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

**Supreme Court Case No. 45451  
Seventh District Court Case No. CV-2011-7613**

\* \* \* \* \*

IN THE MATTER OF THE ESTATE OF RUTH BIRCH, DECEASED.

BRUCE H. BIRCH, real party in interest, Appellant,

v.

LINDA BAILEY, personal representative, Respondent.

\* \* \* \* \*

**RESPONDENT'S BRIEF**

\* \* \* \* \*

Appeal from the District Court of the Seventh Judicial District for Bonneville County.  
Honorable Bruce L. Pickett, District Judge, presiding.

\* \* \* \* \*

Michael D. Moscrip, Esq., residing at Payette, Idaho, for Appellant, Bruce H. Birch

B. J. Driscoll, Esq., residing at Idaho Falls, Idaho, for Respondent, Linda Bailey.

**TABLE OF CONTENTS**

	Page
<u>TABLE OF CASES AND AUTHORITIES</u> .....	2
<u>STATEMENT OF THE CASE</u> .....	3
<u>ADDITIONAL ISSUES ON APPEAL</u> .....	4
<u>ATTORNEY’S FEES ON APPEAL</u> .....	4
<u>ARGUMENT</u> .....	6
I. <u>THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN THE           SECOND AWARD OF ATTORNEY’S FEES AND COSTS AGAINST BIRCH</u> .....	6
A. <u>Standard Of Review</u> .....	6
B. <u>Birch Has Failed To Meet His Burden Of Presenting A Sufficient               Record To Prove The Trial Court Abused Its Discretion</u> .....	6
C. <u>The Magistrate Did Not Abuse His Discretion In Making The Second Award</u> .....	8
<u>CONCLUSION</u> .....	9

**TABLE OF CASES AND AUTHORITIES**

**CASES:**

**Pages**

*Dawson v. Mead*, 98 Idaho 1 (1976).....6  
*PriceCo, Inc. v. Youngstrom*, 117 Idaho 213 (Ct. App. 1990).....6  
*Sanchez v. Galey*, 112 Idaho 609 (1986).....6  
*Smith v. Mitton*, 140 Idaho 893 (2004).....6

**STATUTES AND RULES:**

Idaho Code Section 12-121.....4-5, 8  
Idaho Code Section 15-8-208 .....4-5  
Idaho Appellate Rule 40.....5  
Idaho Appellate Rule 41.....5  
Idaho Appellate Rule 45(b) .....5  
Idaho Rule of Civil Procedure 54(d)(5) .....8

## STATEMENT OF THE CASE

Because the appellant Bruce H. Birch (“Birch”) provides no proper citations to the record anywhere in his brief on appeal, and refers to facts and events not included in the record, respondent Linda Bailey (“Bailey”) offers this statement of the case.

From 2011 to 2016, Respondent Linda Bailey (“Bailey”) served as personal representative of the estate of her mother, Ruth Birch.<sup>1</sup> During that time, Bailey successfully defended against the repeated litigious attacks of her brother, appellant Bruce H. Birch (“Birch”). Originally disinherited by his mother, Birch is an attorney licensed in Idaho and represented himself pro se in the underlying proceedings.<sup>2</sup> Because Birch’s activities unnecessarily increased the estate’s expenses, thus reducing the portion of the estate to be received by Bailey and her sister, Bailey sought an unequal distribution of the estate and an assessment against Birch based on those expenses.<sup>3</sup> The magistrate granted the unequal distribution, reasoning that “[i]n light of the multiple unsuccessful attempts by [Birch] in his repeated challenges, resulting in significant attorney fees, the Court sustains the PR’s proposed distribution, specifically assessing \$10,314.50 in attorney’s fees against [Birch’s] interest in the estate.”<sup>4</sup> (“First Award”).

Due to the additional costs incurred by the estate responding to Birch’s further unsuccessful challenges to the closing and distribution of the estate, Bailey filed a

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<sup>1</sup> See R. Vol. I., pp. 2-7.

<sup>2</sup> See R. Vol. I., pp. 2-7.

memorandum of costs seeking an additional award of fees and costs against Birch under Idaho Code Section 12-121 in the amount of \$10,665.85.<sup>5</sup> Birch filed no objection or motion to disallow this second request for an award of fees and costs against him.<sup>6</sup> The magistrate court awarded the additional fees and costs against Birch (“Second Award”).<sup>7</sup>

Birch appealed from the magistrate to the district court from both the First Award and the Second Award.<sup>8</sup> After briefing and oral argument, the district court reversed the First Award, but affirmed the Second Award.<sup>9</sup> Still not satisfied, Birch hired an attorney from his own office and now appeals the Second Award to this Court.<sup>10</sup>

#### **ADDITIONAL ISSUES PRESENTED ON APPEAL**

Is Bailey entitled to an award of her attorney’s fees and costs on appeal under Idaho Code Sections 15-8-208 and 12-121, and Idaho Appellate Rules 40 and 41?

#### **ATTORNEY’S FEES ON APPEAL**

Idaho Code Section 15-8-208(1) states, “Either the district court or the court on appeal may, in its discretion, order costs, including reasonable attorney’s fees, to be awarded to any party...[f]rom any party to the proceedings...The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable.” Section 15-8-208(2)

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<sup>3</sup> See R. Vol. I., p. 6.

<sup>4</sup> See R. Vol. I., p. 31.

<sup>5</sup> See R. Vol. I., pp. 7 and 15.

<sup>6</sup> See R. Vol. I., p. 7.

<sup>7</sup> See R. Vol. I., pp. 7 and 15.

<sup>8</sup> See R. Vol. I., pp. 16, 21, and 25.

<sup>9</sup> See R. Vol. I., p. 36.

states, “This section applies to all proceedings governed by this chapter [Title 15, Chapter 8] including, but not limited to, proceedings involving...decedent’s estates and properties...”

Idaho Code Section 12-121 states, “In any civil action, the judge may award reasonable attorney’s fees to the prevailing party...when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation.”

Pursuant to Idaho Appellate Rule 40, Bailey seeks an award of her costs on appeal.

Pursuant to Idaho Appellate Rules 41 and 45(b), Bailey asserts her claim to attorney fees on appeal in her Additional Issues Presented On Appeal and in this argument.

If Bailey prevails on appeal, this Court should award her attorney’s fees and costs. This entire case is based on Birch’s barrage of unsuccessful challenges to Bailey’s service as personal representative. Now that she has been released as personal representative and the estate distributed, she has personally incurred attorney’s fees defending against Birch’s attacks. As set forth below, the Court should affirm the district court’s opinion and order on appeal and award Bailey her attorney’s fees and costs incurred herein because this Court has discretion to award costs and attorney’s fees in this matter arising from a decedent’s estate, I.C. § 15-8-208, and Birch has pursued this appeal “frivolously, unreasonably, or without foundation,” I.C. § 12-121).

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<sup>10</sup> See R. Vol. I., p. 38; see also pp. 16, 21, and 25.

## ARGUMENT

### I.

#### THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN THE SECOND AWARD OF ATTORNEY'S FEES AND COSTS AGAINST BIRCH.

##### A. Standard Of Review.

“The awarding of attorney fees and costs is within the discretion of the trial court and subject to review for an abuse of discretion.” *Smith v. Mitton*, 140 Idaho 893, 897 (2004) (citations omitted). This Court “never presume[s] error on appeal. The appellant always bears the burden of proving that the trial court committed error. This is a particularly heavy burden in those cases where the issue to be reviewed on appeal is whether the trial court abused its discretion...” *Sanchez v. Galey*, 112 Idaho 609, 628 (1986) (Bakes, J., dissenting) (citations omitted).

##### B. Birch Has Failed To Meet His Burden Of Presenting A Sufficient Record To Prove The Trial Court Abused Its Discretion.

“With respect to issues of legal or factual error, our Supreme Court has said: ‘It is fundamental that error will not be presumed, but must be shown affirmatively by the appellant *on the record.*’ A parallel statement may be made with respect to issues of discretion. An appellant must present *a full record pertinent to the challenged exercise of discretion.*” *PriceCo, Inc. v. Youngstrom*, 117 Idaho 213, 215, 786 P.2d 606, 608 (Ct. App. 1990) (emphasis added) (*quoting Dawson v. Mead*, 98 Idaho 1, 3 (1976)).



Here, Birch has failed to meet his burden of showing legal or factual error in the record. Other than routine items, such as the register of actions, notices of appeal, and clerk's certificates, the record contains only the magistrate's "Estate Closing Order and Decree of Distribution"<sup>11</sup> and the district court's "Opinion and Order on Appeal."<sup>12</sup> These documents do not support Birch's argument that the magistrate abused his discretion. Rather, throughout his opening brief, Birch primarily complains of the magistrate's First Award, which was previously reversed by the district court and is not at issue in this appeal.

As for the Second Award, Birch has failed to identify anything in the record on appeal to indicate that the magistrate abused his discretion. For this Court to consider a case on appeal, the appellant must present an adequate record for the Court's review. Birch has failed to present the Court with such a record. He did not request that additional items be included in the clerk's record for this Court to review. Instead, Birch refers to documents and events not included in the record, which explains why he offers no citations to the record to support those items.

Not only does Birch's failure to present an adequate record make it difficult for this Court to review the underlying matter, but this also makes Bailey's response similarly difficult because Bailey cannot cite to or rely on matters not in the record to refute Birch's arguments.

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<sup>11</sup> See R. Vol. I., pp. 11-15.

<sup>12</sup> See R. Vol. I., pp. 30-36.

In sum, Birch has failed to meet his burden to show from the record on appeal that the magistrate abused his discretion.

C. The Magistrate Did Not Abuse His Discretion In Making The Second Award.

What little material the record does contain supports the conclusion that the magistrate did not abuse his discretion in making the Second Award. Bailey filed her memorandum of costs pursuant to Idaho Code Section 12-121.<sup>13</sup> Birch then waived his right to object by failing to file a motion to disallow pursuant to Idaho Rule of Civil Procedure 54(d)(5).<sup>14</sup> Bailey acknowledges that Birch's waiver of any objections to her memorandum of costs does not require the magistrate to automatically award the amounts sought. However, Birch points to nothing in the record proving that the magistrate abused his discretion in making the Second Award. To the contrary, the only reference in the record in point is that the magistrate found that Birch had made "multiple unsuccessful attempts...resulting in significant attorney fees"<sup>15</sup> and engaged in "unnecessary or excessive litigation."<sup>16</sup> These findings, limited as they are, support the magistrate's Second Award under Idaho Code Section 12-121. Just like the district court did on appeal, this Court should not presume error where Birch proves none.

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<sup>13</sup> No citation to the record because Birch did not request the memorandum of costs be included in his notice of appeal.

<sup>14</sup> See R. Vol. I., pp. 6 and 34.

<sup>15</sup> See R. Vol. I., p. 31.

<sup>16</sup> See R. Vol. I., p. 32.

## CONCLUSION

For the foregoing reasons, this Court should affirm the district court's opinion and order on appeal, and award Bailey her attorney's fees and costs incurred herein.

RESPECTIVELY SUBMITTED this 11th day of June, 2018.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: \s\B. J. Driscoll  
B. J. Driscoll  
Attorneys for Respondent,  
Linda Bailey

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 11th day of June, 2018, I caused a true and correct copy of the foregoing **RESPONDENT'S BRIEF** to be served, by placing the same in a sealed envelope and depositing it in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

<input checked="" type="checkbox"/> U.S. Mail	Michael D. Moscrip, Esq
<input type="checkbox"/> Facsimile Transmission	P.O. Box 157
<input type="checkbox"/> Overnight Delivery	Payette, ID 83661
<input type="checkbox"/> Hand Delivery	
<input type="checkbox"/> Courthouse Mail Box	
<input checked="" type="checkbox"/> Email: matsulegal@gmail.com	

    /s\B. J. Driscoll      
B. J. Driscoll