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AT \_\_\_\_\_ O'Clock \_\_\_\_\_ M  
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**

**JEFFREY HARRIS,** )  
)  
*Plaintiff,* )  
vs. )  
)  
**WENDI HARRIS,** )  
)  
*Defendant.* )  
)  
)  
)  
\_\_\_\_\_ )

Case No. **CV 07 7092**

**MEMORANDUM DECISION AND  
ORDER ON APPEAL FROM  
MAGISTRATE DIVISION**

**I. INTRODUCTION AND PROCEDURAL BACKGROUND.**

Appellant Wendi Harris (Wendi) is the mother of five children. The youngest two (twins) are the subject of this appeal. The two oldest children, Nick and Brittany, are from Wendi's first marriage. Wendi and Respondent Jeffrey Harris (Jeffrey) were married on September 27, 1992. Wendi and Jeffrey had a son, Jacob, who was fourteen at the time of trial. On July 8, 2005, the twins were born. In October 2007, Wendi lost custody of the twins after being hospitalized and after allegations of her extensive history of drug use were raised, including evidence that she had breastfed the twins while using drugs. A hair follicle test performed on the twins revealed the presence of methamphetamine. Wendi raised the issue of Jeffrey's paternity at trial, alleging Jeffrey was not the biological father of the twins. Genetic testing subsequently confirmed that Jeffrey is not the biological father of the twins.

On June 13, 2008, Wendi appealed Magistrate Judge Benjamin Simpson's

Decree of Divorce filed May 2, 2008, which addressed custody and spousal maintenance. Later, Wendi appealed Judge Simpson's Order on Post Trial Motions filed October 31, 2008, in which he refused to reopen the custody issue after genetic testing was obtained.

The parties filed briefs on appeal, and then filed amended briefs on appeal. Oral argument was held on February 19, 2009.

## **II. STANDARD OF REVIEW.**

Child custody determinations are committed to the sound discretion of the magistrate judge. *McGriff v. McGriff*, 140 Idaho 642, 645, 99 P.3d 111, 114 (2004). On appeal, the magistrate's decision will be overturned only for an abuse of that discretion. *Roberts v. Roberts*, 138 Idaho 401, 403, 64 P.3d 327, 329 (2003). On appeal from an order of the District Court reviewing a Magistrate's findings and conclusions, reviewing courts examine the record of the trial court with due regard for the District Court's intermediate appellate decision. *Carr v. Carr*, 116 Idaho 747, 750, 779 P.2d 422, 425 (Ct.App. 1989). The Magistrate's findings of fact supported by substantial and competent evidence will be upheld even if the evidence is conflicting. *Shurtliff v. Shurtliff*, 112 Idaho 1031, 739 P.2d 330 (1987). Questions concerning application of law are given free review. *Carr*, 116 Idaho at 775, 779 P.2d at 425.

## **III. ANALYSIS.**

### **A. Judge Simpson Did Not Abuse His Discretion in Awarding Sole Legal and Physical Custody to Jeffrey.**

Wendi argues Judge Simpson ignored evidence of her parenting skills and that evidence of her illegal drug use was "an isolated situation out of character for an otherwise devoted and attentive parent." Brief of Appellant (Amended), p. 6. That claim is not supported by the record. Dr. William Miller treated Wendi in November 2007. Tr.

Vol. I, p. 2, LI. 8-22. Dr. Miller testified Wendi admitted using different types of medications, including narcotics and methamphetamines. Tr. Vol. I, p. 14, LI. 6-14. Dr. Miller testified Wendi admitted to breastfeeding the twins after she was told she had methamphetamine in her urine. Tr. Vol. I, p. 15, LI. 8-14. In addition to her use of narcotics and methamphetamine at that time, Wendi also disclosed to Dr. Miller she had been using drugs off and on all her life starting when she was a teenager. Tr. Vol. I, p. 14, LI. 15-21. Wendi's mother testified regarding her observations of Wendi's prescription drug use, depression, rages, mood swings and bizarre behaviors. Tr. Vol I, p. 139, L. 17 – p. 140, L. 5; p. 144, LI. 4-12; p. 145, LI. 1-6; p. 147, LI 1-17. Wendi's mother testified that Dr. Miller was adamant that she was not to nurse the kids, yet Wendi did just that, and Wendi gave her mother a very irrational reason for that refusal to follow the doctor's orders not to breastfeed. Tr. Vol. I, p. 154, L. 14 – p. 155, L. 19. Wendi admitted to Dr. Miller that she had given morphine to her son, without a prescription. Tr. Vol. I, p. 14, LI. 22-25.

Wendi states her mother, the twins' grandmother, now cares for the twins while Jeffrey works and, therefore, joint physical and legal custody should have been awarded giving her at least the opportunity to care for the children while Jeffrey works. Brief of Appellant, (Amended), p. 7. Jeffrey replies he has been the primary caregiver of the twins since October 2007. Respondent's Reply Brief, p. 1. Jeffrey goes on to argue the evidence presented at trial demonstrated longstanding behavior by Wendi adverse to the best interest of the children, and: "the Court had no evidence of any current behavior by Wendi which was in the best interest of the children." *Id.* at 5.

In Idaho, "the child's best interest is of paramount importance in child custody decisions." *Bartosz v. Jones*, 146 Idaho 449, \_\_\_, 197 P.3d 310, 315 (2008). Idaho

Code § 32-717 states the court “may, before and after judgment, give such direction for the custody, care and education of the children... as may seem necessary or proper in the best interests of the children.” The statute requires courts to consider all relevant factors when determining the best interest of the child in making custody determinations. I.C. § 32-717; see *Hoskinson v. Hoskinson*, 139 Idaho 448, 455, 80 P.3d 1049, 1056 (2003). These factors may include: the parents’ wishes for the child’s custody; the child’s wishes; the interrelationship and interaction of the child with his or her parents and siblings; the extent the child has adjusted to his or her school, home, and community; the circumstances and character of the persons involved; the need to promote continuity and stability in the child’s life; and domestic violence. I.C. § 32-717(1)(a)-(g). That list is not exhaustive or mandatory and Magistrates are free to consider other factors they deem relevant. *Nelson v. Nelson*, 144 Idaho 710, 715, 170 P.3d 375, 380 (2007).

Here, Judge Simpson evaluated the statutory factors relevant to the best interest of the children on the record. Tr. Vol. III, pp. 545- 548. Judge Simpson then discussed other relevant factors and evidence he felt must be considered: Wendi’s bizarre conduct: her breast-baring in public; threats she made to Jeffrey’s life; her poor driving; her being awake for days without sleep; the twins having tested positive for methamphetamine; her being on probation for having impersonated a federal officer; the child protective charges raised because the children tested positive for methamphetamine; the lack of any testing by a Ph.D-level professional as to any possible mental health issues of Wendi; and Wendi breastfeeding the twins immediately after being released from the hospital and being directed not to. Tr. Vol. III, pp. 548-550. All of that is supported by the record.

Wendi can point to no evidence demonstrating Judge Simpson abused his discretion in awarding custody to Jeffrey. Wendi's only argument appears to be the claim that Judge Simpson ignored evidence of her parenting skills and that her drug use was brief and uncharacteristic. Brief of Appellant (Amended), p. 6. Specifically, Wendi makes the claim in her briefing: "Although there was evidence from which the Court could infer that for a brief period of time Wendi has been using illegal drugs, and engaging in some bizarre and strange behavior, there was a wealth of evidence establishing that if these events occurred, it was an isolated situation out of character for an otherwise devoted and attentive parent." *Id.* Wendi cites to no portion of the record, no exhibit, and no witnesses' testimony in making that bald-faced claim. The claim that her drug use was brief and uncharacteristic is not supported by the record.

Contrary to Wendi's contentions that "The Court's decision ignored evidence of Wendi's parenting skills" (*Id.*), the record shows Judge Simpson noted the three older children's good school and social performance was a credit to Wendi. Tr. Vol. III, p. 545, LI. 23-24. Judge Simpson went on to note that Wendi has suspended custody of Jacob, the middle son is in Jeffrey's sole custody, and Judge Simpson discussed the troubled relationship Wendi has with Jacob. Tr. Vol. III, p. 545, LI. 6-7, 11-16. As to Wendi's oldest daughter, Brittany, Judge Simpson stated, "If you believe the testimony that came in, she left because she couldn't stand to be in the house, quote, for another day after high school graduation." Tr. Vol. III, p. 545, LI. 17-20. Judge Simpson voiced his concerns regarding Wendi, saying "It's all about you... and there's very little focus on the children." Tr. Vol. III, p. 546, LI. 2-6. Judge Simpson also stated "there are colorable issues related to substance abuse," Tr. Vol. III, p. 543, LI. 6-7. Despite being encouraged to do so, Judge Simpson noted Wendi has declined to get substance abuse

or mental health evaluations and/or treatment. Tr. Vol. III, p. 543, Ll. 7-11.

Wendi has failed to demonstrate Judge Simpson abused his discretion in awarding Jeffrey sole legal and physical custody of the twins. The record clearly reveals Judge Simpson considered statutory factors (I.C. § 32-717(1)(a)-(g)) regarding the best interests of the children (Tr. Vol. III, p. 545, L. 1 – p. 548, L 9), along with the additional non-statutory factors he found relevant (Tr. Vol. III, p. 548, L. 10 – p. 550, L. 24), in determining Jeffrey’s custody was in the best interests of the twins.

**B. Judge Simpson Did Not Err in Not Awarding Wendi Spousal Maintenance for a Period Longer Than Three Months.**

Spousal maintenance is governed by I.C. § 32-705 which states:

Where a divorce is decreed, the court may grant a maintenance order if it finds that the spouse seeking maintenance: (a) lacks sufficient property to provide for his or her reasonable needs; and (b) is unable to support himself or herself through employment.

Idaho Code § 32-705 then lists factors for the court to consider in determining the amount and period of time for such maintenance. That list includes: financial resources of the spouse seeking maintenance; including marital property apportioned to the spouse and the spouse’s ability to meet her needs independently; time necessary to acquire sufficient training and education to enable the spouse seeking maintenance to find employment; duration of the marriage; age and physical and emotional condition of the spouse seeking maintenance; ability of the spouse from whom maintenance is sought to meet his needs while meeting the needs of the other spouse; tax consequences of each spouse; and the fault of either party. I.C. § 32-705(2)(a)-(g). “Unlike an award of property, which turns upon the vested property rights of spouses, maintenance is deigned solely for the support of the dependant spouse after a showing of need.” *Ross v. Ross*, 103 Idaho 406, 411, 648 P.2d 1119, 1124 (1982).

Wendi argues the length of the marriage, her lack of education, her absence from the work force to remain a “stay at home Mom” and the disparity between her income earning capacity and that of Jeffrey, all point to the fact that Judge Simpson erred in not awarding maintenance for a “significant period of time.” Brief of Appellant (Amended), p. 7. Wendi states Judge Simpson erred in only awarding her separate maintenance for a few months following conclusion of the trial. Wendi claims maintenance should have continued for a period of four years to allow her to enroll in and complete higher education. *Id.* at pp. 7-8. Jeffrey replies Judge Simpson had before him evidence that Wendi’s work as a private investigator supported the family for two of the five years he had been unable to work for health reasons prior to his current employment with Dave Smith Motors and the only reason given as to what would prevent Wendi from being a private investigator full time was her desire not to leave her kids until they are in school. Respondent’s Reply Brief, p. 2, citing Tr. Vol. II, p. 353, l. 24 and p. 355, ll. 9-11. Jeffrey argues Wendi is unable to prove both (1) that she lacks sufficient property to provide for her needs and (2) that she is unable to support herself through employment. Respondent’s Reply Brief, p. 2. The record only indicates she wanted to stay home with the twins, but Jeffrey argues: “the fact that she does not have custody of the twins further emphasizes the fact that she is available for employment...” *Id.*, p. 2. Jeffrey also notes Wendi did not state specific higher education goals on the record and no evidence was presented regarding her inability to have an earning capacity sufficient to support herself. *Id.* at 5. Wendi did state if she was not a stay-at-home mom, she would return to school; “I would like to get my law degree.” Tr. Vol. 11, p. 356, ll. 6-8. However, as pointed out by Jeffrey, Wendi’s abstract desire to obtain a law degree is the extent of the higher education goals discussed by her at trial. In his discussion of

maintenance, Judge Simpson noted,

Wendi's had a train wreck here. To a large degree it's a train wreck of her own making. But she's really in a tight spot, and I can't in good consciousness just shove her out the door and say goodbye, you get nothin'. So I've got to give her a little help at least in the short term.

Tr. Vol. III, p. 540, ll. 20-25. This statement addresses the financial resources and emotional condition of the spouse seeking maintenance (and arguably fault) as discussed in I.C. § 32-705(2). Judge Simpson found Wendi could work, was not disabled, and "had the luxury, if you will, of being a stay-at-home mom for many years."

Tr. Vol. III, p. 541, ll. 9-11. Judge Simpson imputed minimum wage income, \$12,000, to her, and averaged Jeffrey's last three tax returns to arrive at his income, \$150,000. Tr.

Vol. III, P. 541, ll. 12-14, 18-20. This discussion by Judge Simpson addresses, again, Wendi's financial resources and ability to meet her own needs and the ability of Jeffrey to meet both his and Wendi's needs. Finally, Judge Simpson specifically addresses the tax implications of his three-month award of maintenance to Wendi as required by I.C. § 32-705(2)(f). Although Judge Simpson does not explicitly address Wendi's age or the duration of the marriage, Judge Simpson had evidence of these facts. This Court finds these factors were implicitly considered as evidenced by the resulting decision to grant maintenance at all. Wendi has pointed to no evidence that Judge Simpson's decision was clearly erroneous or unsupported by substantial and competent evidence.

**C. Judge Simpson Did Not Err in Refusing to Re-Open the Record to Take Additional Evidence Regarding Paternity.**

Wendi's final argument is that Judge Simpson erred in refusing to reopen the record, thereby not allowing her to present additional evidence on the issue of Jeffrey's paternity. Brief of Appellant (Amended), p. 8. At oral argument, counsel for Wendi explained that Judge Simpson had reserved jurisdiction on the issue of genetic testing,

the parties subsequently filed results of the testing with the Court and it was determined that Jeffrey is not the father of the twins. Therefore, Wendi argues that as the biological parent of the twins, she should get custody, and pursuant to *Stockwell v. Stockwell*, 116 Idaho 297, 775 P.2d 611 (1989), the best interest of the child standard is not applicable. If the *Stockwell* analysis does apply, Wendi argues only that “there is no evidence she abandoned the twins or was unfit at the time of trial, the twins had only been in Respondent’s [Jeffrey’s] exclusive care pending the trial, and the primary caretaker was the grandmother, not Respondent [Jeffrey].” Brief of Appellant (Amended), p. 9. At oral argument on appeal, Jeffrey’s counsel replied that the order entered by Judge Simpson after trial was temporary and it was now up to Judge Simpson to finalize the order, and thus, there had been nothing for Wendi to reopen when she brought a motion to do so. Both parties concede the presumption of paternity of a child born during a marriage is rebutted by genetic testing establishing non-paternity. I.C. § 7-1119. Both parties also concede the Idaho Supreme Court’s decision in *Stockwell* stands for the presumption that a natural parent should have custody, precluding consideration of the best interest of the child unless the nonparent demonstrates either that the natural parent has abandoned the child, is unfit, or the child has been in the nonparent’s custody for an appreciable amount of time

In her briefing and at oral argument, Wendi urged this Court to consider her substantive due process rights as a parent in light of *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000). In *Troxel*, the United States Supreme Court held a Washington statute allowing any person to petition the court for visitation rights to unconstitutionally infringe upon the fundamental rights of parents. 530 U.S. 57, 60, 120 S.Ct. 2054, 2061. *Troxel* involved a decision by a fit custodial parent concerning third-party (grandparent)

visitation. 530 U.S. 57, 60, 120 S.Ct. 2054, 2061. The Fourteenth Amendment's Due Process Clause has a substantive component protecting against government interference with fundamental rights and liberty interests and the interests of parents in the care, custody, and control of their children "is perhaps the oldest of the fundamental liberty interests recognized by this Court." 530 U.S. 57, 65, 120 S.Ct. 2054, 2060. As pointed out by Jeffrey in the instant matter, what distinguishes *Troxel* from this case is that Granville was not found to be an unfit parent, nor had the Troxels alleged her to be an unfit parent. "That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children." *Troxel*, 530 U.S. 57, 68, 120 S.Ct. 2054, 2061. Here, the record is replete with both allegations and evidence of Wendi's unfitness, up to and including her not having had physical custody of the twins since October 2007. Substantive due process rights of parents as discussed in *Troxel* presuppose the fitness of the parent(s) involved. Government interference with Wendi's fundamental rights and liberty interests and her interests in the care, custody, and control of her children arose out of Judge Simpson's finding of unfitness.

Contrary to Wendi's argument, ultimately the best interest of the child standard is applicable to the Court's decision regarding custody whether Jeffrey is the biological father of the twins or not. If Jeffrey *is* the presumed biological father because the twins were born during the marriage (he is the individual listed on the twins' birth certificates, and he is listed as the father in the divorce pleadings), the best interest of the child standard is applicable. I.C. § 32-717; *see also Hoskinson v. Hoskinson*, 139 Idaho 448, 455, 80 P.3d 1049, 1056 (2003); *Bartosz v. Jones*, 146 Idaho 449, \_\_\_, 197 P.3d 310, 315 (2008). On the other hand, if Jeffrey *is not* the biological father of the twins, the *Stockwell* analysis would be applied. That is, the natural parent, Wendi, would

presumptively receive custody and no best interest of the child standard would be applied *unless* Jeffrey demonstrates either that Wendi has abandoned the child, is unfit, or the twins have been in Jeffrey's custody for an appreciable amount of time. If Jeffrey makes such a showing, then the best interest of the child standard is applicable. Under either scenario, the best interest of the child standard will be applied. That is the standard Judge Simpson used.

*Stockwell's* presumption that a natural parent should have custody precludes consideration of the best interest of the child *unless* the non-parent demonstrates one of three things: (1) the natural parent abandoned the child; (2) the natural parent is unfit; or (3) the child has been in the non-parent's custody for an appreciable amount of time.

*Stockwell*, 116 Idaho 297 299, 775 P.2d 611, 613. Once a non-parent demonstrates abandonment or unfitness of the natural parent, or that the child has been in the non-parent's custody for an appreciable amount of time, the Court then goes back to the best interest of the child standard, with the knowledge of that abandonment, unfitness, and custody in the non-parent. Here, Judge Simpson found ample evidence to support his conclusion that Wendi was unfit, to-wit: her bizarre conduct; her breast baring in public; threats she made to Jeffrey's life; her poor driving; her being awake for days without sleep; the twins having tested positive for methamphetamine; her being on probation for having impersonated a federal officer; the child protective charges raised because the children tested positive for methamphetamine; the lack of any testing by a Ph.D-level professional as to any possible mental health issues; and her breastfeeding the twins immediately after being released from the hospital and being told not to. Tr. Vol. III, pp. 548-550. All of those findings are entirely supported by the record. Further, the fact that the twins have been in Jeffrey's exclusive custody beginning in October

2007 would support the conclusion that they had been in the non-parent's custody for an appreciable amount of time. There was no error in Judge Simpson's application of the best interest of the child standard. Even if the matter were reopened and reconsidered, the appropriate standard would nonetheless remain "the best interest of the child". The analysis would have been the same. Judge Simpson's analysis of the statutory factors regarding the best interests of the children (I.C. § 32-717(1)(a)-(g)) is very detailed, and supported by the record. Tr. Vol. III, p. 545, L. 1 – p. 548, L 9. The non-statutory factors were discussed in detail as well. Tr. Vol. III, p. 548, L. 10 – p. 550, L. 24.

**D. Attorney's Fees.**

Jeffrey argues Wendi's appeal is frivolous, entitling him to fees under Idaho Appellate Rule 41 and I.R.C.P. 54(e)(1) and 12-121. Respondent's Reply Brief (Amended), p. 7. That request is timely pursuant to I.A.R. 35(b)(5), 41(a). Jeffrey has complied with the rules, requesting fees in his reply brief.

Because this Court finds Jeffrey the prevailing party on appeal, Jeffrey is entitled to his costs.

From a factual basis there is a good argument that Wendi's appeal is frivolous. However, the same cannot be said from a legal standpoint. Wendi has raised legitimate issues of law as to *Stockwell* in light of the more recent decision of the United State Supreme Court in *Troxel*. However, this Court finds *Troxel's* substantive due process analysis presupposes the moving parent is fit. Jeffrey's request for attorney fees on appeal is denied.

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**IV. ORDER.**

**IT IS HEREBY ORDERED** the decision of Judge Simpson is **AFFIRMED** in all aspects.

**IT IS FURTHER ORDERED** Respondent Jeffrey Harris is the prevailing party on appeal. Accordingly, respondent's request for costs on appeal is **GRANTED**. Respondent's request for attorney fees on appeal pursuant to I.C. §12-120(3) and § 12-121 is **DENIED**.

Entered this 18<sup>th</sup> day of April, 2009.

\_\_\_\_\_  
John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of April, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	
Frederick G. Loats	208-664-3644	Honorable Benjamin Simpson
Ramona R. Liesche	208-667-4034	

\_\_\_\_\_  
Jeanne Clausen, Deputy Clerk