STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

HEIDI ANN TRASK,

Petitioner/Respondent,

vs.

CHRISTOPHER KEVIN McGREGOR,

Respondent/Appellant.

Case No. **CV 2016 3988**

MEMORANDUM DECISION AND ORDER DISMISSING APPELLANT McGREGOR'S APPEAL FROM MAGISTRATE DIVISION/DECLINING McGREGOR'S REQUEST FOR PERMISSIVE APPEAL TO DISTRICT COURT

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

This matter is before the Court on appellant Christopher Kevin McGregor's (McGregor) appeal from the magistrate court's interlocutory order denying McGregor's Motion to Dismiss in case no. CV-2016-3988. Counsel for McGregor does not clearly articulate the basis for the Motion to Dismiss, but it appears to be pursuant to IRFLP 502(A)(8) (i.e., IRCP 12(b)(8)), IRFLP 502(A)(2) (i.e., IRCP 12(b)(2)), and 502(A)(1) (i.e. IRCP 12(b)(1)). As discussed below, this Court finds McGregor's appeal is procedurally improper.

J.C.M. is the grandson of respondent Heidi Anne Trask (Trask), and the minor child of McGregor and Harley Nicole Pierce (Pierce). Pierce is Trask's deceased daughter. Following Pierce's death, Trask filed her first petition (case no. CV-2014-2770) for custody of J.C.M. The petition for custody was filed on March 26, 2014. Following trial, on February 9, 2015, the magistrate court issued a Memorandum

Decision, Findings of Fact, Conclusions of Law, and Order (Order), in which Trask was awarded custody of J.C.M. It is not clear the exact arrangement of custody, from that decision in CV-2014-2770 whether it was joint legal custody with physical custody to Trask, or some other arrangement. This Court finds the exact nature does not matter for purposes of this appeal in the present case, CV-2016-3988. In any event, McGregor appealed that Order to the district court. On January 4, 2016, in CV-2014-2770, in a Memorandum Decision and Order on Appeal, the district court, District Judge Cynthia Meyer, concluded that the magistrate court lacked subject matter jurisdiction to determine custody of J.C.M. because a proceeding to determine the custody of J.C.M. had been commenced in the State of Washington and a court in Idaho cannot exercise its jurisdiction in a child custody case when a child custody proceeding has been commenced in another state. Mem. Decision and Order on Appeal 5, 11–12 (citing I.C. § 32-11-206). As a result, the district court deemed the magistrate's Order null and void. *Id.* at 12–13. In addition, the district court instructed the parties that if they wished to proceed, "a custody petition must be filed and the question of jurisdiction must be resolved in accordance with the provisions of the [Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA)] . . . ." *Id.* at 12. Shortly after the district court issued its decision, on January 12, 2016, McGregor filed a Motion for Clarification and, on January 15, 2016, Trask filed a Petition for Rehearing.

Meanwhile, prior to the filing of McGregor's Motion for Clarification and her own Petition for Rehearing, Trask filed a second petition (case no. CV-2016-353) for custody of J.C.M. That petition was filed on January 8, 2016. On January 26, 2016, the magistrate court held a hearing in CV-2016-353. As a result of that hearing, the magistrate court decided to consolidate CV-2016-353 with CV-2014-2770. *Court*

Minutes (Jan. 26, 2016). An order consolidating both cases was issued on March 2, 2016.

On May 3, 2016, the district court held a hearing on McGregor's Motion for Clarification and Trask's Petition for Rehearing in CV-2014-2770. At the hearing, the district court denied Trask's Petition for Rehearing[1] and took McGregor's Motion for Clarification under advisement. *Court Minutes* (May 3, 2016). On May 24, 2016, the district court issued an Order Clarifying Memorandum Decision and Order on Appeal. In it, the district court stated:

> On remand, [CV-2014-2770] should have been dismissed, and that is the reason this Court stated in its January 4th Order that if the parties wished to proceed further with a custody determination, a new petition would have to be filed. Unquestionably, no further actions in this case should have been taken, and any such actions taken are void. Accordingly, the Magistrate is directed to dismiss this action. In addition, the order consolidating the 2016 case (Case No. CV 16-353) into this case is void and must be vacated.

CV-2014-2770, Order Clarifying Mem. Decision and Order on Appeal 9.

On May 25, 2016, Trask filed a Notice of Dismissal Pursuant to Idaho Rule of Family Law Procedure 121 in CV-2016-353 (Trask's second petition). That same day, Trask filed a third petition (case no. CV-2016-3988) for custody of J.C.M. On June 8, 2016, the magistrate court held an order to show cause hearing in CV-2016-3988. At that hearing, the magistrate court dismissed CV-2014-2770 (Trask's first petition) and CV-2016-353 (Trask's second petition). *Court Minutes* (June 8, 2016). On June 24, 2016, McGregor subsequently filed a Motion to Dismiss case no. CV-2016-3988 (Trask's third petition). The Motion to Dismiss was denied on July 11, 2016. *See* Temporary Orders, Dismissal of Preceding Cases, and Denial of Motion to Dismiss. On September 8, 2016, McGregor filed his Answer to Trask's third petition.

[1] An order denying the Petition for Rehearing was issued May 11, 2016.

On September 30, 2016, McGregor filed a second Motion to Dismiss, a Memorandum in Support of Motion to Dismiss, and various affidavits in support of that Motion. On October 7, 2016, Trask filed a Supplemental Response to Respondent's Motion to Dismiss and an affidavit in support of her Response.[2] On November 10, 2016, the magistrate court held oral argument on McGregor's Motion to Dismiss. At the conclusion of oral argument, the magistrate court denied the motion and ordered counsel for Trask to prepare an order. *Court Minutes* (Nov. 10, 2016). On November 17, 2017, the magistrate entered the Order Denying Respondent's (McGregor's) Motion to Dismiss.

On November 29, 2016, McGregor filed a Motion for Permissive Expedited Appeal, in which he asked the magistrate court to permit him to appeal the magistrate court's denial of his Motion to Dismiss to the district court. Mot. Permissive Expedited Appeal 1. The magistrate court held oral argument on that Motion on December 12, 2016. On December 27, 2016, the magistrate court it issued its Order Re: Motion to Compel and Denial of Permissive Appeal.

On January 4, 2017, McGregor filed a Notice of Appeal with the district court. In his Notice of Appeal, McGregor stated that he is appealing the, "Order Denying his Motion for Permissive Appeal entered in the above entitled matter in the Magistrate's Division in Kootenai County, The Honorable Timothy Van Valin presiding, on the 27th day of December, 2016" (Notice of Appeal, p. 1, ¶ 1), pursuant to Idaho Rule of Civil Procedure 83(a), Idaho Appellate Rule 12, and Idaho Rule of Family Law Procedure 823. *Id.* On May 23, 2017, McGregor filed Appellant's Opening Brief. On June 19, 2017, Trask filed Respondent's Response Brief. Oral argument was held on July 6,

[2] Trask filed a Response to McGregor's first Motion to Dismiss. That response was filed July 20, 2016, after the magistrate court had denied the Motion to Dismiss.

2017. The Court notes that trial before the magistrate is currently scheduled to begin on September 19, 2017.

The also Court notes that a UCCJEA conference in this case (CV-2016-3988) was held on December 16, 2016. As a result of that conference, the State of Washington issued an order declining jurisdiction. That order was filed in Kootenai County on December 21, 2016.

II. STANDARD OF REVIEW.

The decision to grant a motion for an interlocutory appeal is reviewed under the abuse of discretion standard. *State v. Bicknell*, 140 Idaho 201, 203, 91 P.3d 1105, 1107 (2004). Under Idaho Appellate Rule 12, appeals are only accepted in the most exceptional cases, with the intent to resolve substantial legal issues of great public interest or legal questions of first impression. *Aardema v. U.S. Dairy Sys., Inc.*, 147 Idaho 785, 789, 215 P.3d 505, 509 (2009). Because the Court finds the Magistrate's interlocutory order is not an appealable order, the Court will not discuss the standard of review on appeal.

III. ANALYSIS.

McGregor frames this case as "an appeal from an interlocutory order denying [his] Motion for Permissive Appeal of the Magistrate Court's denial of [his] Motion to Dismiss . . . ." Appellant's Opening Br. 4. While this statement is consistent with McGregor's filings in this case, it is based on McGregor's failure to follow procedure.[3] Here, the Court must first determine whether the magistrate's interlocutory order—the November 17, 2106, Order Denying Respondent's (McGregor's) Motion to Dismiss—is

[3] As discussed below, after the magistrate court denied (or, more accurately, disapproved) McGregor's Motion for Permissive Appeal, McGregor should have filed a motion with the district court requesting permission to appeal the magistrate court's denial of his Motion to Dismiss. He should not have filed a Notice of Appeal.

an appealable order. If the Order Denying Respondent's Motion to Dismiss were an appealable order, the Court would then consider on appeal whether the magistrate court erred in denying McGregor's Motion to Dismiss. This Court finds the Order Denying Respondent's Motion to Dismiss to be interlocutory, and not an appealable order.

The analysis below proceeds in three parts. First, the Court addresses McGregor's argument that Idaho Appellate Rule 12.1 applies in this case. As a result of that analysis, the Court concludes that Idaho Appellate Rule 12, not Rule 12.1, is applicable in this case. Second, the Court determines whether McGregor complied with Rule 12's procedural requirements. This Court concludes McGregor has not complied. Third, the Court considers whether the magistrate's interlocutory Order Denying Respondent's (McGregor's) Motion to Dismiss meets the criteria for granting permissive appeals as set forth in Idaho Appellate Rule 12. The Court concludes that it does not. Because the Court finds that the magistrate's interlocutory Order Denying Respondent's (McGregor's) Motion to Dismiss is not an appealable order, the Court will not consider whether the magistrate erred in denying McGregor's Motion to Dismiss.

A. Idaho Appellate Rule 12.1 Does Not Apply.

McGregor states that Idaho Appellate Rule 12.1 governs permissive appeals in custody cases and directs this Court to *Miller v. Idaho State Patrol*, 150 Idaho 856, 252 P.3d 1274 (2011), for the proposition that Rule 12.1 allows a district court to grant an appealing party permission to appeal from an interlocutory order. Appellant's Opening Br. 12. There are several issues with McGregor's statement. First, in *Miller*, the Idaho Supreme Court noted in a parenthetical that Idaho Appellate Rule 12, not Rule 12.1, permits a district court to grant a party permission to appeal from an interlocutory order. Second, while Idaho Appellate Rule 12.1 governs permissive appeals in custody

cases, it does so in limited situations. Specifically, Rule 12.1 permits a party or the magistrate hearing a case to petition the Idaho Supreme Court to accept a direct permissive appeal of a final judgment, an order made after final judgment, or a Child Protective Act proceeding *without first appealing to the district court.* I.A.R. 12.1 (emphasis added). In this case, there is no final judgment or order made after final judgment, this is not a proceeding within the Child Protective Act, and, moreover, this is not a direct appeal from the magistrate court to the Idaho Supreme Court.

Third, Idaho Rule of Family Law Procedure 823 provides that an appeal from an order in a case governed by the Idaho Rules of Family Law Procedure must be made pursuant to Idaho Rule of Civil Procedure 83. Idaho Rule of Civil Procedure 83 permits appeals (1) from the magistrate court to the Idaho Supreme Court and (2) from the magistrate court to the district court.[4] More specifically, Rule 83(a)(1)(B) states that an appeal may be taken from the *magistrate court to the Idaho Supreme Court* when permission has been granted pursuant to Idaho Appellate Rule 12.1, while Rule 83(a)(2) states that an appeal from a magistrate's interlocutory order must be taken from the *magistrate court to the district court*, if permissive appeal has been granted in accordance with Idaho Appellate Rule 12. I.R.C.P. 83(a)(1)(B), 83(a)(2)(E). Accordingly, because McGregor wants this Court to review the magistrate's decision to deny his Motion to Dismiss,[5] McGregor must appeal that interlocutory order to the district court and, in doing so, he must comply with the requirements of a permissive appeal as set forth in Idaho Appellate Rule 12.

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[4] An appeal from the magistrate court to the Idaho Supreme Court is also permitted when the magistrate court is acting as a district court. I.R.C.P. 83(a)(3).

[5] As noted above, McGregor has framed this case as an appeal from the magistrate court's order denying his Motion for Permissive Appeal. However, the Court considers this case to be a proposed appeal from the magistrate court's order denying McGregor's second Motion to Dismiss.

In summary, in accordance with Idaho Rule of Family Law Procedure 823 and Idaho Rule of Civil Procedure 83(a)(2)(E), Idaho Appellate Rule 12 governs McGregor's request for permissive appeal, not Rule 12.1.

B. McGregor did not comply with Idaho Appellate Rule 12's Procedural Requirements.

As noted above, Idaho Rule of Civil Procedure 83 governs an appeal from a magistrate order, judgment, or decree in a family law case. I.R.C.P. 83; I.R.F.L.P. 823. A magistrate order denying a motion to dismiss is an interlocutory order. In general, an interlocutory order entered by a magistrate is appealable to the district court only "if permissive appeal has been granted by the district court[.]"[6] I.R.C.P. 83(a)(2)(E). The party seeking permissive appeal must comply with the requirements of Idaho Appellate Rule 12. I.R.C.P. 83(a)(2)(E). Idaho Appellate Rule 12 permits an appeal from an interlocutory order if certain criteria are met. I.A.R. 12(a). Procedurally, Rule 12 requires the appealing party to first file with the magistrate court (i.e., the trial court) a motion for permission to appeal from the interlocutory order issued by that court. I.A.R. 12 (b). The hearing on that motion is to be expedited. I.A.R. 12(b). After the magistrate court issues its decision approving or disapproving the motion, the appealing party must then file a motion with the district court (i.e., the appellate court) requesting

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[6] Idaho Rule of Civil Procedure 83(a)(2)(E) states:

> (2) Appeal form the Magistrate Court to the District Court. An appeal from the following judgments or orders entered by the magistrate court must be taken to the district court:
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> . . .
>
> (E) interlocutory orders, if permissive appeal has been granted by the district court, which must be processed in the same manner as provided by Rule 12 of the Idaho Appellate Rules; or
>
> . . . .

I.R.C.P. 83(a)(2)(E).

acceptance of the appeal by permission. I.A.R. 12(c)(1). The permissive appeal may move forward *only after* the district court enters an order accepting the interlocutory order as appealable and granting leave to the appealing party to file a notice of appeal. I.A.R. 12(d).

In this case, McGregor has not complied with the requirements of subsections (c) and (d) of Idaho Appellate Rule 12. On November 29, 2016, McGregor filed with the magistrate court a Motion for Permissive Expedited Appeal. A hearing on that motion was held December 12, 2016. On December 27, 2016, the magistrate court issued an order denying (or disapproving) McGregor's Motion for Permissive Expedited Appeal. McGregor should have then filed a motion with the district court requesting acceptance of the appeal by permission as required by Idaho Appellate Rule 12(c). He did not. Rather, on January 4, 2017, McGregor filed a Notice of Appeal with the district court. He neither sought permission from the district court to proceed on the appeal nor did the district court grant McGregor leave to file a notice of appeal.

Despite this, McGregor's failure to file a motion with the district court requesting acceptance of his interlocutory appeal is not necessarily fatal as it is not jurisdictional. *State v. McCarthy*, 133 Idaho 119, 123, 982 P.2d 954, 958 (1999) (citing I.A.R. 21); *see also State v. Maynard*, 139 Idaho 876, 879, 86 P.3d 695, 698 (2004) ("An appeal should not be dismissed automatically in every instance where the rules have not been strictly followed, however, a dismissal for non-compliance with the rules of appellate procedure is discretionary." *State v. Maynard*, 139 Idaho 876, 879, 86 P.3d 695, 698 (2004)). Additionally, Trask does not challenge this specific procedural defect. Instead, Trask's argument is that this Court should decline to hear the interlocutory appeal

because the Rule 12 criteria for permissive appeals have not been met. Respondent's Response Br. 19. That argument is addressed in the next section.

While McGregor's failure to follow procedure does not result in automatic dismissal of his proposed appeal, the Court notes that it is not without consequences to McGregor, Trask, and, most importantly, J.C.M.

First, by filing a notice of appeal rather than a motion requesting permission to appeal, this Court scheduled this case for oral argument on appeal. The Court could have held a hearing on a motion for permissive appeal months ago, thus facilitating a speedy resolution of this issue. Instead, because McGregor failed to follow procedure, the Court scheduled this case for oral argument on appeal, which must be set out in order to accommodate preparation of the transcript and filing of the parties' briefs. In short, McGregor's failure to follow procedure has resulted in an unnecessary six-month delay of this case.

Second, that delay has impeded resolution of this case and, consequently, negatively impacted J.C.M. Trial in this case was scheduled before the magistrate for December 2016, March 2017, and June 2017, all of which have been continued in order to accommodate McGregor's proposed appeal. *See Court Minutes* (Dec. 12, 2016); *Court Minutes* (Jan. 30, 2017); Order Continuing Trial (Feb. 15, 2017); *Court Minutes* (May 25, 2017). Again, if McGregor had filed the requisite motion, the March or June continuances would likely have been unnecessary.

Third, by failing to follow procedure, McGregor appears to be trying to appeal the magistrate court's denial (or disapproval) of his motion for permissive appeal. Such an appeal is unnecessary because, as noted, McGregor need only file a motion with the district requesting permission to appeal. That mistake has resulted in the preparation of the wrong transcript—the Court has a transcript from the hearing on McGregor's motion

for permissive appeal but does not have a transcript from the motion to dismiss hearing. Thus, even if the Court decided to grant McGregor permission to appeal, the record before it would be incomplete.

C. The Interlocutory Order Denying Respondent's (McGregor's) Motion to Dismiss, is Not an Appealable Order Because it Does Not Meet the Criteria Set Forth in Idaho Appellate Rule 12.

Idaho Appellate Rule 12(a) sets forth the criteria for permission to appeal an interlocutory order. It states that permission to appeal an interlocutory order may be granted where that order "involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation." I.A.R. 12(a). When deciding whether to accept or reject an appeal made pursuant to Idaho Appellate Rule 12, the Idaho Supreme Court explained:

> In accepting or rejecting an appeal by certification under I.A.R. 12, this Court considers a number of factors in addition to the threshold questions of whether there is a controlling question of law and whether an immediate appeal would advance the orderly resolution of the litigation. It was the intent of I.A.R. 12 to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved. The Court also considers such factors as the impact of an immediate appeal upon the parties, the effect of the delay of the proceedings in the district court pending the appeal, the likelihood or possibility of a second appeal after judgment is finally entered by the district court, and the case workload of the appellate courts. No single factor is controlling in the Court's decision of acceptance or rejection of an appeal by certification, but the Court intends by Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11.

Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 892, 265 P.3d 502, 505 (2011).

McGregor lists nine issues to present on appeal. Appellant's Opening Br. 11–12. In his argument section, McGregor addresses those nine issues in four separate

sections. The Court reviews the arguments presented in each section to determine whether McGregor's arguments present a substantial legal issue of great public interest or a legal question of first impression.

1. Is there a conflict between Stockwell *and the* De Facto Custodian Act*?*

The Court finds that there are no substantial legal issues of great public interest or legal questions of first impression presented in McGregor's first argument in support of his proposed appeal. That is because his argument is based on a misunderstanding of the law. In his Opening Brief, McGregor argues that there is a conflict between the "best interests standard of case law" as found in *Stockwell v. Stockwell*, 116 Idaho 297, 775 P.2d 611 (1989) and Idaho Code §§ 32-1701 to -1705, otherwise known as the De Facto Custodian Act. Appellant's Opening Br. 13–14. Because of this alleged conflict, McGregor argues that the De Facto Custodian Act has preempted, or replaced, *Stockwell.* It is this issue that McGregor wants resolved on appeal. *Id.* at 14–18. In response, Trask argues that the De Facto Custodian Act did not replace *Stockwell*. Trask argues that *Stockwell* "has been articulated by the Idaho Supreme Court as a separate and distinct basis for a non-parent to gain custody of a minor child[,]" and she cites to *Shepherd v. Shepherd*, 161 Idaho 14, 383 P.3d 693 (2016) to support that argument. Respondent's Response Br. 23–24.

Both McGregor and Trask are wrong. First, Trask's reliance on *Shepherd* is misplaced. Trask states that in *Shepherd*, the Idaho Supreme Court "found that Idaho law provides six distinct methods where biological parents can be deprived of their custody rights to their child and allow a non-biological parent to gain custody rights pursuant to a court order. Five of these proceedings are based on statute; one is based on case law." Respondent's Response Br. 23. That, however, is not the Idaho

Supreme Court's holding in *Shepherd* and is not the law in Idaho. Trask's argument relies on and, in fact, quotes the appellant's (Nancy Shepard's) argument as summarized in *Shepherd* to support her conclusion that *Stockwell* is a method for a non-parent to gain custody of a minor child. Respondent's Response Br. 23; *Shepherd*, 161 Idaho at __, 383 P.3d at 697. The Idaho Supreme Court remarked, "Nancy's argument is fundamentally flawed." *Id.* Clearly Trask has misstated the Idaho Supreme Court's holding in *Shepherd* and, as a result, she has misstated Idaho law.

Second, the Court does not understand what McGregor means by the "best interests standard of case law" as found in *Stockwell*. In general, Idaho statute requires courts to consider what is in the best interest of a child when making a custody decision, and Idaho Code § 32-717 non-exhaustive list of factors for a court to consider when making that determination. *Stockwell* did not create a "'best interests' test" as suggested by McGregor, and whether the magistrate court applied such a test in CV-2014-2770 is irrelevant to this case. *See* Appellant's Opening Br. 15. Moreover, this Court will not assume that the magistrate court will erroneously apply the principles set forth in *Stockwell* to this case (assuming *Stockwell* applies to this case) before the magistrate court has an opportunity to issue a judgment. There has been no trial in this case, the magistrate has not determined what the facts are in this case.

Third, both Trask and McGregor appear to misunderstand the applicability of *Stockwell* to a non-parent custody action, and it appears that this misunderstanding underlies what McGregor perceives as a "conflict" between *Stockwell* and the De Facto Custodian Act. As an initial matter, this Court notes that *Stockwell* does not create an independent non-parent custody action. *Doe v. Doe*, No. 44419, 2017 WL 2461382, at *3 (Idaho, June 7, 2017) is instructive. As the Idaho Supreme Court recently explained

in *Doe*, *Stockwell* is "not a key to the courthouse for non-parents seeking custody of minor children" and it "cannot be used as a toe-hold for an independent custody action brought by a non-parent." *Id.* Instead, a non-parent may seek visitation or custody of a minor child pursuant to Idaho statute as follows:

> Idaho Code section 32-1701 et. seq. (De Facto Custodian Act enabling relatives related to a child within the third degree of consanguinity to seek custody); Idaho Code section 32-717(3) (enabling grandparents to intervene in divorce case where the child actually resides with grandparent); Idaho Code section 32-719 (enabling grandparents and great-grandparents to seek visitation); Idaho Code section 15-5-204 (guardianship proceeding authorized where child has been neglected, abused, abandoned, or whose parents are unable to provide a stable home environment).

Id. In this case, Trask has requested custody or visitation rights to J.C.M. pursuant to three of the four listed statutes. Trask seeks custody of J.C.M. pursuant to Idaho Code § 32-717(3),[7] or, in the alternative, pursuant to the De Facto Custodian Act. If she is not awarded custody, she then seeks visitation rights to J.C.M. pursuant to Idaho Code § 32-719. While Trask erroneously argued that *Stockwell* created an independent custody action in response to McGregor's proposed appeal, Trask's petition does not necessarily reflect or rely on that error.

Fourth, it is unclear how a conflict arises between *Stockwell* and the De Facto Custodian Act when the principles announced in *Stockwell* appear to be inapplicable in a custody action filed pursuant to the De Facto Custodian Act. *Stockwell* concerns the presumption applied to parents and non-parents in Idaho. However, the presumption is

[7] In her Petition, Trask states: "Pursuant to Idaho case law (*specifically, but not limited to, Stockwell v. Stockwell, 116 Idaho 297 (1989), Leavitt v. Leavitt, 142 Idaho 664 (2006), In Re Ewing, 96 Idaho 424 (1974)*) and **statutory authority under Idaho Code § 32-717(3)**, it is in the best interest of J.C.M. that [Trask] be granted sole legal and joint physical custody of the minor child. . . ." Petition 3–4 (emphasis added) (italics in original).

inapplicable under the De Facto Custodian Act because, by statute, if the petitioner Trask is a de facto custodian, then, the court applies the best interest factors. In that case, the presumption applicable to parents does not come into play because a non-parent (by definition) is the de facto custodian. The De Facto Custodian Act permits a de facto custodian to seek custody of a child. I.C. § 32-1704. In doing so, the parties must stipulate to, or the court must find facts, establishing by clear and convincing evidence that the petitioner is a de facto custodian pursuant to Idaho Code § 32-1703. I.C. § 32-1704(6). After the court finds facts showing that the petitioner is the de facto custodian, the petitioner must then prove by a preponderance of the evidence that it is in the best interests of the child to be in the custody of the de facto custodian. I.C. § 32-1704(7). To determine the best interests of the child, the court applies the standards set forth in Idaho Code § 32-717. *Id.* It may also consider additional factors as provided in Idaho Code § 32-1704(8). Thus, in this case, in order for Trask to prevail on her custody action pursuant to the De Facto Custodian Act, the magistrate court must find that she is the de facto custodian of J.C.M. If the magistrate court makes that threshold finding, the statute then requires the court to determine whether it is in J.C.M.'s best interest to award custody of J.C.M. to Trask, the de facto custodian, or to McGregor, the natural parent.

Stockwell, on the other hand, announced (or affirmed) the presumptions applicable to a parent and non-parent custody dispute filed pursuant to Idaho Code § 32-717. In *Stockwell*, the Idaho Supreme Court explained that the child's best interests are of "paramount consideration," and thus,

> [i]n custody disputes between a "non-parent" (i.e., an individual who is neither legal nor natural parent) and a natural parent, Idaho courts apply a presumption that a natural parent should have custody as opposed to other lineal or collateral relatives or interested parties. This presumption operates to preclude consideration of the best interests of the child unless

> the nonparent demonstrates either that the natural parent has abandoned the child, that the natural parent is unfit or that the child has been in the nonparent's custody for an appreciable period of time.

Stockwell, 116 Idaho at 299, 775 P.2d at 613. Put another way, in general, Idaho Code § 32-717 requires a court to consider the best interests of the child when deciding a custody dispute between a child's natural parents. However, when a custody dispute arises between a natural parent and a non-parent, the Court presumes that the natural parent should have custody of the child (i.e., it need not consider the best interests of the child because it is presumed that it is in the best interests of the child to award custody to the natural parent) ***unless*** the non-parent demonstrates that the natural parent abandoned the child, is unfit, or the child has been in the non-parent's custody for an appreciable period of time. If one of these three scenarios is present, then the Court will not presume that the natural parent is entitled to custody of the child. Instead, the Court determines whether it is in the best interest of the child to award custody to the non-parent or the natural parent by applying the Idaho Code § 32-717 factors. In summary, Idaho Code § 32-717 is still the basis for the custody action; *Stockwell* simply articulates the presumptions to be applied in such a case.

The Court has only discussed *Stockwell* because counsel for McGregor discusses *Stockwell* at length in an attempt to create a conflict between *Stockwell* and the De Facto Custodian Act. To be clear, by discussing *Stockwell*, the Court is not stating that *Stockwell* is or is not relevant to Trask's petition for custody of J.C.M. Rather, the discussion above is meant to explain why McGregor's proposed appeal does not present substantial legal issues of great public interest or legal questions of first impression and, thus, why the Court is declining to accept McGregor's proposed

appeal. After a trial in this case, it is up to the magistrate court to determine the relevant facts, apply the relevant law to those facts, and draw appropriate conclusions.

2. Does Stockwell *violate McGregor's Due Process Rights?*

With respect to McGregor's due process claim, the Court finds his argument to be incomprehensible. *See* Appellant's Opening Br. 18–19. As a result, his argument presents no substantial legal issues of great public interest or legal questions of first impression. The Court does note that the Idaho Supreme Court previously considered whether *Stockwell* violated the Fourteenth Amendment of the U.S. Constitution and concluded that it did not. *Hernandez v. Hernandez*, 151 Idaho 882, 887–88, 265 P.3d 495, 500–01 (2011) (explaining that the "Fourteenth Amendment accommodates a State's decision to grant nonparents custody").

3. Is Idaho Code § 32-719 applicable to non-divorce proceedings?

Next, McGregor argues that Idaho Code § 32-719 is inapplicable in a "non-divorce proceeding" because that statute is codified at Chapter 7 of Title 32, titled Divorce Actions, rather than in Chapter 10 of Title 32, titled Parent and Child. McGregor states: "Plainly one chapter deals with cases where the parties were married and are divorcing and the other deals with rights of parents in non-marriage situations." Appellant's Opening Br. 19. McGregor's argument is without merit. Idaho Code § 32-719 states:

> The district court may grant reasonable visitation rights to grandparents or great-grandparents upon a proper showing that the visitation would be in the best interests of the child.

I.C. § 32-719. McGregor has cited no case law supporting his proposition that the grandparent of a child, whose parents are unwed or, as in this case, a parent is deceased, cannot utilize § 32-719 to gain visitation rights to that child. In addition, the language of the statute does not limit its applicability to divorce proceedings and

the fact that the legislature opted to codify this statute in Chapter 7 of Title 32 does not mean its application is necessarily limited to divorce proceedings. Similarly, as noted by Trask, Idaho Code § 32-717, also codified under Title 32, has been applied to situations were a child's unwed parents seek or dispute custody. *See* Respondent's Response Br. 27–28. That suggests that application of statutes codified in Title 32 is not necessarily limited to divorce proceedings. In summary, the Court concludes that McGregor's argument does not present substantial legal issues of great public interest or legal questions of first impression that need resolved by an interlocutory appeal.

4. Does Trask have standing pursuant to Idaho Code § 32-1703?

McGregor argues that Trask does not have standing pursuant to Idaho Code § 32-1703 because, 1) Trask is not a de facto custodian, and 2) when Trask filed her petition in this case, CV-2014-2770 and CV-2016-353 were still pending. Appellant's Opening Br. 20–21. The Court finds neither argument presents an issue of standing. Nevertheless, the Court will address both arguments to determine whether they present substantial legal issues of great public interest or legal questions of first impression that need resolved by interlocutory appeal.

With regard to McGregor's first argument that Trask is not a de facto custodian pursuant to Idaho Code § 32-1703, that may or may not be true. McGregor has presented an argument that raises questions of fact to be resolved by the magistrate court, and not an argument to be resolved on an interlocutory appeal. If the magistrate court determines Trask is not a de facto custodian, then her custody action pursuant to the De Facto Custodian Act will fail. Therefore, because McGregor's argument presents a question of fact, his first argument does not present substantial legal issues of great public interest or a legal question of first impression.

As for McGregor's second argument, he provides no analysis in support of that argument. Nevertheless, the Court begins by noting that it took judicial notice of CV-2014-2770 and CV-2016-353 per the parties' stipulation. First, CV-2016-353 was not pending when Trask filed her petition in CV-2016-3988. On May 25, 2016, Trask filed a Notice of Dismissal in CV-2016-353 and simultaneously filed her third petition for custody of J.C.M. (CV-2016-3998). Because McGregor had not filed a responsive pleading in CV-2016-353, Trask's Notice of Dismissal served to dismiss the case at that time. *See* I.R.F.L.P. 121. Second, case no. CV-2014-2770 was void at the time Trask filed her petition in this case and, thus, it was not a pending case that would preclude Trask from filing her third petition.

Even if CV-2016-353 or CV-2014-2770 were pending at the time Trask filed her third petition that does not mean Trask's third petition is subject to automatic dismissal. *Klaue v. Hern*, 133 Idaho 437, 439, 988 P.2d 211, 213 (1999) (citing I.R.C.P. 12(b)(8); *see* I.R.F.L.P. 502(A)(8). As noted by Trask,

> Two tests govern the determination of whether a lawsuit should proceed where a similar lawsuit is pending in another court. First, the court should consider whether the other case has gone to judgment, in which event the doctrines of claim preclusion and issue preclusion may bar additional litigation.
>
> . . .
>
> The second test is whether the court, although not barred from deciding the case, should nevertheless refrain from deciding it.

Klaue, 133 Idaho at 440, 988 P.2d at 214 (citations omitted). Under the first test, CV-2016-353 had not gone to judgment. While CV-2014-2770 went to judgment, the district court deemed that judgment void and of no effect because the magistrate court lacked subject matter jurisdiction. Therefore, the issues of claim preclusion and issue preclusion are not a bar to Trask filing her third petition, nor are they a bar to the magistrate court considering Trask's third petition.

Under the second test, "[t]he determination of whether to proceed with a case where a similar case is pending elsewhere, and has not gone to judgment, is discretionary, and will not be overturned absent an abuse of that discretion." *Id.*

> In deciding whether to exercise jurisdiction over a case when there is another action pending between the same parties for the same cause, a trial court must evaluate the identity of the real parties in interest and the degree to which the claims or issues are similar. The trial court is to consider whether the court in which the matter already is pending is in a position to determine the whole controversy and to settle all the rights of the parties. Additionally, the court may take into account the occasionally competing objectives of judicial economy, minimizing costs and delay to litigants, obtaining prompt and orderly disposition of each claim or issue, and avoiding potentially inconsistent judgments.

Id. (quoting *Diet Ctr., Inc. v. Basford*, 124 Idaho 20, 22–3, 855 P.2d 481, 483–84 (Ct.App.1993)). In this case, at a June 8, 2016 hearing, the magistrate court considered the effect, if any, of CV-2014-2770 and CV-2016-353 on CV-2016-3998. The magistrate court knew that Trask filed a Notice to Dismiss CV-2016-353 and that the district court had declared the judgment in CV-2014-2770 void. *Court Minutes* (June 8, 2016). Based on that understanding, the magistrate court considered both cases to be dismissed. *Id.* In the event that they weren't, the magistrate court ordered both cases dismissed on the record. *Id.* In summary, the fact that one or both cases may have been pending when Trask filed her third petition is not dispositive in light of the application of the two tests outlined above to the procedural facts in this case.

IV. ATTORNEY FEES.

Trask requests attorney fees pursuant to I.C. § 12-121 and all other applicable rules. Respondent's Resp. Br. 33. Under I.C. § 12-121 this Court finds Trask is the prevailing party on this appeal and that the appeal was frivolous, was unreasonable and was brought without foundation. *Idaho Military Historical Soc'y Inc. v. Maslen,* 156 Idaho 624, 329 P.3d 1072 (2014). This appeal does not involve legitimate triable

issues of fact, but rather involves a legal appeal of an interlocutory decision, and such appeal lacks any good faith legal argument. 156 Idaho at 633, 329 P.3d at 1071.

V. CONCLUSION AND ORDER.

For the reasons set forth above, the Court declines the permissive appeal because the requirements of Idaho Appellate Rule 12 are not met.

For the reasons stated above,

IT IS HEREBY ORDERED if McGregor, as set forth in his Notice of Appeal filed January 4, 2017, is appealing the "Order Denying his Motion for Permissive Appeal entered in the above entitled matter in the Magistrate's Division in Kootenai County, The Honorable Timothy Van Valin presiding, on the 27th day of December, 2016" (Notice of Appeal, p. 1, ¶ 1), then such order is AFFIRMED, and if McGregor, in filing his appeal is actually asking this Court for permission to appeal, then this Court DENIES that request as McGregor has failed to meet the requirements of Idaho Appellate Rule 12.

IT IS FURTHER ORDERED Trask is the prevailing party and is entitled to attorney fees under I.C. § 12-121 on appeal as against McGregor, as Trask is the prevailing party on appeal and McGregor's appeal was frivolous, unreasonable and brought without foundation.

IT IS FURTHER ORDERED the amount of attorney fees on this appeal will be decided by this Court and as to all other matters, this case is REMANDED to Magistrate Division.

Entered this 6th day of July, 2017.

_____

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of July, 2017, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Jennifer Brumley	208 765-1046	Henry Madsen	208 664-6258

Hon. Timothy Van Valin

_____
Jeanne Clausen, Deputy Clerk