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Gunn v. Gunn Appellant's Reply Brief Dckt. 46977

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

JARED DANIEL GUNN,

Appellant,

v.

STEPHANIE GUNN,

Respondent.

Docket No. 46977-2019

District Court No. CV-2009-262

APPELLANT'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

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I. DID THE LOWER COURTS EXAMINE OR ADDRESS THE BEST INTEREST OF THE CHILDREN IN REDUCING THE VISITATION BETWEEN THE CHILDREN AND THEIR FATHER?

The Mother contends that the lower courts examined and addressed the best interest of the Gunn children before reducing the visitation rights between the children and their father. *Respondent's Reply Brief pg. 8*. In support of her position, Mother argues that even though "not specifically found by the lower courts'" [sic] it was "in the best interests of the children" to reduce visitation to be in line with historical visitation. *Respondent's Reply Brief pg. 8 (incl. fn. 6)*. The Trial court only refers to the "best interests" of the children 3 times in its *Findings of Fact and Conclusions of Law* ("FFCL"), however. The references are in paragraphs 2-4 in the Trial Court's Conclusions of law and are:

> 2. It is in the remaining minor children's **best interests** to have the custody and visitation schedule modified to reflect the actual amount of time Father can spend with them, which is twenty percent (20%);
>
> 3. It is in the children's **best interests** for their parents to work together to facilitate custodial time with Father which coincides with his time off work;
>
> 4. It is in the children's **best interests** for Father to pay Mother as child support, $1,200.00 per month beginning September, 2016. See Exhibit "A;" (R Vol. 1 p. 131, ¶ ¶ 2-4) (emphasis added).

The conclusions clearly contain no **analysis** of any fact or factor that would give any person (including an appellate court) the ability to clearly understand **why** modification was in these children's best interest. The Trial Court's factual findings don't provide any insight or

meaningful analysis either. The Mother and the District Court hinge their argument, that the Trial Court did analyze the best interests of the children, on Finding of Fact 4 (R Vol. 1, p. 127), which states:

> Since the entry of the decree, except for a time Father was living with Mother at her home in Franklin County, Father has not actually exercised his 35% custody time. Rather, he has had closer to 20% of overnights with the children. This has been due to Father and Mother living in different counties, Father's work schedule, and the activities the children are involved in;

A footnote to the Finding of Fact states:

> The evidence presented to the Court regarding the past history of the children's actual physical custody with Father is less than the 20% estimate. However, by finding the custody to have been 20% and by awarding Father 20% of the custodial time going forward takes into account disputes concerning transportation, the children's schedules, and the Father's work schedule. (R Vol. 1, p. 127, FFCL 4 fn 1).

That is the entirety of the analysis or basis for analysis as it pertains to the best interests of the children in this case, and whether modification of their rights was in their best interest.

The Mother relies on *Quiring v. Quiring*, 130 Idaho 560, 944 P. 2d 695 (1997) for the proposition that the court properly applied the law to the facts in this case. But even a perfunctory review of the FFCL demonstrates that neither the conclusions nor the facts in the FFCL provide any clear or understandable basis (required by *Quiring*) for disregarding every one of the factors identified in Idaho Code § 32-717(1). Neither does the FFCL address, explain or give any insight into why the court chose to exclusively focus on and emphasize historical

visitation as the single overwhelming and compelling factor to reduce the Father's visitation rights.

To work around this gaping analytical hole in the lower court's analysis, the Mother then argues that "it is not necessary for Trial Courts to strictly adhere to Idaho Code § 32-717(1)'s enumerated factors." *Respondent's Reply Brief pg. 8.* The District Court similarly argued this point. (R Vol. 1, p. 156). The District Court's stated, there was "an abundance of evidence in the record which supports the Trial Court's findings of fact number 4." (R Vol. 1, p. 158) FFCL 4 does not support the Trial Court's decision to reduce visitation, however, because the Trial Court did not explain why that evidence or factor was relevant or why no other facts or evidence presented by Father were relevant to his children's best interests. To elevate Finding of Fact 4 to the level of an acceptable sole basis to reduce visitation rights, one has to speculate and assume that it was the only significant evidence relevant to the best interests of the children. That assumption is unsupported and clearly contradicted by the evidence and testimony presented in the case.

And contrary to the assumption that Father believes that only the factors enumerated in Idaho Code § 32-717(1) should be considered by the court, Father has no problem with the theoretical possibility that a case **could** exist where not even a single factor expressly enumerated in Idaho Code § 32-717(1) is relevant. It is difficult to imagine a case where that theoretical possibility actually exists, however. It certainly didn't in this case. As expressed in the Father's opening brief, where the wishes of the children, along with the wishes of the Father and the Mother were presented to the court, along with testimony about significant events such as the

mother's abandonment of the children and the father's exclusive caring for them for a time, it is hard to see how such factors are so irrelevant they can be utterly ignored. This is particularly true considering the timing of the abandonment event event which occurred during the pendency of the lawsuit and only months before trial. *Appellant's Brief* pg. 10-15.

While it is accurate to say that other "relevant factors" can be considered, their consideration is only proper "as long as the Trial Court does not overemphasize one particular factor; and it finds the **other** factor relevant." *Respondent's Reply Brief* pg. 8 citing *Searle v. Searle*, 162 Idaho 839, 405 P. 3d 1180 (2017) at 844(emphasis added).

The record reveals that in this case, the lower courts did precisely what *Searle* prohibits. Only one fact (historical visitation) was even considered (if we speculate that the court even connected that fact to the best interests of the children). Assuming, without real knowledge, that the Trial Court believed historical visitation was exclusively relevant or sufficient to modify custody, then it overemphasized that one factor, and did not explain why the factors in Idaho Code § 32-717(1) were not relevant. As demonstrated in the Father's opening brief, the primary factors usually considered in custody determinations, all clearly show that there was no basis to modify visitation and reduce the children's and father's access to each other.

The lower court's decision should be reversed, not merely remanded to at least attempt to stem the tide of harm created by the loss of those rights.

II. DID THE LOWER COURT FOLLOW THE IDAHO CHILD SUPPORT GUIDELINES WHEN THEY DID NOT FOLLOW THE METHODOLOGY SET OUT IN IRFLP 126(F)(1)(a)(ii)?

Child support is to be calculated based upon the **factors** set forth in the Idaho Child Support Guidelines. *Rohr v. Rohr*, 128 Idaho 137, 911 P.2d 133, 138 (1996). The Mother argues that because the Trial Court identified a reason (which the Mother refers to as a methodology) and calculations in its child support modification decision, that the Trial Court did not abuse its discretion and the child support modification should be sustained. *Respondent's Reply Brief* pg. 14, incl. Fn 22. Mother relies extensively on *Rhor v. Rohr*, supra, for her argument. But *Rohr* does not support Mother's position. In *Rhor*, the Magistrate had performed calculations, but they were in error (the magistrate's calculations were found in error because they failed to "account for the fact that Rohr's six hours per month of overtime was paid at his normal hourly rate plus half of that rate"). See *Rhor* at 142. Calculations and methodology mean little unless they adhere to select standards. *Rhor* at 142. By failing to either identify or apply any of the "factors" identified in IRFLP 126(F)(1)(a)(ii), and applying a standard not recognized by anyone, the Trial Court erroneously modified the Father's child support. Without the recognition of and application of the correct standard, it is not possible to argue that the Trial Court relied on substantial and competent evidence in support of that standard.

The evidence in the case established that Father's job and overtime had remained essentially the same since the divorce and no material change in circumstances, justifying modification, occurred. See e.g. TR. Vol. 1, p. 50-51. There is no legal or factual basis or analysis in the record justifying a deviation from the Guidelines, or attributing all but 10% of the Father's extra work to a condition of employment. Because there was no recognized methodology or proper calculations that future litigants can identify in order to anticipate what

their child support will be (outside of a case by case random determination if this Trial Court's methodology is used), the child support order should be reversed.

III. CONCLUSION

The decisions of the lower courts should be reversed, returning the parties and their physical and financial relationship with their children to the status it was prior to the Modification. The factors identified in IRFLP 126(F)(1)(a)(ii) should be reviewed and applied, based on the evidence presented in the case, if this court finds there was a substantial and material change in circumstances.

CERTIFICATE OF SERVICE

I HEREBY certify that a copy of the foregoing *Appellant's Reply Brief* was served on the following named person(s) in the manner indicated.

Quentin W. Lackey LTM LAW GROUP 1015 Caldwell Blvd Nampa, ID 83651	☐ U.S. Mail ☐ Facsimile: ☐ Hand Delivered ☒ Efile/ICourt

DATED this 19th day of December, 2019.

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