STATE OF IDAHO)
County of Kootenai)

FILED_____

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

Jolene Green,

Plaintiff,

vs.

Daniel R. Olson,

Defendant.

Case No. **CV 1998-6225**

MEMORANDUM DECISION AND ORDER ON APPEAL, AFFIRMING MAGISTRATE

I. BACKGROUND

This is an appeal from the Magistrate Court's decision on a child custody matter. The Notice of Appeal lists several items appealed from, some of which are not appealable orders, but essentially, this is an appeal from the Decree signed by Magistrate Judge Benjamin R. Simpson on March 23, 2001 and entered March 26, 2001.

Plaintiff and defendant were never married, yet had a child together. Plaintiff moved from northeastern Montana to Kootenai County before the child was born. Plaintiff filed suit in this action October 21, 1998, seeking to establish defendant's paternity of the child in dispute, and to establish custody, visitation, and child support orders. The defendant filed his answer and counterclaim on November 25, 1988, admitting paternity, and seeking primary physical custody in himself, with appropriate visitation and support orders.

On October 27, 1999, at the time set for trial on the above-referenced complaint and counterclaim, the parties recited on the record a stipulated resolution of the case. That stipulation was formalized in a decree entered January 21, 2000.

On March 21, 2000, plaintiff filed a petition for modification of the January 21, 2000, decree. On July 31, 2000, defendant filed his response to petitioner's petition for modification and counter-petition. On September 18, 2000, defendant filed his motion for primary physical custody. On October 13, 2000, the Magistrate Court issued its notice of trial.

Trial was held February 28, 2001. The Magistrate's Decree was dated March 23, 2001 and entered on March 26, 2001. On that same day, Plaintiff through her attorney filed her motion for reconsideration on March 26, 2001. Plaintiff filed her notice of appeal May 7, 2001. Hearing on plaintiff's motion for reconsideration was held November 1, 2001. That motion was denied. The matter is before the District Court on appeal. The matter was noticed for hearing before the undersigned on February 11, 2002, but the parties contacted the Court and indicated that the appeal may be decided upon the briefs and the record before the Court.

II. STANDARD OF REVIEW:

I.R.C.P. 83(u) provides the scope of appellate review on an appeal to the district court from the magistrate division. 83(u)(1) states that:

> Upon an appeal from the magistrate's division of the district court, not involving a trial de novo, the district court shall review the case on the record and determine the appeal as an appellate court in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court under the statutes and law of this state, and the appellate rules of the Supreme Court.

Questions of child custody are within the discretion of the trial court, and the Supreme Court will 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 where the evidence is insufficient to support a finding that the interest and welfare of the child will be best served by changing the custody of the child. *Strain v. Strain,* 95 Idaho 904, 523 P.2d 36 (1974). Therefore, the standard of review for the district court in reviewing the child custody decisions of the magistrate court is an abuse of discretion standard.

III. DISCUSSION.

A. Evidence or lack thereof submitted at trial

Plaintiff alleges that the Magistrate Court committed error by allowing inadmissible evidence into the trial record. Nothing in the trial record supports this allegation. This was a bench trial, and plaintiff mistakenly argues that just because an offer to admit evidence is made, that this in itself is automatic reversible error. The trial record clearly shows that the magistrate judge looked at the evidence but did not allow the evidence to be admitted in the two instances plaintiff alleges were reversible error.

The specific instances plaintiff cited are: (1) Whether the magistrate judge erred in allowing as admissible evidence a letter from plaintiff's former attorney to the defendant's former attorney; and (2) Whether the magistrate judge erred in allowing evidence/statements that had occurred in mediation. The alleged attorney's letter was never admitted into evidence, and neither were the statements from mediation. Thus, there is no basis for appeal on these two grounds.

The Magistrate Court did allow admissible evidence into the record that was brought up before the final decree on January 21, 2000. However, this evidence was used in the context of considering all the circumstances that concerned the custody of the child at issue.

In *Stewart v. Stewart,* 86 Idaho 108, 383 P.2d 617 (1963), the Idaho Supreme Court faced a similar case to the one at hand. In *Stewart*, the defendant father alleged that the trial court erred in not allowing him to bring before the Court testimony and information regarding the conditions, circumstances and real causes of the divorce between the parties and limiting all testimony to facts and circumstances which had occurred subsequent to the divorce decree being entered, when it was apparent from the record that this divorce decree had been taken by default and that there had been no trial on the issue of the merits in the custody of the minor children. The Idaho Supreme Court held that while the general rule of res judicata affects judgments of custody, support and other similar judgments, the foregoing general rule is not to be applied strictly in all determinations affecting the welfare of children of divorced parents. *Id.* This is because the jurisdiction of the court continues after divorce for the protection of the welfare of such children. *Id.* The Court further stated that, "where facts, affecting their welfare, existing at the time of the divorce or order awarding custody, are not called to the attention of the court, and particularly in default cases where the issues affecting custody have not been fully tried, the

court upon a proper application may consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination of custody." *Id.* at 114. The idea that a court should allow and consider all evidence relevant to a child's interest, not just that evidence which has emerged since previous orders in determining whether to modify custody provision of a divorce decree, has been upheld by the Idaho Supreme Court in other cases. *Poesy v. Bunney*, 98 Idaho 258, 561 P.2d 400 (1977).

Even though this case does not involve a divorce decree (because the parties were never married), the logic of *Stewart* applies. The parties in our case stipulated to the January 21, 2000, decree awarding joint legal custody and a support award, without going to trial. Evidence was never heard in a trial setting before the February 28, 2001, trial. It was appropriate then at the February 28, 2001, trial for the Magistrate Court to hear information that pre-dated the January 21, 2000, decree and information occurring after this decree. The trial, after all, did involve a custody award. There is no basis for appeal on this ground as well.

B. The propriety of the custody matter before the Magistrate Court

Plaintiff argues that the Magistrate Court erred in hearing defendant's motion for primary physical custody, filed September 18, 2001. This argument fails for three reasons. First, plaintiff herself filed a petition for modification. This opened the door for defendant's response and counter-claim. Even if plaintiff had correctly withdrawn her motion, which she didn't, she still cannot overcome the second and third problems in her argument. Second, defendant himself filed a motion for primary physical custody on September 18, 2001. While defendant's motion might have been procedurally unsound on its own (an assumption not made by the Court), plaintiff corrected any defect in the motion that might have existed by agreeing to go to trial, especially when the magistrate judge gave her the option of a continuance. Plaintiff's third argument alleging a violation of due process fails because plaintiff agreed to proceed with the trial even though she had the option given to her by the magistrate, of continuing in order to do more preparation or discovery. Timely notice and an opportunity to be heard are of the essence of due process, and are jurisdictional essentials of a valid judgment. *Leonard v. Leonard*, 88 Idaho 485, 401 P.2d 541 (1965). Plaintiff has shown nothing that casts doubt on whether or not she had timely notice, or the chance to cure notice, and an opportunity to be heard. Therefore, there is no basis for appeal on these grounds.

C. The Issue of Day Care Expenses Is Not Before the Court on Appeal.

In the March 26, 2001 Decree, the Magistrate did not fail to address work-related day care expenses. The March 26, 2001, decree states, issues relative to child support including day care costs, were deferred for resolution between the parties and/or at trial at a later date. That trial has yet to take place and thus, is not the proper subject for an appeal. There has been no final order for this Court to hear on appeal regarding the day care expenses. Plaintiff must first notice a hearing on the issue with the Magistrate. There is no basis on appeal on this ground.

D. There Was Substantial Competent Evidence to Support a Finding That the Interest and Welfare of the Child Will Be Best Served by Changing the Custody of the Child.

Essentially, on appellate review, this is an abuse of discretion standard.

The plaintiff argues that the magistrate judge failed to consider the mental and emotional well being of the three (3) your old child when he ordered that the minor child should have one-month-on and one-month-off visitation periods with his parents. She bases this argument on the fact that the magistrate judge did not consider expert testimony at the trial. In reading the trial transcript, it becomes apparent that the magistrate judge based his custody order on the fact that in the court's eyes, a permanent and material change of circumstances had occurred since the date of the January 20, 2000, decree. Specifically, the Magistrate noted: "you folks don't get along, you don't agree at all. You're both doing things which the Court perceives to be contrary to the best interest of the boy. Therefore, the threshold has been met." Transcript, Court Trial p. 237, Ll. 15-18. The biggest concern for the Court was the amount of time both parents had to spend interacting with the other. The one-month-on and one-month-off visitation schedule was specifically crafted with this in mind. *Id.* at p. 242, Ll. 8-11. The Court also based its custody order on the "need to promote continuity and stability in the life of the child" (*Id.* at p. 238, Ll. 9-10) and that "the shorter exchanges do not allow Tyler to fully climatize to each home." *Id.* at p. 238, Ll 15-17. This is the pertinent evidence that was relied upon by the Magistrate judge.

The question that this Court must answer is whether or not the Magistrate judge abused his discretion in changing the custody arrangement of the child, due to insufficient evidence to support a finding that the interest and welfare of the child will be best served by changing the

custody of the child. In answering this question, we must keep in mind that the Magistrate judge has broad discretion in deciding issues of child custody. However, the magistrate shall consider all relevant factors, which include those in I.C. §32-717, when deciding custody orders or the modification of custody orders. I.C. §32-317 lists those factors as:

1. The wishes of the child's parent or parents as to his or her custody;
2. The wishes of the child as to his or her custodian;
3. The interaction and interrelationship of the child with his or her parent or parents, and his or her siblings;
4. The child's adjustments to his or her home, school, and community;
5. The mental and physical health and integrity of all individuals involved;
6. The need to promote continuity and stability in the life of the child; and
7. Domestic violence as defined in section 39-6303, I.C. whether or not in the presence of the child.

In looking at this list, the Magistrate judge cited the need to promote continuity and stability in the life of the child, and the fact that shorter exchanges do not allow Tyler to fully climatize to each home. In reaching this decision, the Magistrate judge did not rely on any expert testimony about the best way to promote continuity and stability, while simultaneously allowing the child to build a relationship with both parents. But that is not the fault of the Magistrate. The fact is, there was **no such evidence offered at trial**. The first time any of this information came to the attention of the Magistrate Judge was when an unsworn article from what appears to be a psychological treatise, was attached as Exhibit A to plaintiff's motion for reconsideration. That does not place this evidence before the Magistrate Court[1], nor does it place the evidence before the District Court on appeal. Attached to Petitioner's Appellate Brief is a July 18, 2001 letter from a Lisa Christian, Ph.D, again, unsworn. It is unknown if the Magistrate Court reviewed the letter, but it certainly does not appear to be in evidence before the Magistrate Court, and is not in evidence before the District Court on appeal. There is no basis for appeal on this ground.

The District Court is certainly aware that the best interest of the child is paramount. However, due to the fact that this new material (Exhibit A attached to the Motion for Reconsideration and the Christian letter) was not offered at trial, there is no basis for appeal.

[1] The Clerk's minutes of the November 1, 2001 hearing on Plaintiff's Motion for Reconsideration shows the Magistrate stated the "Court does not review ex parte report".

While an evidentiary hearing before the Magistrate Judge may certainly be warranted in the future to present evidence and fully analyze what type of custody arrangement for a small three year old child would be in his best interest, the District Court on appeal cannot say that the Magistrate Court abused its discretion. Based on the evidence the Magistrate had before him at trial, there is no abuse of discretion. While the main reason for the present custody arrangement was to limit contact between the parents, this also appears to be the Magistrate's reason why this arrangement was in the child's best interest, and that is not an abuse of discretion.

The parties still have a remedy on the custody issue. The Magistrate has continuing jurisdiction to hear custody issues. While the Magistrate stated in his March 23, 2001 Decree that "This order shall remain in effect until Tylor enters the first grade", certainly the Magistrate will hear evidence of changed circumstances. One comment on changed circumstances. Even if the letter of Lisa Christian, Ph.D. was properly before the Magistrate, it does not set forth changed circumstances. That letter is vague and does not make any specific conclusions as to Tylor's situation ("…I would infer that Ms. Broderson is Tylor's primary attachment figure…", "…separation from the primary attachment figure for more than 12 hours can be extremely distressing…" (underlining added). However, if there were competent testimony that the present custody arrangement was having an adverse effect on Tylor, it would seem that the parties could take this matter up again with the Magistrate. It is hoped that the parties will not turn this into a battle of experts, and that they will realize that the paramount issue is what is in Tylor's best interests.

IT IS HEREBY ORDERED that the Decree of Magistrate Benjamin R. Simpson is AFFIRMED in all respects.

Entered this ____25th_____ day of November, 2002.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2002, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**
Suzanna L Graham	208.665.7079
Michael B. Hague	208.664.6338

_____
Merri Thorne, Deputy Clerk