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

**MICHELE HAHAJ,** )  
 )  
 *Plaintiff/Respondent,* )  
 )  
 vs. )  
 )  
 **JIM MITCHELL HAHAJ.** )  
 )  
 *Defendant/Appellant.* )  
 \_\_\_\_\_ )

Case No. **CV 2001 5600**

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

**I. PROCEDURAL HISTORY AND BACKGROUND.**

Jim Hahaj is currently incarcerated by the Idaho Department of Corrections in Boise, Idaho. In August of 2001, Jim Hahaj was arrested on an aggravated assault charge, for which he received a withheld judgment and credit for time served. Kootenai County Case No. CRF 2001 16371. He was released from custody in that case on February 1, 2002.

Four weeks later, on March 1, 2002, Jim Hahaj engaged in conduct that resulted in his being charged with the attempted murder of the complaining witness in the first case, his former wife, Michele Hahaj. Kootenai County Case No. CRF 2002 3665. Their children, Megan (seven or eight years old at the time of the events) and Clifford (just over one year old at the time of the events) witnessed the second incident. Jim Hahaj pled guilty, pursuant to *North Carolina v. Alford*, to the reduced charge of aggravated battery, and on July 18, 2002, he was sentenced to five years fixed, followed by an additional ten years indeterminate, for a maximum possible sentence of fifteen years. On July 18, 2002, Jim Hahaj was sent to prison to serve his sentence.

In the older case, a probation violation was filed on May 28, 2002. As a result of that probation violation, on July 18, 2009, Jim Hahaj also had his withheld judgment revoked and the five year fixed sentence for aggravated assault was imposed in CRF 2001 16371. On July 18, 2002, Jim Hahaj was sent to prison to serve that sentence as well. The sentences in both cases ran concurrently.

Due to subsequent developments at the penitentiary, Jim Hahaj will be serving the full term of his fifteen year sentence in CRF 2002 3665. He will not be released from prison until September 2016. Tr. Vol. 2, p. 147, L. 20.

Following the events that led to Jim Hahaj's incarceration, Michele Hahaj initiated divorce proceedings against Jim Hahaj. At the divorce trial on May 8, 2002, Judge Burton granted primary custody of the children to Michele Hahaj. Judge Burton allowed Jim Hahaj to write to Megan and Clifford on the condition that Michele could screen Jim Hahaj's written correspondence to the children. Tr. Vol. 1, p. 118, LI. 4-9. Judge Burton also ruled that Jim Hahaj was to have no telephone contact with the children "until it is determined by the children's counselor that phone contact with the defendant would be appropriate and would benefit the children." Tr. Vol. 1, p. 118, LI. 10-15.

After he had completed several rehabilitative programs provided in prison by the State of Idaho Department of Corrections, Jim Hahaj petitioned the court to modify the custody decree to allow him telephone contact and visits with the children, as well as "expanded written visitation," in that he wanted the court to remove rescind Michele's screening ability. Tr. Vol. 1, p. 118, LI. 16-23. Jim Hahaj argued that his completion of the rehabilitation programs showed he could be trusted to communicate appropriately with Megan and Clifford, and thus there was a substantial, material change in the circumstances which would justify modification of the original decree. Tr. Vol. 1, p. 119, LI.

1-5. Judge Wayman denied the motion on multiple grounds. First, Judge Wayman found that while it was commendable that Jim Hahaj had completed the rehabilitative programs, Jim Hahaj could not show that his behavior had changed substantially, and he most likely could not do that until he got out of prison. Tr. Vol. 1, p. 120, Ll. 4-14. Second, a modification would not be in the best interest of the children under the factors listed in Idaho Code § 32-717, as the children were having serious difficulty coping with the issues created by the circumstances of their parents' divorce, and modification would create additional tension and instability in their lives. Tr. Vol. 1, pp. 120-127.

After completing additional rehabilitative programs, on September 8, 2005, Jim Hahaj again petitioned for modification of the custody decree. The court again denied the petition, ruling that completion of the prison rehabilitation programs did not constitute a "substantial, material, and permanent change of circumstances that in the best interests of the children would justify [modifying the] custody decree." Tr. Vol. 2, p. 19, Ll. 11-17; p. 21, L. 25 – p. 22, L. 6.

In early 2007, Jim Hahaj filed a third petition to modify, arguing that Megan, then thirteen, was old enough to decide for herself whether she wanted contact with her father. Appellant's Brief, pp. 3-4. Prior to the hearing on the third petition, Jim Hahaj also filed several motions, including a motion to disqualify Judge Wayman without cause, a motion for a change of venue, a motion seeking the appointment of a parenting coordinator, and a motion to compel responses to discovery requests. He also filed several *other* motions, but either he withdrew those at the prior hearing, Judge Wayman dismissed them without prejudice, or Judge Wayman granted them. Therefore, they are not at issue in this appeal.

On the motion to disqualify Judge Wayman without cause pursuant to IRCP 40(d)(1), Jim Hahaj argued that Judge Wayman should be disqualified because of

“perceived bias as a result of Michele Hahaj working for a law firm . . . and the fact that [Jim Hahaj] is in prison.” Tr. Vol. 2, p. 31, LI. 7-13. Judge Wayman denied the motion, ruling both that the motion was untimely (on a “without cause” basis), and that there was no factual basis to support a finding of bias to justify disqualification (on a “for cause” basis). Tr. Vol. 2, p. 31, LI. 14-17.

Jim Hahaj argued that the court should grant his motion to change venue because “the legal community in Coeur d’Alene is . . . very small,” and that as a result Judge Wayman might have had some kind of relationship with one or more members of the firm employing Michele Hahaj that could inappropriately influence the outcome of the case. Tr. Vol. 2, p. 32, LI. 8-20. Judge Wayman denied the motion to change venue on those grounds. Tr. Vol. 2, p. 34, LI. 1-7.

Judge Wayman denied the motion to appoint a parenting coordinator because, under the unmodified custody decree, there would be no need for one. The primary reason given by Jim Hahaj to support his request for appointment of a parenting coordinator was to facilitate the telephone contact he was seeking to have added to the custody decree in that hearing. Tr. Vol. 2, p. 36, L. 20 – p. 37, L. 10. Judge Wayman explained that, prior to the modification of the order, there was no basis to appoint a parenting coordinator. However, if Jim Hahaj had been successful on his motion to modify, his motion to appoint a parenting coordinator might have merit. Tr. Vol. 2, p. 37, LI. 11-18.

Jim Hahaj also moved to compel responses to interrogatories and to compel the production of documents he had requested, but for which he had received no response. Tr. Vol. 2, p. 40, LI. 1-5. Judge Wayman denied the motion due to Jim Hahaj’s failure to comply with the certification requirements of Idaho Rule of Civil Procedure 37 prior to moving to compel discovery. Tr. Vol. 2, pp. 63-64.

Jim Hahaj served a *subpoena duces tecum* on Michele Hahaj that compelled her to produce Megan at the hearing. Tr. Vol. 2, p. 66, LI. 15-19. Megan did not want to testify, and appeared visibly distraught before and during her testimony. Tr. Vol. 2, p. 87, LI. 17-19; p. 74, LI. 9-25. She testified that reading the letters Jim Hahaj had sent made her sad. Tr. Vol. 2, p. 80, LI. 1-11. She also testified that she had stopped going to counseling because she didn't like it, and that she didn't think she needed it. Tr. Vol. 2, p. 78, L. 19 – p. 79, L. 4. She also said that she does not want to go back to counseling. Tr. Vol. 2, p. 88, LI. 21-25. However, when Jim Hahaj questioned her, she did testify that she wanted a relationship with him, and that she wouldn't mind talking to him on the phone. Tr. Vol. 2, p. 86, LI. 23-25.

Clifford did not testify at the hearing. Ellen Jaeger, Clifford's current and Megan's former counselor, submitted an affidavit stating that it "may not be in Clifford's best interest to" have telephone communication with Jim Hahaj. Tr. Vol. 2, p. 143, LI. 4-6. While Michele Hahaj's counsel had said at a previous hearing that she would be calling Ms. Jaeger in her case, Ms. Jaeger was not present in the courtroom, opting to testify telephonically, if necessary. Tr. Vol. 2, p. 148, LI. 19-21.

At the close of Jim Hahaj's evidence, Michele Hahaj's counsel moved to dismiss the petition pursuant to I.R.C.P. 41(b). Judge Wayman granted the motion; he found that the only substantial change introduced by Jim Hahaj was that Megan was older, and perhaps more capable of making the decision to have contact with her father. However, Judge Wayman found she was "absolutely scared" during her testimony, and that, while she was chronologically older, she was still "a terrified little girl." Tr. Vol. 2, p. 154, LI. 7-16. Additionally, Judge Wayman noted her discomfort at being placed in the position of testifying, and noted:

...the fact that she was placed in that situation and then asked the questions that she was asked, how do you feel about telephone contact, do you want to have telephone contact, her change of opinion doesn't really carry much weight with the Court. Under the circumstances, when she's being asked that by one parent in the presence of another parent, that questioning in and of itself forces the child to choose sides, puts the child smack dab in the middle. [S]he's still [a] little girl . . . when it comes to these issues."

Tr. Vol. 2, p. 155, Ll. 3-20. Thus, the change in her age was not a "substantial, material and permanent change of circumstances . . . standing on its own." Tr. Vol. 2, p. 154, Ll. 21-23.

In addition to not modifying the custody decree to allow telephone contact between Jim Hahaj and the children, Judge Wayman also declined to modify the order to allow unscreened written correspondence between them. Judge Wayman noted specific examples of material that most parents would probably find objectionable, including depictions of prison life, adult topics like war, and discussions about the ongoing litigation between Jim and Michele Hahaj. Tr. Vol. 2, pp. 156-157. Judge Wayman found that whether the letters "may or may not have been responded to by the children does not come up to the level of a substantial, permanent . . . change of circumstances because [some of] the letters . . . are clearly inappropriate to have read to a child."

Jim Hahaj subsequently filed a document titled "Motion to Set Aside Judgment and For a New Trial." He claimed that Judge Wayman abused his discretion in denying the motion to modify by (1) ignoring Megan's wishes and by considering the letters Jim Hahaj had written to his children; (2) by not allowing Jim Hahaj to establish Michele Hahaj's animosity towards him during his examination of her; (3) by assuming Megan's state of mind, and (4) that he was unfairly surprised when Michele Hahaj did not call Ms. Jaeger as a witness. See Order Denying Motion to Set Aside Judgment and For a New Trial, Jan. 14, 2009. Judge Wayman denied the motions to set aside and for a new trial. On

November 3, 2008, Jim Hahaj filed his Notice of Appeal. In that Notice of Appeal, Jim Hahaj only appeals from Judge Wayman's "Order dismissing Appellant's Motion to Modify an Order entered by Judge Scott Wayman on the 25<sup>th</sup> day of August, 2008." Notice of Appeal, p. 1. If that truly were the case, Jim Hahaj's Notice of Appeal would be untimely. I.R.C.P. 83(e). However, Judge Wayman's decision made on the record on August 25, 2008, was incorporated in an "Order Denying Motion for Modification" which was filed on September 16, 2008. Even at that, Jim Hahaj's Notice of Appeal would be six days late. However, Jim Hahaj tried to file his appeal on September 13, 2008. Thus, the appeal is timely.

At oral argument on appeal, this Court stated on the record that it was denying Jim Hahaj's "Motion for Transport" (Motion to Transport Jim Hahaj from prison to the Courthouse in Kootenai County for the August 5, 2009, oral argument on appeal) filed on July 20, 2009. The reason for denying Jim Hahaj's Motion to Transport given by this Court on the record was Jim Hahaj's failure to notice that motion for hearing (violating I.R.C.P. 7(b)(3)(A)). Pursuant to I.R.C.P. 7(b)(3)(D), because there was no request for oral argument on that motion and no brief filed by Jim Hahaj on that motion, this Court may dismiss that motion without notice if the court deems the motion had no merit. This Court finds Jim Hahaj's Motion to Transport has no merit, because: 1) oral argument on appeal is purely legal argument and Jim Hahaj would not be disadvantaged in any way by participating in that oral legal argument by telephone, 2) the expense involved to the State of Idaho, and 3) due to the fact that the Court granted Jim Hahaj's Motion for a Telephonic Hearing, which Jim Hahaj filed July 20, 2009.

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

Both parties properly identify the correct standard of review in this case as an abuse

of discretion standard, but not necessarily for the proper reasons. Appellate courts review a trial court's grant or denial of a motion for new trial for an abuse of discretion. *Cramer v. Slater*, 146 Idaho 868, \_\_\_, 204 P.3d 508, 519 (2009). However, questions of child custody are also within the trial court's discretion, and are also reviewed for an abuse of that discretion. *Strain v. Strain*, 95 Idaho 904, 905, 523 P.2d 36, 37 (1974). The parties seem to have conflated the two separate issues into one, and have treated this as an appeal from Judge Wayman's decision on the underlying Motion to Modify, rather than as an appeal of his denial of Jim Hahaj's Motion to Set Aside Judgment and For a New Trial.

Questions of child custody are within the discretion of the trial court, and it has been repeatedly held that an appellate court may not attempt to substitute its judgment and discretion for that of the trial court except in cases where the record reflects a clear abuse of discretion by the trial court. *Id.* In general, a trial court does not abuse its discretion with respect to its decision in a child custody matter so long as it 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 its decision through an exercise of reason. *Roberts v. Roberts*, 138 Idaho 401, 403, 64 P.3d 327, 329 (2003); *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 2009 WL 2170643, 7 (2009).

### **III. ISSUES PRESENTED.**

The issues presented by Jim Hahaj in his Notice of Appeal differ from the issues Jim Hahaj set forth in his brief on appeal. Appellant's Brief, pp. 5-6. Idaho Rule of Civil Procedure 83(f)(6) contemplates this. However, this Court has slightly rearranged the issues to provide distinction in the various standards of review:

1. Whether, in denying Jim Hahaj's motion to modify an existing custody decree, Judge Wayman abused his discretion by:
  - (a) ruling contrary to wishes expressed by one of the minor children;

- (b) dismissing the Jim Hahaj's motion based on Judge Wayman's perception of the mental state of one of the testifying witnesses;
  - (c) not modifying an existing custodial order that prohibits telephone contact between the noncustodial parent and the minor children until the children's counselor approves such contact where one of the minor children is no longer seeing a counselor;
  - (d) not appointing a parenting coordinator to facilitate communication between the noncustodial parent and the minor children where the proposed communication would not be permitted by the existing custody decree, but could be permitted by the modification proposed by the movant, Jim Hahaj; or by
  - (e) not ordering a new trial when a witness (Ellen Jaeger) disclosed for trial by Michele Hahaj was not subpoenaed nor called to testify by Michele Hahaj, and as a result, that witness was unavailable for Jim Hahaj to examine at the hearing.
2. Whether a Magistrate shows bias and misconduct against a party by:
- (a) delaying the advancement of Jim Hahaj's Motion to Modify and other motions;
  - (b) ruling against the party on several motions; or
  - (c) expressing an opinion that it would not be in the best interests of a minor child to be questioned by her father and her mother's attorney in open court; rather it would be better for the child to be interviewed by the judge in his chambers out of the presence of her father and her mother's attorney; and by repeatedly advising Jim Hahaj (present at the hearing via telephone) that the minor child Jim Hahaj was questioning as a witness over the telephone, was demonstrating physical signs of nervousness and discomfort in the courtroom.

#### IV. ANALYSIS.

##### A. Judge Wayman Did Not Abuse His Discretion in Deciding to Modify the Custody Decree.

##### 1. A Magistrate is Not Bound to Follow the Wishes of a Minor Child in Determining Whether to Modify a Custody Decree.

The *threshold* question in a change of custody suit is whether there has been a "change in circumstances"; however, "the *paramount* question in any custody suit . . . is how will the 'best interests of the child' be served." *Cope v. Cope*, 98 Idaho 920, 921, 576 P.2d 201, 202 (1978) (quoting *Poesy v. Bunney*, 98 Idaho 258, 561 P.2d 400 (1977)). (emphasis added). The change in circumstance does not have to be great, but the change

must alter the child's circumstances such that the best interests of the child cannot be served properly without a modification in the custody decree. *Id.* Consequently, the court must thoroughly explore the ramifications of those proposed changes on the best interests of the child. *Id.*

Age is an important factor to consider in evaluating whether to modify a custody decree, but primarily in the context of the ways in which the changes brought about by age change the child's conditions, such that changing the custody decree would be in the best interests of the child. For example, in *Cope*, a father had been granted full custody of his daughter in a divorce decree. At the time of the decree, the daughter was eight years old. When the daughter reached thirteen, the mother petitioned for a modification to the custody decree to grant her custody of the daughter. The district court granted the petition, and the Supreme Court upheld it, emphasizing that the daughter was undergoing "the physical and emotional changes a young woman undergoes while attaining maturity," and that her interests would be better served by granting custody to her mother.

Jim Hahaj is correct when he argues that Megan's desires should be considered by the court in determining whether to modify a divorce decree. Idaho Code § 32-717(b) states: "The court shall consider all relevant factors which may include. . . [t]he wishes of the child as to his or her custodian." The desire of the child becomes particularly important as the child grows older and more intelligent. "With age comes an increased capacity on the part of the child to evaluate his own circumstance and determine what living situation is optimal. Also, with age comes a decreased ability to impose a custody order on a child which is contrary to the desires of the child." *Cope v. Cope*, 98 Idaho 920, 921, 576 P.2d 201, 202 (1978). However, the overriding concern must still be the best interest of the child. *Id.*

In the hearing in this case before Judge Wayman, Megan testified that she wanted to have contact with Jim Hahaj, and she expressed a preference as to time of contact. However, Judge Wayman noted that Megan's body posture and general demeanor indicated that she was in distress during the entirety of her testimony. Tr. Vol. 2, p. 155, Ll. 1-3. Megan's testimony, even from the written transcript, indicates that she was experiencing a high degree of fear and trepidation before anyone even asked her any questions. Tr. Vol. 2, p. 71, L. 4. Even more disheartening is her testimony while she was being questioned by her father. While Jim Hahaj was asking her questions like "Does it embarrass you that I'm in prison?" and "Do you think I still wanna hurt your mommy?" she displayed "obvious signs of being upset" and was close to tears. Judge Wayman found that "while she may [have been] chronologically older, . . . she had the look of a terrified little girl." Tr. Vol. 2, p. 154, Ll. 7-16. Based on his observations, he found that "the expression of her opinion" was not "a substantial and material change of circumstance" sufficient to warrant a modification. Tr. Vol. 2, p. 155, Ll. 21-25.

Jim Hahaj asserts that Megan's nervousness was "stage fright," and that Judge Wayman's ruling discarding her testimony was erroneous. However, Jim Hahaj was present telephonically, and did not have the benefit of seeing Megan's testimony first-hand. While Judge Wayman's ruling contradicts *some* of Megan's testimony (but only if viewed solely from a cold transcript *and* ignoring the observations Judge Wayman placed on the record), Judge Wayman's judgment of her credibility is an issue of fact left to the trial court's discretion unless clearly erroneous. *Hopper v. Hopper*, 144 Idaho 624, 626, 167 P.3d 761, 763 (2007). An appellate court will not set aside a trial court's findings of fact if they are supported by substantial and competent evidence, even if the evidence is conflicting, and should liberally construe fact findings in favor of the judgment entered. *Id.*

Even a cursory review of the transcript of Megan's testimony supports Judge Wayman's finding that her testimony was not voluntary and likely colored by the natural tension most children feel when they wish to please parents who are estranged from each other. As Judge Wayman put it in his written denial of the motion being appealed here:

[Megan] was placed in the untenable position of having to answer questions that placed her squarely in the middle of the dispute between her parents. Had she answered "No" to the defendant's request for telephone visitation, she would've risked disappointing a parent, something very few children would choose to do.

Order, p. 4. His evaluation of her credibility is supported by substantial evidence, and therefore not clearly erroneous.

However, even if Judge Wayman's discounting of Megan's wishes was clearly erroneous (and they were not), the wishes of the child are only one of many factors a court may consider in evaluating whether to modify a custody decree. See I.C. § 32-717. The overarching requirement of any custody arrangement is that it be in the best interest of the children. Judge Wayman based his ruling not only on Megan's testimony (and the fact that her father compelled her to testify in the first place), but also on the content of the previously approved written communication Jim Hahaj introduced into evidence as Exhibits A and B. Judge Wayman noted that "much of the content of these letters is appropriate parent-child communication," but "some of it is not." Order, 4. Michele Hahaj testified that, in her opinion, many of the letters contained "inappropriate" material she did not wish the children be exposed to, such as descriptions of life in prison, the reasons for the divorce, and Jim Hahaj's attempt at suicide. Megan testified that reading the letters made her and her brother "sad." Megan said that writing letters back made her "sad." Order, 4. Judge Wayman based his decision on these feelings, as well as the demonstrated inability of Jim Hahaj to communicate properly with his children using the approved channels. Order, 5.

These findings are supported by testamentary evidence from Megan and Michele Hahaj, as well as Jim Hahaj's Exhibits A and B, and therefore were not an abuse of discretion by Judge Wayman.

## **2. A Magistrate is Not Required to Modify a Custody Decree When a Condition of the Decree Becomes Impossible to Perform.**

Jim Hahaj argues that Judge Wayman abused his discretion in not modifying the decree to compel Megan to see a counselor, or to remove the language from the custody decree granting a counselor the ability to approve telephone contact between Jim Hahaj and the children. Appellant's Brief, p. 5, Issue D, pp. 9-12.

It is improper for a court to impose a condition that is impossible for the parties to fulfill. See *State v. Breeden*, 129 Idaho 813, 816, 932 P.2d 936, 939 (Ct. App. 1997). The Idaho appellate courts have modified custody decrees to prevent impossibility in parental visitation arrangements, such as when the custodial parent decides to move across the country and the other party will be unable to visit according to the original decree. See *Osteraas v. Osteraas*, 124 Idaho 350, 859 P.2d 948 (1993). However, such changes of circumstances only present an opportunity to consider modification; they do not require it. The moving party still "bears the burden of demonstrating that the best interests of the child or children will be served by modification." *Id.* at 353, 859 P.2d at 951.

It appears that Jim Hahaj may have a point regarding the wording of the custody decree and Megan's no longer attending counseling sessions. If Megan does not see a counselor, how can that counselor approve telephone contact? This could potentially serve as the substantial, material change of circumstances necessary for a court to order a modification of an existing custody decree. However, the best interests of the children are still the overriding concern, not the interests of Jim Hahaj. Megan stated at the hearing that she does not think she needs counseling, it did not help her, and she would rather not

attend counseling sessions. She should not be compelled to attend counseling sessions simply because Jim Hahaj wishes it.

The counselor clause in the custody agreement apparently exists to prevent Jim Hahaj initiating telephone contact prior to a mental health professional judging that it would not be damaging to the children, not to give the counselor the ability to compel Megan and Clifford to contact their father. A modification to the custody decree should have removed this clause entirely rather than mandating telephone contact when the children discontinue counseling.

However, even if it would have been appropriate for Judge Wayman to modify the decree, it was still within his discretion to do so. Judge Wayman declined to modify the decree, reasoning that the existing decree did not prohibit telephone contact that was approved by the parties, whether or not a counselor found it appropriate. The existing decree only prevented Jim Hahaj from initiating telephone contact until a counselor approved, but it says nothing about the parties agreeing to contact. Tr. Vol. 2, p. 162, Ll. 15-20. Because Judge Wayman recognized the issue as one of discretion, acted within the bounds of the law, and reached his decision based on reason, he did not abuse his discretion in declining to modify that provision of the custody decree.

### **3. Appointing a Parenting Coordinator Prior to Hearing the Proposed Modification Would Have Been Premature in This Case.**

Judge Wayman did not abuse his discretion in denying Jim Hahaj's motion to appoint a parenting coordinator because such an appointment would have been unnecessary until after Jim Hahaj had succeeded in modifying the custody decree to allow telephone contact between him and his children.

Jim Hahaj argues Judge Wayman abused his discretion by not appointing a parenting coordinator to facilitate the telephone contact he was arguing for in the motion to

modify. He bases his argument on an analysis of IRCP 16(l)(2). The rule discusses circumstances that would merit appointment of a parenting coordinator, and lists five factors a court may evaluate in deciding whether to appoint a parenting coordinator. Jim Hahaj asserts that because his situation satisfies three of the five criteria, Judge Wayman should have appointed a parenting coordinator and abused his discretion by not doing so.

The appointment of a parenting coordinator, despite the presence of the factors listed in IRCP 16(l)(2), is still a matter of judicial discretion. See IRCP 16(l)(3) (“[T]he court *may* appoint a Parenting Coordinator . . .”). In denying Jim Hahaj’s motion, Judge Wayman noted this discretion (Tr. Vol. 2, p. 35, L. 25) and that, while the use of a Parenting Coordinator can be helpful in cases where the parties fail to abide by court orders post-litigation, the rule itself states that referral “to a Parenting Coordinator shall be the exception and not the rule.” IRCP 16(l)(2).

The reason given by Jim Hahaj to justify his request for a parenting coordinator was so that the coordinator could facilitate the telephone communication Jim Hahaj hoped to attain by having his motion to modify granted. While Judge Wayman denied the motion prior to the hearing, he did so because such an appointment would not be necessary until after the hearing. Judge Wayman advised Jim Hahaj that, if Jim Hahaj were successful on his motion to modify, a parenting coordinator might be appropriate. However, such an appointment would not be appropriate until Jim Hahaj succeeded in convincing the court to modify the custody decree to allow increased communication between him and the children. Tr. Vol. 2, p. 37, Ll. 11-18. Judge Wayman recognized the issue as one of discretion, acted within the bounds of the law, and reached his decision through an exercise of reason. Thus, he did not abuse his discretion.

#### **4. The Absence of an Unsubpoened Witness Does Not Constitute Surprise Sufficient to Warrant a New Trial.**

Next, Jim Hahaj argues that Judge Wayman abused his discretion in not ordering a new trial when Michele Hahaj's counsel had indicated in a previous hearing that she would be calling Ellen Jaeger to testify at the hearing, but Ms. Jaeger was not present at the hearing for him to cross-examine or examine in his case-in-chief. Jim Hahaj insists that he was unfairly surprised and prejudiced by Ms. Jaeger's absence.

Ms. Jaeger was not present at the August 25, 2009, hearing. Michele Hahaj's attorney stated she intended to examine Ms. Jaeger telephonically, if necessary, but did not instruct Ms. Jaeger to come to court. Had she been present in person or telephonically, Jim Hahaj could have cross-examined Ms. Jaeger, as Jim Hahaj intended. However, Michele Hahaj's attorney moved to dismiss the motion to modify to allow telephonic communication at the conclusion of Jim Hahaj's case, and the court granted the dismissal, obviating the need for Ms. Jaeger to testify. During his presentation, Jim Hahaj did not attempt to call Ms. Jaeger as a witness, and it appears he never intended to. Instead, Jim Hahaj now claims that he only expressed a desire to cross-examine her.

Had Jim Hahaj wanted to examine Ms. Jaeger in his case, he could have easily subpoenaed Ms. Jaeger. Jim Hahaj is obviously aware of the necessities of subpoenas, as evidenced by his subpoenaing Megan to testify. This is simply a mistake made by Jim Hahaj at the hearing which he is attempting to remedy through the appeals process. This Court rejects this argument, just as Judge Wayman did. An additional discussion of the merits of granting Jim Hahaj's motion for a new trial is below. Judge Wayman did not abuse his discretion in not ordering a new trial.

**B. Judge Wayman Did Not Show Impermissible Bias Against Jim Hahaj.**

Jim Hahaj has not appealed Judge Wayman's decision on Jim Hahaj's motion to disqualify. Instead, Jim Hahaj lists as an issue on appeal:

The Court showed bias and exhibited misconduct in the delay of advancing Appellant's Motion to Modify and accompanying motions and for the mistreatment of Megan during her testimony and for denying all of Appellant's motions with exception of a motion for telephonic hearing.

Notice of Appeal, p. 6. Judge Wayman did not show bias, did not exhibit any misconduct, and did not mistreat Megan during her testimony. Jim Hahaj's claims are completely unsupported by the record.

### **1. Adverse Rulings Alone Do Not Show Impermissible Bias.**

To warrant the disqualification of a judge for alleged bias, "the bias must either be based on information other than what the judge learned from his participation in the case or be of such a nature and character that it would make it impossible for the litigant to get a fair trial." *Roe v. Doe*, 142 Idaho 174, 177, 125 P.3d 530, 533 (2005) (quoting *Desfosses v. Desfosses*, 120 Idaho 27, 29, 813 P.2d 366, 368 (Ct.App.1991)).

The fact that a trial court makes rulings that a party does not like is not, in and of itself, evidence of impermissible bias. *State v. Griffith*, 144 Idaho 356, 361, 161 P.3d 675, 680 (Ct. App. 2007); *See Bell v. Bell*, 122 Idaho 520, 530, 835 P.2d 1331, 1341 (Ct. App. 1992) ("Adverse rulings alone do not support the existence of a disqualifying prejudice."). "Bias, in order to be a ground for disqualification, must stem from the judge forming an opinion on the merits of the case on some basis other than what has been learned from presiding over the case." *Liebelt v. Liebelt*, 125 Idaho 302, 306, 870 P.2d 9, 13 (Ct.App.,1994). The burden is on the moving party to introduce facts that show this bias, through testimony, affidavits, or other evidentiary tools.

Jim Hahaj did not make a motion during the hearing to disqualify Judge Wayman for cause pursuant to I.R.C.P. 40(d)(2). Jim Hahaj did make an untimely motion to disqualify the judge without cause under I.R.C.P. 40(d)(1), but then argued it as a "for cause" motion, arguing that the small size of the Coeur d'Alene legal community made it very likely that

Judge Wayman might have connections to the law firm employing Michele Hahaj which could impermissibly bias Judge Wayman against him. However, Jim Hahaj presented no evidence to substantiate this claim, and Judge Wayman appropriately denied the motion, citing a lack of a factual basis.

Also, as discussed in the Background section above, Judge Wayman ruled against Jim Hahaj on several motions, including his motion to disqualify, motion to change venue, the motion to appoint a parenting coordinator, the motion to compel, and ultimately the motion to modify. Jim Hahaj believes these denials indicate that Judge Wyman is biased against him.

Jim Hahaj has not introduced any evidence that Judge Wayman made his decisions in this case based on anything but what he heard while presiding over the case. The fact that the rulings were adverse to Jim Hahaj does not in itself indicate bias. Thus, Jim Hahaj's argument fails due to a complete lack of any factual basis.

**2. Expressing an Opinion that Compelling a Thirteen-Year-Old Child to Testify in Open Court Was Not in the Child's Best Interest Does Not Show Bias Against the Party Calling the Child.**

Prior to Megan's testimony, Michele Hahaj's counsel moved to quash the subpoena under which Megan was testifying, and to not allow the testimony. Judge Wayman made reference to a prior conversation between the parties where they discussed allowing Megan to testify in Judge Wayman's chambers, out of the presence of the parties, instead of in the courtroom. (Tr. Vol. 2, 68:5-12.) He stated that he could only do that if the parties agreed. (Tr. Vol. 2, 68:11-12.) Jim Hahaj wanted the opportunity to examine Megan, feeling that Megan could provide him information that would be vital for his case. (Tr. Vol. 2, 67:23-68:4.) Before ruling on the motion, Judge Wayman agreed that testifying in open court was not in Megan's interest, that it "places the child squarely between . . . both

parents and generally is not a good thing.” (Tr. Vol. 2, 69:4-6.) He went on to say that the rules of evidence and procedure permit a parent to bring in a child to testify, but that a “parent that chooses to do that in light of the Court’s comments might be found to be acting not in the child’s best interest but in the parent’s own best interests.” (Tr. Vol. 2, 69:9-13.) Jim Hahaj called Megan as a witness, and during his questioning she experienced the fear and trepidation already discussed.

Jim Hahaj explains in his brief that he felt the suggestion that Megan be interviewed outside the presence of him and Michele Hahaj’s counsel was an attempt to exclude him from the process. Appellant’s Brief 16. He feels that Judge Wayman’s displeasure with his decision to force Megan to testify indicates bias against him. *Id.*

In the present case, if Judge Wayman gained any bias against Jim Hahaj as a result of him having Megan testify, it was gained through participation in the case, not from any extra-judicial source. If a new trial could be granted on the grounds Jim Hahaj desires, any defendant can claim judicial bias any time a witness testifies against them because that testimony would create bias in the mind of the judge.

He also cites other instances in the record where Judge Wayman spoke to Megan as “telltale sign[s] of bias” toward him. One instance he claims is indicative of bias occurred during the following exchange:

Q. What time would you like to talk to him?

A. I don’t care.

Q. Mornin’? Night?

A. Night.

Q. Okay. That might be kinda hard for him, but we’ll see.

Tr. Vol. 2, p. 89, Ll. 14-19.

Jim Hahaj states that this exchange shows that Megan was indicating a preference for a time of contact, but that Judge Wayman said the time stated would not be possible

even though he had no knowledge of when Jim Hahaj could have initiated or received telephone contact. Appellant's Brief 16. What Jim Hahaj fails to mention are the extensive discussions that had occurred previously about Jim Hahaj being incarcerated in Oklahoma, which is in the Central Time Zone, a two-hour time difference from Coeur d'Alene, Idaho. See Tr. Vol. 2, p. 59, L. 23 – p. 60, L. 6. It is clear from the transcript that Judge Wayman was simply recognizing the fact that contacting the children in the evening could potentially be logistically difficult. Additionally, no decision on whether to allow telephone contact at all had been made at that time, and it was a prudent measure for the judge to temper any hopes or fears that Megan might have had that telephone contact with her father was going to happen. This does not indicate a bias for or against a result in the matter, and as such does not warrant a new trial on the basis of bias.

**C. Judge Wayman Did Not Exhibit Misconduct by Advising Jim Hahaj of Megan's Physical Condition When Jim Hahaj Appeared Telephonically.**

Jim Hahaj claims that Judge Wayman exhibited misconduct by advising him during the trial that Megan was demonstrating physical signs of nervousness and discomfort. He asserts that these statements only served to defeat "all the work [Jim Hahaj] had done in calming Megan down." Appellant's Brief, p. 16. There is little case law directly on point. However, based on an analysis of the circumstances of the hearing, it is clear Judge Wayman acted primarily to inform Jim Hahaj of Megan's condition during her testimony, and not to bring her greater distress.

Mere statements by the court to witnesses do not necessarily show misconduct or bias. See *Markham v. Anderton*, 118 Idaho 856, 861, 801 P.2d 565, 570 (Ct. App. 1990) (holding that questioning by court of *pro se* defendant did not show bias). Jim Hahaj points out several instances where Judge Wayman communicated to him that Megan was experiencing distress. When Megan first took the stand, Judge Wayman stated to Jim

Hahaj “that sometimes the asking of the questions and the demeanor of the person answering them says more than the words do. And I will tell you, Jim Hahaj, right now that your daughter does not look very comfortable.” Later, Judge Wayman stated that “if you were here, you could see it, but since you’re not here, I’m going to give you . . . the benefit of the Court’s own observations. She doesn’t appear to be real happy here.” These statements indicate Judge Wayman’s purpose in communicating these indicia to Jim Hahaj was to compensate for the limitations inherent in the telephonic hearing—Jim Hahaj could not directly observe Megan’s demeanor, and Judge Wayman felt Megan’s words were not conveying all the information she was communicating during her testimony.

The transcript in this case indicates that Judge Wayman was acting for the benefit of Jim Hahaj. Judge Wayman was actually in the courtroom, could observe Megan’s distress, and communicated that information to Jim Hahaj. Jim Hahaj has pointed out no testimonial or other evidence which indicates Megan was disturbed by Judge Wayman’s statements, and an examination of the transcript does not reveal any such disturbance. Jim Hahaj is asking this Court to accept his interpretation of Megan’s testimony, and discount Judge Wayman’s, without presenting any factual or legal basis as to why his interpretation is more reasonable. Therefore, Jim Hahaj’s argument fails.

**D. Judge Wayman Did Not Abuse His Discretion by Denying the Motion for a New Trial.**

Judge Wayman entered his “Order Denying Motion to Set Aside Judgment and for a New Trial” on January 14, 2009. That order was filed after Jim Hahaj filed his Notice of Appeal, and, since no amendment has been requested to his Notice of Appeal, this issue is not truly an issue on appeal. However, Jim Hahaj has discussed this motion in his briefing on appeal.

An appellate court reviews a district court’s ruling on a motion for a new trial, or

motion for relief from judgment, for an abuse of discretion. *Palmer v. Spain*, 138 Idaho 798, 800, 69 P.3d 1059, 1061 (2003). Again, a court acts properly within its discretion when it recognizes the issue as one of discretion, acts within the bounds of the law, and reaches its decision through an exercise of reason. *Reed v. Reed*, 137 Idaho 53, 57, 44 P.3d 1108, 1112 (2002).

In the underlying motion for a new trial, Jim Hahaj argued that he should be granted a new trial because Judge Wayman abused his discretion by: (1) ignoring the wishes of the parties' child and by considering the letters Jim Hahaj wrote to the children; (2) not allowing Jim Hahaj to establish Michele Hahaj's animosity towards him during his examination of her; and (3) by assuming Megan's state of mind. He also claimed that he was surprised when Michele Hahaj did not call Ms. Jaeger as a witness. All of these were recognized by Judge Wayman. Order Denying Motion to Set Aside Judgment and for a New Trial. Judge Wayman then discussed these in detail. *Id.*, pp. 4-6. This Court has already discussed the merits of these arguments above.

In his memorandum order, Judge Wayman identified the standards which motions for a new trial brought under I.R.C.P. 59 must meet. *Id.*, p. 3. In identifying these standards, Judge Wayman recognized that the issue was one of discretion, and that these standards were those by which Jim Hahaj's arguments would be measured. He then proceeded to analyze Jim Hahaj's arguments with results identical to those reached above. *Id.*, pp. 4-5. Judge Wayman acted within the law in denying the motion for a new trial, and did so through an exercise of reason. If Jim Hahaj were appealing Judge Wayman's Order Denying Motion to Set Aside Judgment and for a New Trial, it would be affirmed. As couched by Jim Hahaj on appeal, Judge Wayman's Order Denying Motion to Set Aside Judgment and for a New Trial provides absolutely no evidence of bias or misconduct.

**V. CONCLUSION AND ORDER.**

On his appeal, Jim Hahaj has not shown that Judge Wayman abused his discretion, showed bias, or exhibited misconduct during the course of and in denying Jim Hahaj's third Motion to Modify. Accordingly;

IT IS HEREBY ORDERED that Judge Wayman's September 16, 2008, Order Denying Motion for Modification is AFFIRMED.

Entered this 13<sup>th</sup> day of August, 2009.

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

**Certificate of Service**

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

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Hon. Scott Wayman

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