

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**

STEPHANIE REED,)
)
 Plaintiff/respondent,)
 vs.)
)
 SCOTT REED,)
)
 Defendant/appellant.)
)
 _____)

Case No. **CV 2009 10686**

**MEMORANDUM DECISION AND
ORDER DENYING HEARING BY
DISTRICT COURT ON PLAINTIFF'S
"MOTION FOR APPOINTMENT OF A
PERSON TO SIGN ON BEHALF OF
DISOBEDIENT PARTY PURSUANT
TO I.R.C.P. 70"**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before this Court (as an appellate court) on plaintiff Stephanie Reed's (Stephanie) "Motion for Appointment of a Person to Sign on Behalf of Disobedient Party Pursuant to I.R.C.P. 70", filed on June 5, 2011.

On December 22, 2009, Stephanie filed her divorce complaint on December 22, 2009. On June 20, 2011, judgment was entered in favor of Stephanie against defendant Scott Reed (Scott) and a Final Decree of Divorce was entered on that date. Thereafter, a writ of execution in the amount of \$213,559.20 was issued on July 8, 2011. That writ was returned on July 12, 2011, as "unused" and a second writ of execution in the same amount was issued on July 12, 2011. An appeal was filed by Scott on July 25, 2011.

Prior to the entry of the final divorce decree on June 20, 2011, Stephanie, on June 5, 2011, filed this "Motion for Appointment of a Person to Sign on Behalf of Disobedient Party Pursuant to I.R.C.P. 70". The motion was originally before

Magistrate Judge Scott Wayman, and was discussed in a hearing before Judge Wayman on July 25, 2011. A few hours before that afternoon hearing before Judge Wayman, Scott filed his Notice of Appeal at 10:19 a.m. on June 25, 2011.

On July 29, 2011, Stephanie then noticed for hearing this “Motion for Appointment of a Person to Sign on Behalf of Disobedient Party Pursuant to I.R.C.P. 70” before this Court, originally scheduled for hearing on August 9, 2011. On August 5, 2011, Stephanie vacated the August 9, 2011, hearing and re-noticed the hearing for August 31, 2011. Before the July 25, 2011, filing of Scott’s appeal, on July 12, 2011, counsel for Scott moved for leave to withdraw. The next day after filing the Notice of Appeal, on July 26, 2011, counsel for Scott noticed for hearing his Motion to Withdraw before this Court, for hearing on August 2, 2011. Following that August 2, 2011, hearing, this Court granted the motion to withdraw and signed an Order for Leave to Withdraw on August 2, 2011.

At present, the “Motion for Appointment of a Person to Sign on Behalf of Disobedient Party Pursuant to I.R.C.P. 70” is before this Court and a motion for reconsideration and motion for a stay are presently pending before Judge Wayman.

Oral argument was held on August 31, 2011, on Stephanie’s “Motion for Appointment of a Person to Sign on Behalf of Disobedient Party Pursuant to I.R.C.P. 70”. At that hearing, counsel for Stephanie reiterated what Judge Wayman said at the July 25, 2011, hearing, and such representation seemed to conflict with the Court Clerk’s minutes. At the conclusion of the August 31, 2011, hearing, this Court took the matter under advisement to check the digital recording of the July 25, 2011, hearing, and to further review annotations to I.R.C.P. 83(i)(1). The Court has had the opportunity to review that rule and listen to that digital recording.

II. STANDARD OF REVIEW.

Idaho Rule of Civil Procedure 70 states in relevant part:

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has the like effect as if done by the party.

I.R.C.P. 70. “The word ‘may’ is permissive and denotes an exercise of discretion.”

State v. Hanson, 150 Idaho 729, ___, 249 p.3d 1184, 1187 (Ct.App. 2011) (citing *State v. Harbaugh*, 123 Idaho 835, 837, 853 P.2d 580, 582 (1993).

III. ANALYSIS.

In her June 5, 2011, “Motion for Appointment of a Person to Sign on Behalf of Disobedient Party Pursuant to I.R.C.P. 70”, Stephanie requests the appointment of attorney John Sahlin (Sahlin) to sign documents compelling the transfer of real and personal property in compliance with Judge Wayman’s March 30, 2011, Order “and subsequent Order after Plaintiff’s Motion to Reconsider whereby the Defendant was given fourteen (14) days or by May 6, 2011, to execute any and all documents necessary to transfer title, deed and transfer personal property and investment accounts.” Motion for Appointment of a Person to Sign on Behalf of Disobedient Party Pursuant to I.R.C.P. 70, p. 1. It is Stephanie’s contention that Scott “is blatantly refusing to comply with the Court’s Order effectively having a ‘battle of wills’ with the Court, however, the party whom [sic] is suffering is the Plaintiff, economically and financially.” *Id.*, p. 2. Stephanie specifically “...further asks this Court to retain jurisdiction over said damages as the Plaintiff is unsure of the ramifications of the Defendant’s willful failure to transfer property.” *Id.*, p. 4. At that point in time (June 5, 2011), “this court” could have only referred to Judge Wayman, as no Notice of Appeal

had been filed (nor had a final order been issued). Stephanie also asked this court to enter a writ of execution permitting Sahlin to sign for the transfer of a Hanover Family Practice 401K, two T. Rowe Price IRAs, a “Hartford, Group Number 023765” (presumably a life insurance policy), and a Smith Barney IRA. *Id.*, p. 4. Again, in writing “this court”, Stephanie could have only referenced Judge Wayman, as he was the *only* judge involved at the time. Stephanie also asks that Sahlin be permitted to sign any and all quitclaim deeds necessary to effectuate transfers of real property. *Id.* And, she moves the Court to award attorney fees and costs pursuant to I.R.C.P. 70 and 54 and I.C. §§ 12-120 and 12-121. *Id.* Finally, Stephanie asks the Court to order Scott pay any and all fees associated with the writ of execution and Sahlin’s proposed efforts, and that the Court retain jurisdiction over the matter. *Id.*

On August 25, 2011, Scott filed an Objection to Motion and Hearing on Appeal. Scott notes this matter was originally noticed for hearing before Judge Wayman, and urges this Court to require hearing be had before Judge Wayman pursuant to Idaho Appellate Rules 13(b)(10) and (13). Objection to Motion and Hearing on Appeal, p. 2. Scott goes on to mention that Stephanie noticed the instant hearing during the twenty day period within which no actions were to be taken following the grant of leave to withdraw entered by this Court on August 2, 2011. *Id.* Finally, Scott argues I.R.C.P. 83(t) requires motions on appeal to be supported by a brief and are to be decided by the Court without oral argument unless otherwise ordered by the Court, neither of which occurred here. *Id.*

Scott is correct in arguing Rule 83 reads:

All motions on appeal shall be filed with the district court, except those expressly required to be file with the trial court, and served upon the parties in the same manner as motions before a trial court under these rules. All motions must be accompanied with a brief in support thereof.

The opposing party shall have 14 days from service to file a response or reply brief and the motion shall be determined without oral argument unless ordered by the court.

I.R.C.P. 83(t). There has been no request for oral argument brought by Stephanie in the instant matter. Although Stephanie, at the time her motion was filed before Judge Wayman in June of 2011, requested oral argument and the right to present evidence and cross-examine Scott and Scott's witnesses, there has not been a request for oral argument pursuant to I.R.C.P. 83(t) before or since the motion was noticed up for hearing before this Court.

Scott is correct that Stephanie filed no separate brief to accompany Stephanie's motion for appointment of a signer as contemplated by I.R.C.P. 83(t). However, Stephanie's five-page motion sets forth the request she seeks and the support she cites in support of her motion. It cannot be said that Scott has been prejudiced in any way as a result of Stephanie's filing a motion which encompassed her arguments in their entirety, as opposed to her having filed an accompanying brief. To so find, this Court would be exalting form over substance, in derogation of I.R.C.P. 61, which requires the Court to disregard harmless errors.

Scott argues I.A.R. 13(b)(10) and (13) are matters which are to be heard by the District Court when a matter is on appeal to the Supreme Court. In *Department of Health & Welfare v. Doe I*, 147 Idaho 314, 208 P.3d 296 (2009), the Supreme Court held an appeal taken from magistrate court to a higher court is handled in the same manner as an appeal from the District Court to the Supreme Court:

Thus, pursuant to I.R.C.P. 83(u)(1), when an appeal is taken from the magistrate court to a higher court, the magistrate court retains the powers enumerated in I.A.R. 13(b).

147 Idaho 314, 316, 208 p.3d 296, 298. Here, there has been no prohibition by this Court that Judge Wayman not have the power and authority to rule upon "any action or

enter any order required for the enforcement of any judgment or order.” See I.A.R. 13(b)(13). Nor did this Court limit Judge Wayman’s ability to “make an order regarding the use, preservation or possession of any property which is the subject of the action on appeal.” See I.A.R. 13(b)(10).

It is entirely unclear why Stephanie now seeks to have this Court appoint a signer pursuant to I.R.C.P. 70, when Judge Wayman’s Order is the one she seeks to have enforced. Judge Wayman is intimately familiar with the property subject to the request she now makes. The motion, when made, was clearly made to Judge Wayman.

At the August 31, 2011, oral argument before this Court, this Court asked counsel for Stephanie what Judge Wayman said about this motion at the July 25, 2011, hearing Judge Wayman held. Counsel for Stephanie responded: “Judge Wayman said I don’t have jurisdiction to hear any of these any more. As far as I’m concerned they’re all appellate issues.” This Court has reviewed that portion of the July 25, 2011, hearing before Judge Wayman. Judge Wayman took care to analyze the purpose for I.R.C.P. 70, acknowledged that he had the discretion to order a third party sign these documents, but found that instead of Scott signing these documents he had chosen to exercise his appellate rights. Judge Wayman then discussed his discretion under I.A.R. 13, and found that discretion had to be balanced against Scott’s appeal rights. Judge Wayman then discussed the fourteen-day automatic stay under I.R.C.P. 83(i), and stated that under that rule he did not have the authority to take any action to enforce the judgment for that fourteen-day period (which had only begun a few hours earlier). Then Judge Wayman stated: “Given the track record, I think it appropriate to appoint a third party to execute the documents, but once that’s done it can’t be undone on appeal.” Judge Wayman again explained “There is a stay of execution on the judgment in effect

for fourteen days.” He acknowledged “It would be an abuse of my discretion to order another person to execute the documents in the fashion Ms. Reed wants me to do.” Judge Wayman then stated, “If I was to enter that order (that Ms. Reed wanted) I would be no giving full respect to that fourteen days, and would place a burden on Mr. Reed’s appellate rights, for that fourteen days”, and Judge Wayman emphasized the limitation when he said “for those fourteen days”, by the tone of his voice. Then Judge Wayman said it would be an abuse of discretion now that the appeal has been filed, but then specifically said that he would “deny the motion without prejudice, meaning that it can be brought before the court again.”

Judge Wayman’s explanation needs no interpretation by this Court. Stephanie’s counsel misheard Judge Wayman’s remarks as Judge Wayman simply did not say “He doesn’t have jurisdiction to hear any of those any more” or that “As far as I’m concerned they’re all appellate issues.”

This Court finds Judge Wayman, pursuant to I.A.R. 13(b), has jurisdiction over Stephanie’s “Motion for Appointment of a Person to Sign on Behalf of Disobedient Party Pursuant to I.R.C.P. 70”. For that reason, this Court will not hear such motion.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court finds it is inappropriate for this Court to decide Stephanie’s “Motion for Appointment of a Person to Sign on Behalf of Disobedient Party Pursuant to I.R.C.P. 70”, and this Court specifically finds Judge Wayman retains ongoing jurisdiction over the issues raised and the relief sought in such motion.

IT IS HEREBY ORDERED this Court will not hear Stephanie Reed’s “Motion for Appointment of a Person to Sign on Behalf of Disobedient Party Pursuant to I.R.C.P. 70.”

Entered this 31st day of August, 2011.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
Suzanna Graham	208 665-7079	Michael Ramsden	208 664-5884
Mark Ellingsen	208 667-8740	Dan J. Rude	208 666-0550

Hon. Scott Wayman

Jeanne Clausen, Deputy Clerk