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Garner v. Garner Appellant's Reply Brief Dckt. 41898

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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 REPLY 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

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ARGUMENT

1. Chris' motion to modify custody and the attorney's fee issue resulting therefrom is not an issue in this appeal.

At pages two through three and pages fifteen through nineteen of the respondent's brief, Chris discusses the attorney's fees related to the dismissal of a motion to modify custody filed by Chris. However, Chris' motion to modify and the resulting attorney's fees issue are not issues involved in this appeal.

Monica initially appealed to the district court from the trial court's decision on the award of attorney's fees on the dismissal of Chris' motion to modify custody. However, Monica did not renew her appeal of the attorney's fee issue on this appeal to the Idaho Supreme Court. Thus, Chris' argument in the respondent's brief on the attorney's fees issue is irrelevant.

2. No slanderous statements of Chris were made in the opening brief.

At page seven of the respondent's brief, Chris states as follows:

> Appellant opines about the motivation behind the Respondent's decision to request a dismissal. The argument set forth is neither factual nor based upon any legal justification. The opinions of Appellant that Respondent is a bad father and a terrible person are incorrect and inappropriate for a brief submitted to the Idaho Supreme Court. The Court should not consider the slanderous words and

> Respondent respectfully requests the rebuttal brief contain only arguments that have a factual basis in the record or are based upon solid legal arguments.

Chris does not specify what statements were made that were slanderous about Chris. Regardless, nowhere in this case or in the record has Monica referred to Chris as a bad father or a terrible person.

Presumably, Chris objects to the statements made in section two of the opening brief wherein a hypothetical scenario is given of the motives of parties in family law cases involving child support. The hypothetical scenario explained that parties in child support cases often exchange child support for child custody. However, there was no reference to Chris in the hypothetical scenario, nor was anything stated that is not supported by the record. The opening brief simply acknowledged what happened in this case and what happens in many family law cases involving child support.

The trial court and Chris' counsel both acknowledged the very facts that Chris appears to object to now. On February 26, 2013, the trial court stated as follows:

> 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.
>
> See Transcript Lodged July 3, 2013, of the Motion Hearing on February 26, 2013. See also R, Vol. II, p. 204.

Both in the Respondent's Brief on Appeal in the district court appeal and at page nine of the Respondent's Brief in this appeal, Chris stated that the "mere fact that the Appellant now has decided she doesn't like the agreement made at the time of the original decree does not magically relieve her of the legal burden of proving a material and substantial change in circumstances." R, Vol. II, p. 235. Moreover, Chris' counsel explained in detail to the trial court the terms of the parties' agreement. See Transcript Lodged July 3, 2013, of the Motion Hearing on February 26, 2013. Thus, Chris acknowledges that an agreement was made relating to child support in the original judgment of divorce in this action. The parties may disagree as to what the specific terms of the agreement were, but an agreement was made nonetheless.

3. Monica did not fail to assert the public policy argument before the trial court and such argument is not waived on this appeal.

At page seven of the Respondent's Brief, Chris stated that Monica failed to assert the public policy argument to the trial court. However, Monica did present the public policy argument to the trial court.

In the Plaintiff's Motion/Objection to Deny Defendant's Motion to Dismiss Plaintiff's Motion in the Form of Complaint to Modify Judgment filed on January 23, 2013, Monica argued that the "public policy of the State of Idaho is a strong policy as set forth in the above statutes [Idaho Code §§ 32-706 & 32-709] and Idaho Child Support Guidelines requiring child support to be fixed and

to comply with Child Support Guidelines." R, Vol. II, p. 153. Additionally, at the oral argument on Chris' Motion to Dismiss on February 26, 2013, Monica's counsel argued the public policy issue. See Transcript Lodged July 3, 2013, of the Motion Hearing on February 26, 2013. Thus, Monica argued public policy to the trial court and the public policy argument was properly preserved as an issue on appeal to the district court.

The public policy argument was also presented to the district court. In the Appellant's Reply Brief in the appeal to the district court, Monica provided case law and argument on Idaho's public policy of disfavoring agreements limiting child support. See R, Vol. II, p. 255-256 & 260. Therefore, Monica argued public policy in the appeal to the district court and the public policy argument is properly preserved as an issue on this appeal.

4. The agreement of the parties to limit Chris' child support obligation violates Idaho Code § 32-706 (5) and violates public policy.

Chris cites *Verska v. St. Alphonsus Regional Medical Center* 265 P.3d 502, 151 Idaho 889 (2011), for the proposition that unambiguous legislation cannot be modified by the asserted purpose of the legislation or by public policy. *Verska* dealt with a conflict between a set of statutes and the statement of purpose that accompanied those statutes. The statement of purpose was not enacted into law. The court found that the set of statutes were not ambiguous and therefore declined to consider the statement of purpose in interpreting the set of statutes.

In this case, Idaho Code § 32-709 is at issue and that statute is being compared and contrasted with Idaho Code § 32-706 and the Idaho Child Support Guidelines ("Guidelines" hereafter). The issues presented in this case are materially different than the issue presented in *Verska* because there are statutes and court rule being interpreted together rather than a set of statutes being interpreted in isolation. The interplay between the statutes and court rule are addressed individually below.

The first item to consider is the interplay between Idaho Code §§ 32-709 & 32-706. Idaho Code § 32-709 states that the "provisions of any decree respecting maintenance or support may be modified...only upon a showing of a substantial and material change in circumstances." However, Idaho Code § 32-709 does not address how to deal with modifying a decree respecting child support that was originally entered in violation of Idaho Code § 32-706, which is the statute that details the process for setting child support. 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)

Idaho Code § 32-706(5) specifically states the procedure to be used when departing from the Guidelines, which requires the court to 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." The question left unanswered is what is the remedy when Idaho Code § 32-706(5) is not followed by the parties or by the court?

In this case, there is no question that the initial child support obligation deviated from the Guidelines. However, the trial court that entered the initial child support obligation did not make written findings or specific findings on the record that the application of the guidelines would be unjust. Therefore, the question of how to address a violation of Idaho Code § 32-706(5) is presented.

The second item to consider is the interplay between Idaho Code § 32-709 and Section 5 of the Guidelines, which was adopted by the Idaho Supreme Court pursuant to Idaho Code § 32-706(5). Again, Idaho Code § 32-709 requires a showing of a substantial and material change of circumstances before a child support obligation can be modified. However, 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.

Section 5 of the Guidelines provides an additional method for modifying child support in that Section 5 allows for an analysis of the amount of child support provided for under the Guidelines as compared to the amount of child support currently ordered. That comparison can provide the substantial and material change of circumstances required for a modification of child support.

5. Rules of statutory interpretation provide insight on how Idaho Code § 32-709 should be interpreted as compared to Idaho Code § 32-706 and Section 5 of the Guidelines.

Both Chris and the District Court have made Idaho Code § 32-709 the preeminent statute relating to modification of child support. In their view, no fact or issue has any bearing on modifying child support other than proving a substantial and material change of circumstances. By doing so, Chris and the District Court have rendered Idaho Code § 32-706(5) meaningless as it relates to the procedure to be used when there is a deviation from the amount of child support suggested by the Guidelines. If a child support obligation is set in contravention of Idaho Code § 32-706(5), it is untouchable unless there is a substantial and material change of circumstances. Additionally, Section 5 of the Guidelines is also rendered meaningless under Chris and the District Court's conclusion that the provision in Idaho Code § 32-709 requiring a substantial and material change of circumstances is the only consideration in modifying child support.

Idaho Code §§ 32-709 & 32-706(5) can be read and interpreted to preserve meaning for both statutes. "It is a well-settled principle of statutory construction that statutes should not be construed

to render other provisions meaningless." *Moss v. Bjornson*, 115 Idaho 165, 166, 765 P.2d 676 (1988). Additionally, conflicting statutes pertaining to the same subject are to be construed in harmony with each other as much as reasonably possible. *Christensen v. West*, 92 Idaho 87, 88, 437 P.2d 359 (1968).

Idaho Code §§ 32-709 & 32-706(5) can be reasonably construed together by making Idaho Code § 32-706(5) a prerequisite to applying Idaho Code § 32-709—i.e. the requirement of proving a substantial and material change of circumstances to modify a child support obligation does not apply if the original child support obligation deviated from the amount of support provided in the Guidelines and the trial court made no finding or written record of the reason for the deviation.

Idaho Code § 32-709 and Section 5 of the Guidelines can also be reasonably construed together. In 1980, Idaho Code § 32-709 was enacted providing that the provisions of any decree respecting maintenance or support may be modified only upon a showing of a "substantial and material change of circumstances."

On February 10, 1993 the Guidelines were adopted and Section 5 provides that the amount of child support provided under those guidelines may constitute a "substantial and material change of circumstances" for granting a motion for modification of child support obligations.

The use of the phrase "substantial and material change in circumstances" in both Idaho Code § 32-709 and Section 5 of the Guidelines is strong evidence that the two provisions were intended to work together and that Section 5 is remedial of the language in Idaho Code § 32-709.

Idaho Code § 32-709 deals with motions to modify child support where there has been no "substantial and material change of circumstances." Section 5 of the Guidelines deals with motions to modify child support where there has been no "substantial and material change in circumstances" but where the child support is "grossly inadequate" when compared to what the child support would be when applying the child support guidelines.

6. The remedial nature of Section 5 of the Guidelines addresses the concern raised by the District Court on the finality of judgments.

In the Memorandum Decision, the District Court placed a high emphasis on the finality of judgments and stated as follows:

> Plaintiff argues that the original agreement was void, since it did not comport with the guidelines. Here, the agreement on child support was apparently part of the comprehensive parenting plan that had been merged into and was part of the court's decree. It is the court's decree that makes the issue final, not the mere agreement of the parties. There is no showing to support any contention that the judgment and decree itself should be declared void or otherwise set aside.
>
> R, Vol. II, p. 278.

It appears that the District Court viewed the judgment in this case as an all-or-nothing proposition—i.e. that the judgment would either have to be completely set aside or that the judgment will remain in full effect. As explained by the District Court in the Memorandum Decision, "the court does have continuing jurisdiction over the matter of child support." R, Vol. II, p. 276. Thus, there is no apparent reason why the child support in this case could not be addressed without overturning the entire judgment.

Additionally, as explained above, Section 5 of the Guidelines was enacted after Idaho Code § 32-709 and thereby should be considered remedial of Idaho Code § 32-709. Section 5 of the Guidelines provides an alternate route for modifying child support. However, Section 5 of the Guidelines does not require a wholesale overturn of the judgment. Section 5 of the Guidelines should be interpreted to allow a modification of child support and to leave the remainder of the judgment alone as it relates to property division, custody, etc.

7. The District Court erred in affirming the trial court's dismissal of Monica's motion to modify child support.

The District Court discussed the trial court's discretion on the dismissal of Monica's motion to modify child support and stated as follows:

> In any event, because Section 5 uses the term "may," there is no basis for this court to conclude that the trial judge, in the exercise of his discretion, erred finding that the plaintiff had not established a substantial and material change of circumstances. *See Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995) ("When used in a

> statute, the word 'may' is permissive rather than the imperative or mandatory meaning of 'must' or 'shall'").

The District Court seems to determine that the use of the word "may" in Section 5 of the Guidelines renders the entire provision discretionary. If Section 5 of the Guidelines is discretionary, then the District Court committed reversible error in affirming the trial court's decision.

The trial court found that Chris' child support obligation is "grossly inadequate." As explained above, the District Court suggests that the trial court had the discretion to apply Section 5 of the Guidelines to correct the child support obligation, but did not. The District Court's reasoning appears to be that since the trial court had discretion to apply or to not apply Section 5, then the trial court did not commit error by not applying Section 5 to fix the grossly inadequate child support.

The trial court's recognition of an injustice in the form of the grossly inadequate child support required the trial court to apply any available remedies to correct that injustice under Idaho's Constitution. Article I, § 18 of the Idaho Constitution provides as follows:

> **Justice to be freely and speedily administered.** – Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice.

Thus, Idaho's Constitution entitles Monica to a remedy, if available, for the grossly inadequate child support. When the trial court failed to exercise his discretion in applying Section 5 of the

Guidelines, the trial court committed error and the District Court committed error by affirming the trial court.

8. Chris' child support obligation is grossly inadequate.

In the Respondent's Brief, Chris argued that his additional contributions to the children should be taken into consideration on the issue of child support. Chris argues at page nine of the Respondent's Brief as follows:

> In this case, the Respondent contributed directly to the children's needs. The decree requires Respondent to assist in paying for clothing, food, school supplies and extracurricular activities. Those are the types of items that child support would normally cover. That the parties simply chose a more direct path for supplying these items to the children justified a deviation from the child support guidelines.

Thus, Chris believes that his extra contributions to the children's expenses justifies the deviation from the amount of support suggested in the Guidelines. However, Chris never provides financial figures to support his conclusion that his extra contributions to the children's expenses justifies the deviation from the Guidelines. The burden of proof should be on Chris to support his argument and conclusion.

The parenting plan attached to the Judgment entered on October 26, 2010, provides several categories of expenses to be split by Monica and Chris. The Parenting Plan apportions costs as follows:

- Chris and Monica will 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 and 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.

See R, Vol. I, p. 57.

Chris' total yearly expenditures under the parenting plan are approximately $1100.00, which is comprised of the following: $600.00 for clothes; approximately $300.00 for school lunches ($30.00 per month for ten months of school); an estimate of $100.00 for school supplies (since the parties alternate years, this estimate is actually $200.00 every other year); and an estimate of $100.00 to split class fees, yearbooks and activity cards. By dividing the $1100.00 approximate yearly total by twelve months, Chris' monthly expenses under the parenting plan are approximately $91.67. Therefore, Chris' total monthly obligation to support his children is $141.67 ($50.00 monthly child support + $91.67 in monthly expenses under the parenting plan).

As previously explained in Monica's opening brief, Chris' child support should be set at $720.08 per month according to the Guidelines (the $720.08 figure does not account for the tax exemption). After accounting for Chris' additional expenses under the parenting plan, Chris is still paying $578.41 less per month than he should be paying. Thus, Chris' argument that his additional expenses under the parenting plan justify the deviation from the Guidelines is not supported.

Moreover, the trial court considered Chris' additional expenses under the parenting plan and still found that his child support obligation was grossly inadequate. The trial court found as follows:

> Within that divorce stipulation, the defendant -- excuse me, the plaintiff's motion points out that the order was for a very low amount of child support and in addition to that within that stipulation, there were some other provisions which you don't normally find in decrees but happen from time to time. Specifically that the parties would share the costs of school lunch, for example, half each, school supplies, extracurricular activity and there was a clothing provision within that decree that provided for I believe up to 600 a year.
> ....
> 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.
>
> See Transcript Lodged July 3, 2013, of the Motion Hearing on February 26, 2013 at 8-9.

Thus, the trial court was well aware of the extra expenses paid by Chris and the trial court still found that Chris' child support is grossly inadequate. Since Chris' child support is still grossly inadequate after accounting for the additional expenses in the parenting plan, those expenses cannot support a deviation from the Guidelines as argued by Chris.

9. The children would benefit from additional child support.

As a final attempt to justify the deviation from the Guidelines, Chris argues at page nine of the Respondent's Brief that "[t]he Appellant failed to make any showing at the hearing that the children's needs were no longer adequately met." This argument is troublesome for several reasons.

First, Chris' argument fails to recognize that Monica's motion to modify child support was dismissed without a trial or any opportunity for Monica to provide evidence to the trial court. Chris filed a motion to dismiss Monica's motion to modify child support before Chris filed an answer. Thus, the case never got far enough along for Monica to provide evidence to the trial court on whether the children's needs were being adequately met.

Second, even if this case had made it to trial, Monica was not required to prove that the children's needs were not being adequately met. A motion to modify child support does not depend on whether children's needs are being adequately met.

Third, it is entirely unreasonable to argue that a motion to modify child support should turn on whether the children's needs are being adequately met. For instance, if one parent was wealthy and could provide everything the children needed, then under Chris' theory the other parent would not need to pay child support because the children's needs were already being adequately met. Idaho law and public policy have long held that both parents owe a duty of support to their children. That duty does not disappear if one parent is able to adequately provide for the children.

The fact that the children would have been better provided for if Chris paid child support in accordance with the Guidelines seems undisputable. In fact, there are objective facts that the appellate court can take judicial notice of in considering Chris' statement that Monica provided no proof that the children's needs were not being adequately met.

Under Idaho Rule of Evidence 201(f), "[j]udicial notice may be taken at any stage of the proceeding." More specifically, judicial notice "may be taken at any stage in the proceeding, at the trial or appellate level." *Trautman v. Hill*, 116 Idaho 337, 340, 775 P.2d 651 (Ct.App.1989). The only limitation on the use of judicial notice by the appellate court is that a "judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Idaho R. Evid. 201(b).

In this case, Monica asks the appellate court to take judicial notice of her bankruptcy. Monica's bankruptcy is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Bankruptcy records are public records. Thus, the appellate court can easily verify the information provided below regarding Monica's bankruptcy.

On July 12, 2013, Monica filed for bankruptcy. Chris had notice of this bankruptcy because he was listed as a creditor in the bankruptcy. Of note in the bankruptcy schedules is that Monica owned a 1994 Ford Explorer that was in poor condition and that Monica did not own any real property. Thus, Monica was renting a house for her and the children to live in and Monica was driving the children around in a vehicle that was older and in poor condition.

Chris made the statement in the Respondent's Brief that Monica "failed to make any showing at the hearing that the children's needs were no longer adequately met." The insinuation of that statement is that the children's needs were being adequately met and that additional child support is unnecessary. Chris knew Monica was experiencing financial difficulties because he had notice of the bankruptcy as a creditor. There is little doubt that the children would have benefited had Chris been paying the Guideline child support amount.

The child support lost by Monica and saved by Chris is substantial. On November 7, 2012, Monica filed her motion to modify child support. Thus, child support could have been modified beginning on December of 2012.

Twenty-three months have elapsed since December of 2012. As explained above, even after accounting for Chris' current child support and the additional expenses he pays for the children, Chris pays $578.41 less per month than he should under the Guidelines. Since December 1, 2012, Monica has lost and Chris has saved $13,303.43 in child support (23 months x $578.41 = $13,303.43). The children surely would have benefited from that lost child support over the last twenty-three months.

10. Conclusion.

As far as is known to counsel, there is no case law in Idaho or in other states that directly addresses the issues raised in this case. This is a matter of first impression in Idaho and likely many other

states. This is also a matter of great importance and a matter that is frequently an issue in custody and child support cases.

This case really boils down to the interpretation of Idaho Code §§ 32-706 & 32-709 and Section 5 of the Guidelines. Chris and the District Court interpret Idaho Code § 32-709 in a way that gives no meaning to Section 5 of the Guidelines and that also eliminates the requirements of Idaho Code § 32-706(5) when deviating from the child support amount recommended by the Guidelines.

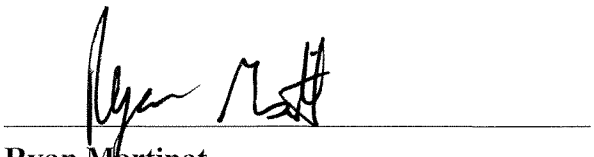
The Guidelines were adopted by the Idaho Supreme Court on February 10, 1993, and amended by the Idaho Supreme Court some twenty times with no changes being made to Section 5. If the Idaho Supreme Court intended for Section 5 to have no meaning, as argued by Chris and the District Court, then the Idaho Supreme Court would likely have taken Section 5 out of the Guidelines.

On the other hand, Monica provides an interpretation that allows Idaho Code §§ 32-706 & 32-709 and Section 5 of the Guidelines to work in harmony together. Moreover, Monica's interpretation supports and enforces Idaho's public policy that parents have a duty to support their children.

Regardless of all of the arguments made by Chris and the District Court, there is no question that the children in this case would be better off with more financial support from their father Chris. The current child support amount is grossly inadequate and adversely affects the children on a day-

to-day basis. Idaho law and equity must intervene to provide a remedy to correct the grossly inadequate child support in this case and to do what is in the best interests of the children.

Respectfully Submitted,



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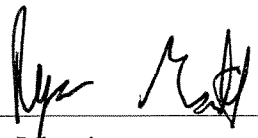
SERVICE BY MAIL: The undersigned hereby certifies that a true copy hereof was this date mailed to: **Anne-Marie Kelso,** Payette County Prosecutor's Office, Payette County Courthouse, 1130 Third Ave. No., Rm. 105, Payette, ID 83661-2473.

DATED: OCT 28 2014

SIGNED: 

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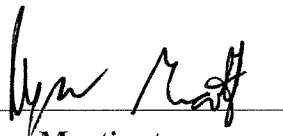
CERTIFICATE OF COMPLIANCE: The undersigned hereby certifies that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on **Anne-Marie Kelso** at the following email address: kelsoam@gmail.com.

DATED: OCT 28 2014

SIGNED: 

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