STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

_____
Deputy

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

STANLEY TOELLE,

Plaintiffs/Appellants,

vs.

BEVERLY JEAN OHE (TOELLE).

Defendants/Respondents.

Case No. **CV 2004 6898**

MEMORANDUM DECISION AND ORDER DISMISSING APPEAL

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

This is an appeal from Magistrate Division. Plaintiff/Appellant Stanley Toelle (Stanley) appeals from the "Final Order of Custody and Child Support entered in the above entitled action on the 18th day of April, 2007, Honorable Benjamin Simpson presiding." Notice of Appeal, pp. 1-2, ¶1, filed April 20, 2007. Similar language is found in Stanley's Amended Notice of Appeal, pp. 1-2, ¶ 1, filed February 28, 2008.

The underlying case is a divorce and child custody litigation between Stanley and Beverly Toelle (Beverly). Stanley is represented by Monica Flood Brennan (Ms. Brennan), and Beverly is represented by Suzanna Graham (Ms. Graham)

There are several issues on appeal, but one issue touches on what is determinative. Issue "B" on Stanley's Amended Notice of Appeal reads: "Did the magistrate err by entering the Final Order of Custody and Child Support after Receipt of an [sic] Plaintiff's Affidavit and Motion for Disqualification pursuant to I.R.C.P. section 40(d), or not setting

aside the same?" Amended Notice of Appeal, p. 2, ¶ 3B. The original Notice of Appeal read: "Did the magistrate err by issuing the Order without first ruling on the Plaintiff's Motion for Disqualification pursuant to I.R.C.P. section 40?" Notice of Appeal, p. 2, ¶ 3B. Even though the disqualification issue is determinative, it is not that Appellant Stanley "prevailed" on that issue on appeal. Rather, this appeal must be **dismissed** because Stanley's attorney should not have filed this appeal on April 20, 2007, because four days earlier, Stanley's attorney had filed a motion to disqualify Magistrate Judge Simpson for cause. Until that motion for disqualification was decided, Magistrate Judge Simpson had no jurisdiction to enter the Final Order, from which Stanley appealed. Thus, due to the actions of Stanley's attorney, there is no valid order or judgment from which to appeal. Accordingly, Stanley's appeal must be dismissed.

The following sequence of events is crucial to understanding this determinative issue. On April 16, 2007, Magistrate Judge Benjamin R. Simpson, **signed** the "Final Order of Custody and Child Support." Final Order of Custody and Child Support, p. 7. For some unknown reason, that Final Order of Custody and Child Support was not **filed** by the Deputy Clerk of Court until April 18, 2007, at 9:56 a.m. *Id.,* p. 1. Between Judge Simpson's signing the Final Order of Custody and Child Support on April 16, 2007, and the filing of that Final Order on April 18, 2007, Stanley filed his "Motion for Disqualification of Magistrate Pursuant to I.R.C.P. 40" on April 17, 2007. More specifically, Stanley's motion for disqualification was "for cause" pursuant to I.R.C.P. 40(d)(2)(A)(4), alleging Magistrate Judge Simpson was biased or prejudiced against him.

II. ANALYSIS.

A. Magistrate Judge Simpson Lacked Jurisdiction When the Final Order was Entered/Filed on April 18, 2007.

Idaho Rule of Civil Procedure 40(d)(2)(B) states: "Any such disqualification for

cause shall be made by a motion to disqualify accompanied by an affidavit of the party or the party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion." Stanley's counsel filed both a motion and an affidavit on April 17, 2007. The rule continues: "Such motion for disqualification for cause may be made at any time", and "the…magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions." Magistrate Judge Simpson gave no notice of a hearing and held no hearing on Stanley's motion to disqualify for cause. Instead, on April 26, 2007, Judge Simpson entered an Order of Voluntary Disqualification pursuant to I.R.C.P. 40(d)(4). That Order was filed by the Deputy Clerk of Court the same day.

Unfortunately, the filing of Stanley's I.R.C.P. 40(d)(2)(B) motion to disqualify Magistrate Judge Simpson for cause, divested Magistrate Judge Simpson from the ability to do *anything* other than: 1) provide notice of hearing, 2) hold a hearing and 3) rule on that I.R.C.P. 40(d)(2)(B) motion. In other words, due to Stanley's filing of the motion to disqualify **for cause** on April 17, 2007, Magistrate Judge Simpson thereafter lacked jurisdiction to **voluntarily** disqualify himself under I.R.C.P. 40(d)(4) on April 26, 2007.

The instant it was filed on April 17, 2007, Stanley's Motion for Disqualification for Cause pre-empted all other pending matters. That is because "Upon the filing of a motion for disqualification, the presiding judge shall be without authority to act further in such action except to grant or deny such motion for disqualification." I.R.C.P. 40(d)(5). "All of the proceedings, findings, conclusions and orders in this action, after affidavit of prejudice was filed, were improper, void and of no effect." *Lewiston Lime Co. v. Barney,* 87 Idaho 462, 467, 394 P.2d 323, 326 (1964), *citing Price v. Featherstone,* 64 Idaho 312, 314-15, 130 P.2d 853, 855 (1964), 143 A.L.R. 407 and *Esterby v. Justice Court of Hellgate*

Township, 127 Mont. 1, 256 P.2d 544 (Mont. 1953). According to I.R.C.P 40(d)(5), as soon as Stanley's attorney filed the affidavit and motion on April 17, 2007, Magistrate Judge Simpson was "without authority to act further in such action except to grant or deny such motion for disqualification". According to case law, after Stanley's attorney filed the affidavit and motion on April 17, 2007, Magistrate Simpson's subsequent actions, including the filing of the Final Order on April 18, 2007, were "improper, void and of no effect." *Id., Lewiston Lime Co.*

The only possibility of a different result might be if Magistrate Judge Simpson's *signature* on the Final Order on April 16, 2007, amounts to the *entry* of that order, and the actual *filing* of the order by the Deputy Clerk of Court is merely a ministerial act. Such an interpretation would not be consistent with I.R.C.P. 77(d) which reads: "Immediately upon the entry of an order or judgment the clerk of the district court, or magistrates division, shall serve a copy thereof, with the clerk's filing stamp thereon showing the date of filing, by mail on every party affected thereby…" A question then becomes "What constitutes entry of the order?" That question seems to be answered by the Idaho Supreme Court in *Thompson v. Pike,* 122 Idaho 690, 838 P.2d 293 (1992), when it wrote: "The placement by the clerk of the district court of the filing stamp on the summary judgment order on March 16, 1990, constituted the entry of judgment." 122 Idaho 690, 695, 838 P.2d 293, 298 *citing City of Preston v. Baxter,* 120 Idaho 418, 816 P.2d 975 (1991). As to judgments, "The filing of a judgment by the court as provided in Rule 5(e) or the placing of the clerk's filing stamp on the judgment constitutes the entry of the judgment." I.R.C.P. 58(a). Additionally, "entry of judgment shall not be made as to any decree that contains the obligations for one party to pay child support unless and until it is accompanied by the completed transmittal form to the Department of Health and Welfare." *Id.*

Since it is the Final Order filed April 18, 2007, from which Stanley appeals, and the Final Order filed April 18, 2007, is "improper, void and of no effect", this appeal must be **dismissed** and remanded back to Magistrate Division, Judge Simpson presiding, for him to rule on Stanley's Motion to Disqualify for Cause. Once that is ruled upon, the Magistrate Judge then assigned to the case simply must enter (file) the Final Order signed by Judge Simpson on April 16, 2007. Because Magistrate Judge Simpson had no jurisdiction to enter the Final Order, and that fact is determinative, the issues raised by Appellant Stanley in his Notice of Appeal will not be addressed.

This Court reviewed all pertinent transcripts on appeal and reviewed the Court minutes and all filings of record filed since this matter began in 2004. The transcript shows the parties' conduct was extremely acrimonious. Magistrate Judge Simpson stated: "This is, by any measure, a high conflict divorce." January 19, 2007, Transcript, p. 5, Ll. 11. One can tell from the transcript that the conduct of the parties' attorneys was nearly as acrimonious.

This Court is mindful that it was primarily Stanley's attorney, to whom Magistrate Judge Simpson, at the end of the hearing held January 19, 2007, delegated the task of preparing the Final Order. The dialogue was as follows:

> THE COURT: Okay. Miss Brennan, would you please prepare the order regarding custody and submit it to Miss Graham for a no objection. If you can't get her no objection, we'll talk about it on the record, figure something else.
> MISS BRENNAN: Do you have a date that you'd like it prepared by, your Honor?
> THE COURT: Tomorrow.
> MISS BRENNAN: (laughing) Ha, ha, all right.
> THE COURT: As soon as you can reasonably accomplish it.
> MISS BRENNAN: Thank you.
> THE COURT: If it sits too long, I'll have you up in Chambers wondering where it is.
> MISS BRENNAN: I'll try to get it in by next Friday.
> THE COURT: Okay.
> MISS BRENNAN: I would be nice to have a week.
> THE COURT: That sounds reasonable.
> MISS BRENNAN: Thank you.

January 19, 2007, Transcript, p. 32, L. 13 – p. 33, L. 5. The following Friday was January 26, 2007. No order was presented on January 26, 2007. While Beverly's attorney Ms. Graham was ordered by Magistrate Judge Simpson to prepare the calculations, deductions and credits for alimony paid (January 19, 2007, Transcript, p. 26, Ll. 3–16), those calculations would be *part* of that Final Order. Preparation of the Final Order was placed squarely on Ms. Brennan's shoulders, and Magistrate Judge Simpson clearly told Ms. Brennan on the record "…submit it to Miss Graham for a no objection. If you can't get her no objection, we'll talk about it on the record, figure something else." January 19, 2007, Transcript, p. 32, Ll. 14–17. Magistrate Judge Simpson established a mechanism for Ms. Brennan to deal with any difficulties she might have getting Ms. Graham to prepare her part of the order. Apparently, Ms. Graham did not timely prepare her calculations, but that does not excuse Ms. Brennan from her ultimate responsibility to prepare the Order or get back in front of Magistrate Judge Simpson in a timely manner. At every hearing, Magistrate Judge Simpson made replete the record that time was of the essence in this matter, and pointed out that fact to both counsel and their parties because both children were having emotional and academic problems, and the child who was about to become an adult had mental health problems. January 19, 2007, Transcript, p. 2, L. 22 – p. 7, L. 21. It is clear Magistrate Judge Simpson appreciated that if that child did not begin mental health treatment as a child, there was little likelihood of that child choosing on her own volition to obtain treatment for her psychiatric problems as a young adult. Magistrate Judge Simpson pointed out according to the psychologist's report, the children's emotional and mental health issues were "rooted in" and "exacerbated by…parental conflict". *Id.,* p. 6, L. 23 – p. 7, L. 1.

Not only was no order presented by Ms. Brennan on January 26, 2007. This Court

finds no order was presented by Ms. Brennan even at the time of the March 16, 2007, hearing. Stanley's attorney claims "The Defendant submitted a proposed Final Order Re: Child Support on March 7, 2007" (Appellant's Memorandum on Appeal, p. 4), but nothing in the record supports that claim. Stanley's attorney then claims "The Plaintiff (Stanley) objected to the proposed child support on March 9, 2007." *Id.* There is nothing in the record to support that claim. There were no pleadings filed on or even around that date, and there was no court proceedings near that time. Stanley's counsel is simply wrong. It is clear from a reading of the entire transcript of the March 16, 2007, hearing (quoted extensively below), that Stanley's attorney had submitted nothing by way of an order at the March 16, 2007, hearing or anytime before.

The frustration created with Magistrate Judge Simpson by Stanley's counsel's failure to do what she was ordered to do, prepare the Final Order, pales in comparison to the damage to the children caused by such nonfeasance. At that March 16, 2007, hearing it was brought to the attention of Magistrate Judge Simpson that one of the children had spent four days in the intensive care unit of the hospital after jumping out of Stanley's car. March 16, 2007, Transcript, p. 1, Ll. 7-13.

> THE COURT: * * * She ended up spending four days in the ER – or in the ICU relative to an incident uh, the facts of which are not particularly clear at this point, other than she did jump out of the car when she was with her father. That just points out to me how important it is that we get this kid into counseling. And I don't know why she isn't in there. I ordered it some time ago.
>
> We don't have an order from the last hearing. We need to get that in place. We've got a kid in crisis. She's about to turn 18.

Id. p. 1, Ll. 9-18.

Stanley's counsel claims she:

> …submitted a proposed Decree regarding custody and child support on March 16, 2007. (To Plaintiff's knowledge, this document is not currently in the Court record, but see Plaintiff's Motion to Argument the Record and Affidavit filed therewith).

Appellant's Memorandum on Appeal, p. 4. On February 28, 2008, Stanley's counsel filed a pleading captioned "Motion to Augment the Record and for an Extension of Time to Submit Additional Briefing" in which she claims: "The record is incomplete and does not reflect the fact that Plaintiff submitted child support calculations on the 17th of March, 2007…" Apparently Stanley's counsel cannot consistently recall whether she "submitted" a document to the court on March 16, 2007, or March 17, 2007, the latter being the day after the hearing, so the distinction is important. On February 28, 2008, Stanley's counsel also filed an "Affidavit of Monica Brennan Re: Augmentation of the Record" in which she seems to have settled on the March 16, 2007, date, stating under oath:

> On March 16, 2007, I filed a proposed Final Order of Custody and Child Support with child support figures attached. Attached hereto as Exhibit 11 is the document I faxed along with the QDRO and other attachments.

Affidavit of Monica Brennan Re: Augmentation of the Record, p. 2, ¶ 3. Incredibly, NO EXHIBIT 11 IS ATTACHED TO THE AFFIDAVIT! On March 12, 2008, Stanley's attorney filed her Notice of Hearing on the "Plaintiff's Motion to Augment the Record". On March 12, 2008, at the appointed hour of 4:00 p.m., this Court, staff and bailiff appeared in the courtroom, BUT NEITHER COUNSEL APPEARED FOR THE HEARING ON THE MOTION TO AUGMENT THE RECORD! After that hearing was scheduled to begin, upon returning to her desk from the Courtroom, this Court's deputy clerk of court listened to a message on her voicemail from Ms. Brennan (left while the Court, staff and bailiff were waiting for counsel on this case to appear), stating that Ms. Brennan did not need the hearing.

In a separate pleading, Ms. Brennan states under oath:

> Plaintiff's counsel immediately went back to the office on the day of court March 16, 2007, and prepared a proposed Custody and Child Support Order pursuant to the Court's findings on January 19, 2007. It was filed by fax on March 16, 2007 and a copy was sent to opposing counsel.

Affidavit of Attorney Monica Brennan RE: Disqualification of Magistrate, p. 4., ¶ 6. The first sentence, if true, is an admission by Ms. Brennan she has taken fifty-five days to do what she agreed to do and was ordered to do in seven days. The problem is nothing in the record substantiated Ms. Brennan's claim that she prepared that order on March 16, 2007. Ms. Brennan's claim that she "filed by fax on March 16, 2007" is simply false. There was no such order or any other document **filed** on or around that date. If it would have been a proposed order, the proper procedure would not be to **file** the proposed order, but to lodge it with the court with a copy to counsel. There is no evidence in the file that such a proposed order was ever lodged with the court at any time, let alone on March 16, 2007. Ms. Brennan's own affidavit corroborates the fact that she neither filed nor lodged with the court her proposed order, as Magistrate Judge Simpson had not seen it until at earliest the April 4, 2007, meeting in chambers. Regarding the April 4, 2007, hearing in chambers, Ms. Brennan attributes the following to Magistrate Judge Simpson:

> The Court then said something to the effect of, "Ms. Brennan, you really do not have anything to say at this point. I ordered you over two weeks ago to get a signed order in to me by the following Tuesday, and you failed to do it. This family is in crisis and it is because there is still no custody decree." Plaintiff's counsel responded, "What are you talking about? I submitted an Order that very day after Court. I faxed it myself." The Court stated, "This is the first time that I've seen it."

pp. 6-7, p. 7 ¶ 8 (actually there are two paragraphs 6, two paragraphs 7 and three paragraphs 8, the paragraph at hand is the second paragraph 8 on page 6)

An even greater mystery is that the Final Order that was actually filed on April 18, 2007, was not prepared by Ms. Brennan, but was **prepared by Ms. Graham** and faxed by Ms. Graham's office to the magistrate on April 16, 2007, the same date Magistrate Judge Simpson signed the order. Thus, if there ever was a proposed order submitted by Ms. Brennan to Magistrate Judge Simpson after the March 16, 2007, hearing and before or at the April 4, 2007, hearing in chambers, it must have been inadequate. We will never know

what, if any, order Ms. Brennan gave to Magistrate Judge Simpson, and when, if ever, that occurred. As stated above, on February 28, 2008, Ms. Brennan filed an "Affidavit of Monica Brennan Re: Augmentation of the Record" in which she stated under oath: "Attached hereto as Exhibit 11 is the document I faxed [to the court on March 16, 2007]", but she failed to attach Exhibit 11, and she failed to attend her own hearing on March 12, 2008, on "Plaintiff's Motion to Augment the Record", her only opportunity to rectify that problem before this Court on appeal.

It was Stanley's counsel who failed to timely prepare the Final Order. The failure of Stanley's counsel to prepare that Final Order set in motion the subsequent events that led to Stanley's counsel filing of the Motion to Disqualify Magistrate Judge Simpson for cause.

Nearly all of the twenty-five page transcript of the March 16, 2007, hearing is Magistrate Judge Simpson trying to communicate to both counsel, especially Stanley's counsel, Ms. Brennan, that it was Ms. Brennan's responsibility to prepare the order nearly two months before:

> THE COURT: * * * We have pending motions to uh, reconsider. I'm not hearing any motions to reconsider until the last orders from the last hearing are done.

March 16, 2007, Transcript, p. 8, Ll. 22-24. The guardian ad litem, attorney John Sahlin stated he wasn't getting paid for his services because the order was not done. *Id.,* p. 8, L. 25 – p. 9. L. 7. The hearing continued:

> MISS BRENNAN: We don't understand –
> MR. SAHLIN: -- so I can't bill anything.
> MISS BRENNAN: -- what figures we're suppose to be using. We're confused. Suzi and I. So, but it is also my fault that I didn't get the order done, 'cause I thought Suzi was suppose to do it. Then I saw her in court one day. She said "How come you haven't done the order?" I'm like, how come you haven't done your order? And then she goes, "Well, no, you're suppose to do both orders." So, then she did the one that I thought I was suppose to do, and then I did the one she was suppose to do.
> MISS GRAHAM: You were suppose to do both.
> MISS BRENNAN: But we don't agree on child support.
> MISS GRAHAM: I just did the child support order.

THE COURT: But the –
MISS GRAHAM: You were suppose to do both.
THE COURT: -- two of you need to sit down, get an order done.
MISS BRENNAN: Right. I know.
THE COURT: Either agree to it, sign no objection, or call me –
MISS BRENNAN: Okay.
THE COURT: -- and we'll sit down and we'll talk about it.

March 16, 2007, Transcript, p. 9, L. 6 – p. 10, L. 5. After listening to a rather convoluted explanation as to why Ms. Brennan had yet to prepare the order, the conversation continued:

THE COURT: Listen to me.
MISS BRENNAN: Okay.
THE COURT: I want the two of your to take the income numbers I gave you, run them through the child support calculations according to the Idaho Child Support Guidelines, come up with a child support order.

If you disagree with the numbers I gave you, then you have the right to appeal.
MISS BRENNAN: I know.
THE COURT: Okay. It's simple.
BRENNAN: This is the question I'm asking you. Can—can you please just let me finish for one second. I'm asking you, do—am I suppose to be figuring out a child support figure that Dr. Toelle is paying for Angela, and then offset it with a child support figure that Mrs. Toelle is paying—
THE COURT: No.
MISS BRENNAN: --for Lauren?
THE COURT: You run the—
MISS BRENNAN: That's the question—
THE COURT: --Child Support—
MISS BRENNAN: --I'm asking.
THE COURT: -Guidelines calculation.
MISS BRENNAN: Okay.
THE COURT: That's what –
MISS BRENNAN: That's all—
THE COURT: --I'm asking for—
MISS BRENNAN: --I wanted.
THE COURT: And you need to run it two ways: You need to run it until Angela is done with high school. And you need to do it after she's done with high school.
MISS BRENNAN: I—I understand that.
THE COURT: It's an accounting problem. It's a computer--
MISS BRENNAN: Okay.
THE COURT: --program.
MISS BRENNAN: Okay.
THE COURT: Put the numbers in. You take any offsets that are allowed under the rule, you crank the number out.

If you disagree with the income figures that I gave each party, then you have

the right to appeal that on an abuse of discretion basis. Okay?
MISS BRENNAN: Yes. I'm—yes. I'm just trying to explain to the Court that Dr. Toelle isn't asking for Bev to pay him any child support. That's not the point. We're misunderstanding. I am not understand—was not understanding at the hearing. And maybe you're clarifying that now. If I'm suppose to be figuring out, you know the child support for one child, and then the child support for the other child, and then do an offset. Or if you were asking Dr. Toelle to waive for Lauren right now. That's all I'm saying.

And you've clarified that, I guess. I'm –
THE COURT: All right.
MISS BRENNAN: We have never been wanting --
THE COURT: Here's – here's--
MISS BRENNAN: --for Bev to pay Dr. Toelle child support.
THE COURT: Here's what the --
MISS BRENNAN: He's not wanting that.
THE COURT: --law is: The Idaho Child Support Guidelines--
MISS BRENNAN: I--
THE COURT: --apply.
MISS BRENNAN: Okay, fine.
THE COURT: Unless there is an extraordinary circumstance justifying that we differ from that. And the party seeking not to apply the Guidelines has the burden of proof in that regard.

I do not find there are extraordinary reasons to divert from that. That's why I asked Dr. Toelle if he was willing to waive.
MISS BRENNAN: Okay.
THE COURT: His answer so far is no.
MISS BRENNAN: No.
THE COURT: This is something that you and Miss Graham need to sit down and crank out.

I also want the order from the last hearing by Tuesday of next week. If I don't have it by Tuesday of next week, I'm going to order that Dr. Teolle pay all of John Sahlin's costs today. Okay.
MISS BRENNAN: Yes.
THE COURT: It's that simple. I've already made the decision. We're not going to re-litigate it here.
MISS BRENNAN: I'm—I'm not trying to re-litigate it. I'm just trying to explain to you so that I can get it clarified. I've discussed it with Suzi, we both did not understand. And, you know, you're yelling at me like I did something wrong. I'm just trying to--
THE COURT: I'm not yelling at you. I'm asking you--
MISS BRENNAN: I'm try--
THE COURT: --you to do what I asked you to do a considerable period of time before.

If you and Miss Graham disagree. Sit down and talk about it.
MISS BRENNAN: We're not disagreeing about anything.
THE COURT: If you don't get it resolved to your mutual satisfaction, then I'll sit down in a Chamber's conference and we can talk about any disputes. Okay?
MISS BRENNAN: I am just telling you, for my client, he is not saying no about waiving child support for Lauren. That's—we're just—I'm not understanding what it is the Court is asking him to do. That's—that's all--

THE COURT: It's already--
MISS BRENNAN: --I'm trying to say.
THE COURT: --been decided. He said "No" okay. That's what he said on the record.
MISS BRENNAN: No, he did not. I'm sorry. That's not what happened. But it doesn't matter now. I'm just trying to find out, for the purposes of now, what the Court is asking me to do. And I guess you're saying that – and the other problem that I'm having is that the Child Support Guidelines top out at certain figures.
THE COURT: Okay.
MISS BRENNAN: So, do we just take that figure and multiply it by four, or what do we do? I mean—
MISS GRAHAM: It does defaults.
MISS BRENNAN: --IT SAYS—RIGHT?
THE COURT: There's an explanation –
MISS BRENNAN: It says—
MISS GRAHAM: Mine—mine—
THE COURT: --it's a percentage beyond—
MISS GRAHAM: I did that.
MISS BRENNAN: Well, I don't have a computer program that runs that.
MISS GRAHAM: Oh (inaudible)…
THE COURT: Well, then go look at—
MISS GRAHAM: I already did all that, yeah.
THE COURT: Miss Graham's. See if—
MISS BRENNAN: I know. We're talk—
THE COURT: --if you agree or--
MISS BRENNAN: We are.
THE COURT: disagree. Okay.
MISS BRENNAN: I know we have--
THE COURT: My problem is--
MISS BRENNAN: --been talking about it.
THE COURT: -- we had a hearing on January 19th, I entered a decision. I asked for an order. It's now two months hence.
MISS BRENNAN: I understand that--
THE COURT: I implemented--
MISS BRENNAN: --your Honor.
THE COURT: --a plan for the safety and the well-being of the children. It is not implemented.

Mr. Sahlin has not been paid. He didn't have a release until yesterday. We're two months into something that should have happened. And I want it done. Okay?
MISS BRENNAN: I am sorry. I take responsibility for that. That's not even what I'm talking about. That's my fault.
THE COURT: Okay.
MISS BRENNAN: I—I think it's my fault. I haven't listened to the hearing yet, but I believe it's my fault. I'm not even trying to argue with the Court. I'm just trying to ex-
-
MISS GRAHAM: So, can I ask—
MISS BRENNAN: --get a clarification, that's all.
THE COURT: Well, I'm not arguing either. I just want the decision from the last

hearing where I gave a decision on the record.
MISS GRAHAM: We both noted up our April um—on April 5th, I think, for the motions to reconsider. I would like to do it one fell swoop where we just say issue/decision, issue/decision, and get them all done.

Without that last order, do you want to vacate—do you want to vacate that day, and then get another one in like in a month when we can do – work through all of it and just—
THE COURT: Yes.
MISS GRAHAM: -- be done with it—
THE COURT: Yes.
MISS GRAHAM: --once and for all?
THE COURT: Yes.
MISS BRENNAN: I don't want to do that, because--
THE COURT: I'm not gonna hear--
MISS BRENNAN: --some of the issues--
THE COURT: I'm not gonna hear them piece-meal. I'm not gonna hear any of them until we have the orders form the last hearing entered.
MISS BRENNAN: We are going to have the orders from the last hearing.
THE COURT: I'm not gonna have them—
MISS GRAHAM: There's—the problem is, is that there's some tax—

March 16, 2007, Transcript, p. 13, L. 14 – p. 20, L. 24. Ms. Brennan and Ms. Graham then had a discussion on the record about tax issues, which obviously had not been discussed in any prior meetings that the two might have had, and the Court said:

THE COURT: I want that order by Tuesday.
MISS BRENNAN: I am—I will.
THE COURT: I want all orders signed--
MISS BRENNAN: I will do it--
THE COURT: --and ready.
MISS BRENNAN: --today, your Honor.
THE COURT: Okay.
MISS BRENNAN: A lo—I'm sorry, I will do it today. I have been talking with Suzi with about this for the past couple of weeks.
THE COURT: Okay.
MISS BRENNAN: We're not positive what we're suppose to do. That's—she will tell you that, that is true.
MISS GRAHAM: Well, I did the child supports the way I thought he meant, and I think they're right. But don't drag me into it, I'm—I know what—I'm cool.
THE COURT: And I want Mr. Sahlin on board. I want him to be paid. And I want him doing what the charge was from the Court.
MISS BRENNAN: You know, if you have—if you have a bill, just give it to Stan and he'll pay you.
MR. SAHLIN: I don't know how much to bill him, Monica, because I was suppose to bill according to the Idaho Support Guideline ratio. And I don't know what it is.
MISS BRENNAN: No, the Judge said three-quarters and one-quarter. Sorry.
MR. SAHLIN: Well, that's news to me—

MISS BRENNAN: Okay.
MR. SAHLIN: --'cause my notes say the Guidelines ration.
MISS BRENNAN: (inaudible)… three-quarters and one quarter he said. Stan pays three-quarters and –
MISS GRAHAM: No, if Stan was here—
MISS BRENNAN: --Bev pays one-quarter.
MISS GRAHAM: --he'd talk to both of you. But he's not gonna do it one-sided, so (inaudible)…
THE COURT: Okay.
MISS GRAHAM: Thank you.
THE COURT: We'll be in recess.

March 16, 2007, Transcript, p. 23, L. 9 – p. 24, L. 25. What is obvious from this dialogue is that in the two weeks prior to this March 16, 2007, hearing, **if** in fact Ms. Graham and Ms. Brennan did in fact meet and talk, then no one was listening.

Given the fact that two children were in crisis, the untenable fact is neither attorney did what they were ordered to do by Magistrate Judge Simpson at the conclusion of the January 19, 2007, hearing. Not only that, but the above shows that for the better part of two months, each attorney was expecting the other attorney to do something first, and **neither attorney communicated with the other, neither attorney picked up the phone and initiated a conversation to clear things up.** It wasn't until this meeting at the courthouse while each attorney was present for other cases that a discussion took place. The first time the attorneys talked about the order not getting done was apparently about two weeks before the March 19, 2007, hearing. March 16, 2007, Transcript, p. 23, Ll. 16-18. Obviously, even after this discussion, **no order was generated by either attorney!** Magistrate Judge Simpson was clear at the January 19, 2007, hearing, as to what he ordered each attorney to do regarding the orders. Ms. Brennan was asked by Magistrate Judge Simpson to "please prepare the order regarding custody and submit it to Miss Graham for a no objection. If you can't get her no objection, we'll talk about it on the record, figure something else." January 19, 2007, Transcript, p. 32, L. 13–17. Following

which a deadline of the following Friday, January 26, 2007, was set for the preparation of that order. *Id.,* p. 32, L. 18 – p. 33, L. 8. Ms. Graham was ordered by Magistrate Judge Simpson to prepare the calculations, deductions and credits for alimony paid. *Id.,* p. 26, Ll. 3–16). Even if the attorneys were not willing to talk to each other after the January 19, 2007, hearing in order to clear things up and get the order prepared, the simple solution was for either or both attorneys to: 1) look at the court minutes from that hearing, 2) listen to the digital recording of the entire proceeding, or 3) buy a transcript of the hearing and **find out** what Magistrate Judge Simpson told them each to do at the January 19, 2007, hearing. Neither attorney did that. No order was prepared.

Ms. Brennan admitted at the March 16, 2007, hearing that she had never sat down and listened to the recording of the January 19, 2007, hearing. March 16, 2007, Transcript, p. 19, Ll. 16-19. What is absolutely untenable about such an admission is **there is no way Ms. Brennan could even begin to prepare the Final Order she was ordered to prepare unless she listened to the tape of that hearing!**

Even after the hearing on March 16, 2007, in which Magistrate Judge Simpson went into repetitive detail (twenty-five transcript pages worth) reiterating what he clearly ordered the attorneys do at the January 19, 2007, hearing, and even after Ms. Brennan on March 16, 2007, promised to prepare the order "today" (*Id.,* p. 23, L. 16), **the order still did not get done!**

Ms. Brennan claims:

> The parties met in chambers to discuss the changes to the Plaintiff's proposed Decree on April 4, 2007, wherein the Court started to go over the proposed Decree submitted by Plaintiff. Plaintiff requested a hearing on the record rather than an in chambers meeting and the meeting with the Court was terminated.

Plaintiff's Memorandum on Appeal, p. 4. The Affidavit of Monica Brennan Re: Disqualification of Magistrate goes into detail about her recollection of what happened at

this April 4, 2007, meeting in Magistrate Judge Simpson's chambers. Obviously, it was what occurred there that upset Ms. Brennan enough to file a motion to disqualify Magistrate Judge Simpson for cause. However, even though these events, if true, occurred on April 4, 2007, it was almost two weeks later that Ms. Brennan filed her motion and affidavit in support of disqualification for cause on April 17, 2007. This is a case where time is clearly of the essence, yet it took a day shy of two weeks for Ms. Brennan to file an affidavit describing what was so upsetting to her?

One might wonder, as does this Court, where is the justice in allowing one party's attorney's nonfeasance (not preparing the Final Order when ordered to do so), to create a situation that leads to that same attorney filing a motion for disqualification, which in turn not only divests the magistrate from further acting on a case in which time is of the essence, but, because of that attorney's malfeasance (in not recognizing the motion for disqualification divested the Magistrate Judge from jurisdiction to act on the Final Order which her opponent finally prepared), essentially aborting the appeal that same attorney filed four days after she filed the motion to disqualify? Where is the justice when that course of conduct **keeps a final order from being entered for more than another year?** This Court is mindful that it is really the two children of these two warring parties who continue to suffer, more than a year after Stanley's attorney Ms. Brennan failed to do what she was ordered to do by Magistrate Judge Simpson. There is neither justice or equity in this result, but the Idaho Rules of Civil Procedure are clear. Magistrate Judge Simpson lacked authority to have the Final Order filed. Accordingly, such Final Order is void.

On January 19, 2007, Magistrate Judge Simpson announced his decision on the record. On April 16, 2007, Magistrate Judge Simpson signed the Final Order presented to him. That act, that signature was valid, because Stanley's motion to disqualify was not filed

until the following day.

On remand, Magistrate Judge Simpson must rule on Stanley's Motion to Disqualify for Cause. If he denies that motion, Judge Simpson should (or, if Judge Simpson grants that motion, then the Magistrate Judge who is subsequently assigned to the case should) do the following: After the decision is made on the disqualification for cause, the magistrate then assigned to the case must simply enter (cause to be filed) the Final Order Judge Simpson signed, which he obviously felt was consistent with his announced decision on the record. The unfortunate reality is, once that Final Order is filed, the parties and primarily the two children (one now an adult) involved in this case will finally obtain what Magistrate Judge Simpson ordered Ms. Brennan to have prepared no later than January 26, 2007…fifteen months ago.

B. Attorney's Fees.

1. Appellant's Request for Attorney Fees.

In the original Notice of Appeal filed April 20, 2007, Stanley did not request attorney's fees nor did Stanley state attorney's fees were an issue on appeal. In Stanley's Amended Notice of Appeal, filed the same date as Appellant's Opening Brief, Stanley adds the following issue: "The Appellant is requesting Attorney fees and Costs on Appeal on the grounds that the Respondent was frivolous in failing to Stipulate to Modify the Final Order of Custody and Child Support when Respondent knew that They were Incorrect and not In Keeping with the Court's ruling and Pursuing the Appeal." Amended Notice of Appeal, p. 3, ¶ 3H. Attorney fees are denied to Appellant. Even though one of issues raised by Appellant Stanley touched on what was determinative (the Motion to Disqualify for Cause not being addressed), that had nothing to do with the reason attorney's fees were sought by Stanley. Further, the above issue, as stated by counsel for Stanley, demonstrates even

on the day that Appellant's Opening Brief on appeal was filed, counsel for appellant Stanley still did not understand that all Magistrate Judge Simpson ever wanted from Stanley's counsel was an order.

> THE COURT: Okay. Miss Brennan, would you please prepare the order regarding custody and submit it to Miss Graham for a no objection. If you can't get her no objection, we'll talk about it on the record, figure something else.

January 19, 2007, Transcript, p. 32, Ll. 13-17.

> THE COURT: Listen to me.
> MISS BRENNAN: Okay.
> THE COURT: I want the two of your to take the income numbers I gave you, run them through the child support calculations according to the Idaho Child Support Guidelines, come up with a child support order.
> If you disagree with the numbers I gave you, then you have the right to appeal.
> MISS BRENNAN: I know.

March 16, 2007, Transcript, p. 13, Ll. 14–22.

Most importantly, the reason attorney fees cannot be awarded to Stanley is Stanley should not have filed his appeal, there being no Final Order to appeal from due to Stanley's motion to disqualify filed four days earlier.

For the above reasons, Appellant's request for attorney fees are denied.

2. Attorney Fees as Requested by Respondent.

According to Respondent, "Attorney's fees at the Magistrate level have been reserved by Judge Marano on the Defendant's (Respondent's) Motion until after the Appeal herein. Respondent's Memorandum on Appeal, p. 11. Respondent then claims she is entitled to attorney fees on appeal as this is frivolous, pursuant to I.R.C.P. 11(a)(2)(B). *Id.,* p. 12. However, none of the reasons set forth by Respondent for attorney's fees are the reason this Court has made its decision dismissing the appeal. Indeed, dismissal of the appeal was not the relief sought by Respondent, so from a prevailing party analysis, Respondent should not be awarded attorney fees.

3. Attorney's Fees Against Appellant on Court's Own Motion.

Idaho Rule of Civil Procedure Rule 11(a)(1) reads:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one (1) licensed attorney of record of the state of Idaho…The signature of the attorney…constitutes a certificate that the attorney…has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief after reasonable inquiry, it is well grounded in fact and warranted by existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. * * * If a pleading, motion or other paper is signed in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including reasonable attorney's fees.

In this case it was Ms. Brennan's filing her Notice of Appeal, four days after filing her motion for disqualification for cause and before Judge Simpson ruled on such motion, which caused this appeal to have no merit and be dismissed. A simple reading of I.R.C.P. 40(d)(5) would have made it evident to Ms. Brennan that "Upon the filing of a motion for disqualification, the presiding judge shall be without authority to act further in such action except to grant or deny such motion for disqualification." Ms. Brennan filed her motion to disqualify for cause on April 17, 2007, and upon doing so, should have realized that the only thing she could do at that point was **wait** for Magistrate Judge Simpson to set a hearing and rule on her motion to disqualify. Instead, she filed her Notice of Appeal three days later on April 20, 2007. Attorney fees are warranted against Appellant in favor of Respondent. However, it is not fair that Appellant Stanley pay for his counsel's failure to read I.R.C.P. 40(d)(5) before filing the appeal on Stanley's behalf. Accordingly, attorney fees on appeal are awarded against Appellant's attorney Ms. Brennan, in favor of Respondent, as it was Ms. Brennan, under I.R.C.P. 11(a)(1) who signed the Notice of Appeal. Certainly, Respondent's counsel at any time in the last year while this appeal was

pending, could have posed the argument that this appeal must be dismissed for the reasons stated today by this Court. However, it was not Respondent's counsel who signed the pleading initiating this appeal.

III. ORDER.

IT IS HEREBY ORDERED the Final Order filed April 18, 2007 is "improper, void and of no effect", accordingly this appeal is DISMISSED, and remanded back to Magistrate Division, Judge Simpson presiding, for him to rule on Stanley's Motion to Disqualify for Cause. Following that decision, the then assigned magistrate shall cause the Final Order signed by Magistrate Judge Simpson on April 16, 2007, to be filed.

IT IS FURTHER ORDERED that attorney fees on appeal are awarded against Ms. Brennan, counsel for Appellant Stanley, in favor of Respondent Beverly.

Entered this 30th day of April, 2008.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 2008, 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 #	Lawyer	Fax #
Monica Flood Brennan	676-8288	Suzanne L. Graham	665-7079
Hon. Benjamin R. Simpson		Hon. Eugene A. Marano	

_____
Secretary