that does not adequately provide for the needs of the children and such child support differs significantly from the amount of child support suggested by the child support guidelines, then child support should be modified even where there is no change of circumstances.

6. <u>There is a conflict of law between Idaho Code § 32-709 and Idaho Code § 32-706 that must be resolved in favor of the best interests of the children.</u>

Chris, the trial court and Judge McKee have all argued that child support cannot be modified unless there is a substantial and material change of circumstances since the parties' Judgment on October 26, 2010. Their position is supported by the Guidelines and Idaho Code § 32-709 which provides that the "provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of a substantial and material change of circumstances." The problem with their position is that it fails to recognize or consider the effect of when a child support order is entered contrary to existing law and guidelines.

There is no denying that the Judgment that was entered in this case on October 26, 2010, did not comply with the requirements of the Guidelines and Idaho Code § 32-706. The Judgment deviated from the Guidelines and awarded $25.00 per child per month in child support when then child support should have been set at $720.08. Both the Guidelines and Idaho Code § 32-706 provide a specific procedure when there is a deviation from the amount of support to be awarded under the Guidelines.

Section 3 of the Guidelines provides as follows:

> **Section 3. Function of Guidelines.** The Guidelines are premised upon the following general assumptions: (a) the costs of rearing a child are reasonably related to family income, and the proportion of family income allocated to child support remains relatively constant in relation to total household expenditures at all income levels; (b) in relation to gross income, there is a gradual decline in that proportion as income increases; (c) **the Guidelines amount is the appropriate average amount of support during the minority of the child at a given parental income**, so that age-specific expenses do not alter the Guidelines amount. These assumptions may not be accurate in all cases. **The amount resulting from the application of the Guidelines, which includes the basic child support calculation and all adjustments, is the amount of child support to be awarded unless evidence establishes that amount to be inappropriate. In such case the court shall set forth on the record the dollar amount of support that the Guidelines would require and set forth the circumstances justifying departure from the Guidelines**; and (d) child support received and the custodial parent's share of support are spent on the child(ren).
> (emphasis added)

Idaho Code § 32-706(5) provides as follows:

> The legislature hereby authorizes and encourages the supreme court of the state of Idaho to adopt and to periodically review for modification guidelines that utilize and implement the factors set forth in subsections (1) through (4) of this section to

> create a uniform procedure for reaching fair and adequate child support awards. **There shall be a rebuttable presumption that the amount of the award which would result from the application of the guidelines is the amount of child support to be awarded, unless evidence is presented in a particular case which indicates that an application of the guidelines would be unjust or inappropriate. If the court determines that circumstances exist to permit a departure from the guidelines, the judge making the determination shall make a written or specific finding on the record that the application of the guidelines would be unjust or inappropriate in the particular case before the court.** When adopting guidelines, the supreme court shall provide that in a proceeding to modify an existing award, children of the party requesting the modification who are born or adopted after the entry of the existing order shall not be considered.
> (emphasis added)

The procedure set out in the Guidelines and in Idaho Code § 32-706(5) was not followed in this case. Chris, the trial court, and the district judge would argue that Idaho Code § 32-709 (requiring a substantial and material change of circumstances) controls regardless of whether Idaho Code § 32-706(5) was followed, which requires a record to be made when there is a deviation from the Guidelines child support amount. Thus, the issue is what is the effect of a child support order that is entered in violation of the Guidelines and Idaho Code § 32-706(5)?

Monica proposes that when the child support order is entered in violation of Section 3 of the Guidelines and Idaho Code § 32-706(5), that the standard requiring a substantial and material change of circumstances is not required by Section 5 of the Guidelines.

7. <u>The Guidelines and Idaho Code § 32-706(5) are not discretionary.</u>

Monica has argued throughout this case that the Guidelines and Idaho Code § 32-706(5) were not followed. Chris and the trial court failed to address the issue of the Judgment being entered in

violation of the Guidelines and Idaho Code § 32-706(5). The district judge stated in his memorandum decision that the "guidelines are just that—guidelines. They may be modified or used differently depending upon circumstances." [insert citation – page 9 of memorandum]. It is error to assume that an Idaho Rule of Civil Procedure such as I.R.C.P. 6(c)(6) - Child Support Guidelines is only a suggestion or discretionary.

I.R.C.P. 6(c)(6) is a procedural rule which cannot be disregarded simply because the word "guidelines" is used in the name of the civil rule. The Guidelines were adopted as an Idaho Rule of Civil Procedure by the Idaho Supreme Court pursuant to Idaho Code § 32-706(5), which provides, in part, as follows:

> The legislature hereby authorizes and encourages the supreme court of the state of Idaho to adopt and to periodically review for modification guidelines that utilize and implement the factors set forth in subsections (1) through (4) of this section to create a uniform procedure for reaching fair and adequate child support awards.

Thus, the Idaho Supreme Court has authority from the Idaho legislature to adopt the Guidelines.

Nowhere in the I.R.C.P. 6(c)(6) does it state that the Guidelines can be wholly ignored by the trial court. However, both the trial court that handled the parties' divorce case and the trial court that dismissed Monica's motion to modify child support ignored the rules provided in the I.R.C.P. 6(c)(6) as explained throughout this brief. On appeal, the district judge ratified such conduct by dismissing I.R.C.P. 6(c)(6) as only a guideline. By doing so, the district judge committed reversible error.

8. **The district judge committed error in affirming the court's decision to dismiss Monica's motion to modify child support.**

The district judge also explains that Monica's motion to modify was improper because Monica should have sought other legal remedies. The district judge's memorandum decision provides as follows:

> A motion to modify child support should not be a substitute for a timely objection or challenge to the support issue in the trial court before the entry of judgment, or to a timely challenge to the judgment itself under I.R.C.P. 60 or its equivalents, or to a timely appeal from the judgment.
> (Memorandum Decision at 8-9).

Thus, the district judge provides three possible solutions to the problem that Monica faces and only one of those solutions is still available to Monica.

A timely objection obviously cannot be made before the entry of judgment in this case since judgment was entered on October 26, 2010. Additionally, a timely appeal cannot be had because the time to appeal the judgment has long since expired. The last solution offered by the district judge is a motion under I.R.C.P. 60.

Monica's motion to modify child support was brought under I.R.C.P. 60, specifically 60(c). At pages one and six of Monica's motion to modify, she cites I.R.C.P. 60(c) in support of the motion. In addition, Monica cites I.R.C.P. 60(c) at pages eight through nine of her objection to Chris' motion to dismiss. Thus, Monica did exactly what the district judge said she should do, yet the

district judge affirmed the trial court's decision to dismiss Monica's motion to modify child support. By doing so, the district judge committed reversible error.

9. **This case appears to be a matter of first impression in Idaho and other states.**

This case presents a very unusual fact pattern with little to no similar case law. In this case, the parties entered into an agreement on child support that substantially deviated from the Guidelines. Since the judgment was entered, there has not been a substantial and material change of circumstances other than Chris' income increasing by $3,462.00 per year. The trial court and the district court on appeal found that Chris increase in income was not a substantial and material change in circumstances.

An extensive search was made to find case law with similar fact patterns. However, the cases found doing research typically had a significant difference from this case. Those differences are as follows:

- Some states do not use the substantial and material change of circumstances standard for modifying child support [put in cases];
    - In some cases, the trial court has complete discretion over when a child support order should be modified;
    - In some cases, there is a specific percentage used to determine whether child support should be modified—i.e. if the child support amount sought in a modification differs by more than 10% up or down from the previous child support amount, then a modification is granted;
- In cases where the parties had made an agreement deviating from the child support guidelines and a party was before the court attempting to modify child support, there was a substantial and material change in circumstances (such as changed incomes) involved with the modification proceeding;

- In cases where the child support order deviated from the amount of child support under that particular state's child support guidelines, the party appealed the original child support order rather than attempting a modification at a later date.

In addition, there did not appear to be any states with a child support provision similar to Section 5 of the Guidelines. Therefore, while a substantial amount of research was done to determine how other states would handle this situation, that research was not helpful in the facts of this case.

10. <u>An agreement of the parties to limit one party's prospective child support obligation is unenforceable.</u>

At the hearing on February 26, 2013, the trial judge granted Chris' motion to dismiss and ruled, in part, as follows:

> Ms. Garner has filed an action asking the Court to modify this based on child support calculations and demonstrating as a bootstrap argument that the application of all of the standards with these income numbers would show that the child support is adequately – or an inadequate number. **It's grossly inadequate**.
>
> And Mr. Eismann points to the child support rules as grounds for modification but he's missing the point. He's missing the same point that Mr. Garner missed in the last action and that is there is no material change in circumstance.
>
> This case demonstrates exactly the problems that courts have when parties show up in agreements where you have pro se litigants who produce numbers which are not consistent with child support guidelines. But in this occasion, I have written stipulations and agreements and it's clear from this record that Mr. Garner apparently at some point in this negotiation agreed on the custody arrangement that was made and Mrs. Garner agreed to lesser support – accepting lesser support.
>
> Hrg. Transcr. 9:9 - 10:3 (Feb. 26, 2013) (emphasis added).

Thus, the trial judge found that Chris' current child support obligation is "grossly inadequate" to what Chris should be paying in child support. However, the trial judge refused to modify Chris' child support because there was no substantial and material change in circumstances and the district judge affirmed the trial judge's decision.

Monica argues that the substantial and material change of circumstances standard should not apply to protect a child support order that significantly limits one parent's financial support of the children. Idaho case law has held that agreement between parents that limit one parent's financial support of a child are unenforceable and thereby void. It is illogical to require a party to prove a substantial and material change of circumstances from a child support order that is considered legally void. Requiring a party to prove a substantial and material change in circumstances results in a validation of the child support order that is legally void.

In *Keyes v. Keyes*, 51 Idaho 670, 674-675, 9 P.2d 804 (1932), the Idaho Supreme Court addressed agreements limiting a party's child support obligation and stated as follows:

> Thus, the parties, by their agreement, and the court by its decree, based thereon, attempted to release respondent from further liability for the support and maintenance of the minor child, except when he was in his custody, and the validity of that portion of such agreement and decree is thus presented for consideration. The general rule would seem to be that as between the husband and wife, an agreement touching the custody and maintenance of the children will be respected and enforced, yet such an agreement cannot, as against the children, divest either parent of the paramount duty imposed upon both by law to support and educate them. (*Brice v. Brice*, 50 Mont. 388, 147 P. 164.) As said in *Karlslyst v. Frazier*,213 Cal. 377, 2 P.2d 362:
>
> > "It was beyond the power of the parties to deprive the court by their

> private contract of its right to make such suitable provision for the support of their minor child as her welfare required. *Lewis v. Lewis*, 174 Cal. 336, 163 P. 42; *Black v. Black*, 149 Cal. 224, 86 P. 505; *Parkhurst v. Parkhurst*, 118 Cal. 18, 50 P. 9; *Merritt v. Merritt*, 106 Cal.App. 234, 289 P. 240; *Fernandez v. Aburrea*, 42 Cal.App. 131, 183 P. 366. . . . In view of the fact that the interests of the child are a factor of prime importance, the court is not bound by the contract of the parties or the prayer for relief."
>
> To the same effect see: 9 Cal. Jur. 803, sec. 144; *D'Arcy v. D'Arcy*, 89 Cal.App. 86, 264 P. 497; *Wilson v. Wilson*, 45 Cal. 399; 46 C. J. 1260. The duty of a father to supply necessaries for a child's maintenance cannot be discharged by a separation agreement between husband and wife. (*Melson v. Melson*, 151 Md. 196, 134 A. 136.) **It follows that that portion of the property settlement agreement and the decree relieving respondent from all further liability for the support and maintenance of the minor child is void as between said minor and its parents.** From the foregoing authorities it seems conclusively established that **the liability of a father to support his minor child cannot be abridged or limited by agreement of the parties**, and that notwithstanding the decree provides that upon the transfer of certain property to the wife the husband shall be relieved of all further liability for the maintenance and support of a minor child, the decree may thereafter, in a proper proceeding, be modified to require the father to support and maintain such minor child.
> (emphasis added)

The points to be drawn from *Keyes*, which are relevant to the issues in this case, are as follows:

- Each parent owes a duty of maintenance and support to his or her children;
- Such duty of maintenance and support cannot be discharged by an agreement between the parents;
- An agreement between the parents in a divorce decree that relieves a parent of the duty of maintenance and support is void;
- An agreement between the parents in a divorce decree that relieves a parent of the duty of maintenance and support is void even where there was consideration given by the parent attempting to avoid the duty of maintenance;
- A divorce decree which limits or relieves a parent from the duty of maintenance and support is modifiable.

In *Anderson v. Anderson*, 89 Idaho 551, 557-558, 407 P.2d 304 (1965), the Idaho Supreme Court again ruled that future child support obligations cannot be limited by an agreement of the parties

as follows:

> With the payments she received from defendant, and any additional funds she may have provided from other sources, plaintiff supported the children. The past due obligation of defendant became an obligation to plaintiff to recompense her for the support of the children, otherwise provided by her. This obligation was hers to release for a consideration satisfactory to her. Likewise, defendant's obligation for alimony payments to plaintiff could be released by her for such consideration as she chose to accept.
>
> In regard to the agreement to reduce future support payments, plaintiff was likewise competent to bind herself, and her agreement was sufficient to support the order of the court modifying the decree as to such payments. However, **she could not permanently nor conclusively release the defendant from the duty which the law imposes upon him as a father to provide future needed support.**
> (emphasis added)

In *Anderson*, the Idaho Supreme Court upheld the mother's agreement to release the father from his past due child support obligation upon the receipt of consideration that was satisfactory to the mother. However, the agreement purporting to permanently release the father from future child support obligations is void.

The agreement between Monica and Chris in the divorce decree that limits Chris' duty of maintenance and support of the parties' two children is modifiable. Chris' child support obligation that accrued prior to Monica's motion to modify child support cannot be altered. However, Chris' child support obligation after the filing of Monica's motion to modify child support is modifiable.

The trial judge's decision to dismiss Monica's motion to modify was an abuse of discretion. The district judge's affirmation of the trial judge's decision is reversible error. The trial judge did not

act consistently with the legal standards applicable to Monica's motion to modify. The trial judge failed to consider the effect of a legally void agreement. When the original child support order is void, the requirement of a permanent and substantial change in circumstances in inapplicable because there is no starting point to determine whether a permanent and substantial change has occurred. Thus, Monica was not and is not required to prove a permanent and substantial change in circumstances in order to modify child support in this particular scenario.

11. <u>The trial court's equitable powers allow the court to modify the child support.</u>

In *Thomas v. Campbell*, 107 Idaho 398, 404-405, 690 P.2d 333 (1984), the Idaho Supreme Court discussed the equitable powers of courts as follows:

> Although there is the established principle of law that equity will not afford relief to a plaintiff where there is an adequate remedy at law, "'it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.'" *Rich v. Braxton,* 158 U.S. 375, 406, 15 S.Ct. 1006, 1017, 39 L.Ed. 1022 (1895) (citations omitted); *see* Am.Jur.2d Equity § 94 and cases cited therein. The applicability of this rule depends on the circumstances of each case. Equitable **"[r]elief will be granted when in view of all the circumstances, to deny it would permit one of the parties to suffer a gross wrong at the hands of the other party**, who brought about the condition." *Thisted v. Country Club Tower Corp.,* 146 Mont. 87, 405 P.2d 432, 436 (1965), quoting *Fey v. A.A. Oil Corp.,* 129 Mont. 300, 285 P.2d 578, 587 (1955).

Thus, the trial court and the appellate court have the equitable power to correct a gross wrong or injustice to one party.

Chris' current child support obligation of $25.00 per month results in a gross wrong and injustice to Monica and the parties' children. Chris is paying approximately $700.00 less per month than

he should be paying to support his children. Since Chris is not paying his proper share of child support, the burden falls to Monica to support the children financially. On February 26, 2013, the trial judge specifically stated in open court that Chris' child support obligation was "grossly inadequate." Since Chris' current child support obligation results in an injustice to Monica and to the parties' children, equity must intervene to provide relief if the law will not. Therefore, Monica should be allowed to modify child support to reflect the actual amount Chris should be paying in child support.

Both the trial court and the district judge failed to address Monica's equitable claim that child support should be modified to correct the gross wrong and injustice to Monica and the parties' children. By recognizing that child support was grossly inadequate and by refusing to use the trial court's equitable powers to correct the child support, the trial court abused his discretion. In addition, the district court committed reversible error by affirming the trial court's decision without addressing Monica's equity theory.

12. Monica did not file the motion to modify child support frivolously, unreasonably or without foundation as provided in I.C. § 12-121 and I.R.C.P. 54(e)(1).

In the Motion for Attorney Fees at the trial court level, Chris requested attorney's fees on the dismissal of Monica's motion to modify child support under Idaho Code § 12-121 and I.R.C.P. 54(e)(1). On the appeal to the district court, the district court awarded attorney's fees to Chris pursuant to Idaho Code § 12-121 and remanded the issue to the trial court to determine the actual amount to be awarded.

Idaho Code § 12-121 provides as follows:

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

I.R.C.P. 54(e)(1) provides as follows:

> **Rule 54(e)(1). Attorney fees.**
>
> In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. 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; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment. [I.R.C.P. 54(e)(1) (1999)]

Thus, in order to be awarded attorney's fees at the trial court level and at the district court level pursuant to Idaho Code § 12-121 and I.R.C.P. 54(e)(1), Chris was required to show that Monica brought or pursued her motion to modify child support and the subsequent appeal frivolously, unreasonably or without foundation.

In *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 250-251, 869 P.2d 554 (1994), the Idaho Supreme Court stated the appellate standard of review of an award of attorney's fees under Idaho Code § 12-121 and I.R.C.P. 54(e)(1) as follows:

> An award of fees under I.R.C.P. 54(e)(1) and I.C. § 12-121, is subject to reversal for an abuse of discretion by the district court. *Anderson v. Ethington,* 103 Idaho 658, 651 P.2d 923 (1982). When an exercise of discretion is involved, an appellate court conducts a three-step analysis: (1) whether the trial court properly perceived

> the issue as one of discretion; (2) whether that court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by the exercise of reason. *Sun Valley Shopping Center v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

Thus, if the trial judge failed to act within the outer boundaries of his discretion and consistently with any legal standards applicable to the award of attorney fees, then the award of attorney fees to Chris must be reversed.

Monica presented legitimate and triable issues of fact and law, which thereby make an award of attorney fees under Idaho Code § 12-121 improper. In *McGrew v. McGrew*, 139 Idaho 551, 82 P.3d 833, 844 (2003), the Idaho Supreme Court addressed awards of attorney's fees under Idaho Code § 12-121 as follows:

> An award of attorney fees under Idaho Code § 12-121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. *Nampa & Meridian Irrigation Dist. v. Washington Fed. Savings,* 135 Idaho 518, 20 P.3d 702 (2001). When deciding whether the case was brought, pursued, or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. *Id.* Thus, **if there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation**. *Id.* Although an award of attorney fees under the statute is discretionary, the award must be supported by findings, and those findings, in turn, must be supported by the record. *Wait v. Leavell Cattle, Inc.,* 136 Idaho 792, 41 P.3d 220 (2002).

Thus, if Monica's motion to modify child support and subsequent appeal raised triable issues of fact or legitimate issues of law, then the trial judge and the district judge's award of attorney's fees

were improper.

Monica's motion to modify child support and the subsequent appeal were neither frivolous, unreasonable, nor without foundation because she raised legitimate issues of fact and law. As explained above, Chris' current child support obligation is "grossly inadequate" compared to what he should be obligated to pay under the Guidelines. The sole reason that the trial judge and the district judge awarded attorney fees to Chris was that Monica had failed to prove a substantial and material change in circumstances.

Monica provided several legitimate legal arguments stating that the standard of a substantial and material change in circumstances should not apply in this case because of the unusual facts involved. Monica argued that the agreement between Monica and Chris that purports to limit or reduce Chris' child support obligation is void under Idaho law. Monica argued that because the agreement between Monica and Chris relating to child support is void, the agreement can be modified as to future payments. Monica argued that Section 5 of the Guidelines does not require a party to prove a change in the circumstances of the parties. Monica has argued that equity should intervene to prevent the enforcement of an inequitable child support award.

Monica also provided a legal and factual issue regarding Chris' gross annual income, which had risen by $3,462 from the time the judgment was entered on October 26, 2010. The trial judge did not specifically address Monica's claim regarding the increase in Chris' annual income. The

district judge concluded that Chris' increase in income was not substantial and material. However, just because the trial court and district court disagreed with Monica, that does not automatically make Monica's motion to modify and appeal frivolous, unreasonable, or without foundation.

In *Garner v. Povey*, 151 Idaho 462, 467-468, 259 P.3d 608 (2011), the Idaho Supreme Court further addressed awards of attorney's fees under Idaho Code § 12-121 as follows:

> Fees under I.C. § 12–121 are not awarded to a prevailing party as a matter of right but, rather, are subject to the district court's discretion. *Coward v. Hadley,* 150 Idaho 282, 290, 246 P.3d 391, 399 (2010). A district court should only award fees "when it is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." *C & G, Inc. v. Rule,* 135 Idaho 763, 769, 25 P.3d 76, 82 (2001) (internal quotation marks omitted). However, "when a party pursues an action which contains fairly debatable issues, the action is not considered to be frivolous and without foundation." *Id.* **A claim is not necessarily frivolous simply because the district court concludes it fails as a matter of law.** *Gulf Chem. Employees Fed. Credit Union v. Williams,* 107 Idaho 890, 894, 693 P.2d 1092, 1096 (Ct.App.1984). Furthermore, "**[a] misperception of the law, or of one's interest under the law is not, by itself, unreasonable. Rather, the question is whether the position adopted was not only incorrect, but so plainly fallacious that it could be deemed frivolous, unreasonable, or without foundation.**" *Snipes v. Schalo,* 130 Idaho 890, 893, 950 P.2d 262, 265 (Ct.App.1997) (internal citation omitted) (internal quotation marks omitted). (emphasis added)

Thus, Monica's motion to modify is not frivolous simply because the trial court and the district judge concluded that Monica's motion failed as a matter of law. The trial court and the district court must find that Monica's motion to modify was so plainly fallacious that it was frivolous, unreasonable, or without foundation. Monica presented legitimate triable issues of fact and law in her motion to modify and in her appeal. Therefore, attorney's fees under Idaho Code § 12-121 were not appropriate at the trial court level or the district court level.

Idaho has not set a particular amount or percentage of increase in income that validates a modification of child support. In *Rohr v. Rohr*, 126 Idaho 1, 5-6, 878 P.2d 175 (Ct.App.1994), the Idaho Court of Appeals explained as follows:

> We note also that the Supreme Court, in adopting the Idaho Child Support Guidelines, I.R.C.P. 6(c)(6), under the authority of I.C. § 32-706A, had the opportunity to establish a rule defining a point at which an increase in income would be substantial per se. Neither the Supreme Court nor the Idaho legislature has elected to adopt such a standard.
>
> Under Idaho decisional law, the determination of whether there has been a substantial and material change of circumstances necessitating a modification of child support has been left to the sound discretion of the trial court, taking into account the unique facts of each case. *Ireland v. Ireland,* 123 Idaho 955, 959, 855 P.2d 40, 44 (1993); Levin v. Levin, 122 Idaho 583, 587, 836 P.2d 529, 533 (1992). We think this case-by-case approach continues to be appropriate. **We decline to specify any level where, as a matter of law, an enhanced ability to pay becomes a substantial change of circumstances which will trigger an increased child support obligation.**
> (emphasis added)

Thus, there is no ascertainable or set level at which an increase in income is considered a substantial and material change in circumstances to modify child support.

Since there is no set amount or percentage at which a change in income is considered substantial and material, Monica's motion to modify child support required the trial judge to make a determination of fact and law regarding whether the change in income was substantial and material. Since the trial judge had to make a determination of fact and law, Monica's motion to modify child support was not frivolous, unreasonable, or without foundation. Since Monica's

motion to modify child support was not frivolous, unreasonable, or without foundation, the trial court erred in awarding attorney's fees to Chris and the district judge erred in awarding attorney's fees on appeal.

13. <u>An award of attorney's fees under Idaho Code § 12-121 are not appropriate on cases involving a matter of first impression.</u>

In *Ticor Title Co. v. Stanion*, 144 Idaho 121, 127, 157 P.3d 613 (2007), the Idaho Supreme Court stated that attorney's fees are not appropriate under Idaho Code § 12-121 on matters of first impression and explained as follows:

> Stanion argues that he is entitled to an award of attorney fees on appeal under I.C. § 12–121. That statute allows an award of "reasonable attorney's fees to the prevailing party...." I.C. § 12–121. Attorney fees are awarded to the prevailing party only if "the Court determines that the action was brought or pursued frivolously, unreasonably or without foundation." *Baker v. Sullivan,* 132 Idaho 746, 751, 979 P.2d 619, 624 (1999). Ticor has not pursued this action frivolously or without foundation. **Whether or not a title company involved in a bankruptcy proceeding, but not as a pre-petition creditor, is a party to the proceeding for purposes of claim preclusion is an issue of first impression. Thus, we decline to award Stanion attorney fees.**
> (emphasis added)

The unique factual pattern and legal arguments presented in this case are a matter of first impression in Idaho and seemingly all other states. The district court's interpretation of Section 5 of the Guidelines without citing any authority for such interpretation shows that this is a matter of first impression in Idaho. Thus, the district court's award of attorney's fees pursuant to Idaho Code § 12-121 was error.

Monica's case presents a significant and prevalent problem of what to do when a child support order is entered in violation of the Guidelines. Since this is a matter of first impression in Idaho, attorney's fees are inappropriate because Monica's motion to modify and her appeal to the district court were not frivolous, unreasonable and without foundation. Therefore, the trial court and the district judge committed reversible error and the award of attorney's fees at the trial court level and the district court level should be reversed.

14. <u>The awards of attorney's fees were entered in violation of I.R.C.P. 54(e)(2).</u>

Chris requested attorney fees under I.R.C.P. 54(e)(1) and Idaho Code § 12-121, which were granted by the trial court. The district judge on appeal awarded attorney's fees to Chris pursuant to Idaho Code § 12-121.

I.R.C.P. 54(e)(2) creates an additional requirement for an award of attorney fees under Idaho Code § 12-121 and provides as follows:

> **Rule 54(e)(2). Findings.**
> Whenever the court awards attorney fees pursuant to section 12-121, Idaho Code, it shall make a written finding, either in the award or in a separate document, as to the basis and reasons for awarding such attorney fees. [I.R.C.P. 54(e)(2) (1979)]

If the awards of attorney's fees at the trial court and the district court are not reversed on appeal, then those awards must be reversed and remanded for additional findings of fact and conclusions of law. In *Snipes v. Schalo*, 130 Idaho 890, 892-893, 950 P.2d 262 (Ct.App.1997), the Idaho Court of Appeal addressed attorney's fees requests under Idaho Code § 12-121 and stated as follows:

> We must decide whether the district court's award of attorney fees to the Snipeses was proper. Idaho Code Section 12-121, augmented by I.R.C.P. 54(e)(1), authorizes an award of attorney fees in a civil case brought or defended frivolously, unreasonably or without foundation. *Wing v. Amalgamated Sugar Co.,* 106 Idaho 905, 910, 684 P.2d 307, 312 (Ct.App.1984). An award of attorney fees at trial under I.C. § 12-121 and I.R.C.P. 54(e) is subject to reversal only upon a showing that the district court abused its discretion. *U.S. Nat. Bank of Oregon v. Cox,* 126 Idaho 733, 735,889 P.2d 1123, 1125 (Ct.App.1995). While an award of attorney fees is within the unique discretion of the district court, if the record itself discloses that the claim or defense was not frivolously pursued, an award of attorney fees cannot be upheld. *Black v. Young,*122 Idaho 302, 309, 834 P.2d 304, 311 (1992).
> Idaho Rule of Civil Procedure 54(e)(2) requires the district court, when it awards attorney fees pursuant to I.C. § 12-121, to make written findings as to the basis and reasons for awarding the fees. The purpose of requiring the district court to make specific findings of fact and conclusions of law is to afford the appellate court a clear understanding of the district court's decision, so that it may be determined whether the district court applied the proper law to the appropriate facts in reaching its conclusion. *Pope v. Intermountain Gas Co.,* 103 Idaho 217, 225, 646 P.2d 988, 996 (1982). The absence of adequate findings and conclusions of law will require a reversal of the judgment and remand for additional findings and conclusions. Id.

Thus, an award of attorney's fees that is not accompanied by written findings as to the basis and reasons for awarding attorney's fees must be reversed and remanded.

The trial judge awarded attorney's fees to Chris on the sole basis of an oral finding that Monica's motion for modify child support was "brought without any basis." The sole statement that a claim is brought without any basis does not meet the requirements of I.R.C.P. 54(e)(2) as explained in *Snipes*. The appellate courts do not have a clear understanding of the magistrate court's decision so that the appellate court may determine whether the magistrate court applied the proper law to the appropriate facts in reaching its conclusion.

The district judge stated at page fourteen of his memorandum decision that "the defendant clearly prevailed on appeal on all three of the essential issues raised. The plaintiff's case on appeal was fatally flawed and I conclude that there was no legal basis for any of the issues raised." Again, the explanation by the district judge is not sufficient to explain how or why Monica's appeal was frivolous, unreasonable, or without foundation.

If Chris' awards of attorney's fees at the trial court and on appeal to the district court are not reversed in this appeal, then the issue of Chris' awards of attorney's fees should be remanded with instructions that findings of fact and conclusions of law must be submitted by the trial judge and by the district judge.

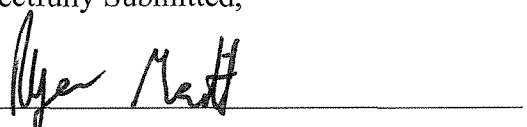
CONCLUSION

There is no question in this case that the child support of $25.00 per child per month is grossly inadequate. The agreement reached between Monica and Chris was in violation of Idaho's public policy that parents must financially support their children. The trial court and the district judge's reliance on the standard of proving a substantial and material change of circumstances promotes and continues the violation of Idaho's public policy. Idaho's appellate courts must not allow agreements like the one involved in this case to stand and to continue to be enforced because a party cannot prove a substantial and material change of circumstances. To do so, is not in the best interests of the children and is a violation of Idaho's public policy.

Monica argues that the Guidelines, specifically Section 5, provide the legal remedy to correct the grossly inadequate child support order. Moreover, Monica asks that equity intervene to correct the grossly inadequate child support order in this case if the court finds that Section 5 of the Guidelines is not a legal remedy in this case.

Lastly, Monica asks that the awards of attorney's fees at the trial court and the district court levels be reversed. Monica presented legitimate triable issues of fact and law on an issue of first impression in Idaho. Monica's motion to modify and subsequent appeal were not frivolous, unreasonable or without foundation under Idaho Code § 12-121.

Respectfully Submitted,



Ryan Martinat
Counsel for the Plaintiff/Appellant

SERVICE BY FACSIMILE: The undersigned hereby certifies that a true copy hereof was this date faxed to: **Anne-Marie Kelso,** Payette County Prosecutor's Office, Payette County Courthouse, 1130 Third Ave. No., Rm. 105, Payette, ID 83661-2473 at 208-642-6099.

DATED: JUN 30 2014

SIGNED:

Ryan Martinat
Counsel for the Plaintiff/Appellant