11-29-2019

# Gunn v. Gunn Respondent's Brief Dckt. 46977

**LTM LAW GROUP**
QUENTIN W. LACKEY, ISB NO. 9938
1015 Caldwell BLVD.
Nampa, ID 83651
Telephone: (208) 466-3753
Facsimile: (208) 475-8074
Email: qlackey@ltmlawyers.com
iCourt: efile@ltmlawyes.com

*Attorney for Respondent*

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

| | |
|---|---|
| STEPHANIE GUNN,<br><br>Appellant,<br><br>v.<br><br>JARED DANIEL GUNN,<br><br>Respondent. | Docket No. 46977-2019<br><br>District Court No. CV-2009-262<br><br>**RESPONDENT'S REPLY BRIEF** |

# RESPONDENT'S REPLY BRIEF

Appeal from the District Court of the Sixth Judicial District
of the State of Idaho, in and for the County of Bear Lake

---

Honorable Mitchell W. Brown
Bear Lake County Case CV-2009-262

Bron Rammell (ISB No. 4389)
MAY, RAMMELL & WELLS, CHTD.
P.O. Box 370
Pocatello, ID 83204-0370
Telephone: (208) 233-0132
Facsimile: (208) 234-2961
*Attorney for Appellant*

Quentin W. Lackey (ISB No. 9938)
LTM LAW GROUP
1015 Caldwell BLVD.
Nampa, ID 83651
Telephone: (208) 466-3753
Facsimile: (208) 475-8074

## TABLE OF CONTENTS

## TABLES OF CASES

## TABLES OF AUTHORITIES

**Statues** **Page(s)**

## I. STATEMENT OF THE CASE

This is an appeal of two (2) issues by the Appellant from the *Memorandum Decision and Order on Appeal* by the Honorable Mitchell W. Brown on March 11, 2019, upholding the Magistrate's decision following a one (1) day trial on November 13, 2017, modifying Appellant's ("Father's") visitation and child support.[1]

On September 1, 2016, Respondent ("Mother") filed a Verified Motion to Modify Decree of Divorce through counsel. Father, through counsel, filed an Answer responding to Mother's Verified Motion. After a hearing on Mother's Motion for Temporary Orders, the Magistrate court set the matter for trial on May 23, 2017. On May 23, 2017, Mother and counsel were present for trial, however, Father, nor his counsel were present and the Magistrate court entered an order "grant[ing] everything in the Petition to Modify in full."[2]

On July 25, 2017, Father appeared through new counsel and filed: (1) a Motion to Set Aside Default, (2) Alternative Motion to Reconsider, (3) Alternative Motion to Set Aside, and (4) a Motion for Stay[3]. The Magistrate court on August 15, 2017, issued it Minute Entry and Order granting Father' Motion to Set Aside the Modified Decree of Divorce. Subsequently, the Magistrate court, following one (1) rescheduling took the matter up for trial on November 13, 2017.

After hearing testimony from both parties, third-party witnesses, and admitted evidence on the record, the Magistrate court issued its' Findings of Facts and Conclusions of Law ("F.F. & C.L.") and its Judgment on January 16, 2018.

---

1 See R., Vol. I, p. 150-152.
2 See Tr.of May 23, 2017 Hrg., Vol. I, p.8, L.13-17.
3 See R., Vol. I p. 152; The District Court recognized that Appellant filed a Rule 306, Rule 503(B), Rule

In its' F.F. & C.L.'s and Judgment the Magistrate court modified Father's visitation rights with the parties' minor children reducing the Father's time from 35% to 20% and modified Father's child support increasing the Father's support for the benefit of the children to $1,200.00 from $853.00. The Magistrate court left intact Father's joint legal and physical custody of the parties' minor children.[4]

On February 20, 2018, Father filed his Notice of Appeal of the Magistrate's Judgment. After taking the matter up for appeal, the District Court on March 31, 2019, issued its' Memorandum Decision and Order on Appeal affirming the Magistrate's Judgment.

## II. ISSUES PRESENTED ON APPEAL

**A.** Can the custody and visitation rights of a parent and his children be modified without consideration of the "best interests" of the children, including any factors in Idaho Code § 32-717(1)?

**B.** When considering a parent's income received in excess of a forty (40) hour work week ("overtime"), is the court required to examine, address, and apply each of the standards expressly set forth in Rule 126(F)(1)(a)(ii) of the Idaho Rules of Family Law Procedure

## III. ARGUMENT

### A. When modifying the custody and visitation rights of a parent and his/her children, in determining what is in the "best interests" of the children, the court must consider all relevant statutory factors outlined in Idaho Code § 32-717, however, the factors outlined in Idaho Code § 32-717, is not exhaustive or mandatory and the court is free to consider other factors that may be relevant to the "best interests" standard.

1. Standards of Review:

#### a. De Novo Review

A de novo standard of review as to questions of law is applied by this Court. *Zeyen v. Pocatello/Chubbuck School Dist. No.* 25, 451 P.3d 25, 29 (2019). This Court exercises free

807A(1)(7), Rule 989(1)(6) motions pursuant to the Idaho Rules of Family Law Procedure.

4 See R., Vol. I, p. 126-133. In its F.F.& C.L. the trial court's foot note No. 1, notes that evidence presented was regarding past history of the children's actual physical custody with the Father.

review over the lower court's conclusions of law. *Doe v. Doe*, Idaho 162 254, 256 (2017). This Court also exercises free review when interpreting the meaning of a statute. *Id.*

**b. Abuse of Discretion**

"The determination of whether to modify child custody is left to the sound discretion of the trial court, and this Court will not attempt to substitute it judgment and discretion for that of the trial court expect in cases where the record reflects a clear abuse of discretion." *Woods v. Woods*, 163 Idaho 904, 906-907, 422 P.3d 1110, 1112-1113 (2018).

A Trial court does not abuse its discretion as long as the court "recognizes the issue as one of discretion, acts within the outer limits of its discretion and consistently with the legal standards applicable to the available choices and reaches it decision through an exercise of reason." *Lamont v. Lamont*, 158 Idaho 353, 356, 347 P.3d 645, 648 (2015); quoting *Roberts v. Roberts*, 138 Idaho 401, 403, 64 P.3d 327, 329 (2003). Only when the evidence is insufficient to support a magistrate's conclusion that the interests and welfare of the children would be best served by a particular custody award or modification, does this Court determine a Trial Court abused its discretion. *Id.* Nor, will this Court set aside the findings on appeal unless they are clearly erroneous such that they are both based upon substantial and competent evidence. *Id.*

**c. Sufficiency of Evidence**

"Substantial evidence is more than a scintilla of proof, but less than a preponderance. It is relevant evidence that a reasonable mind might accept to support a conclusion." *Kelly v. Kelly*, No. 46748, 2019 WL 5485180, at *11 (Idaho Oct. 25, 2019); quoting *Ehrlich v. Delray Maughan, M.D., P.L.L.C.*, Idaho 80 (2019). Substantial evidence does not require that the evidence be uncontradicted. *Id.* Rather, the evidence need only be of sufficient quantity and probative value that reasonable minds could conclude that the fact finder's conclusion was proper. *Id.*

The evidence adduced at trial by both parties was of sufficient quantity and of probative value for the trial court to conclude it was in the children's "best interests" for Father's visitation rights to be modified from 35% to 20%.[5]

2. The lower courts did examine or address the best interests of the children and the reduction in visitation of the Father should be affirmed.

The Lower Courts correctly concluded that modification of Father's visitation rights was in the "best interests of the children" as codified in Idaho Code § 32-717(1) as the trial court has wide discretion in its statutory application of Idaho Code § 32-717(1) and may consider factors others than those enumerated in Idaho Code § 32-717(1).

The trial court modified the Father's visitation rights with the children after it concluded that it was "in the best interests of the children," that Father's visitation rights be more in line with the visitation he had been exercising as a result of his own unilateral acts.[6] Further, the District Court concluded that the trial court had, "an abundance of evidence in the record which supports the trial court's findings of fact number 4."[7]

It is not necessary for trial courts to strictly adhere to Idaho Code § 32-717(1)'s enumerated factors in its conclusion as to whether modification is in the children's best interests. Rather, the trial court in determining whether modification is in the children's best interests requires it to apply all relevant factors outlined in Idaho Code § 32-717(1), and any other relevant factor not-outlined in Idaho Code § 32-717(1) to supports its' conclusions; as long as the trial court does not overemphasize one particular factor; and it finds the other factor relevant. *Searle v. Searle*, 162 Idaho 839, 844, 405 P.3d 1180, 1185 (2017).

---

5 See R., Vol. I, p. 155-159.

6 Though not specifically found by the lower courts', both the trial court and District Court found that Father's historic and current visitation schedule supported a modification of his visitation right.

The record does not support Father's contention that the trial court's conclusion should be reversed because the, "lower court's did not apply or recognize the appropriate legal standard in this case."[8] In its F.F. & C.L.'s the trial court applied the best interests of the children standard when it ordered Father's visitation rights from 35% to 20%.[9] The District Court also affirmed the trial court's conclusion because the evidence adduced at trial was sufficient to support the trial court's conclusion. The District Court did not conclude that Idaho Code § 32-717(1) was not considered or relevant in its affirmation of the trial court's judgment. Rather, the District court concluded that even though Idaho Code § 32-717(1) outlines statutory factors to aid the trial court in determining custody as to the best interests of the children, the evidence adduced at trial, permitted the trial court to consider factors outside Idaho Code § 32-717(1) which are more relevant to the issues in this case, as permitted by said statute.[10] For these reasons the District Court concluded that the "historical amount of time [Father] had spent with the parties' children and the factors associated with his exercise, or lack thereof, were the most germane and relevant issues at play."[11] This Court has held that, "equal visitation or residency time is not required for joint custody." *Lamont v. Lamont*, 158 Idaho 353, 362, 347 P.3d 645, 654 (2015). Further, this Court upheld a trial court's judgment as to the parties' custodial time in the light of one parties' unilateral actions.[12] *Id.*

The Father's reliance upon the legal standard that, "modification of a decree of child

---

7 See R., Vol. I, p. 158.
8 See App. Br., p. 7.
9 See R., Vol. I, p. 131 L. 1-3.
10 See R., Vol. I, p. 157
11 Id.
12 This Court in Lamont v. Lamont, found that the magistrate court discussed the mother's unilateral actions multiple times in its decision and stated that it would hold her conduct against, was not an error in the magistrate court's consideration of the mother's unilateral actions. Like the mother in Lamont v. Lamont, in this present case, the Father has unilaterally acted not to exercise the full extent of his adjudicated visitation, and his conduct too should be held against him and the Mother.

custody will not be granted" unless the modification, "appears to be in the best interests of the child's welfare," is greatly misguided at best, and is an attempt for this Court to second guess the lower court's conclusions in light of Father's permissive acts in this case. *Adams v. Adams*, 93 Idaho 133, 116, 456 P.2d (1969). See also, *Kirkpatrick v. Kirkpatrick*, 52 Idaho 27, 31-32, 10 P.2d 1057 1058-1059 (1932); *Clair v. Clair*, 153 Idaho 278, 283, 281 P.3d 115, 120 (2012). The record in this case shows that historically, prior to and after a reconciliation attempt, the Father never fully exercised his adjudicated visitation rights of 35% with the children. Even with conflicting evidence as to why the Father failed to exercise his adjudicated 35% visitation with the parties' children, the evidence adduced by and from the Father, showed he historically refused his visitation rights with the children for a number of reasons[13]. Through his own unilateral acts the Father produced a material, permanent and substantial change in circumstances warranting a downward modification[14], as to visitation rights with the children; and he, himself, determined that having less visitation with the children was in the best interests of the children without court intervention[15]. The Mother's Verified Motion to Modify Decree of Divorce therefore only requested what had historical been occurring as to the children's visitation with both parents, especially the Father.

The trial court, as a result of Father's unilateral acts, as stated above, was not required to adhere to all of the factors outlined in Idaho Code § 32-717(1) as there were other relevant factors to consider outside Idaho Code § 32-717(1), in its' conclusion that modification of the parties' visitation rights, [were] in the best interest of the child's welfare. *Adams v. Adams*, 93 Idaho 133, 116 (1969). See also, *Kirkpatrick v. Kirkpatrick*, 52 Idaho 27, 31-32 (1932); *Clair v.*

---

13 See Tr., Vol. I, p. 218, L. 8-25; p. 221, L. 24-25; and p. 222, L. 1-25.
14 See *Woods v. Woods*, 163 Idaho 904, 906, 422 P.3d 1110, 1112 (2018).
15 *Woods,* 163 Idaho 904, 907, 422 P.3d 1110,1113 (2018). Holding that the court must look not only for changes of condition or circumstance which are material, permanent and substantial, but also must thoroughly explore the ramifications, vis-à-vis the best interest of the child, of any change which is evident.

*Clair*, 153 Idaho 278, 283 (2012). The District Court affirmed the trail court's judgment because the Father had already modified his visitation rights as to the children.[16] Therefore, the lower court's did appropriately apply the legal standard when concluding that Father's visitation rights with the children should be modified.

3. Idaho Code § 32-717 provides the "framework" for determining the best interests of the children in making a custody decision. Section 32-717(1) sets forth a non-exhaustive list of factors to consider. *Searle v. Searle*, 162 Idaho 839, 844, 405 P.3d 1180, 1181 (2017); Findings of Facts [should] afford the appellate court a clear understanding of the basis of the trial court's decision, so that it might be determined whether the trial court applied the proper law to the appropriate facts in reaching it ultimate judgment in the case. Quiring v. Quiring, 130 Idaho 560, 565, 944 P.2d 695, 700 (1997).

Father is correct in his argument, that "Idaho Family law practitioners understand that the factors set forth in Idaho Code § 32-717(1) should be addressed in every custody proceeding", but should also now, that Idaho Family law practitioners understand that the trial court is not required to apply just the factors outlined in Idaho Code § 32-717(1). *Searle v. Searle*, 162 Idaho 839, 844, 405 P.3d 1180, 1181 (2017). Idaho Family law practitioners know that a trial court shall consider all relevant factors in its' determination as legal and physical custody and how that custody applies to the best interests of the children. *Id.* Idaho Family Law practitioners further know that trial courts have wide discretion in applying the factors outlined in Idaho Code § 32-717(1), and that the trial court is not mandated to just consider the factors outlined in Idaho Code § 32-717(1) but, is free to consider other factors that may be relevant. *Lamont v. Lamont*, 158 Idaho 353, 359, 347 P.3d 645, 651 (2015).

The District Court did not err when it affirmed the trial court's conclusions in modifying Father's visitation rights. The District Court in its affirmation of the trial court's conclusion concluded that there was sufficient evidence to support the trial court's F.F. & C.L.[17]

16 See previous foot note 5 and 6.
17 Id. see previous foot note.

Father overtly relies on the analysis of *Searle v. Searle*. This present case is distinguishable from *Searle v. Searle*, in that the Father through his own-permissive-unilateral-acts modified his visitation rights with his children to his and their detriment, as outlined and discussed herein above.[18]

The trial court is not bound to diagram all of its analysis in its conclusion. Rather, the trial court must issue a finding of fact "[that is determinative] of a fact support by the evidence," and that the magistrate's conclusions of law follow from those findings. *Searle*, 162 Idaho 839, 846, 405 P.3d 1180, 1187 (2017). *See also*, *Garner v. Garner*, 158 Idaho 932, 934-935, 354 P.3d 494, 496-497 (2015). Here, the District Court concluded that the historical factors the trial court considered "were the most germane and relevant issues at play," and lead the District Court to reasonably conclude in its appellate role, that the trial court's conclusions of law follow form those findings.[19] This Court has upheld lower court's decisions when other factors (history) outside Idaho Code § 32-717(1) were more relevant to the issues in the case. *Lamont v. Lamont*, 158 Idaho 353, 347 P.3d 645 (2015).

This present case is further distinguishable from *Searle v. Searle*, because the trial court's F.F. & C.L. are not merely a recitation the court record. *Searle*, 162 Idaho 839, 844, 405 P.3d 1180, 1181 (2017). The trial court's F.F. & C.L. are reasoned conclusions based upon evidence in the record.[20] As such, the trial court's F.F. & C.L., "afford the appellate court a clear

---

18 The District Court Stated: "if Idaho Code § 32-717(1) has any bearing on this proceeding, it is marginal." Is not an admission that the trial court failed to consider the factors enumerated in Idaho Code § 32-717(1). R. Vol. I, p. 127. The evidence as to the reason(s) the Father spent less time children was conflicted. The District Court recognized this fact, even in this light, the District Court affirmed the magistrate court's decision because, "the issue raided by the Mot. Modify Decree was whether the trial court should reduce Father's periods of physical custody with the parties' children because of Mother's claim that he was not exercising the visitation provided under the current decree." The District Court reasoned that Mother's request was much more limited and narrow then the initial evaluation establishing the terms and conditions of the initial custody rights and visitation schedule, which were ultimately stipulated to by the parties." Because Mother's request was much more limited and narrow it was not necessary for the trial court to consider all factors outlined in Idaho Code § 32-717(1), but was free to consider

understanding of the basis of the trial court's decision, so that that it might be determined whether the trial court applied the proper law to the appropriate facts in reaching its ultimate judgment in the case." *Quiring v. Quiring*, 130 Idaho 560, 565, 944 P.2d 695, 700 (1997). It is clear from the trial court's F.F. & C.L., and the District Court's affirmation that the F.F. & C.L., "afford the appellate court a clear understanding of the basis of the trial court's decision." *Id.* For this and other reasons the lower court's decisions should be affirmed.

B. **Prior to finding an abuse of discretion, the Court must determine whether or not the lower court's findings are based upon substantial and competent evidence to support the magistrate's findings. *Rohr v. Rohr*, 128 Idaho 137, 137-138, 911 P.2d 133, 137-138 (1995). If the magistrate provides the methodology or calculations it used in concluding what a parent's yearly gross income is, including income received in excess of a forty (40) hour work week ("overtime") at outlined in Rule 126(F)(1)(a)(ii) of the Idaho Rules of Family Law Procedure; then the lower court has not abused its discretion. *Id.***

1. Standard of Review

A magistrate's child support order is reviewed for an abuse of discretion. *Garner v. Garner*, 158 Idaho 932, 934-935, 354 P.3d 494, 496-497 (2015). Under the abuse of discretion standard, [the Court] conducts a multi-tiered inquiry: (1) whether the trial court rightly perceived the issue as one of discretion, (2) whether the trial court acted within the outer boundaries of its discretion and consistently with any legal standards applicable to the specific choices available to it, and (3) whether the trial court reached its decision by an exercise of reason. *Browning v. Browning*, 136 Idaho 691, 693, 39 P.3d 631, 633 (2001). Unless an abuse of discretion is found, the trial court's order will not be disturbed on appeal. *Noble v. Fisher*, 126 Idaho 885, 888, 894 P.2d 118, 121 (1994). The trial court did correctly calculate Father's gross income in accordance to Rule 126(F)(1)(a)(ii) as the F.F. & C.L. show that there was substantial and competence evidence to support the magistrate's findings. Again, this appears to be an attempt

---

other relevant factor's it believed were issues at play. R., Vol. I, p. 156-157.
19 See previous foot note 5 & 6.

by the Father, to have this Court second guess the lower court's decisions.

The magistrate court's F.F. & C.L. demonstrate how the magistrate judge concluded Father's gross yearly income is $96,474.13.[21] This Court, in *Rohr v. Rohr*, upheld the trial court's modification of child support because, "there was substantial and competent evidence to support the magistrate's finding that a material and substantial change of circumstances had occurred since the last order modifying the divorce decree." *Rohr v. Rohr*, 128 Idaho 137, 137-138, 911 P.2d 133, 137-138 (1995). But overturned the Father's income calculation because the magistrate court did not provide the methodology or calculations it used in concluding the father's monthly gross income. *Id.*[22]

Not unlike the parties in *Rohr v. Rohr*, the parties in this present case, since the entry and filing of the Supp. Divorce Decree filed February 14, 2011, have not modified child support.[23] The trial court in its' F.F. & C.L. found, after an analysis of the facts and evidence at trial, that a change in Father's income had occurred since entry of the Supp. Divorce Decree in 2011.(f) *Id.* However, unlike the magistrate court in *Rohr v. Rohr*, the lower courts in this present case provided "the methodology or calculations it used in concluding Father's gross yearly income" in their findings.[24] *Id.*

---

20 See R., Vol. I, p. 126-133.

21 In its F.F. & C.L. the trial court in subparagraphs 9-18 outlined how it calculated each of the parties' yearly gross income. The outline by the trial court was laid out in such a way that the District Court easily affirmed the trial court's decision modifying child support because, the "trial court made express finding[s] that ninety (90) percent of Father's 2016 gross income was result of 'work [Father] was required to do for his employer, with ten percent (10%) being additional voluntary income.'" R., Vol. I., p.159

22 Even though this Court did not delineate a rule per se, as expressed in this Reply Brief, the facts of Rohr v. Rohr the reasoning as to why this Court affirmed and overruled the magistrate court's findings in part, does not change the fact that in this present case, the magistrate court in detail provided its' methodology and calculations as to how it concluded that the Father's yearly gross income is $96,474.13. The magistrate court also modified the Mother's yearly gross income and concluded her income is approx. at $42,840. R., Vol. I, p. 130, L. 16-17.

23 Though conflicting evidence was presented as to the hours the Father worked and whether or not his overtime was voluntary the evidence presented at trial as to his actual hourly income is not. At trial an exhibit displaying the Father's 2016 income was admitted in to evidence. R., Vol I, p. 188, Ex. 2. It was further testified by the Mother that Father's income since 2011 had increased. Tr., Vol I. p. 141, L. 6-25; and p. 142, L. 1-24.

24 The trial court concluded that both parties were attempting to minimize their income for purposes of decreasing and increasing the child support order. R., Vol. I, p. 130.

Regardless of whether the magistrate judge specifically outlined each element contained in I.R.F.L.P. Rule 126(F)(1)(a)(ii) in the F.F. & C.L, as the Father contends it should have, the fact that the trial court's F.F. & C.L. provide the methodology and calculations as to how it determined the Father's yearly gross income shows the sufficiency of the evidence presented and that the evidence is substantial and competent enough to support the findings.

There is substantial and competent evidence on the record to support the lower court's conclusions justifying a modification of the parties' child support order. Therefore, this Court should affirm the lower court's decisions as to the child support modification.

## IV. Conclusion

The modification of the Father's visitation rights from 35% to 20% was proper in this case since the evidence presented to the trial court is sufficient enough that its F.F. & C.L., afford[s] the appellate court a clear understanding of the basis of the trial court's decision, so that that it might be determined whether the trial court applied the proper law to the appropriate facts in reaching its ultimate judgment in the case. *Quiring v. Quiring*, 130 Idaho 560, 565, 944 P.2d 695, 700 (1997).

The order for child support was not an abuse the trial court's discretion because the lower court's provided the methodology or calculations it used in concluding Father's gross yearly income sufficiently enough that supports its findings. *Rohr v. Rohr*, 128 Idaho 137, 137-138, 911 P.2d 133, 137-138 (1995). The decisions of the lower court's should be affirmed.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of November, 2019, I caused a true and correct copy of the above document to be sent by the method indicated, to the following person(s):

Bron Rammell (ISB No. 4389)
MAY, RAMMELL & WELLS, CHT
P.O. Box 370
Pocatello, ID 83204-0370
Telephone: (208) 233-0132
Facsimile: (208) 234-2961

[ ] U.S. Regular Mail
[ ] Facsimile Transmission
[ ] Hand Delivery
[ x] iCourt/Efile

LTM Law Group
*Attorney for Respondent*

Dated this 29th day of November 2019.

Quentin W. Lackey