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Firmage v. Snow Appellant's Brief Dckt. 42141

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IN THE SUPREME COURT IN THE STATE OF IDAHO

HILARY BETH CANDLAND
FIRMAGE FKA HILARY SNOW,)
)
 Respondent,)
v.)
)
HOWARD HUNTER SNOW,)
)
 Appellant)
_____)

Docket No: 42141-2014

—————○—————
APPELLANT'S SUPPLEMENTAL BRIEF
—————○—————

On Appeal from the Fourth Judicial District of the State of Idaho, in and for the County of Ada. The Honorable Russell C. Comstock, Magistrate Judge, Presiding

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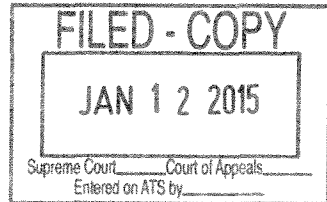


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Preliminary Statement

APPELLANT HOWARD HUNTER SNOW files this supplemental brief through Order of this Court that the Magistrate conduct further proceedings and ultimately to issue a memorandum of findings of fact and conclusions of law that reflect that the best interests of the children are served by the final JUDGMENT RE: MODIFICATION entered January 30th, 2014.

Idaho Appellate Rule 13.3 (b) reads in salient part, “the district court or administrative agency shall have jurisdiction to *take all actions necessary* to fulfill the requirements of the order of remand.” (emphasis added). In remanding the instant case, this Court specifically ordered “further *proceedings*” (emphasis added on plural).

The unambiguous instructions of this court obliged the Magistrate to conduct regular and proper proceedings to accurately find the facts and to ensure that those findings were supported with conclusions of law reflecting the best interests of the children.

Instead, the Magistrate conducted a hurried 5 minute Status Conference where he summarily denied Howard the right to discuss the issues of fact, the right to depose Dr. Engle or otherwise be heard in any meaningful way. As a result, Howard was denied due process of law.

Not surprisingly, the Magistrate’s findings are a mechanical recitation of the *observations* found in Dr. Engle, and not facts found by the trial court (emphasis added). Such exercise does not constitute fact finding, and is an abuse of discretion which cannot be allowed as supporting the determinative outcome in this case.

THE MAGISTRATE ERRED IN FAILING TO DETERMINE THE ADMISSIBILITY OF THE EVIDENCE IN THE FIRST INSTANCE

In his AFFIDAVIT IN OBJECTION TO INTERIM ORDERS, Howard informed the magistrate that he contested Dr. Engle's observations and recommendations in the report. The report in that they contained numerous factual errors, omitted critical information, was anchored in hearsay without supporting factual documentation, was incomplete based on I.R.C.P. Rule 719 3(d), and went contrary to Idaho's best interest standard (Clerk's Record. Pgs 35-38). Prior to the HEARING ON INTERIM ORDERS, Howard specifically asked the Magistrate to take note of hearsay, bias, and inaccuracies in Dr. Engle's report (CR. Page 35, Item 9).

When hearsay becomes so heavily relied upon by an court appointed expert such as Dr. Engle, it does not automatically become admissible just because the expert relied upon those matters or references in his report. The trial court in no way determined the veracity of Dr. Engle's statements or the accuracy of the children's statements, e.g. whether Dr. Engle's interviews with the children were recorded, taken from his notes or merely his recollections.

The most apparent issue with Dr. Engle's report is the lack of impartiality and improper bias against Howard, who Dr. Engle described as being very "self-involved" and one who constructs sentences "to convey...an impression of his intelligence." (Exhibit #1, Top of Page 16). Dr. Engle then dedicates an entire paragraph linking Howard with "similar persons" who "are very good at making positive first impressions" but tend to be "too loud, exhibitionistic...histrionic". (Exhibit #1, Top of Page 16).

Instead of investigating the accuracy, clarity, and credibility of Dr. Engle's report as well as the questionable supporting affidavits submitted by Hilary, the record clearly shows the Magistrate bypassed the step of ruling on the evidence and quickly dispensed of the case by means of the pre-trial stipulation:

THE COURT: "So the answer to the question is yes, you're no longer willing to - you're no longer willing to abide by the agreement that you made to settle the case based on the recommendations of Dr. Engle?"

MR SNOW: "That is correct."

THE COURT: "And on what basis are you trying to get out of that stipulation?"

MR SNOW: "Well, that Dr. Engle's report goes contrary to the Idaho guidelines for best interest of the children." (Tr. Page 24, Lines 24-25; Page 25, Lines 1-12).

There is no question that the Magistrate must consider and identify all material facts and carefully weigh the evidence before a fully informed and legally reasoned finding is made. In the instant case the Magistrate did not view the evidence available, but chose to view a limited and biased interpretation of the evidence taken through Dr. Engle's report.

In the Magistrate's Findings of Fact and Conclusions of Law, he notes that Dr. Engle was appointed as an expert under Idaho Rules of Evidence 706. The rule, which, reads that the expert "witness so appointed shall advise the parties of the witness' findings, if any; a deposition of the witness may be taken by any party."

While the case was temporarily remanded for findings of fact, the trial court failed to conduct the necessary actions in order to determine the veracity of the evidence presented by Dr.

Engle and simultaneously suppressing favorable evidence Howard had previously offered. In so doing, the trial court abused its discretion.

**THE MAGISTRATE ERRED BY ADOPTING DR. ENGLE’S OBSERVATIONS
WITHOUT JUDICIAL ADJUDICATING MATERIAL ISSUES OF FACT**

Beginning with the key findings the Magistrate reveals that the trial court’s findings are not a preponderance of the evidence as is asserted, but merely a mechanical adoption of Dr. Engle’s findings. The Magistrate’s findings begin by stating: “In Sum, Dr. Engle found as follows,” and thereafter he recites facts found only by Dr. Engle (FINDINGS OF FACT, Pg 5, Item 14). There is no indication that there was a preponderance available evidence, or, more importantly, an inquiry and investigation into the evidence that went into the report.

Included in the Magistrate’s findings were critically weighted and erroneous findings regarding the children’s wishes:

“the children's wishes regarding custody were as follows: (i) Beman wanted to reside primarily with Howard (ii) Hyrum wanted to live primarily with Hilary and (iii) the other children were ambivalent about the custody schedule.”(FINDINGS OF FACT Pg 11, Para 2).

This was not the case. Excepting Mac, all the children requested for a 50/50 custody schedule (Exhibit 1: Top of Pg. 24).

With respect to Beman, he had expressed his desire to live with Howard full time *only* if his mother moved away with his 3 brothers (emphasis added). A scenario inappropriately and unprofessionally posited by Dr. Engle during his interview:

“I asked what he wanted to do assuming his mother relocated and he said, ‘I don't know, I want to stay with dad in Boise’” (Exhibit 1, Bottom of Pg 25).

Throughout the entire report, Dr. Engle inappropriately and unprofessionally used leading questions that form the basis of his report and, ultimately, the Magistrate's findings:

"I asked if his father was talking about the conflict between his parents a great deal and he replied, "Yeah. Probably to inform us." I asked how his exposure to the conflict made him feel" (Exhibit 1, Bottom of Pg. 23)

"I asked if his father was talking badly about his mother and he replied, 'A little bit'" (Exhibit 1, Bottom of Pg 26).

Howard had previously presented ample evidence to the Magistrate in his AFFIDAVIT IN OBJECTION TO INTERIM ORDERS, asserting that Dr. Engle's report was biased, unprofessional and was written in the best interests of Hilary and not the children's best interests. In addition, Howard offered evidence to rebut the majority of Dr. Engle's assertions, however, there is no indication that the Court read, considered it or weighed it when making its findings.

In overcoming the burden of joint custody and relocation, the court gave considerable weight to Hilary's financial situation in Utah stating:

"In this case, the benefits of allowing Hilary to relocate with three of the children to Utah, even contrary to their wishes, were (i) it would reduce the children's exposure to parental conflict which was adversely affecting them, and (ii) it offered more financial stability to Hilary and Josef and derivatively to the children. In this case, the court concludes that Hilary has met her burden of proof. (FINDINGS OF FACT, Pg 12, 2nd Paragraph)

Nowhere in Dr. Engle's report is Hilary's financial situation discussed, nor is there any evidence in the record supporting these alleged financial benefits than Hilary's AFFIDAVIT IN SUPPORT OF INTERIM ORDERS. In overcoming the burden of relocation and joint custody the Magistrate arbitrarily went outside the his defined set of evidentiary terms, cherry picked an

item of hearsay from Hilary's Affidavit and gave it considerable weight without any supporting documentation.

The trial court addresses the question the parties' character, but does so only in a general sense, writing: "a comparison of each party's character favored primary custody of Mac, Hyrum and Will with Hillary in Utah." (FINDINGS OF FACT, Pg 11 Last Paragraph). The Magistrate fails to state the reasons why Howard's character was less favorable than Hilary's and how that would translate into the children's best interests. Howard had previously pointed to the fact that all of Hilary's letters of character reference came from immediate family members, and two childhood friends, all of whom provided heavily biased points of view. In stark contrast, 3 of Howard's letters came the boys' school teachers who had known both parties and the boys for years; 2 others from upstanding members of the Boise community who knew all parties involved.(CR.Pg. 35, Item 12, 2nd bullet point).

In short, the trial court relied purely on hearsay to overcome the burden of moving and denial of joint custody in asserting that the decision was in the children's best interests.

This Court has consistently provided guidance on the inherent difficulties resulting from such a mechanical adoption of proposed findings. Compton v. Gilmore, 560 P.2d 861 (Idaho 1977).Matheson v. Harris, 572 P.2d 861 (Idaho 1977), The opinion in Compton*supra* held that when prevailing counsel submits findings, it should not be treated as ultimate fact, but considered by the court as "no more than informal suggestions for the assistance of the court." (Citing Wright & Miller, Federal Practice & Procedure, § 2578 at 702-04 (1971)).

This Court's opinion in Schultz v. Schultz, 187 P.3d 1234 (2008) provides sufficient guidance to the Magistrate's abuse of discretion in this case. In Schultz, this Court held that an abuse of discretion occurs when the Magistrate fails to address "all of the relevant factors impacting the custody decision should be *considered and reflected* in the record (emphasis added).

In exercising its discretion in making a custodial determination, the Magistrate must have an accurate understanding of the factors it deems to be material and all of the available evidence supporting those issues. The Magistrate's findings can only be as robust as the facts on which they are based. When material issues of fact are left unaddressed, the findings on which they rest are extremely tenuous. In the instant case, the Magistrate erred in making Dr. Engle's opinions become the court's determinative facts. The Magistrate failed to show that it was trial court and not, the court-appointed expert who became the ultimate decision maker.

The Magistrate's de facto adoption of an expert's findings without judicial investigation impugns the integrity of the judicial system. By reflexively adopting Dr. Engle's findings the Magistrate exposed the lack of careful consideration and legal reasoning through which the final decision was reached.

In his supporting conclusions of law, the Magistrate entirely ignored any review of the visitation schedule, and failed to support that the modification provided a satisfactory basis for preserving and fostering boys' relationship with the Howard. Danti v. Danti, 146 Idaho 929 (S.C. 2009)). Since the trial court failed to carefully consider fostering Howard's relationship with his sons, the court abused its discretion. Danti v. Danti, *supra*.

**THE MAGISTRATE DENIED HOWARD DUE PROCESS THROUGH IRREGULAR
COURT PROCEEDINGS, ARBITRARY LEGAL REASONING AND DENYING
HOWARD TO BE HEARD IN ANY MEANINGFUL WAY**

IRREGULAR COURT PROCEEDINGS

Two days following the court's scheduling of the initial status conference to allow the parties to discuss Dr. Engle's report, Hilary's counsel moved the court for INTERIM ORDERS. In spite of the upcoming status conference, the Magistrate approved opposing counsel's request to hold a hearing and argue to uphold the parties to the pre-trial stipulation, thus circumventing due process and the opportunity for Howard to be fully heard on the matter.

After hearing briefly arguments centered around the pre-trial stipulation on January 27th, 2014, the Magistrate instructed Hilary's counsel to prepare the final order. (Tr. Page 29, Lines 24-25; Page 30, Lines 1-3) Only, after ruling and instruction for the preparation of the order did the Magistrate vacate the conference that was promised at the pre-trial conference. (Clerk's Record, Page 11, time-stamped procedure history).

These irregular and inconsistent proceedings denied Howard the opportunity to present evidence, call Dr. Engle as a witness or be heard in any meaningful way. These unusual procedures adopted by the court to dispense of the case quickly denied Howard substantive due process.

ARBITRARY LEGAL REASONING

In answering this Court's ORDER FOR CLARIFICATION, the Magistrate asserted he did not feel constrained to hold the parties to the pre-trial stipulation (ANSWER TO

CLARIFICATION ORDER, Pg. 2). However, the record reveals just the opposite: through the adjudication of the case, the Magistrate kept a single focus on the pre-trial stipulation and used it as the sole as an enforcement mechanism.

The arguments at the HEARING FOR MOTION ON INTERIM ORDERS, centered on the agreement at the pre-trial conference with Hilary's counsel opening the discussion

MR. MILLER: "Your Honor, what we are really doing is asking the court to enforce the stipulation" (Tr. Page 23 Lines 9-10)

THE COURT: "So the answer to the question is yes, you're no longer willing to - you're no longer willing to abide by the agreement that you made to settle the case based on the recommendations of Dr. Engle?"

MR SNOW: "That is correct."

THE COURT: "And on what basis are you trying to get out of that stipulation?"

MR SNOW: "Well, that Dr. Engle's report goes contrary to the Idaho guidelines for best interest of the children."

THE COURT: "There are no guidelines, it's completely discretionary and there are certain factors that are to be considered. (Tr. Page 24, Lines 24-25; Page 25, Lines 1-12)

The Magistrate's comments at the HEARING ON MOTION FOR AMENDED

JUDGMENT reiterate his same legal reasoning:

THE COURT: I think at the last hearing when you sought to get out from underneath that stipulation, I carefully measured the prejudice, as well as your rights in the case and balanced them in determining that it wasn't an appropriate case to set aside the party's agreement. I'll just stand on the record based on that prior analysis and respectfully deny your motion" (TR. Pg. 36, Lines 3-10)

Yet, when this Court asked the Magistrate for a clarification on his usage of the pre-trial stipulation, the Magistrate answered that it did not feel compelled to hold the parties to it, directly contradicting himself (ANSWER FOR CLARIFICATION, Pg. 2).

Once case was remanded back for proper fact finding, Howard asked the Magistrate for a clarification on the pre-trial stipulation. In his response the Magistrate obfuscated, equivocated and showed impatience:

MR SNOW: Just a point of clarification on the court 's response to the Supreme Court, on the pretrial stipulation, could you clarify for the parties whether or not that is in effect, has that been set aside, or are you still holding the parties to the pretrial stipulation?

THE COURT: I think the order of judgment was entered has not been vacated or stayed.

MR. SNOW: Okay. So the pretrial stipulation is still in force? I would like --

THE COURT: You're phrasing it "pretrial stipulations." I'm talking about the judgment that was entered based on your agreement. ." (Tr.TR. Status Conference on Remand 11/24/14 Pg 6 lines 10-22,)

DENIAL TO BE FULLY HEARD

Not only do this Court's precedents on procedural due process rest on ensuring that the facts have been fully heard and adjudicated, but universal principles of law support this reasoning. It is an error to disallow a party not to be fully heard, especially when constitutional rights are at stake, hence the Latin maxim *audialteram partem*; translated "hear the other side." Hilton Jackson, Latin for Lawyers 127 (6th printing 2000).

In none of the proceedings, is there scant indication that the Court allowed Howard to be fully heard, or be allowed to elaborate on the evidence supporting his objections to the Dr.

Engle's report. In spite of Howard's AFFIDAVIT IN OBJECTION TO THE INTERIM ORDERS, The Magistrate never gave any specific line of questioning to understand Howard's side. In fact, there is no indication on the record that the Magistrate read any of Howard's submitted affidavits as he never commented or questioned any of their content during the proceedings.

Where the "evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy," the individual's right to show that it is untrue depends on the rights of confrontation and cross-examination. "This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny." Richardson v. Perales, 402 U.S. 389 (1971).

It is well-recognized that "[a] fundamentally fair hearing requires the procedural steps of notice, an opportunity to be heard, the opportunity to present evidence which is relevant and material, and arbitrators who are not infected with bias" Santosky v. Kramer, 455 U.S. 745, 753-54 (1982)

By ignoring salient information, disallowing Howard to depose Dr. Engle, and failing to inquire as to the rebutting evidence Howard had submitted, the Magistrate denied Howard due process of law.

THE COURT: Well, when you say you're going to have him testify in that regard, I'm going to consider the evidence I have to consider and that was the report.

THE COURT: The sum and substance of your agreement was that the report would be what I would consider, so I'm not going to allow you to reinvent that wheel.

MR. SNOW: Would you allow me to depose Dr. Engleand at least get clarification on some of his conclusions?

THE COURT: I think since you're in the midst of an appeal, that is something that will be determined if there's a reversal. If there's a reversal and a remand, I think you'll have that opportunity. (TR. Status Conference on Remand 11/24/14 Pg 7, Lines 10-25).

It is an abuse of discretion and extreme error to disallow the opportunity to depose an expert witness. This abuse of discretion is especially egregious when the Magistrate deems that deposition only necessary when this Court has determined a reversal. This is not the proper usage of the Idaho Rules of Civil Procedure and a denial of due process.

THE MAGISTRATE ERRED IN FAILING TO ESTABLISH A COMPELLING STATE INTEREST PRIOR TO INFRINGING ON HOWARD'S RIGHT TO PRIVACY

The Constitutional right to privacy is guaranteed under the 4th Amendment to the U.S. Constitution and requires a compelling state interest to establish reasonable infringement. The Magistrate's advising Howard that his rights were "waived" by virtue of the pretrial stipulation is preposterous and an abuse of discretion. (Tr. Page 34, Lines 9-10). Further, the Magistrate's FINDING OF FACT AND CONCLUSIONS OF LAW provides no supporting case law to warrant such intrusion.

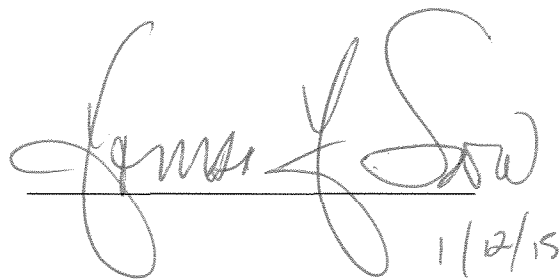
While Idaho recognizes that the best interests of the children may serve as a compelling interest, a court order cannot be upheld unless it is backed by substantial evidence and then tailored to the least restrictive means possible. Zablocki v. Redhail, 434 U.S. 374, 389 (1978).

This Court has never held that the "best interests of the child" gives a magistrate judge the authority to record a father's sole form of communication with his children and further, to vest those recordings in the hands of his former spouse. The Magistrate's ordering the recording of a law-abiding citizen's conversations without his consent is hardly a "reasonable" infringement, and there is no indication that legal reasoning was used to determine the least restrictive means possible. Instead, the recording of conversations goes contrary to the intent of this Court's opinion in Danti, which requires the lower court to provide a satisfactory basis for preserving and fostering the child's relationship with the non-custodial parent Danti v. Danti, 146 Idaho 929 (S.C. 2009)

CONCLUSION

This Court has stated that the lower courts must afford special weight to a parent's decision regarding the care, custody, and control of his children Hernandez v. Hernandez, 265 P.3d at 499, 151 Idaho at 886. In the case at hand, the trial court found Dr. Engle's findings would suffice as being in the children's best interests, and that would be the end of it. The record aptly demonstrates this. The magistrate thus failed to give the necessary consideration to all the material facts and evidence of this particular case as is required by duty.

Instead of taking the necessary steps to fill the requirements of the remand Order, the Magistrate failed to do the work required of every trial judge confronted with objections to evidence offered in a contested custody case. The Magistrate failed to carefully weigh the evidence available to him, allow the appropriate parties to present evidence and depose, ultimately showing that careful consideration was given to the fact finding process. In failing in his judicial duties, he abused his discretion and the result is contrary to Idaho Code, and the numerous opinions by this Court. Howard respectfully reiterates his request that the JUDGMENT RE: MODIFICATION be vacated and the case be sent back to the lower courts so that the best interests of the children will be served.

A handwritten signature in cursive script, reading "Howard H. Snow", is written over a horizontal line. To the right of the signature, the date "1/2/15" is written in a similar cursive style.

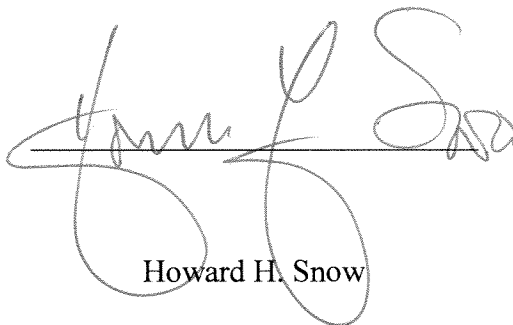
Howard H. Snow

Appellant Pro Se

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing document was served upon the person named below, by hand delivery.

DATED THIS 12th DAY OF JANUARY, 2015

A handwritten signature in black ink, appearing to read "Howard H. Snow", written over a horizontal line.

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