

IDAHO DIVORCE LAW CASE REVIEW
Supplement, February 12, 2007-October 20, 2009

By
James A. Bevis,
Bevis, Thiry & Schindele, P.A.

This outline supplements case changes since February 12, 2007. New cases are cited by their Opinion No. when issued by the Courts of Appeal of Idaho. This outline is not meant to be a complete summary of all cases and issues and is not a substitute for a careful review of the cases cited.

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I. RELATIONSHIP BETWEEN SPOUSES.

E. Marriage Settlement and Property Settlement Agreements.

The doctrine of judicial estoppel applies in the context of a settlement stipulation placed upon the record under oath such that if a party obtains a final divorce resolving all issues the party is judicially estopped from adopting an inconsistent position thereafter, having taken advantage of the settlement. Heinze v. Bauer, 145 Idaho 232 (S.C. 2008).

II. JURISDICTION.

I. Contempt. A court's contempt sanction is not limited to imprisonment or a fine but includes the power to compel obedience to its judgment, orders and process, including an order that a party continue to abide by the terms of a judgment. Steiner v. Gilbert, 144 Idaho 240 (S.C. 2007).

M. Rules of Construction.

(1) Ambiguity. If reference to extraneous evidence is required in order to explain a provision in a Decree the provision is ambiguous. Earlier Idaho appellate decisions address interpretation of a divorce decree as a matter of the party's intent, but such cases involved a divorce decree entered upon Stipulation of the parties or where the court adopted a marriage settlement agreement. Where ambiguous language in a decree was not simply adopted from the agreement of the parties the inquiry is to determine the intent of the court that entered the decree. Similarly, the parole evidence rule as doctrinal contract law does not apply to a court decree which was not based

upon a Stipulation or a Settlement Agreement. McKoon v. Hathaway, 146 Idaho 106 (C.A. 2008).

R. Summons. Lacking good cause, a Summons must be served within six months after filing a Complaint. Rule 4(a)(2), I.R.C.P. Good cause does not exist simply because the parties were engaged in settlement negotiations during said six month period. Campbell v. Reagan, 144 Idaho 254 (S.C. 2007).

S. Motion and Affidavit Practice. A Motion to be heard must be served no later than fourteen (14) days prior to the hearing and if supported by Affidavit, opposing Affidavits must be filed seven (7) days prior to the hearing. The same time periods apply to briefs, with the exception that a reply brief must be filed two (2) days prior to the hearing. Rule 7(b)(3), I.R.C.P. By Local Rule 8.5 in the Fourth Judicial District Motions for Temporary Orders in the Family Court set forth the required contents for Affidavits concerning custody, child support, spousal maintenance and attorneys fees, which time periods are controlled by Rule 7(b)(3), I.R.C.P. The Motion will be heard and decided exclusively on Affidavits, unless at the hearing the court determines that the parties should be allowed to present evidence thereby rescheduling the evidentiary hearing within a reasonable time thereafter.

III. CHILD CUSTODY.

A. Best Interest. It is presumed under Idaho law that a continuing relationship with both parents is in a child's best interest and that fundamental principle must be considered.

Hopper v. Hopper, 144 Idaho 624 (S.C. 2007), citing I.C., § 32-1007. The Court held that father's equal rights were prejudiced when the mother absconded with the child to another state in violation of I.C. § 18-4506. Hopper, supra.

(1) I.C. § 32-717(1). The enumerated factors in I.C., § 32-717(1) are both non-mandatory and non-exhaustive and a trial court is not asked simply to check off the considerations listed in the statute but rather is asked to consider in its discretion "all relevant factors". Nelson v. Nelson, 144 Idaho 710 (S.C. 2007). In Nelson, the lower court considered the dishonesty and aggression of the parents, where the children seemed more comfortable and which home was more stable. It is also proper to consider a visitation schedule which reduces the time the children spend riding in cars for purposes of visitation. When the parents cannot agree upon the time and place for visitation the court is required to define reasonable visitation in such detail as may be necessary. Nelson, supra. The best interest standard governs decisions regarding where a child will reside and it is the province of the trial court to determine the amount of time the child spends with each parent. Bartosz v. Jones, 146 Idaho 449 (S.C. 2008).

(2) Visitation. The establishment of a visitation schedule is a matter within the trial court's sound discretion and must be guided by a concern for the child's best interest so as to provide a satisfactory basis for preserving and fostering the child's relationship with the non-custodial parent. Danti v. Danti, 146 Idaho 929 (S.C. 2009). Since the trial court

thoroughly considered the children's best interest, the convenience of the parties, the parties' need for structure, and the costs of travel in establishing the visitation schedule, the visitation schedule set by the court was not an abuse of discretion. Danti v. Danti, supra.

(3) Joint Custody. Since the children's best interests are the paramount consideration, a court may decline to award joint custody if doing so will serve the children's best interest. I.C. § 32-717(B)(4). The Court must state in its decision the reasons for denial of an award of joint custody. Danti v. Danti, 146 Idaho 929 (S.C. 2009). In Danti the trial court awarded joint legal custody to the parents but awarded sole physical custody to the mother which award was upheld on appeal because the trial court meticulously analyzed each of the factors in I.C. § 32-717(1) and applied those factors to the evidence before it. Certain factors weighed more heavily, namely the need to promote continuity and stability for the children, the fact that mother had been the primary care giver for the children and her interrelationship with her children was more constructive, as well as the fact that the father involved the children directly in his conflict with the mother by "denigrating her character to them". Danti, supra.

Unless one parent is a habitual perpetrator of domestic violence, courts are required to apply Idaho's presumption that an award of joint custody is in the child's best interest. Danti v. Danti, 146 Idaho 929 (S.C. 2009), citing Hopper v. Hopper, 144 Idaho 624, 626 (S.C. 2007). The court may

make an award of joint physical custody, joint legal custody or both. In Danti the award of joint physical custody was not in the children's best interest and accordingly the presumption of joint physical custody was overcome. Addressing the citation in Hopper of I.C. § 32-1007, the court clarified that Section 32-1007 did not establish an exclusive set of conditions for awarding one parent sole physical custody. Danti, supra.

C. Fitness of Parent and Other Factors. In a termination of parental rights case it is relevant to consider past criminal conduct, and past and current efforts by a parent to maintain a parent-child relationship. State v. Jane Doe, 144 Idaho 839 (S.C. 2007). Where a parent is unable to discharge parental responsibilities because of mental illness that factor is relevant in a parental termination case. State Dept. of Health and Welfare v. Doe, 144 Idaho 312 (S.C. 2007). In a proceeding under the Child Protective Act the definition of "abuse" includes the situation where the child has failed "to thrive". Doe v. State of Idaho, 144 Idaho 420 (S.C. 2007).

F. Grandparents. Because the grandparents proceeded under the guardian statute in Does II v. Does III, 145 Idaho 337 (S.C. 2008), the Supreme Court did not face the issue of whether grandparents could obtain custody under I.C. § 32-717(3) where there was no divorce action filed between the parents.

Grandparent visitation after Troxel v. Granville, 530 U.S. 57 (2001) in Idaho and various states is discussed at length in the article attached hereto, authored by Philip M. Bevis. Also see Section III(O), Step-parent and Non-Parent Custody

Issues, in the Idaho Divorce Law Case Review, January 1991-February 12, 2007. A grandparent visitation statute similar to the one attached in the article was introduced in the Idaho legislature in 2009 but failed to clear committee and the committee requested that interested parties keep working on a proposed new grandparent visitation statute to present to the Idaho legislature in 2010.

K. Moving with Children. Where a parent through a criminal act takes a child from Idaho and files a false domestic violence claim, the court should order the return of the child to Idaho and not permit the child to remain outside the State of Idaho during the pendency of the case. Hopper v. Hopper, *supra*. In Schultz v. Schultz, 145 Idaho 859 (S.C. 2008) the wife fled to Oregon with the child because of domestic abuse by the husband. The trial court directed that she return with the child to Idaho under the penalty of requiring the child to live with the father if she did not return. Hopper did not remove the court's discretion in granting or denying a motion to return the child. Schultz, *supra*. The lower court committed error when it considered only the distance between the father and the child created by the move and held that a unilateral move is only one factor to consider when making a custody determination. Schultz v. Schultz, 145 Idaho 859 (S.C. 2008); Navarro v. Yonkers, 144 Idaho 882 (S.C. 2007). In short, Hopper does not mandate that a court require a parent to return to Idaho without the Court first determining whether such an order would serve the child's best interest. The holding in Hopper does not allow a parent to commit

a crime, tell falsehoods, and gain an advantage from the misconduct of fleeing the State. Schultz, supra.

Courts must take into account Idaho's presumption that it is in the child's best interest to maintain frequent and continuing contact with both parents unless one parent is a habitual perpetrator of domestic violence. Bartosz v. Jones, 146 Idaho 449 (S.C. 2008). When a move would violate an existing custody arrangement the party seeking to relocate with the child has the burden of proving that relocation is in the best interest of the child. Bartosz following Roberts v. Roberts, 138 Idaho 401 (S.C. 2002). Idaho Code, § 32-717 provides sufficient guidance in relocation cases and the Supreme Court has declined to adopt a presumption that it is in the child's best interest to relocate with the custodial parent. Bartosz, supra. An award of physical custody to a relocating parent may only be made if he or she proves that the move is in the child's best interests. Danti v. Danti, 146 Idaho 929 (S.C. 2009). Danti contains language supporting Hopper but distinguishes its applicability. For example, the court quoted "we reasoned [in Hopper] that allowing the child to stay in Montana would reward the mother for unlawful conduct". Hopper characterized the mother's conduct as a criminal act although there was no such finding in a criminal proceeding but now Mrs. Hopper's conduct is referred to as "unlawful conduct". Hopper was distinguished in Danti on the ground that in Hopper the domestic violence claim by the mother had been determined to be false. Danti also distinguished Hopper on the basis that Michelle Danti did not secret the children from her husband as occurred in Hopper.

A Hopper challenge failed in Johnson v. Johnson, 2009 Opinion No. 113 (September 8, 2009). The Hopper decision was entered after the lower court decision in Johnson dismissing the case in Idaho after the mother left the State and filed one day later in New York. Hopper hadn't been decided when the lower court issued its decision. The Supreme Court held that it could not consider the child custody jurisdiction issue on appeal because it had not been timely raised in the District Court.

A unilateral removal by one parent of a child is a factor properly considered under the best interest standard. Navarro v. Yonkers, 144 Idaho 882 (S.C. 2007). A right to travel claim failed in Bartosz v. Jones, 146 Idaho 449 (S.C. 2008), as the child's best interest is a compelling State interest. In Danti the court properly weighed the benefits the children would receive in moving to California against the benefits of having more regular contact with the father and found the benefits of having more contact with the father were "far outweighed by other considerations". Author note: Typically the most persuasive argument against a move is the fact that the parent remaining in Idaho would not be able to see his children as frequently and continuously, for example every other weekend, or have midweek visits. Trial courts in Idaho are free to consider factors that are not listed in I.C. § 32-717 but are not required to do so and as such in making its custody award the trial court is not obligated to consider Tropea factors if they are irrelevant. See: Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996). Interestingly, in Danti the court mentioned that the trial court properly

considered the emotional and financial well-being of the mother and the children if they were permitted to move to California.

In Allbright v. Allbright, 2009 Opinion No. 103 (S.C. August 21, 2009) in a direct appeal to the Supreme Court, the Supreme Court reversed an order preventing a divorced parent from moving out of State even without the child. In Idaho the mother exercised 54% and the father exercised 46% of the time with their daughter, age 3 at the time of divorce. Mother had remarried and her husband lost his employment in Idaho and found employment in Michigan. The lower court found that under the current custody and visitation schedule both parents saw their daughter daily and that she was thriving and was well-adjusted to her current environment including community and school. The lower court held that mother failed to prove that disrupting the current custody and visitation arrangement in order for her to move to Michigan was in her daughter's best interest. Mother would have also relocated with the child's step-sister to Michigan. The appeal did not involve whether mother should be allowed to move to Michigan with her daughter. I.C. § 32-717(1) does not authorize the court to decide the geographic area in which the parent or parents of the child shall live. The Court held that the trial Judge quoted language from Roberts v. Roberts, 138 Idaho 401 (S.C. 2002) out of context. The relocation issue in Roberts was not the relocation of a parent, but rather was a relocation of the children. Allbright, supra. The Allbright court also distinguished the court's use of Rule 65(g), I.R.C.P., stating that it does not grant a court authority to make any order it believes just. Apparently it is not proper to deny a

move of a parent to another State without the child even if by moving the Idaho close proximity, frequent and continuing contact and active participation of both parents would be adversely effected. Author note: The usual solution is to not restrict a parent's move from the State without the child, even though a new visitation schedule for the moving parent would be required.

R. Custodial Interference, Alienation of Affection, and Purposeful Exclusion. Unilateral moves by a spouse may establish a pattern of interference in the relationship between the other parent and child, a factor to be considered in a custody case. Bartosz v. Jones, 146 Idaho 449 (S.C. 2008).

T. Child Custody and Allegations of Abuse. A "habitual perpetrator" of domestic violence is defined as "customary, usual-recidivist" by a person who commits a crime or offense. In order for the court to find that a party was a habitual perpetrator of domestic violence there must be more than one incident of domestic violence before the court applies the presumption set forth in I.C. § Section 32-717(B)(5). Sexually abusing a family or household member fits the definition of domestic violence in I.C. § 39-6303(1) but physical abuse of someone who is not a family member or in a dating relationship would not be an act of domestic violence for purposes of the domestic violence statute, 32-717(B)(5). Michalk v. Michalk, 2009 Opinion No. 128 (S.C. October 20, 2009).

W. Constitutional Right. In the context of a termination of parental rights case, Idaho follows the long standing presumption that a natural parent should have custody of his or her children and before the State may sever that relationship

irrevocably, due process requires that the State support its allegations by at least clear and convincing evidence. State v. John Doe, 144 Idaho 534 (S.C. 2007).

A child custody decision that implicates a parent's constitutional rights will be upheld so long as the decision is necessary to ensure the child's best interest. Bartosz v. Jones, 146 Idaho 449 (S.C. 2008); Danti v. Danti, 146 Idaho 929 (S.C. 2009). Restricting a father's visits to a certain location, for example not beyond the Sacramento area, does not violate his constitutional right to care, custody and control of his children. Danti, supra.

AA. Informal Custody Trial and Child Support Trials. If the parties voluntarily agree, then the court may conduct an informal custody and child support trial, wherein the Idaho Rules of Evidence do not apply and where each party addresses the court or the court makes inquiry of the parties without lawyer questioning. Rule 16(p), Idaho Rules of Civil Procedure.

IV. CHILD SUPPORT.

K. Transportation Costs. It is proper to consider the costs of transportation in setting a child support award but the court need not reduce the award for all of the travel expenses incurred for a parent required to visit their children in a case where the court has approved a move from Idaho. Danti v. Danti, 146 Idaho 929 (S.C. 2009). A pro-rata sharing of transportation costs could be ordered.

M. Voluntary Under and Unemployment. Child support abated while obligor was incarcerated at the Idaho Penitentiary and the mother was required to bring an appropriate proceeding at the time following his release. Mackowiak v. Harris, 146 Idaho 864 (S.C. 2009).

P. Trade-Business Expenses. In Olson v. Montoya, 2009 Opinion No. 58 (C.A. August 14, 2009), the father after constructing an office building obtained take out financing for the construction loan and raised the rent paid from his solely owned companies occupying the building with other tenants to himself from \$6,500 to \$20,000 per month in order to cover the take out loan, thereby allegedly reducing the amount of income for child support. The court calculated child support based on the expense as necessary and reasonable and that the methodology was not employed to deliberately conceal income and accordingly the lower court decision was affirmed as a proper exercise of discretion and application of law. The Idaho Child Support Guidelines, Section 6(a)(2), found at I.R.C.P. 6(c)(6), states in relevant part:

"For rents, royalties, or income derived from a trade or business (whether carried on as a sole proprietorship, partnership or closely held corporation) gross income is defined as gross receipts minus ordinary and necessary expenses required to carry on a trade or business or to earn rents and royalties. Excluded from ordinary and necessary expenses under these guidelines are expenses determined by the court to be inappropriate for determining gross income for purposes of calculating child support. In general, income expenses from self employment or operation of a business should be carefully reviewed in order to determine the level of gross income of a parent to satisfy a child support obligation."

The decision in Olson constituted a careful review and there was also a failure of proof by appellant in the lower court. Author note: Expert accountant's testimony or real estate appraiser testimony is required in such a technical case and the parent seeking child support is required to produce such proof.

R. New Spouse Income and Living Expenses Paid by Relatives. Gross income ordinarily does not include a parent's community property interest in the financial resources and obligations of a spouse who is not a parent of the child, unless compelling reasons exist. Idaho Code, § 32-706(1)(b) and Idaho Child Support Guidelines, Section 6(a)(3), Rule 6(c)(6), I.R.C.P. A disparity in income between the obligor and the obligee because of the obligee's new spouse's income is not a compelling circumstance. Harris v. Carter, 146 Idaho 22 (C.A. 2008).

V. SPOUSAL MAINTENANCE.

F. Standard of Living. The court is required to give due consideration to each party's financial needs and resources in determining spousal maintenance and should take into account the standard of living established during the marriage. The court should also consider income from investments in evaluating a claim for spousal maintenance. White v. White, 2007 Unpublished Opinion No. 724. THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY.

VII. COMMUNITY PROPERTY.

A. Character or Nature of Property.

(1) Time of Acquisition Rule. The character of

property vests at the time the property was acquired. Kraly v. Kraly, 2009 Opinion No. 64 (S.C. May 1, 2009).

(2) Source of Funds. If property is purchased with separate funds, even if acquired during the marriage, the property maintains its separate character. The status of property acquired during marriage is determined by the funds with which it is purchased. If the entire purchase price was paid with separate funds then the asset is separate including its natural appreciation. Kraly v. Kraly, 2009 Opinion No. 64 (S.C. May 1, 2009).

M. Cotenancy. Husband and Wife can acquire a cotenancy interest in community property. A cotenant is entitled to contribution for expenditures necessary for the benefit and preservation of common property, such as a deed of trust obligation and real estate taxes, and if a cotenant makes a contribution on behalf of other cotenants he or she is entitled to interest. In BahnMiller v. BahnMiller, 145 Idaho 517 (S.C. 2008), the husband and wife as community cotenants were liable to the other cotenant.

VIII. SEPARATE PROPERTY.

D. Acquisition. Where real property was purchased after marriage entirely with Husband's separate property it is separate property. Kraly v. Kraly, 2009 Opinion No. 64 (S.C. May 1, 2009). The character of the property vests at the time the property is acquired and although the deed conveyed the property purchased to

both husband and wife the presumption of community property was overcome with reasonable certainty and particularity because it was entirely purchased with separate property. Kraly, supra.

E. Loan Proceeds and Refinance. In the case of Dunagan v. Dunagan, 2009 Opinion No. 82 (S.C. June 9, 2009), during the marriage Wife's separate property was refinanced resulting in a deed to husband and wife at the request of the bank which issued the loan. Parole evidence is not admissible to vary the terms of the deed but is admissible to show compelling reasons justifying an unequal division of community property. Dunagan, supra.

J. Deeds from One Spouse to the Other or Both/Parole Evidence Rule. The parole evidence rule does not bar admission of evidence of the grantor's intent at the time a deed is executed, as well as intent at the time of delivery of the deed. Barmore v. Perrone, 145 Idaho 340 (S.C. 2008). Any evidence indicating the absence of delivery or intent to deliver is proper. The court distinguished Bliss v. Bliss, 127 Idaho 170 (S.C. 1995), but did not address Hall v. Hall, 116 Idaho 483 (S.C. 1989). Author note: It appears that the deed rule in Hall has finally suffered significant blows. Also see Hoskinson v. Hoskinson, 139 Idaho 448 (S.C. 2003).

Where a spouse conveys real property to the other as separate property, the property conveyed is the separate property of the grantee. Bliss v. Bliss, 127 Idaho 171 (S.C. 1995). I.C. § 32-906(2) creates a presumption of separate property from the deed. Until Barmore v. Perrone, 145 Idaho 340 (S.C. 2008), the presumption could not be overcome by grantor's testimony (parole

evidence) of intent, if it contradicted the clear language of the Deed. Hall v. Hall, 116 Idaho 483 (S.C. 1989); Bliss v. Bliss, supra. But see: Hoskinson v. Hoskinson, 139 Idaho 448 (S.C. 2003). The rule has been applied by lower courts where one spouse conveys their separate real property to both spouses as husband and wife. Hall, supra. California addressed the matter by statute in its Family Code, Section 2640(b) and a separate property reimbursement will be honored if traced. Under Barmore, the parole evidence rule does not bar the admission of evidence of the grantor's intent at the time the deed was executed or evidence of intent at the time the deed was delivered.

In the case of Dunagan v. Dunagan, 2009 Opinion No. 82 (S.C. June 9, 2009), during the marriage Wife's separate property was refinanced resulting in a deed to husband and wife at the request of the bank which issued the loan. Parole evidence is not admissible to vary the terms of the deed but is admissible to show compelling reasons justifying an unequal division of community property. Dunagan, supra.

Where wife conveyed her interest in real property to husband in one deed, and where husband conveyed his interest in the same property to them as husband and wife in another deed, the court permitted parole evidence which was affirmed on appeal in Hoskinson v. Hoskinson, supra. The Court in Hoskinson did not mention Hall v. Hall, 116 Idaho 483 (S.C. 1989) and Bliss v. Bliss, 127 Idaho 171 (S.C. 1995). The lower court held that the wife had not proved a transmutation by clear and convincing evidence because the parole evidence did not establish that

husband intended to make a gift to the community. The evidence also failed to show which deed came first and the lower court believed the husband because his testimony was more credible than the Wife's testimony. Hoskinson, supra. Transmutation must be proved by clear and convincing evidence. Hoskinson, supra.

(1) Where a deed to land was in the corporation's name, yet a third-party shareholder lived in the private residence on the land, and where it was contended that the property was inappropriately conveyed to the corporation, the Court held that under Idaho law, a rebuttable presumption arises that a holder of title to property is the legal owner. McAfee v. McAfee, 132 Idaho 281 (C.A. 1999). The rebuttable presumption imposes upon the party against whom it operates the burden of going forward with evidence to rebut the presumption pursuant to I.R.E. 301. McAfee v. McAfee, supra. In support the court said, where the title to property is taken in the name of one party but the consideration is paid by another, a resulting trust arises in favor of the party who pays the consideration. McAfee, supra. But see: Hall v. Hall, supra.

Objection to parole evidence must be raised in the lower court to preserve the issue on appeal if the lower court admits parole evidence. Kraly v. Kraly, 2009 Opinion No. 64 (S.C. May 1, 2009).

XII. APPEAL.

A. Effect of Prior Review in the District Court. The Supreme Court recently determined that although for decades it had been reviewing the Magistrate Court's decision independently

of, but with due regard for, the District Court's decision, the structure of the Idaho Appellate Rules now requires the Supreme Court to directly review the District Court's decision and consider whether the District Court committed error. Now the Supreme Court reviews the trial court record to determine whether there is substantial and competent evidence to support the Magistrate's Findings of Fact and whether the Magistrate's Conclusions of Law follow those findings. If the findings are so supported and the conclusions follow therefrom, and if the District Court affirms the Magistrate's decision, then the Supreme Court will affirm the District Court's decision as a matter of procedure. Losser v. Bradstreet, 145 Idaho 670 (S.C. 2008); State of Idaho Dept. of Health and Welfare v. Doe 145 Idaho 662 (S.C. 2008); Harris v. Carter, 146 Idaho 22 (C.A. 2008).

B. Decree-Clarity or Ambiguity. On appeal, if the language of the Decree is unambiguous the determination of its meaning and legal effect is a question of law over which free review is exercised. The trial court's interpretation of an ambiguous judgment or decree will be upheld upon review if it is supported by substantial and competent evidence. McKoon v. Hathaway, 146 Idaho 106 (C.A. 2008). Also see part II(M) above.

C. Review of Findings of Fact. The appellate court will not make credibility determinations or replace the trial court's factual findings by re-weighing the evidence. The evidence will be viewed in favor of the Magistrate's judgement and the

appellate court will uphold the Magistrate's findings even if there is conflicting evidence. Danti v. Danti, 146 Idaho 929 (S.C. 2009).

D. Conclusions of Law.

(2) Examples of Law:

(b) In Kraly the court stated that the characterization of property is either community or separate involves mixed questions of law and fact citing Krebs v. Krebs, 114 Idaho 571, 573, (C.A. 1988). Kraly recited that the method and manner of acquisition of property are questions of fact citing Batra v. Batra, 135 Idaho 388, 391 (C.A. 2001). The characterization of an asset in light of the facts found, however is a question of law over which the appellate court exercises free review. Kraly, supra.

(c) Interpretations of the Idaho Child Support Guidelines are questions of law subject to free review. Harris v. Carter, 146 Idaho 22 (C.A. 2008).

F. Issues that Rest in the Discretion of the Court.

(14) A trial court's discretion to grant relief per I.R.C.P. Rule 60(b) is reviewed for abuse of discretion. Waller v. State Department of Health and Welfare, 146 Idaho 234 (S.C. 2008).

G. Res Judicata and Collateral Estoppel. Res judicata only applies to a subsequent action between the same parties upon the same claim. Navarro v. Yonkers, 144 Idaho 882 (S.C. 2007). Res judicata applies equally to cases of default judgment and the

doctrine covers both claim preclusion and issue preclusion. Once a Judgment is entered it is res judicata with respect to all issues which were or could have been litigated. Waller v. State Department of Health and Welfare, 146 Idaho 234 (S.C. 2008).

I. Attacks Upon a Judgment and Decree. A cause of action under Rule 60(b), I.R.C.P. for "fraud upon the court" contemplates more than interparty misconduct and may be found only in the presence of tampering with the administration of justice so as to prevent the losing party from fully and fairly presenting its case. Rae v. Bunce, 145 Idaho 798 (S.C. 2008).

There is no express time period for an independent action under I.R.C.P., Rule 60(b) to relieve a party from Judgment, but it must be brought within a reasonable time. Waller v. State Department of Health and Welfare, 146 Idaho 234 (S.C. 2008).

L. Direct Appeal. In termination of parental rights cases the Magistrate is permitted to enter on its own initiative an order recommending permission to appeal directly to the Supreme Court. I.A.R. 12.1. However, the Magistrate must have jurisdiction over the case to make such recommendation. In State Department of Health and Welfare v. John Doe I, 2009 Opinion No. 67 (S.C. May 7, 2009), the interim appeal to the District Court did not preserve the Magistrate's power to recommend a direct permissive appeal pursuant to I.A.R. 12.1. The appeal also failed because of Appellant's failure to file a Notice of Appeal to the Supreme Court together with a request for a direct permissive appeal. Author note: In the specially concurring

opinion by Judge Horton he felt the fundamental liberty interest controlled the issue of whether a separate notice of appeal beyond that filed in the District Court was required.

M. Attorneys Fees on Appeal. Pursuant to I.C., § 12-121, even a pro se litigant can be liable for attorneys fees when the appeal is frivolous, unreasonable, and merely second guessed the trial court regarding conflicting evidence, and particularly when the custody litigation appeared to be an unabated vendetta. Nelson v. Nelson, 144 Idaho 710 (S.C. 2007).

XIII. ATTORNEYS FEES.

D. Authority for Attorneys Fees in Divorce. With the exception of a default judgment and an award of attorneys fees other than pursuant to I.C. § 12-121, generally it is not necessary to plead attorneys fees and costs in order to receive an award of attorneys fees. Straub v. Smith, 145 Idaho 65 (S.C. 2007).

Where a party's conduct suggests an improper purpose, such as harassment or maliciousness, attorneys fees may be awarded by the trial court. In Rae v. Bunce, 145 Idaho 798 (S.C. 2008), a particularly litigious Pamela Rae demonstrated a repeated pattern that she would not abide by orders of the court, which when coupled with a frivolous appeal led to an I.C. § 12-121 attorney fee award.

XIV. MISCELLANEOUS.

D. Discovery and Redraft of Idaho Rules of Civil Procedure in Family Law Cases. A family law subcommittee of CFC (Children

and Families in the Court's Committee) is drafting local rules in the Fourth Judicial District encompassing Idaho Civil Procedure Rule changes in family law cases which preliminary draft should surface in 2010. The pilot project in the Fourth Judicial District has the potential for development of statewide rules in family law cases.

M. Ineffective Assistance of Counsel. Negligence, mistakes, or unskillfulness of counsel do not provide a basis for setting aside a judgment in a divorce case. Such negligence is attributable to the party who hired the lawyer and litigants are not able to avoid the consequences of their attorney's mistakes even if they were drunk and had chemical dependency problems and failed to appear at prior hearings. Danti v. Danti, 146 Idaho 929 (S.C. 2009). Author note: What if the attorney was so drunk he didn't appear at a custody trial? In my view the court would continue the case and sanction the non-appearing attorney. Otherwise the court would risk the extreme case testing the rule that ineffective assistance of counsel will not serve as a basis for reversing the lower court decision. In Michalk v. Michalk, 2009 Opinion No. 128 (October 20, 2009) the court held that pro se civil litigants "are not accorded special latitude merely because they chose to proceed through litigation without the assistance of an attorney". A pro se litigant is held to the same standard of care as an attorney when they represent themselves.

N. Alleged Judicial Bias. In Danti the court rejected a bias claim, presuming that the Magistrate was not biased or prejudiced particularly since the claim was not supported except by the claimed statement that adultery was the Judge's "personal

pet peeve" or the Judge was offended by the tone of Mr. Danti's voice. In Michalk v. Michalk, 2009 Opinion No. 128 (October 20, 2009) absurd, fanciful attacks were made upon the trial court by a pro se Plaintiff who claimed personal bias. The appellate court actually commended the trial court for its demeanor and temperament in dealing with the arguments presented by Wendy Michalk. The trial Judge's restraint and actions to help Wendy were "remarkable".

O. I.R.C.P. Rule 12(b)(8). The trial court may dismiss an action pending in Idaho on the basis of a prior action pending in another State under the abuse of discretion standard. Johnson v. Johnson, 2009 Opinion No. 113 (S.C. September 8, 2009).

TABLE OF AUTHORITIES

CASES:

Allbright v. Allbright, 2009 Opinion No. 103
(S.C. August 21, 2009)

Bahnmler v. Bahnmler, 145 Idaho 517 (S.C. 2008)

Barmore v. Perrone, 145 Idaho 340 (S.C. 2008)

Bartosz v. Jones, 146 Idaho 449 (S.C. 2008)

Bliss v. Bliss, 127 Idaho 170 (S.C. 1995)

Campbell v. Reagan, 144 Idaho 254 (S.C. 2007)

Danti v. Danti, 146 Idaho 929 (S.C. 2009)

Dunagan v. Dunagan, 2009 Opinion No. 82
(S.C. June 9, 2009)

Doe v. Dept. of Health and Welfare,
144 Idaho 420 (S.C. 2007)

Does II v. Does III, 145 Idaho 337 (S.C. 2008)

Hall v. Hall, 116 Idaho 483 (S.C. 1989)

Harris v. Carter, 146 Idaho 22 (C.A. 2008)

Heinze v. Bauer, 145 Idaho 232 (S.C. 2008)

Hopper v. Hopper, 144 Idaho 624 (S.C. 2007)

Hoskinson v. Hoskinson, 139 Idaho 448 (S.C. 2003)

Johnson v. Johnson, 2009 Opinion No. 113
(September 8, 2009)

Kraly v. Kraly, 2009 Opinion No. 64 (S.C. May 1, 2009)

Losser v. Bradstreet, 145 Idaho 670 (S.C. 2008)

Mackowiak v. Harris, 146 Idaho 864 (S.C. 2009)

McKoon v. Hathaway, 146 Idaho 106 (C.A. 2008)

Michalk v. Michalk, 2009 Opinion No. 128
(S.C. October 20, 2009)

Navarro v. Yonkers, 144 Idaho 882 (S.C. 2007)

Nelson v. Nelson, 144 Idaho 710 (S.C. 2007)

Olson v. Montoya, 2009 Opinion No. 58
(C.A. August 14, 2009)

Rae v. Bunce, 145 Idaho 798 (S.C. 2008)

Roberts v. Roberts, 138 Idaho 401 (S.C. 2002)

Schultz v. Schultz, 145 Idaho 859 (S.C. 2008)

State v. Jane Doe, 144 Idaho 839 (S.C. 2007)

State v. John Doe, 144 Idaho 534 (S.C. 2007)

State Department of Health and Welfare v. Doe,
144 Idaho 312 (S.C. 2007)

State Department of Health and Welfare v. Doe,
145 Idaho 662 (S.C. 2008)

State Department of Health and Welfare v. John Doe I, 2009
Opinion No. 67 (S.C. May 7, 2009)

Steiner v. Gilbert, 144 Idaho 240 (S.C. 2007)

Straub v. Smith, 145 Idaho 65 (S.C. 2007)

Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996)

Waller v. State Department of Health and Welfare,
146 Idaho 234 (S.C. 2008)

White v. White, 2007 Unpublished Opinion No. 724
THIS IS AN UNPUBLISHED OPINION AND
SHALL NOT BE CITED AS AUTHORITY

STATUTES AND RULES:

I.A.R. 12.1

I.C., § 12-121

I.C., § 18-4506

I.C., § 32-706(1)(b)

I.C., § 32-717

I.C., § 32-1007

I.R.C.P., Rule 4(a)(2)

I.R.C.P., Rule 7(b)(3)

I.R.C.P., Rule 6(c)(6), Idaho Child Support Guidelines,
Section 6(a)(3)

I.R.C.P., Rule 16(p), Informal Custody Trial

I.R.C.P. Rule 65(g)

4th Judicial District Court Local Rules, Rule 8.5