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

JACK BACHMEIER, Plaintiff/Appellant, vs. SUSAN BACHMEIER, Defendant/Respondent. and STATE OF IDAHO, Department of Health and Welfare, Intervenor.	)	**CASE NO. CV-92-90693** MEMORANDUM OPINION IN RE: APPEAL

Plaintiff/Appellant appeals from a decision of the Magistrate Judge denying his Petition for Modification of Custody. Remanded as set forth herein.

Jack Bachmeier, *Pro Se*, for the Plaintiff/Appellant.

Ruth J. Fullwiler, Attorney at Law, for the Defendant/Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

Jack Bachmeier and Susan Bachmeier were formerly husband and wife. A Decree of Divorce was entered on July 13, 1992. ***See Bachmeier v. Bachmeier***, Kootenai County Case No. CV-92-90693.

Jack and Susan are the parents of three children: Joy Katharine Bachmeier, Brook Star Bachmeier, and Jesse Colemen Bachmeier.[1] Pursuant to the Decree of Divorce, Jack and Susan had joint custody and Jack was awarded primary physical custody of Joy and Brook; Jack and Susan had joint custody and the parties had primary physical custody of Jesse in alternate years. Neither party had any child support payment obligation under the Decree of Divorce.

In December of 1993, Susan filed a petition for modification in the Superior Court in Spokane County, Washington. At the time that Susan filed the petition, she was residing in the State of Washington and had been residing there for at least six months preceding the filing of the petition.[2]

On January 2, 1996, an ORDER RE MODIFICATION OF CUSTODY DECREE OR PARENTING PLAN was entered in the Superior Court in Spokane County, Washington. ***See In re the Marriage of: Susan Bachmeier and Jack Bachmeier***, Spokane County Superior Court Case No. 93-3-02555-4. The Superior Court modified the custody decree so that Jesse would reside with Jack based upon a finding that it was in Jesse's best interest. This finding was based upon the parents' agreement to the modification and the fact that Susan had

[1] Joy's date of birth was October 23, 1983, Brook's date of birth was February 2, 1985, and Jesse's date of birth was May 3, 1989.

[2] Jesse lived with Susan in Cheney, Washington from June 15, 1992, until September1, 1982 and in Spokane, Washington from September 1, 1992 to the time of the filing of the petition in December of 1993.

moved her residence to North Carolina - the previous order calling for alternating year rotation for Jessie's primary residence was not in his best interest. Attached to the Order was a detailed Parenting Plan that provided, in part, that the children would reside with Jack. The Parenting Plan was signed by both parents through their attorneys.

In November of 1999, the State of Idaho Department of Health and Welfare filed a Petition to Intervene and Modify Child Support in this case. The Petition sought to have Susan pay child support to Jack for the benefit of her minor children. The Petition did not mention the Washington Order. Susan filed a Motion to Dismiss. The Motion to Dismiss was based, in part, on jurisdictional grounds because of the action taken in Washington. On May 23, 2000, the State of Idaho filed the Washington Order as a foreign judgment.

At a Hearing on November 8, 2000, the Magistrate Judge ruled that the Washington Order was invalid because it was entered without permission of the Idaho court and, as long as the Plaintiff was in Idaho, jurisdiction would remain in the Idaho court. Susan withdrew her Motion to Dismiss.

An Amended Petition to Intervene and Modify Child Support was filed on November 13, 2000. The Amended Petition incorporated the Washington Order. In her Response to Petition to Intervene and Modify Child Support, Susan denied that the Washington Order was a valid and enforceable order based upon the Magistrate Judge's ruling at the previous Hearing.

Jack joined with the State of Idaho. In his Joinder, he stated that the parties had handled custody substantially in accordance with the Washington

Final Parenting Plan since its entry on January 2, 1996. He noted that the Final Parenting Plan provided that "all future actions concerning the parties and/or their children shall be brought in Kootenai County, Idaho." He also argued that, even if the Washington court did not have jurisdiction to modify the original Divorce Decree, the parties had entered into an agreement or stipulation to modify the parenting arrangements.

On December 8, 2000, the matter proceeded to a Court Trial. The Magistrate Judge again declined jurisdiction of the Washington Order. On January 31, 2001, an AMENDED ORDER was entered allowing the State of Idaho to intervene. Susan was ordered to pay child support for the three children.[3]

On March 19, 2001, Jack filed a MOTION TO ENFORCE FOREIGN DECREE AND/OR MODIFY CUSTODY. A Hearing was held on Jack's Motion to enforce the Washington Order on March 29, 2001. The Magistrate Judge held that he considered the ruling on November 8th to be "a holding" and the "law of the case" so that it was "res judicata as to that issue." Transcript, p 24. An Order denying Jack's Motion was entered on April 16, 2001.

On June 18, 2001, a Court Trial commenced on Jack's Motion to Modify Custody. Both Jack and Susan testified. Susan testified to the following:

> Last summer [Joy] was uh, probably with me about two weeks and she came to me and she was complaining of a vaginal infection. Uh, I said, "Well, we need to make a doctor's appointment right away." Well, she wanted to call Sarah first to make sure that it was okay with the Lord, she was worried about losing her virginity in this examination. Uh, she tried to call Sarah, Sarah wasn't there and so we went to the doctor's. The

[3] The Amended Order acknowledges the original Decree of Divorce, but it does not acknowledge the Order of Modification from the Superior Court of Washington. The written Amended Order does not directly address the jurisdictional issue. This was a judgment.

> doctor examined her, basically explained all the things that I explained to her previously. Um, made some recommendations to her and gave her some medications. And then, of course, when Joy got back she called Sarah again, and she was just saying, "I just wanted to make sure it was gonna be okay with the Lord."

Transcript, pp. 140-141. At the conclusion, the Magistrate Judge stated as follows:

> Well, there's no doubt there's – that there's been a substantial material change in circumstances here. The remarriage of the father in and of itself by Idaho case law establishes that. The age of the children are as sufficiently attenuated to the extent that that is a substantial material change in circumstances. The movement of the mother out-of-state and across the country is a substantial material change in circumstances. There's probably a couple others in there, but I'm not gonna go – it's not necessary for me to go any further than that.
>
> . . .
>
> These kinds of cases turn on rather – there are certain points in a case where the Court comes to conclusions that give the Court the clue on how to decide the case.
>
> When a young lady has to call her stepmother to make sure that her religious belief will allow her to be examined by a doctor for a yeast infection. There's something wrong there, folks. That's what the testimony is. That has not been rebutted. She doesn't call her father, who is the – her custodian. And I can see probably a reason for that. But her mother tells her, well, we're gonna take you to the doctor and we'll get this cleared up. Gotta check with step-mom to find out if the Lord will allow it.
>
> I'm a member of the largest Christian church in the world. I have never gone to a public school [-] grade school, high school, college and law school have all been at Christian schools. I don't want to involve religion in this, but that's the way it played out. There's something wrong there.
>
> There's been testimony here that, and the Court has already decided that there's been a substantial material change in circumstances, I cannot find from the evidence that it's in the best interest of the children to modify the decree of divorce entered by this Court . . . in 1992.
>
> To cut the visitation back to two weeks is not supported by the evidence. To cut the visitation back to four weeks is not supported by the evidence.
>
> Jesse calling and saying "I'm bored." I would be hard pressed to take a poll of every child in this city, of that approximate age, and have them tell me that throughout the summer that they were never bored. Kids are always bored in the summer. It happens every day. . . .
>
> Jesse calls up and says "it's boring here," well, yeah, it probably is, but it ain't gonna be any different at home. You get about four weeks into the summer and kids get bored. They've done all the fun things and then they have to just get through life.
>
> . . .
>
> For the following reasons I'll deny the . . . plaintiff's petition, for those reasons, the mentioned reasons.
>
> . . .

> The previous decree is in effect. In case we misunderstand each other, the entire child custody arrangement is in effect of the previous decree.

Transcript, pp. 175-179.

On June 27, 2001, an Order denying Jack's Motion was entered. The Trial Court found that "there was not enough evidence to justify a modification of the Decree of Divorce . . . ."

Jack filed a NOTICE OF APPEAL. In support of his Appeal, he has submitted a Memorandum and a Reply Brief. He has also filed an Amended Affidavit of Joy Bachmeier. Susan has submitted Respondent's Brief in opposition to the Appeal.

ISSUES ON APPEAL

1. Did the Magistrate Court err in determining that the Idaho court had jurisdiction and that the Washington Order, including the Final Parenting Plan, was invalid and of no effect for lack of jurisdiction?

2. Did the Magistrate Court err in denying Plaintiff/Appellant's Motion to Modify?

3. Did the Plaintiff/Appellant suffer prejudice because the transcript in the record is inaccurate?

4. Did the Magistrate Court err by refusing to allow Joy Bachmeier to testify?

STANDARDS ON APPEAL

The instant case involves an Appeal from the Magistrate's Division to the District Court. In an appellate review of a magistrate's decision, the district court must review the case on the record and determine the appeal in the same manner and upon the same standards as an appeal from the district court to the Supreme Court. ***Rule 83(u), Idaho Rules of Civil Procedure***.

The role of the district court in reviewing a finding of fact is limited. The district court does not weigh the evidence or substitute its view of the facts for the view of the magistrate. The district court must determine whether the record contains substantial evidence to support the magistrate's findings of fact. If based upon substantial and competent, although conflicting, evidence, the finding cannot be deemed clearly erroneous and will not be set aside. Evidence is "substantial" if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven. ***Ortiz v. Department of Health and Welfare***, 113 Idaho 682, 747 P.2d 91 (Ct.App. 1987); ***Allison v. Bradley***, 107 Idaho 860, 693 P.2d 1062 (Ct.App. 1984).

If those findings are so supported, then the district court must turn to the conclusions of law. If the conclusions of law demonstrate the proper application of legal principles to the facts found, the district court will affirm the magistrate's judgment. ***Balderson v. Balderson***, 127 Idaho 48, 896 P.2d 956 (1996); ***McNelis v. McNelis***, 119 Idaho 349, 806 P.2d 442 (1991).

DISCUSSION

I

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE WASHINGTON ORDER WAS INVALID

The Trial Court held that the Idaho court had jurisdiction and that the Washington Order, including the Final Parenting Plan, was invalid for lack of jurisdiction. The 1992 Idaho Divorce Decree provided that Jesse would reside with the parties in alternating years while the Washington Order provided that Jesse would reside with Jack.

Jack contends that the Superior Court of Washington had jurisdiction over the parties to modify the 1992 Idaho Divorce Decree and that the Magistrate Judge erred in refusing to give effect to the provisions of the Washington Order. On the other hand, Susan contends that the Trial Court did not err by refusing to recognize the Washington Order but that, in any event, Jack's Appeal on this issue is untimely.

The record reflects that the jurisdictional issue was a part of the proceedings on three occasions: (1) at the Hearing on November 8, 2002,[4] (2) at the Hearing on December 8, 2002, and (3) at the Hearing on March 29, 2002. The first two Hearings involved issues relating to the State's intervention and the State's case for child support; an Amended Order completing the State's case was filed on January 31, 2001. After the last Hearing, a written Order On Plaintiff's Motion to Enforce Foreign Decree and/or Modify Custody was entered on April 16, 2002. This written Order specifically denied Plaintiff's Motion to enforce the Washington Order in Jack's custody modification case.

According to Susan, Jack should have appealed the issue of jurisdiction after the Amended Order was entered. Susan argues that, pursuant to the Idaho Appellate Rules, the time for filing an appeal is forty-two days from the filing of the final judgment, which expired on March 14, 2001. The instant Appeal was not filed by Jack until July 9, 2001. Therefore, according to Susan, the Appeal is untimely.

[4] Susan's Motion to Dismiss the State's Petition to Intervene and Modify Child Support was deemed to be withdrawn following the Magistrate Judge's ruling on the jurisidictional issue.

While it is not crystal clear, it can be determined that the holding on the jurisdictional issue was incorporated into the Amended Order. The Trial Court could not have proceeded to make a decision on child support without deciding the jurisdictional issue. Furthermore, the decision with regard to child support was based upon a recognition of the provisions of the 1992 Divorce Decree and a failure to recognize the provisions of the Washington Order. The Amended Order was a final order or judgment with regard to the State's Petition. Therefore, Jack should have appealed the jurisdictional issue in a timely fashion after the Amended Order was entered. The Appeal on the jurisdictional issue is untimely.

Even if the Appeal was not untimely with regard to the jurisdiction of the Idaho court, a review of the record indicates that the Trial Court did not err in taking jurisdiction based upon the law as applied to the facts of this case. ***See Idaho Code §§ 32-709 and 32-717; see also*** Uniform Child Custody Jurisdiction Act, ***Idaho Code §§ 32-11-101, et seq.*** (formerly ***Idaho Code §§ 32-1001, et seq.***

II

THE MATTER MUST BE REMANDED FOR FURTHER FINDINGS ON THE PLAINTIFF/APPELLANT'S MOTION TO MODIFY CUSTODY

Jack filed a Motion to Modify Custody. The 1992 Divorce Decree had included provisions for primary physical custody of the daughters with Jack, primary physical custody of the son in alternating years with both parents, summer visitation for a period of eight (8) weeks with Susan, and liberal visitation for the parent not having primary physical custody of the children. Jack sought to

modify that child custody to provide for primary physical custody of Jesse with him and summer visitation of the children with Susan for a period of two (2) weeks or possibly as much as four (4) weeks.

At the conclusion of the Court Trial on the Motion, counsel for the parties presented closing arguments. Those arguments addressed the factors set forth in ***Idaho Code § 32-717***. Then the Trial Court delivered its decision. The Trial Court clearly stated that there had been a substantial material change in circumstances in that Jack had remarried, the children had grown older, and Susan had moved across the country. The Trial Court then addressed the circumstances surrounding Joy's visit to the doctor, including a reference to religion, and concluded that it was not in the best interest of the children to modify the custody provisions of the 1992 Decree of Divorce. Finally, the Trial Court decided not to modify the summer visitation schedule even though evidence had been presented that Jesse was bored during the summer visit with Susan. For the above stated reasons, the Trial Court denied Jack's petition to modify.

The ORDER ON PLAINTIFF'S MOTION TO MODIFY CUSTODY was filed on June 27, 2001. The Order simply stated that the court found that "there was not enough evidence to justify a modification of the Decree of Divorce and reduction of visitation . . . ."

Jack appeals on grounds that there was error in denying his Motion to Modify. He contends that there was a material and substantial change of

circumstances, which would support a modification of child custody. He further contends that it was error to base the decision to modify upon religious grounds.

A. <u>The Law Regarding Modification of Child Custody</u>

The determination of whether to modify child custody and visitation is left to the sound discretion of the trial court. The appellate court will not substitute its judgment for that of the trial court except in cases where the record reflects a clear abuse of that discretion. The standard for reviewing an abuse of discretion is (1) whether the trial court correctly perceived the issue as one of discretion, (2) whether the trial court acted within the outer bounds of that discretion and consistent with the applicable law, and (3) whether the trial court reached its decision by an exercise of reason. An abuse of discretion occurs where there is insufficient evidence to support the trial court's finding regarding the best interest of the child, where the trial court misapplies the law, or where the trial court fails to reach its decision by an exercise of reason. ***Ratliff v. Ratliff***, 129 Idaho 422, 925 P.2d 1121 (1996); ***Osteraas v. Osteraas***, 124 Idaho 350, 859 P.2d 948 (1993); ***Levin v. Levin***, 122 Idaho 583, 836 P.2d 529 (1992); ***Biggers v. Biggers***, 103 Idaho 550, 650 P.2d 692 (1982).

The burden of justifying the change is upon the party seeking modification of child custody. First, the party seeking to modify a child custody order must demonstrate that a material, substantial change of circumstances has occurred since the original custody order was entered. Once this threshold question has been answered in the affirmative, the paramount concern is the best interest of

the child as determined pursuant to ***Idaho Code § 32-717***. ***Osteraas v. Osteraas, supra; Levin v. Levin, supra; Biggers v. Biggers, supra***.

In making a determination regarding child custody and the best interest of the child, the court must consider all relevant factors. ***Idaho Code § 32-717***. The statute contains a non-exhaustive list of factors that may be considered in reaching a decision. ***See Brownson v. Allen***, 134 Idaho 60, 995 P.2d 830 (2000).

As a general rule, the courts must avoid comparing one religion to another and, in custody disputes, courts should "refrain from entering the tangled web of religion altogether." ***Osteraas v. Osteraas***, 124 Idaho at 354. According to the Idaho Supreme Court,

> [W]here the trial court does not follow the generally established rule of noninterference in religious matters in child custody cases without an affirmative showing of compelling reasons for such action, we are of the opinion that this is tantamount to a manifest abuse of discretion. (Quoting from ***Munoz v. Munoz***, 79 Wash.2d 810, 489 P.2d 1133, 1135 (1971).

Osteraas v. Osteraas, 124 Idaho at 354. In ***Osteraas***, the Idaho Supreme Court relied upon ***Compton v. Gilmore***, 98 Idaho 190, 560 P.2d 861 (1977), the U.S. CONST. Amend. I (violation of the free exercise and establishment of religion clauses), and art.1, § 4 of the Idaho Constitution. In ***Osteraas,*** the trial court abused its discretion in removing primary physical custody from the mother based in part on the court's perception of the mother's lack of religiousness. ***Cf. Meredith v. Meredith***, 91 Idaho 898, 434 P.2d 116 (1967) (there was other evidence to support the trial court's findings and conclusions so that the trial

court's error in admitting evidence concerning the defendant's religion was harmless error under a harmless error test). Because of the appellate court's inability to determine from the record if the error was harmless in ***Osteraas***, the matter was remanded to the trial court for further proceedings.

In ***Compton v. Gilmore,*** 98 Idaho 190, 560 P.2d 861 (1977), the Idaho Supreme Court indicated that an exception to the general rule of non-interference might exist if there is a clear affirmative showing that the conflicting religious beliefs affect the "general welfare of the child" or that there are "compelling reasons" found in situations where "there is a serious danger to the life or health of a child as a result of the religious views of a parent." ***Compton v. Gilmore***, 98 Idaho at 192.

See Religion as Factor in Child Custody and Visitation Cases, ***22 A.L.R.4th 971*** (1983); 24A Am.Jur.2d ***Divorce and Separation*** § 935; Child Custody Entangled with Religion: *Osteraas v. Osteraas*, ***31 Idaho L. Rev. 339*** (1994).

In deciding a child's custody, it is necessary that findings of fact and conclusions of law be made by the trial court and included in the record on appeal. This can include the factors that are relevant to the trial court's findings and conclusions. ***Peosy v. Bunney***, 98 Idaho 258, 561 P.2d 400 (1977). ***Compton v. Gilmore, supra; Rule 52(a)***.

B. <u>Application of the Law to the Facts of This Case</u>

In this case, Jack was seeking modification of child custody and visitation as set forth in the 1992 Divorce Decree. Therefore, the burden was upon Jack to

demonstrate that a material, substantial change of circumstances had occurred since the previous custody order was entered.

The Trial Court found that there had been a substantial material change of circumstances based upon Jack's remarriage, Susan's move across the country, and the older ages of the children. Therefore, the threshold question was answered affirmatively.

That finding alone does not, however, conclude the matter or dictate a change of custody. The next question is the best interest of the child, which is paramount. A review of the record indicates that, at the Court Trial, evidence pertaining to the factors set forth in ***Idaho Code § 32-717*** was presented by both parties. At the conclusion of the Court Trial, the parties' counsel presented closing arguments and addressed the statutory factors.

Jack was the only witness for his Motion to Modify. He testified that Jesse had struggled in school, had been held back in the fourth grade, and that he had improved since he repeated the grade. Jack was critical of Susan's parenting. Religion was first mentioned by Jack. Transcript, p. 60-61. Susan presented testimony from Dr. Mary Dietzen, a psychologist with a focus on children. Dr. Dietzen testified that, at the current ages of the children, the "generic" child needs frequent contact with both parents. Dr. Dietzen had evaluated the custodial arrangements for the children on more than one occasion. Dr. Dietzen found that Jesse was emotionally below his age; at the time of her earlier evaluation in 1994, she recommended that he reside with Susan. Susan testified that she felt Jack had tried to undermine her efforts with her children. She

related incidents where Jack refused to send one of the children for summer vacation, where Jack refused to allow them to have a computer for e-mail if she bought it, and where Joy wanted to call her step-mother about going to the doctor. Although Susan has a master's degree in education and is a teacher, her efforts to educate her children met with resistance.

When delivering the oral decision, the Trial Court ordered the parties to read ***Unexpected Legacy of Divorce*** by Judith Wallerstein. With regard to the custody modification, the case turned upon an incident involving a religious connotation. Among other things, the Trial Court could have made a finding from the evidence presented as to the interactions and interrelationships of the children, particularly Jesse, with their parents, including the need to have interaction and a relationship with both parents. The Trial Court could also have made a finding concerning Jesse's adjustment to his school. Indeed, the intended focus of the comments may have been upon these factors. The Trial Court might have addressed the religious issue in terms of the general welfare of the children or a serious danger to their lives or health as a result of the religious views.

Because there are limited findings of fact and conclusions of law, however, it is not possible to determine from the record of the Trial Court's decision if there was an abuse of discretion because the decision was based upon an impermissible entanglement with religious or if the error was harmless. Therefore, the matter must be remanded to the Trial Court for further proceedings.

Upon remand, it is not necessary for the Trial Court to address the issue of a substantial material change of circumstances. This issue has been clearly decided. With regard to the issue of the best interests of the children, the Trial Court may make its findings of fact and conclusions of law based upon the evidence in the present record or the Trial Court may request that the record be supplemented if it finds that there is insufficient evidence upon which to base a decision.

III

PLAINTIFF/APPELLANT HAS NOT SUFFERED PREJUDICE BASED UPON AN INACCURATE TRANSCRIPT

Initially, it must be noted that this issue may be moot based upon the decision above. It will be addressed here, however, so that the question of inaccuracy in the transcripts is addressed and put to rest.

Jack alleges that he has suffered prejudice because the transcript of the court proceedings below is inaccurate. In his Rebuttal Brief in Support of Motion for Appeal, he alleges that the court transcript was "watered-down" and that the "court tapes of record were held back and changed by Judge Marano . . . ."

The settlement and filing of a transcript is addressed in ***Rule 83(o), Idaho Rules of Civil Procedure***. The parties have twenty-one (21) days after the date of the service of the transcript within which to file objections to the transcript, including requests for corrections, additions or deletions. If no objection is filed within that period, the transcript is deemed settled.

In this case, the transcripts were lodged in June and October of 2001.[5] The transcripts were deemed settled since there were no objections within the twenty-one day period; a Notice of Settling of Transcript on Appeal was filed on November 2, 2001. Jack did not make his complaints with regard to the transcript until the filing of his Rebuttal Brief on March 28, 2002. Therefore, any issue with regard to the transcripts is untimely.

Although Jack claims that changes in the court tapes were witnessed by several people who attended the hearings, there is no affidavit or any other admissible proof in the record to that effect. Therefore, Jack has not suffered any prejudice due to inaccurate transcripts.

IV

THERE WAS NO ERROR IN REFUSING TO ALLOW JOY BACHMEIER TO TESTIFY

Jack claims that error was committed when his daughter, Joy Bachmeier, was not permitted to testify. This claim arises from the statement by the Trial Court that there was something wrong when a young lady had to call her stepmother to make sure that her religious belief would allow her to be examined by a doctor for a yeast infection; the testimony to that effect was not rebutted.

The Court Trial on Plaintiff's Motion to Modify Custody commenced on June 18, 2001. At the beginning of the proceeding, the Trial Court ruled that the minor children would not be allowed to testify as witnesses in the child custody proceeding. At the time, Joy Bachmeier was seventeen (17) years old. It was represented that Joy would be able to testify as to "the living situation, living

[5] The first transcript of hearings was ordered before the Court Trial occurred and before this Appeal was taken.

arrangements and relationships in North Carolina with the mother." Transcript, p. 37. The reason given for barring the children from being witnesses was that it could be psychologically damaging to them. The Trial Court indicated that it would, however, allow hearsay of the children.

The first question to be decided is whether it was error to refuse to allow Joy to testify at the Court Trial. The general rule is that trial court decisions to admit or exclude evidence are reviewed under the abuse of discretion standard. ***Morris v. Thomson***, 130 Idaho 138, 937 P.2d 1212 (1997). There is no abuse of discretion and a ruling is not clearly erroneous if the trial court (a) recognized the issue as one of discretion, (b) acted inside the outer boundaries of its discretion, and (c) reached its decision by an exercise of reason. ***West v. Sonke,*** 132 Idaho 133, 968 P.2d 228 (1998). There is no error in a ruling that admits or excludes evidence unless a substantial right of a party is affected. ***L & L Furniture Mart, Inc. v. Boise Water Corporation***, 120 Idaho 107, 813 P.2d 918 (Ct.App. 1991). ***See also Rule 103, Idaho Rules of Evidence***.

It was not error to exclude testimony by Joy because the Trial Court had broad discretion to determine the admissibility of such evidence. The Trial Court recognized that the admissibility of testimony by the children was a matter of discretion. An opportunity was provided for other persons to testify as to the statements of the minor children, thus acting within the outer boundaries of the Trial Court's discretion. The reason was given for refusing to allow the children to be witnesses. Therefore, there was no abuse of discretion in refusing to allow Joy to testify as a witness at the Court Trial.

Furthermore, no substantial right was affected by the exclusion of Joy's testimony. The evidence indicates that the telephone call was attempted, but it was never completed because Joy was unable to reach her stepmother before she had to leave to go to the doctor. The evidence also indicates that Joy talked with her stepmother by telephone upon her return from the doctor. It was not error to refuse to allow Joy to testify since the information regarding the attempted telephone call and the telephone call was already in evidence. Even if Joy had testified, she would have been unable to rebut the testimony to the effect that she attempted to call her stepmother before she went to the doctor or that she telephoned her stepmother upon returning from the doctor. While it may have been impossible for Jack to rebut the allegations because he was not present, other persons such as the stepmother could have testified as to their own accounts and Joy's account of what actually happened. The Trial Court did not rule that the children were not taken to the doctor – the ruling went to the reliance upon the stepmother, rather than the mother, in such a delicate health matter and/or to seeking guidance upon religious grounds in order to make a decision as to whether to seek health care.

The second question that must be addressed is whether or not the Amended Affidavit of Joy Bachmeier in Support of Motion for Appeal can be considered here. It appears that this is an attempt to supplement the appellate record. According to ***Rule 83(q), Idaho Rules of Civil Procedure,*** and ***Rule 30, Idaho Appellate Rules***, augmentation to the record on appeal must be made by motion and served upon the other party. In this case, Jack has not followed the

proper procedure to augment the appellate record. Therefore, Joy's Affidavit cannot be considered on appeal.

In conclusion, there was no error in excluding the testimony of Joy Bachmeier as a witness at the Court Trial. Furthermore, her testimony by affidavit cannot be considered here.

CONCLUSION

Based on the foregoing discussion, the Appeal by Jack Bachmeier, Plaintiff/Appellant, has been decided and the matter shall be and hereby is remanded to the Trial Court for proceedings in accord with the foregoing.

DATED this _____ day of May, 2002.

_____
John Patrick Luster
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION IN RE: APPEAL has been mailed, postage prepaid, sent by interoffice mail, or sent by facsimile transmission on the _____ day of May, 2002, to the following:

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ALL FIRST DISTRICT COURT JUDGES

DANIEL J. ENGLISH
Clerk of the District Court

By: _____
Deputy Clerk