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MAY 17, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Kelsey Rae Lerfald n/k/a Bosch, Plaintiff-Appellee, vs. Tyson Arleigh Lerfald, Defendant-Appellant, And State of North Dakota, Interested Party.	Case No. 09-2015-DM-00529 Supreme Court No. 20210008 **APPELLANT'S BRIEF**

ON APPEAL FROM THE ORDER ENTERED DECEMBER 17, 2020.

JUDGE THOMAS R. OLSON, PRESIDING

APPELLANT'S BRIEF

/s/ Kristin Overboe

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STATEMENT OF THE ISSUES

I. Whether the District Court abused its discretion and/or erred as a matter of law in the District Court's December 17th, 2020 Order in its findings and conclusions regarding parenting time.

II. Whether the District Court abused its discretion and/or erred as a matter of law in denying Defendant's request to vacate the provision of the judgment requiring him to maintain a valid driver's license and be solely responsible for transportation to facilitate his parenting time with ARL, causing his parenting time to be contingent on whether he has a valid driver's license.

III. Whether the Court exceeded it's jurisdiction in entering the Amended Judgment, and subsequently enforcing it.

STATEMENT OF THE CASE

[1.] The parties to this action are Kelsey Rae Lerfald n/k/a Kelsey Ray Bosch and Tyson Arleigh Lerfald. This is action was commenced on May 14, 2015 (Index #1-2) by personal service upon Mark A. Mazaheri. A Judgment by stipulation was entered on November 17th, 2015 granting a divorce to Kelsey Rae Lerfald n/k/a Kelsey Ray Bosch. A certified Amended Judgment was entered on March 3rd, 2020 reducing and placing restrictions on Tyson Lerfald's parenting time, specifically requiring him to have a valid driver's license to exercise parenting time with A.R.L. In November of 2020 Tyson moved for to amended the Judgment.

STATEMENT OF FACTS

[2.] Kelsey Rae Lerfald ("Kelsey") and Tyson Arleigh Lerfald ("Tyson") were married in September 2012 and have one child, A.R.L., born in 2010. Kelsey sued for an absolute decree of divorce from Tyson on May 11th, 2015. A stipulated Judgment was entered on November 17th, 2015 awarding Kelsey primary residential responsibility of A.R.L., a liberal parenting time schedule for Tyson, and joint decision-making responsibility. The parties agreed that Kelsey would have primary residential responsibility of A.R.L. and that Tyson would have parenting time every other weekend, and every Tuesday to Thursday. The agreement provided for alternating holidays.

[3.] On February 4th, 2020 Kelsey filed a Motion to Amend the Judgment for sole decision-making responsibility, to reduce Tyson's parenting time with A.R.L., and to require Tyson to maintain a valid driver's license and be responsible for transportation of A.R.L. Tyson's parenting time was contingent on him having a valid driver's license. A certified Amended Judgment (Index # 84) was entered on March 3rd, 2020 incorporating Kelsey's requests.

[4.] On November 17th, 2020 Tyson brought a Motion for Amended Judgment. With the motion, Tyson filed an affidavit describing his lack of contact with A.R.L. since May of 2020.

[5.] Tyson expressed that he wanted to see his daughter and that Kelsey was not allowing him to see her or communicate with her. Kelsey blocked Tyson and his parents from her phone and A.R.L.'s phone. Tyson expressed that A.R.L. has not seen her first cousins for over eight (8) months. Tyson argued that the material change that has occurred is that Kelsey is actively trying to end his relationship with A.R.L., that Kelsey was refusing to

foster his relationship with A.R.L. A.R.L. and Tyson had an extremely close bond and father-daughter relationship. The last time Tyson was allowed to see his daughter was on April 27th, 2020 for only 29 minutes. According to Tyson's affidavit, on September 30th, 2020 Kelsey petitioned the Court to change A.R.L.'s last name to Bosch. Tyson was not aware at the time and did not agree with Kelsey changing A.R.L.'s name without his consent. Tyson expressed fear that A.R.L. would believe he abandoned her.

[6.] Tyson expressed concerns with the Amended Judgment and the requirement that he maintain a valid driver's license and be solely responsible for transportation for A.R.L. Tyson has suffered from anxiety and depression making it difficult to run his business, Alliance Truck and Trailer. Tyson's business has been in decline since early 2018, in part because of the decline in the agriculture and oil industry and now also because his license was suspended. According to Tyson's affidavit, his income is less than $10,000 this year. Tyson requested a second amended Judgment vacating provision "g." on Page 4 which states "Tyson must maintain a valid driver's license and shall be solely responsible for transportation to facilitate his parenting time with A.R.L.", for enforcement of his parenting time; modification of his child support obligation, and other things.

[7.] Kelsey's position was that Tyson does not have parenting rights, and because Tyson does not have a valid driver's license and he is solely responsible for transportation he is not entitled to parenting time. Kelsey testified that she is employed at Wells Fargo as a mortgage banker earning approximately $72,000 in 2020. At the hearing Kelsey testified that she has always had intentions of nurturing a healthy relationship between Tyson and A.R.L. (T – Pg. 8, L. 12-15). That Tyson has made it impossible for Kelsey to do that. (T – Pg. 8, L. 16-17). Kelsey testified that she has blocked Tyson from her cell phone since

May of 2020. (T – Pg. 10, L. 8-16). When asked about her concerns regarding parenting time and communication between Tyson and A.R.L., Kelsey referred to her affidavit on multiple occasions. (See T – Pg. 8, L. 19-20, L. 23-24; Pg. 11, L. 22-23).

[8.] Kelsey testified that her primary concerns are that "A.R.L. is in immediate danger in Tyson's care, which he has proven over and over and over again." (T – Pg. 11, L. 25; Pg. 12, L. 1-2). Kelsey testified that she would not facilitate Tyson's parenting time with A.R.L. even if he took a breathalyzer before, during, and after his parenting time. (T – Pg. 13, L. 12-16). Kelsey testified that she "would love to facilitate any type of parenting time between A.R.L. and Tyson if Tyson is able to complete recommendations from Social Services. But when asked what those recommendations were, Kelsey did not know, and referred to an exhibit attached to her affidavit. (T – Pg. 14, L. 15-18). Kelsey did not offer her affidavit or the exhibits attached as evidence. Kelsey further testified that Tyson has psychologically abused A.R.L., and referred to him as a "registered child abuser." (T – Pg. 16, L. 1-4). When asked to describe the abuse she stated "I can't, because I did not complete the assessment…" (T – Pg. 16, L. 11). When asked, Kelsey could not describe how A.R.L. was abused, nor did she request information from social services regarding the alleged conduct. (T – Pg. 16, L. 17-24). When asked to explain, in general, how Tyson has abused A.R.L., Kelsey referred to her affidavit. (T – Pg. 17, L. 13-14). Kelsey's affidavit is not evidence.

[9.] Kelsey testified that she believes that because a foreclosure action was pending on Tyson's home, that it would impact his ability to have parenting time with A.R.L. (T – Pg. 20, L. 14-24). Kelsey testified that she would be opposed to Tyson exercising his parenting time at his parents' house (A.R.L.'s grandparents). (T – Pg. 21, L. 6-9). Kelsey testified

that she would not allow A.R.L.'s grandparents to see her (T – Pg. 24, L. 23-24) "because Tyson doesn't have parenting rights and I don't know if they have Grandparent rights." (T – Pg. 25, L. 1-2). When asked if there was anything that Tyson's family could do for her be willing to facilitate his parenting time she stated "no." (T – Pg. 30, L. 15-17). Kelsey testified that Tyson should be the only one allowed to provide transportation for exchanges, (T – Pg. 35, L. 3-7), yet she acknowledged that Tyson did not have a driver's license. (T – Pg. 35, L. 11-14). When asked if it would be more appropriate to allow for extended family or another driver to facilitate his parenting time with A.R.L., Kelsey said "no". (T – Pg. 35, L. 15-20). Her reasoning was because she believed "Tyson has an extensive history of drinking and driving..." (T – Pg. 36, L. 21-22). When asked if it would be better to amend that provision for that reason, Kelsey said "no". (T – Pg. 37, L. 2).

[10.] Roberta Lerfald, A.R.L.'s grandmother, testified that she had a very close relationship with A.R.L. from day one. She did a lot of babysitting for her and they spent a lot of time together, baking cookies, going to the park, shopping, and visiting relatives. (T – Pg. 38, L. 16-25). Following the divorce the contact was less, but she did see A.R.L. every time Tyson had her. (T – Pg. 38, L. 23-25). As of December 10th, 2020, Roberta testified that she has not seen A.R.L. since March 2020. (T – Pg. 39, L. 1-2). Robert testified that A.R.L. had a very close relationship with her dad, and that she would be willing to provide transportation to facilitate Tyson's parenting time with A.R.L. (T – Pg. 42, L. 1-18). Robert testified that she was aware that Tyson has had some problems with alcohol in the past, but that she has not observed Tyson to be intoxicated during his periods of parenting time. (T – Pg. 43, L. 3-8).

[11.] Tyson testified that he has known his wife, Kelsey, since 2003. (T – Pg. 45, L. 16-25). The parties have known each other for eighteen (18) years. Tyson testified that there have been material changes since the judgment because of the reduction in his parenting time, specifically the last time he was able to see A.R.L. was on his birthday, [redacted]th of 2020. During that visit he was only allowed to see A.R.L. at her house for a half hour, and under her circumstances. (T – Pg. 46, L. 10-22).

[12.] Tyson testified that over the past year he has experienced depression from losing his business and from the lack of contact with A.R.L. (T – Pg. 48, L. 2-15). Tyson's testimony indicated that his father was serving as his power of attorney and his father was receiving his mail. [T – Pg. 72, L. 14-25].

[13.] He further testified that although A.R.L. had sent multiple messages stating that she loves him and misses him, in May or June of 2020 Kelsey blocked him on her phone. (T – Pg. 48, L. 16-25). The Court received exhibits 100 through 108 which were photographs of Tyson and A.R.L., videos, and letters. The photographs provide Tyson attending A.R.L.'s dance competitions, dance recitals, photos of Tyson and A.R.L. fishing, and a photo of them of her birthday when Tyson bought her a guitar and a harmonica. Tyson testified that A.R.L. loves music, that she is a very good singer, and he was teaching her how to play guitar. Prior to losing contact with A.R.L., Tyson did most of the transportation, was at all of her activities, and would even braid her hair for recitals. (T – Pg. 52, L. 1-25). Tyson testified that he still has drawers and a closet full of A.R.L.'s clothing. Tyson testified that he is actively working towards sobriety, has begun taking medication for depression, and is now exercising to relieve his anxiety and depression. (T – Pg. 56, L. 1-11).

[14.] Following the hearing, the Court issued an Order Denying Defendant's Motion in all respects, and finding that "there has not been a material change of circumstances since entry of the amended Judgment on March 3rd, 2020 warranting modification of the parties' parenting time provisions…". That "any changes of circumstances which have occurred since entry of the Amended Judgment are all negative regarding Tyson's parenting time. And that "[a]n analysis of the best interest of the child factors all weigh heavily in Kelsey's favor." The Court made findings regarding pending criminal charges against Tyson and a report from Cass County Social Services regarding recommended services, even though no evidence was offered regarding the criminal charges or the report and the court did not receive it as evidence. The Court did not describe how parenting time with Tyson were likely to endanger the minor child's physical or emotional health. While Kelsey specifically requests that Tyson provide A.R.L.'s transportation with a valid driver's license, that is not possible, nor is it in the best interest of the minor child at this time.

[15.] Following the hearing, the Court found "no material change in circumstances. [T – Pg. 78, L. 10 -11]. The Court further noted, "If I were to apply the best interest factors, I would find that they weigh heavily in favor of Kelsey Lerfald." [T – Pg. 78, L. 12-14].

STANDARD OF REVIEW

[16.] A district court's decision on parenting time is a finding of fact, reviewed under the clearly erroneous standard. Wolt v. Wolt, 2010 ND 26, ¶ 38. A finding of fact is clearly erroneous if it is made by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court, on the evidence, is left with a firm conviction a mistake has been made. Wolt, at ¶ 7. A district court's factual findings should be stated with sufficient

specificity to enable this Court to understand the basis for the decision. See Marsden v. Koop, 2010 ND 196, ¶ 21, 789 N.W.2d 531.

LAW AND ARGUMENT

[17.] **Whether the District Court abused it's discretion and erred as a matter of law in the District Court's analysis of the best interest factors, findings, and conclusions in determining parenting time.**

[18.] Section 14-05-22(2), N.D.C.C., provides that "upon request of the other parent, [the court] shall grant such rights of parenting time as will enable the child to maintain a parent-child relationship that will be beneficial to the child, unless the court finds, after a hearing, that such rights of parenting time are likely to endanger the child's physical or emotional health." "'In awarding [parenting time] to the non-custodial parent, the best interests of the child, rather than the wishes or desires of the parents, are paramount.'" Wolt v. Wolt, 2010 ND 26, ¶ 38, 778 N.W.2d 786 (quoting Bertsch v. Bertsch, 2006 ND 31, ¶ 5, 710 N.W.2d 113); see N.D.C.C. § 14-09-06.2 (best interest factors). "[O]ur statutes and case law recognize that [parenting time] with a noncustodial parent may be curtailed or eliminated entirely if it is likely to endanger the child's physical or emotional health." Marquette v. Marquette, 2006 ND 154, ¶ 9, 719 N.W.2d 321. This Court has said a restriction on parenting time must be supported by a preponderance of the evidence and "'accompanied by a detailed demonstration of the physical or emotional harm likely to result from visitation.'" Wolt, 2010 ND 26, ¶ 38, 778 N.W.2d 786 (quoting Marquette, at ¶ 9). The noncustodial parent is deprived of visitation only if "visitation is likely to endanger the child's physical or emotional health." N.D.C.C. § 14-05-22(2). Visitation with the noncustodial parent is presumed to be in the best interests of the children. Blotske v. Leidholm, 487 N.W.2d 607 (N.D. 1992). N.D.C.C. 14-09-06.2 states that for the purpose of parental rights and

responsibilities, the best interests and welfare of the child is determined by the court's ***consideration and evaluation*** of all factors affecting the best interests and welfare of the child. The Court is required to make specific findings explaining how the statutory factors apply. Datz v. Dosch, 2013 ND 148. The court's findings are adequate if the factual basis for the court's decision and the findings afford a clear understanding of the decision. Id.

[19.] Here, the Court's findings are not only based on inadmissible hearsay, but they also do not afford a clear understanding on his decision. The Court finds that:

Any changes of circumstances which have occurred since entry of the Amended Judgment are all negative regarding Tyson's parenting time.

....

An Analysis of the Best Interest of the Child Factors all weight heavily in Kelsey's favor.

[20.] This case provides a textbook example of how to improperly consider and evaluate the best interest factors. Here, in restricting Tyson's parenting time, the district court did not consider the best interest factors. Following the hearing, the Court found "no material change in circumstances. [T – Pg. 78, L. 10 -11]. The Court did not apply the best interest factors noting that "[i]f I were to apply the best interest factors, I would find that they weigh heavily in favor of Kelsey Lerfald." [T – Pg. 78, L. 12-14].

[21.] The testimony and evidence in the record does not support the Court's finding. At the hearing Kelsey testified that she has always had intentions of nurturing a healthy relationship between Tyson and A.R.L. (T – Pg. 8, L. 12-15). That Tyson has made it impossible for Kelsey to do that. (T – Pg. 8, L. 16-17). Kelsey testified that she has blocked Tyson from her cell phone since May of 2020. (T – Pg. 10, L. 8-16). When asked about her concerns regarding parenting time and communication between Tyson and A.R.L.,

Kelsey referred to her affidavit on multiple occasions. (See T – Pg. 8, L. 19-20, L. 23-24; Pg. 11, L. 22-23).

[22.] Kelsey testified that her primary concerns are that "A.R.L. is in immediate danger in Tyson's care, which he has proven over and over and over again." (T – Pg. 11, L. 25; Pg. 12, L. 1-2). Kelsey testified that she would not facilitate Tyson's parenting time with A.R.L. even if he took a breathalyzer before, during, and after his parenting time. (T – Pg. 13, L. 12-16). Kelsey testified that she "would love to facilitate any type of parenting time between A.R.L. and Tyson if Tyson is able to complete recommendations from Social Services. But when asked what those recommendations were, Kelsey did not know, and referred to an exhibit attached to her affidavit. (T – Pg. 14, L. 15-18). Kelsey did not offer her affidavit or the exhibits attached as evidence. Kelsey further testified that Tyson has psychologically abused A.R.L., and referred to him as a "registered child abuser." (T – Pg. 16, L. 1-4). When asked to describe the abuse she stated "I can't, because I did not complete the assessment…" (T – Pg. 16, L. 11). When asked, Kelsey could not describe how A.R.L. was abused, nor did she request information from social services regarding the alleged conduct. (T – Pg. 16, L. 17-24). When asked to explain, in general, how Tyson has abused A.R.L., Kelsey referred to her affidavit. (T – Pg. 17, L. 13-14). Kelsey's affidavit is not evidence.

[23.] Kelsey testified that she believes that because a foreclosure action was pending on Tyson's home, that it would impact his ability to have parenting time with A.R.L. (T – Pg. 20, L. 14-24). Kelsey testified that she would be opposed to Tyson exercising his parenting time at his parents' house (A.R.L.'s grandparents). (T – Pg. 21, L. 6-9). Kelsey testified that she would not allow A.R.L.'s grandparents to see her (T – Pg. 24, L. 23-24) "because

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[24.] Roberta Lerfald, A.R.L.'s grandmother, testified that she had a very close relationship with A.R.L. from day one. She did a lot of babysitting for her and they spent a lot of time together, baking cookies, going to the park, shopping, and visiting relatives. (T – Pg. 38, L. 16-25). Following the divorce the contact was less, but she did see A.R.L. every time Tyson had her. (T – Pg. 38, L. 23-25). As of December 10th, 2020, Roberta testified that she has not seen A.R.L. since March 2020. (T – Pg. 39, L. 1-2). Robert testified that A.R.L. had a very close relationship with her dad, and that she would be willing to provide transportation to facilitate Tyson's parenting time with A.R.L. (T – Pg. 42, L. 1-18). Robert testified that she was aware that Tyson has had some problems with alcohol in the past, but that she has not observed Tyson to be intoxicated during his periods of parenting time. (T – Pg. 43, L. 3-8).

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have been material changes since the judgment because of the reduction in his parenting time, specifically the last time he was able to see A.R.L. was on his birthday, [redacted]th of 2020. During that visit he was only allowed to see A.R.L. at her house for a half hour, and under her circumstances. (T – Pg. 46, L. 10-22).

[26.] Tyson testified that over the past year he has experienced depression from losing his business and from the lack of contact with A.R.L. (T – Pg. 48, L. 2-15). He further testified that although A.R.L. had sent multiple messages stating that she loves him and misses him, in May or June of 2020 Kelsey blocked him on her phone. (T – Pg. 48, L. 16-25). The Court received exhibits 100 through 108 which were photographs of Tyson and A.R.L., videos, and letters. The photographs provide Tyson attending A.R.L.'s dance competitions, dance recitals, photos of Tyson and A.R.L. fishing, and a photo of them of her birthday when Tyson bought her a guitar and a harmonica. Tyson testified that A.R.L. loves music, that she is a very good singer, and he was teaching her how to play guitar. Prior to losing contact with A.R.L., Tyson did most of the transportation, was at all of her activities, and would even braid her hair for recitals. (T – Pg. 52, L. 1-25). Tyson testified that he still has drawers and a closet full of A.R.L.'s clothing. Tyson testified that he is actively working towards sobriety, has begun taking medication for depression, and is now exercising to relieve his anxiety and depression. (T – Pg. 56, L. 1-11).

[27.] Following the hearing, the Court issued an Order Denying Defendant's Motion in all respects, and finding that "there has not been a material change of circumstances since entry of the amended Judgment on March 3rd, 2020 warranting modification of the parties' parenting time provisions…". That "any changes of circumstances which have occurred since entry of the Amended Judgment are all negative regarding Tyson's parenting time.

And that "[a]n analysis of the best interest of the child factors all weigh heavily in Kelsey's favor." The Court made findings regarding pending criminal charges against Tyson and a report from Cass County Social Services regarding recommended services, even though no evidence was offered regarding the criminal charges or the report and the court did not receive it as evidence. The Court did not describe how parenting time with Tyson were likely to endanger the minor child's physical or emotional health. While Kelsey specifically requests that Tyson provide A.R.L.'s transportation with a valid driver's license, that is not possible, nor is it in the best interest of the minor child at this time.

[28.] **Whether the District Court abused it's discretion and/or erred as a matter of law in issuing the December 17, 2020 Order by relying on inadmissible hearsay evidence.**

[29.] Tyson challenges the "evidence" upon which the district court relied to make its factual findings. The submission of affidavits without stipulating to the admissibility of the contents or without providing subsequent testimony creates an evidentiary deficiency. On point is the case of O'Keeffe v. O'Keeffe, 948 N.W.2d 848 (N.D. 2020) (Justice Jenson concurring specially). In O'Keeffe, the district court held a hearing on Defendant's motion. A hearing was set by the district court. At the beginning of the initial hearing the parties agreed to submit the matter to the court on the parties' filings and the arguments of the attorneys. The parties expressed that neither intended to put on any additional testimony or evidence. The district court requested clarification regarding what the parties believed had been provided as evidence, noting that he usually required a stipulation or offer of proof for the court to make a ruling on at trial. The District Court explained that "just the fact that they were filed doesn't mean that they are admitted into evidence." During the subsequent legal arguments to the district court, Defendant's counsel repeatedly referred

to Defendant's affidavit as factually supporting his motion. In response, Plaintiff's counsel argued that Defendant's affidavit was not evidence. Subsequently, when the district court made its factual findings, it incorporated the substance of Defendant's affidavit.

[30.] In his concurring opinion, Chief Justice Jenson notes that although there was no evidentiary challenge, the Defendant's affidavit is hearsay and not admissible under a statute, the Rules of Evidence, or other rule promulgated by the North Dakota Supreme Court. O'Keeffe, 948 N.W.2d 848 at ¶36 (citing Cusey v. Nagel, 2005 ND 84, 695 N.W.2d 697 ; Mehus v. Thompson, 266 N.W.2d 920, 924 (N.D. 1978). Rule 801(c) of the North Dakota Rules of Evidence provides as follows: (c) Hearsay. "Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. The Court explained that inadmissible hearsay should not have been used for subsequent factual findings of the district court. Rule 802 of the North Dakota Rules of Evidence provides that [h]earsay is not admissible unless any of the following provides otherwise: (a) a statute; (b) these rules; or (c) other rules prescribed by the North Dakota Supreme Court. The Court further noted that if the evidentiary deficiency had been raised, it would not have been necessary for this Court to make a determination on the substance of the appeal in order to reverse the district court's findings.

[31.] In this case, the Court relied on Kelsey's exhibits filed in connection with her affidavit. At the hearing, Kelsey did not offer the exhibits or her affidavit. Because no evidence was received at the December 10, 2020 proceeding to support the District Court's December 17, 2020 order. The District Court relied on inadmissible hearsay to make it's findings.

[32.] At the hearing the only exhibits received by the court were the following:

a. Affidavit of Tyson Lerfeld (filed with motion)
b. Ex. 100 – Photographs of A.R.L. & Tyson
c. Ex. 101 – The I love Daddy Book
d. Ex. 102 – Birthday Card from A.R.L.
e. Ex. 103 – My Dad is Special
f. Ex. 104 - Letter from A.R.L. to Tyson
g. Ex. 105 – Me and My Dad Sheet
h. Ex. 106 – Wage and Tax Statement
i. Ex. 107 – Tyson's 2016-2018 Tax Returns
j. Ex. 108 – Thumb Drive
k. Ex. 109 – Unsworn Declaration of Tyson Lerfald In Response to Affidavit of Kelsey Bosch

[33.] Here, the Court did not base it's findings on the evidence and testimony presented. The Court's findings are not stated with specificity and do not afford a clear understanding of the court's decision in this case. "Under N.D.R.Civ.P. 52(a), a district court trying an action upon the facts without a jury 'must find the facts specially.' A district court's findings of fact must be sufficient to enable an appellate court to understand the factual determinations made by the district court and the basis for its conclusions of law. 'A district court's "findings of fact . . . should be stated with sufficient specificity to assist the appellate court's review and to afford a clear understanding"' of the court's decision. A district court's findings are adequate if this Court can discern from them the factual basis for the district court's decision." Niska v. Falconer, 2012 ND 245, ¶ 10, 824 N.W.2d 778.

[34.] **Whether the District Court abused its discretion in denying Defendant's request to amend/vacate a provision in the amended Judgment requiring him to maintain a valid driver's license and be solely responsible for transportation in order to exercise his parenting time with ARL.**

[35.] Section 14-05-22(2), N.D.C.C., provides that "upon request of the other parent, [the court] shall grant such rights of parenting time as will enable the child to maintain a parent-child relationship that will be beneficial to the child, unless the court finds, after a hearing,

that such rights of parenting time are likely to endanger the child's physical or emotional health." "'In awarding [parenting time] to the non- custodial parent, the best interests of the child, rather than the wishes or desires of the parents, are paramount.'" Keita v. Keita, 2012 ND 234 (quoting Wolt v. Wolt, 2010 ND 26, ¶ 38, 778 N.W.2d 786 (quoting Bertsch v. Bertsch, 2006 ND 31, ¶ 5, 710 N.W.2d 113); see N.D.C.C. § 14-09-06.2 (providing "best interest" factors). A district court's decision on parenting time is a finding of fact, which we review under the clearly erroneous standard of review. Wolt, at ¶ 38; Bertsch, at ¶ 5. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court, on the entire evidence, is left with a definite and firm conviction a mistake has been made." Wolt, at ¶ 7 (quotations omitted). A district court's factual findings should be stated with sufficient specificity to enable this Court to understand the basis for its decision. See Marsden v. Koop, 2010 ND 196, ¶ 21, 789 N.W.2d 531.

[¶6] "[O]ur statutes and case law recognize that [parenting time] with a noncustodial parent may be curtailed or eliminated entirely if it is likely to endanger the child's physical or emotional health." Marquette v. Marquette, 2006 ND 154, ¶ 9, 719 N.W.2d 321. This Court has said a restriction on parenting time must be supported by a preponderance of the evidence and "'accompanied by a detailed demonstration of the physical or emotional harm likely to result from visitation.'" Wolt, 2010 ND 26, ¶ 38, 778 N.W.2d 786 (quoting Marquette, at ¶ 9). The U.S. Supreme Court has held that the fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents..." Santosky v. Kramer, 455 U.S. 745, 102 S. Ct 1388, 71 L.Ed.2d 599 (1982).

[36.] Here, Tyson moved to amend the Amended Judgment which provides the following provisions:

> Tyson shall not consume alcohol 24 hours prior to or during his parenting time with ARL. Tyson shall take a breathalyzer prior to, during and following his parenting time at Kelsey's request.
>
> Tyson must maintain a valid driver's license and shall be solely responsible for transportation to facilitate his parenting time with ARL.

[37.] Tyson did not object to the first provision. However, the second provision provides an unreasonable restriction on his ability to exercise any parenting time with A.R.L. This provision requires Tyson to have a valid driver's license in order to see his daughter. This provision unreasonably restricts Tyson's contact with his daughter. Parenting time should not be contingent on whether a party has a valid driver's license. If parenting time were contingent on having a valid driver's license, then many people in the state of North Dakota would not see their children due to suspensions related to non-payment of child support and restrictions due to Driver Under the Influence.

[38.] Finally, Tyson raises issue with the certified Amended Judgment dated March 3rd, 2020. Tyson asserts that the Court exceeded its jurisdiction to issue the amended Judgment and the judgment is void due as illegal.

[39.] Under Rule 54(b) of the North Dakota Rules of Civil Procedure if an action presents more than one claim for relief, whether as a claim, counterclaim, crossclaim, or third-party claim … the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of

a judgment adjudicating all the claims and all the parties' rights and liabilities. N.D.R.Civ. P. 54(b). A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. N.D.R.Civ. P. 54(c). In Kelsey's Complaint she prays for a judgment awarding "her a decree of absolute divorce from Defendant." [A-11]. In the original Judgment dated November 17th, 2015, Plaintiff was granted an absolute divorce from Defendant on the grounds of irreconcilable differences [A-15], and granted both parties the right to remarry at any time. The Judgment was not certified under Rule 54 of the North Dakota Rules of Civil Procedure and was consequently not a final judgment. However, on March 3rd, 2020, following Kelsey's motion to reduce and restrict Tyson's parenting time the Court entered a certified Amended Judgment. At the time, Court did not expressly determine that there was no just reason for delay as required by the rule.

[40.] Here, the Court exceeded it's jurisdiction to enter a final and certified Judgment granting only one party a divorce, but granting both parties the right to remarry at any time.

[41.] Jurisdiction in divorce matters is wholly statutory and the court's power to deal with such matters must find support in statute or in the constitution. Leifert v. Wolfer, 74 N.D. 746, 24 N.W.2d 690, 169 A.L.R. 633; Agrest v. Agrest, 75 N.D. 318, 27 N.W.2d 697; Brandt v. Brandt, 76 N.D. 99, 33 N.W.2d 620; Stoutland v. Stoutland's Estate (N.D.) 103 N.W. 2d 286; King v. Menz, N.D., 75 N.W.2d 516. Questions of the feasibility or policy of a law are for the legislature. As was said in Territory of Dakota v. Taylor, 1 Dak. (459) 479, "[t]he court cannot make, or unmake, laws. It must take them as they are, and not, as in some instances, it might wish them to be. A court must not deviate… from the law as it is. If the law is bad, it is not for the judiciary, but for the people themselves, through… the Legislative Assembly, to change, modify or repeal it."

[42.] Jurisdiction means the power to inquire into the facts, apply the law, and to determine and pronounce judgment. In Re Edinger's Estate, 136 N.W.2d 114 (1965). "The `subject matter of a suit,' means the nature of the cause of action, and the relief sought." King v. Menz, supra. Subject matter jurisdiction is derived solely from the law and can, in no event, be conferred by the consent of the parties, waiver or estoppel. Bryan v. Miller, 73 N.D. 487, 16 N.W.2d 275. Jurisdiction of the court does not depend upon whether its decision is right or wrong, correct or incorrect. Reichert v. Turner, 62 N.D. 152, 242 N.W. 308; Ryan v. Nygaard, 70 N.D. 687, 297 N.W. 694. Every court of general jurisdiction has the power to determine whether the conditions essential to its exercise of jurisdiction exist. In Re Edinger's Estate, 136 N.W.2d 114 (1965). To this extent it may determine its own jurisdiction. *Id.* Once the district court acquires jurisdiction over the subject matter, it will retain it to do complete justice by the parties. *Id.* This is assuming the original jurisdiction was invoked by proper submission of the issue to the court for determination. *Id.* Unless the issue was submitted, the district court never acquired jurisdiction over the subject matter which it could retain to do complete justice between the parties. *Id.* The critical question is not what the parties had the legal right to do, but what they actually did. *Id.* To answer this question, upon examination of the record it shows that the Plaintiff's Complaint, [A – 9] sought an absolute decree of divorce from defendant. The parties submitted a stipulation to the Court. The Court, relying in upon on that submission, created its Findings of Fact, Conclusions of law, and Order for Judgment.

[43.] Here, because Plaintiff did not request a judgment decreeing a divorce of both parties, the Court does not have the authority to do it. A "court in a default action may not grant relief beyond that which is demanded in the complaint. Estate of Williams, 36 Cal.2d

289 (citing Burtnett v. King, 33 Cal.2d 805 [205 P.2d 657, 12 A.L.R.2d 333]). Here, Tyson's Answer and counterclaim cannot broaden the scope of the complaint. The complaint must support the judgment, and a plaintiff may not recover beyond the case stated in his or her complaint. Chapman v. Chapman, 354 P.2d 184 (Mont. 1960). The pleader must limit proofs within the cause of action stated and may not go beyond the material allegations of the pleadings. Id. A defendant, in answering a case is not bound to do more than answer the case in the mode in which it is put forward. Id.

[44.] Here the parties' marriage has not been dissolved or terminated because the complaint does not sustain granting the parties an absolute decree of divorce, one from the other, as required by the statute. Furthermore, the Judgment originally granted on May 8th, 2018 exceeded the Court's authority under the law when it failed to grant both parties a divorce, while granting both parties the right to remarry at any time. [A-30]. A divorce granted without complying with the statute is void for lack of jurisdiction. Kasal v. Kasal, 227 Minn. 529, 35 N.W.2d 745 (1949). Wyman v. Wyman, 212 N.W.2d 368 (1973); Salzbrun v. Salzbrun, 81 Minn. 287, 83 N.W. 1088 (1900); Thelen v. Thelen, 75 Minn. 433, 78 N.W. 108 (1899). "An order that exceeds the jurisdiction of the court is void and can be attacked in any proceeding in any court where the validity of the judgment comes into issue". Pennoyer v. Neff (1877) 95 US 714, 24 L ed 565; Thompson v. Whitman (1873) 18 Wall 457, 21 l ED 897; Windsor v. McVeigh (1876) 93 US 274, 23 L ed 914; McDonald v. Mabee (1917) 243 US 90, 37 Sct 343, 61 L ed 608. The lack of statutory authority to make a particular order or a judgment is akin to lack of subject matter jurisdiction and is subject to collateral attack. 46 Am. Jur. 2d, Judgments Â§ 25, pp. 388-89.

[45.] The North Dakota Century Code provides that a marriage is dissolved only by (1) the death of one of the parties; or (2) by a judgment of a court of competent jurisdiction decreeing a divorce of the parties. See N.D.C.C. § 14-05-01. The effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons. See N.D.C.C. § 14-05-02. The statute provides that neither party to a divorce may marry except in accordance with the decree of the court granting the divorce. *Id.* See also In Re Marriage of Campbell, 136 Cal. App. 4th at P. 508, 38 Cal. Rptr.3d 908 (stating that "a person may never legally remarry prior to dissolution of his or her existing marriage."); See also In re Marriage of Seaton, (2011) 200 Cal. App. 4th 800, 133 Cal. Rptr. 3d 50 (stating that "under California law, a bigamous marriage is "'void without any decree of divorce or annulment or other legal proceedings'..."). It is the duty of the court granting a divorce to specify in the order for judgment whether either or both of the parties shall be permitted to marry, and if so, when. *Id.* The court has jurisdiction to modify the divorce decree at any time so as to permit one or both of the parties to marry, if the court deems it right. *Id.* The District Court exceeded its jurisdiction under Chapter 14 of the North Dakota Century Code by issuing an Order which exceeded the scope of the statutes. Accordingly, statutes dealing with the same subject matter are construed together to harmonize them and give full force to their meaning. Burgum v. Jaeger, 2020 ND 251 at ¶19. The Legislative Assembly passed §14-05-02 which applies to how a divorce can be granted. N.D.C.C. § 14-05-02, gives the Court authority to grant the right to remarry. The Court exceeded its jurisdiction when it granted only Plaintiff a divorce from Defendant, yet gave both parties the right to remarry. The divorce was not properly finalized. When a divorce judgment is not properly finalized it exposes the parties who rely on what looks like a "judgment" to question the validity of

a subsequent marriage entered into by one of the parties before those issues were determined. Albrecht v. Albrecht, 2014 ND 221, ¶18, 856 N.W.2d 755 (VandeWalle, Chief Justice, concurring specially). If a divorce is not properly finalized, and if one parties dies before the divorce is finalized, the parties assets, or lack thereof, could become the property or debt of the living spouse. A subsequent putative spouse could be exposed to risk as well. This can cause harmful litigation between the parties, putative spouses, and potential beneficiaries. *Id.* See also Estate of Albrecht, 2018 ND 67, 908 N.W.2d 135 and Albrecht v. Albrecht, et al. 2020 ND 105, 942 N.W.2d 875; See Albrecht v. Albrecht, 2014 ND 221, 856 N.W.2d 755 (where the "Judgment" stated that each party was entitled to a divorce from the other on the grounds of irreconcilable differences, the divorce was not finalized.) Similar language was used in the case of Estate of Williams, 36 Cal.2d 289 where the interlocutory decree states that "... plaintiff is entitled to a judgment from defendant ...," The Court held "that under such circumstances, it cannot be said that the court decided any issue other than the right to a divorce.").

CONCLUSION

[46.] Wherefore, APPELLANT requests that the North Dakota Supreme Court VACATE the original 2015 Judgment as void for illegality and lack of jurisdiction;

[47.] Alternatively, Appellant requests that this Court REVERSE the District Court's ORDER dated 12/17/2020, and REMAND for new findings of fact based on the evidence presented, and/or VACATE the provision requiring a valid driver's license to exercise parenting time.

[48.] Alternatively, REMAND for further proceedings requiring the court to hear additional evidence and make findings on the evidence received as to what is in the child's best interest.

[49.] For attorney fees and costs and for any other relief deemed appropriate by the court.

CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellant hereby certifies that said Brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated this 17th day of May, 2021.

Respectfully Submitted,

/s/ Kristin Overboe

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Kelsey Rae Lerfald n/k/a Bosch, Plaintiff-Appellee, vs. Tyson Arleigh Lerfald, Defendant-Appellant, And State of North Dakota, Interested Party.	Case	No. 09-2015-DM-00529 Supreme Court No. 20210008 **CERTIFICATE OF SERVICE**

I, Kristin A. Overboe, state, pursuant to Rule 5(f) of the North Dakota Rules of Civil Procedure, that I am an attorney licensed in the State of North Dakota. I further state that:
On the 17th day of May, 2021, I sent by electronic mail a true and correct copy of the following:

1. **Appellant's Brief;**
2. **Appellant's Appendix; and**
3. **Certificate of Service**

[2] Copies of the foregoing were sent by E-MAIL/Electronic Service to the following addresses:

Robert Schultz, 406 Main Ave, Suite 200, Fargo, ND 58103, rschultz@conmylaw.com

Child Support Enforcement, 4950 13th Ave So., Ste 22, Fargo, ND 58103, fargocse@nd.gov

[3] To the best of my knowledge, the above listed email address is the actual address of the party intended to be served or her attorney.

Dated this 17th day of May, 2021.

/s/ Kristin Overboe

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Kelsey Rae Lerfald n/k/a Bosch, Plaintiff-Appellee, vs. Tyson Arleigh Lerfald, Defendant-Appellant, And State of North Dakota, Interested Party.	)	Case No. 09-2015-DM-00529 Supreme Court No. 20210008 **CERTIFICATE OF SERVICE**

I, Kristin A. Overboe, state, pursuant to Rule 5(f) of the North Dakota Rules of Civil Procedure, that I am an attorney licensed in the State of North Dakota. I further state that:
On the 21st day of May, 2021, I sent by electronic mail a true and correct copy of the following:

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Dated this 21st day of May, 2021.

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Kelsey Rae Lerfald n/k/a Bosch, Plaintiff-Appellee, vs. Tyson Arleigh Lerfald, Defendant-Appellant, And State of North Dakota, Interested Party.	Case No. 09-2015-DM-00529 Supreme Court No. 20210008 **CERTIFICATE OF SERVICE**

I, Kristin A. Overboe, state, pursuant to Rule 5(f) of the North Dakota Rules of Civil Procedure, that I am an attorney licensed in the State of North Dakota. I further state that:
On the 24th day of May, 2021, I sent by electronic mail a true and correct copy of the following:

1. **Appellant's Brief;**
2. **Appellant's Appendix; and**
3. **Certificate of Service**

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Dated this 24th day of May, 2021.

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