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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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Matthew Thomas Roy Hanson,	)	Supreme Court No. 20220261
	)	
Plaintiff/Appellee,	)	Dist. Ct. No. 09-2021-DM-01199
	)	
v.	)	
	)	
Kristin Dawn Hettervig,	)	
	)	
Defendant/Appellant.	)	
and	)	
	)	
State of North Dakota,	)	
	)	
Statutory Real Party	)	
in Interest and Appellee.	)	

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**APPEAL FROM AN ORDER OF CONTEMPT ENTERED AUGUST 11<sup>TH</sup>, 2022  
 FROM THE CASS COUNTY DISTRICT COURT IN NORTH DAKOTA, EAST  
 CENTRAL JUDICIAL DISTRICT, THE HONORABLE DANIEL ERIC GAST  
 PRESIDING.**

**BRIEF FOR THE APPELLANT**

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## **STATEMENT OF ISSUES**

- [1.] Whether the Court abused its discretion and/or exceeded its authority in exercising subject matter jurisdiction;
- [2.] Whether the Court abused its discretion by holding the Defendant in contempt.
- [3.] Whether the Court abused its discretion in awarding attorney fees.

## **STATEMENT OF THE CASE**

[4.] This case originated by service of a summons and complaint to establish residential and decision-making responsibility for one (1) minor child on November 8<sup>th</sup>, 2021 in Cass County, North Dakota. (R:4). An interim Order was issued on November 15<sup>th</sup>, 2021 by stipulation of the parties. (R:13). The Appellant (“Kristin”) filed an Answer on February 7<sup>th</sup>, 2022. (R:18). On July 13<sup>th</sup>, 2022 the Appellee (“Matt”) filed a Motion for Contempt. (R:29). On July 14<sup>th</sup>, 2022, Matt filed an Application for Ex Parte Order. (R:33). The Court held a hearing on July 15<sup>th</sup>, 2022 and subsequently issued an Order Denying Ex Parte Interim order. (R:40). A contempt hearing was held on August 8<sup>th</sup>, 2022. Following the hearing, the Court issued an Order of Contempt on August 11<sup>th</sup>, 2022 and awarding “reasonably attorney’s fees” to Matt. Kristin appealed to the North Dakota Supreme Court.

## **STATEMENT OF FACTS**

[5.] This action was commenced by Matt on November 8<sup>th</sup>, 2021 to establish primary residential and decision-making responsibility of a minor child, namely S.Q.H., born in 2020. The parties were never married but were in an intimate relationship and resided together until shortly before S.Q.H. was born. The complaint alleged, in relevant part, that paternity was established when Matt “signed an acknowledgment of paternity.” (R:2:2:¶7). Matt voluntarily submitted to a “DNA Test Report” from “AnyLabTestNow!.” (R: 51). In seeking custody, Matt alleged that he was the “fit and proper” parent to have primary residential responsibility of S.Q.H. subject to Kristin’s reasonable parenting time. (R:2:2:¶10).

[6.] S.Q.H. resided with Kristin until approximately November 11<sup>th</sup>, 2021, when the parties agreed to a temporary joint residential and decision-making responsibility of S.Q.H. The Court issued an Order in accordance with the stipulation which provided for “no formal exchange of child support.” (R:13:2:¶6). At a scheduling conference on May 25<sup>th</sup>, 2022, Kristin, through counsel, argued that paternity had not been legally established and the Court lacked subject-matter jurisdiction over the action. Kristin maintained this position throughout the litigation. Matt opposed this position on all accounts.

[7.] On July 13<sup>th</sup>, 2022, Matt filed a Motion for Contempt alleging that Kristin was frustrating his parenting time with S.Q.H. The next day, on July 14<sup>th</sup>, 2022, Matt filed an Application for Ex Parte Order for the same reasons. A hearing on the Application for Ex Parte Order was held on July 15<sup>th</sup>, 2022. Matt’s counsel argued the following:

I really don’t find the need to talk about this paternity issue. I don’t know why it keeps getting raised. It’s well established that Matt is the father. I have an email from opposing counsel admitting as much. The opposing party (R:73:3:22-25) knows that there was a paternity test done; it knows that it shows my client as the father. The Court gave counsel a chance to brief it after it was brought up. The reality is she didn’t. It was never briefed. That should tell the Court plenty about the merits of this argument. (R:73:4:1-5).

[8.] The Court denied Matt’s Application for Ex Parte Order, and scheduled a hearing on the contempt motion for September 9<sup>th</sup>, 2022. At the hearing Matt testified that: (1) he did not have a court order adjudicating paternity; (2) that he is not on the child’s birth certificate; and (3) that he did not sign an acknowledgment of paternity. (R:74:19:1-16). Following the contempt hearing, the Court held Kristin in contempt and ordered her to pay “reasonable attorney’s fees.” Kristin appealed to the North Dakota Supreme Court.

## STANDARD OF REVIEW

[9.] The North Dakota Supreme Court reviews challenges to a district court's subject matter jurisdiction under a de novo standard of review. Datz v. Dosch, 2014 ND 102, ¶7, 846 N.W.2d 724.

[10.] A finding of contempt will not be overturned unless there is a clear abuse of this discretion. Endersbe v. Endersbe, 555 N.W.2d 580, 581 (N.D. 1996). We will conclude a trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner or when it misinterprets or misapplies the law. *Id.*

## LAW AND ARGUMENT

**[11.] The Court abused its discretion and exceeded its authority in exercising subject matter jurisdiction.**

[12.] In order to issue a valid order, the District Court must have both subject matter and personal jurisdiction. Trottier v. Bird, 635 N.W.2d 157, 159 (N.D. 2001) (citing Albrecht v. Metro Area Ambulance, 1998 ND 132, ¶10, 580 N.W.2d 583). "Subject-matter jurisdiction is the court's power to hear and determine the general subject involved in the action...." Albrecht, 1998 ND 132, ¶ 10, 580 N.W.2d 583. That power is derived from the constitution and the law, and cannot be created by agreement, consent or waiver. Long v. Long, 439 N.W.2d 523, 525 (N.D. 1989). "For subject-matter jurisdiction to attach, 'the particular issue to be determined must be properly brought before the court in the particular proceeding.'" Albrecht, at ¶ 11 (quoting Reliable, Inc. v. Stutsman County Comm'n, 409 N.W.2d 632, 634 (N.D. 1987). If subject matter jurisdiction is lacking, N.D.R.Civ.P. 12(h)(3) requires that the action be dismissed. A dismissal under Rule 12(h)(3) is not a

ruling on the merits of the case, but a determination of a court's power to hear and decide the dispute. See N.D.R.Civ.P. 41(b).

[13.] The scope of subject matter is governed by the way in which the legislature allows a litigant to assert their parental rights. In North Dakota, "parental rights and responsibilities" are rights and responsibilities a "parent" has concerning the parent's child. See N.D.C.C. §14-09-00.1(3). A "parent" is an individual who has established a parent-child relationship under section 14-20-07. See N.D.C.C. §14-20-02(13). The term does not include the unwed father if paternity has not been acknowledged or established.

[14.] In North Dakota, to assert your parental rights you must establish a legal relationship existing between a father and child incident to which the law confers or imposes rights, privileges, duties, and obligations. In the Interest of A.C., 2022 ND 169; see also N.D.C.C. §14-20-02(14). The father-child relationship is established between a man and a child in any of the following ways:

- a. An un rebutted presumption of the man's paternity of the child under section 14-20-10;
- b. An effective acknowledgment of paternity by the man under sections 14-20-11 through 14-20-24, unless the acknowledgment has been rescinded or successfully challenged;
- c. An adjudication of the man's paternity;
- d. Adoption of the child by the man; or
- e. The man's having consented to assisted reproduction by a woman under sections 14-20-59 through 14-20-65 which resulted in the birth of the child.

N.D.C.C. § 14-20-10(1)(a)-(e).

[15.] Here, part (b) through (e) do not apply because it is undisputed that there was no acknowledgment of paternity, no adjudication of paternity, no adoption of S.Q.H., and no assisted reproduction. Therefore, we must determine if a presumption of paternity exists under 14-20-10. A man is presumed to be the father of a child if:



- a. He and the mother of the child are married to each other and the child is born during the marriage;
- b. He and the mother of the child were married to each other and the child is born within three hundred days after the marriage is terminated by death, annulment, declaration of invalidity, divorce, or after a decree of separation;
- c. Before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within three hundred days after its termination by death, annulment, declaration of invalidity, divorce, or after a decree of separation;
- d. After the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and:
  - (1) The assertion is in a record filed with the department of health and human services;
  - (2) He agreed to be and is named as the child's father on the child's birth certificate; or
  - (3) He promised in a record to support the child as his own; or
- e. For the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.

[16.] The first four presumptions (a) through (d) do not apply because the parties were never married. The fifth presumption under (e) does not apply because for the first two years of S.Q.H.'s life, Matt did not reside in the same household with S.Q.H. Therefore, Matt is not presumed to be S.Q.H.'s father under the statute.

[17.] Consistently throughout these proceedings Matt has argued that the "DNA Test Report" from "AnyLabTestNow!" conclusively proves his paternity with a 99.999999% probability. However, the DNA Test Report does not comply with the law for determining paternity. N.D.C.C. § 14-20-25 through 14-20-35 govern genetic testing of an individual to determine parentage, whether an individual: (1) voluntarily submits to testing; or (2) is tested pursuant to an order of the court or a support enforcement agency. See N.D.C.C. § 14-20-25. Here, because Matt voluntarily submitted to testing section 14-20-27 applies to ensure the proper requirements for genetic testing were met. Under this provision, it is

paramount that genetic testing be of a type reasonably relied upon by experts in the field of genetic testing and performed in a testing laboratory accredited by:

- a. The American association of blood banks, or a successor to its functions;
- b. The American society for histocompatibility and immunogenetics, or a successor to its functions; or
- c. An accrediting body designated by the United States secretary of health and human services.

See N.D.C.C. § 14-20-27.

[18.] In addition, under N.D.C.C. § 14-20-28 a report of genetic testing must be in a record and signed under penalty of perjury by a designee of the testing laboratory. The documentation from the testing laboratory is only sufficient to establish a reliable chain of custody that allows the results of genetic testing to be admissible without testimony, if the following information is included:

- a. The names and photographs of the individuals who specimens have been taken;
- b. The names of the individuals who collected the specimens;
- c. The places and dates the specimens were collected;
- d. The names of the individuals who received the specimens in the testing laboratory; and
- e. The dates the specimens were received.

[19.] Here, there was no testimony from the designee of the testing laboratory. In reviewing the DNA Test Report it does not state the full legal names of the individuals who were tested or provide photographs of the individuals being tested. The test does not state the names of the individuals who collected the specimens, or the place and dates the specimens were collected. The test does not provide the names of the individuals who received the specimens in the testing laboratory or the dates the specimens were received. Because the DNA Test Report does not provide sufficient information to establish a reliable chain of custody, it is inadmissible even if this was an action to adjudicate paternity.

[20.] If that is not enough to convince Matt and his attorney, at the bottom of the report it states that “since the samples were not collected under a strict chain of custody by a third neutral party and the Laboratory cannot verify the origin of the samples, this test result may not be defensible in a court of law for the establishment of paternity and other legally related issues. The tested parties’ names that may appear on this report have been provided by the client and cannot be verified. The laboratory assumes no responsibility for incorrect or misspelled patient information.” The designee of the test further asserts that “[b]ased on the samples received from the tested parties whose identities cannot be independently verified, I, the undersigned Laboratory Director, declare the genetic data is correct as reported on 9-1-2020. Signed by John W. Peterson, Ph.D.

[21.] Because paternity was not legally established, the Court did not have jurisdiction to allocate parental rights and responsibilities to the parties, despite the parties’ agreements.

**[22.] The Court abused its discretion by holding Kristin in contempt for violating the interim order, and awarding attorney fees to Matt.**

[23.] Because the Court lacked jurisdiction to issue the interim order, it was equally without jurisdiction to hold Kristin in contempt under the same order. Where a court has jurisdiction, and makes an incorrect decision, its decision until reversed is regarded as binding, but if the Court acts without authority, its decision or orders are regarded as null and void. In re Sawyer, 124 U.S. 200, 220 (1888). When an individual is punished for failing to comply with an order that the Court had no authority to make, the order itself, being without jurisdiction, is void, and the order for contempt is also void. Ex parte Fisk, 113 U.S. 713, 718, 726 (1885); see also Edward P. Krugman, Note, Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments, 87 Yale L.J. 164, 165-71 (1977).

[24.] Alternatively, even if the Court were to find that the interim order was valid, Kristin's actions were not intentional disobedience of the order. Kristin's actions were done with the minor child's best interests in mind. Under N.D.C.C. § 27-10-01.1(1)(c), the meaning of "contempt of court" includes "[i]ntentional disobedience, resistance, or obstruction of the authority, process, or order of a court or other officer . . . ." Any "court of record of this state may impose a remedial or punitive sanction for contempt of court . . . ." N.D.C.C. § 27-10-01.2.

[25.] The Court awarded attorney fees to Matt in an unknown amount, to be paid at an unknown time. The Court did not make specific findings regarding how Kristin was in contempt under the statute. The Court did not make findings regarding the amount and reasonableness of the fees. Because the order is invalid, the fee assessment should be reversed as well.

[26.] WHEREFORE, Kristin requests the following:

- a. Vacate the Interim Order as void for lack of jurisdiction;
- b. Vacate the Contempt Order as null and void;
- c. Alternatively, reverse for additional findings on jurisdiction and contempt;
- d. For attorney fees and costs; and
- e. Any further relief the Court deems appropriate.

[27.] Dated this 6th day of December, 2022.

*/s/ Kristin Overboe*

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### **Certificate of Compliance**

[72] I certify that Appellant's brief does not exceed 38 pages and is in compliance with Rule 32(A) of the North Dakota Rules of Appellate Procedure.

*/s/ Kristin Overboe*

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Attorney for Appellant

Matthew Thomas Roy Hanson,	)	Case No. 09-2021-DM-01199
	)	S. Ct. No. 20220261
Plaintiff-Appellee,	)	
	)	
vs.	)	<b>Certificate of Service</b>
	)	
Kristin Dawn Hettervig,	)	
	)	
Defendant-Appellant.	)	
And	)	
	)	
State of North Dakota,	)	
Real Party in Interest.	)	
	)	

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