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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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MAY 24 2016

Rebecca Lynn Curtiss, )  
 )  
 Petitioner-Appellee )  
 )  
 v. )  
 )  
 Spencer Kerry Curtiss, )  
 )  
 Defendant-Appellant. )  
 )  
 )

Supreme Court No. 20160064 STATE OF NORTH DAKOTA  
District Court No. 08011-C-00808

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**BRIEF OF APPELLANT**

**APPEAL FROM AN ORDER FOR THIRD AMENDED**

**JUDGMENT, DECEMBER 21<sup>ST</sup>, 2015**

**Burleigh County District Court**

**South Central Judicial District**

**The Honorable Gail Hagerty, Presiding**

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Spencer K. Curtiss  
P.O.Box 5521  
Bismarck, North Dakota 58506-5521  
Appellant/ Defendant

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**Notice:** Please note following References to the record

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## STATEMENT OF THE ISSUES

- 1) This case is about a disruption of communication and visitation, an issue of failed Parental Responsibilities by custodial parent that has worked against the children's best interests with the continued delay tactics; failure to cooperate and refusal to in any way facilitate communication and visitation between these two minor children and their Father, with the loss of nurture, love and simple support and guidance.
- 2) Defendant thus requested that the district court set a hearing, with Spencer K. Curtiss on video conference, to enforce the existing Parenting Plan contained within Amended Judgment through mediation and add a provisional Order enforcing such to the Amended Judgment.
- 3) District court made Third Amended Judgment appointing a therapist, having conflict of interest, total and full discretion of all correspondence with minor children without any allowance of 'appearance' of Spencer Curtiss in hearing to determine such; and with no provisions for future revision or amendment, no provisions for the implementation of this new order with Department of Corrections and Rehabilitation, or finally, even enforcement of remaining intact Amended Judgment.

## STATEMENT OF THE CASE

4) The parties have two minor children together. D.L.C. and P.B.L.C.

Spencer Kerry Curtiss and Rebecca Lynn Herbrucksemier were married February 8<sup>th</sup>, 2002, at the Sedgwick County Courthouse, Wichita, Kansas. The divorce was finalized August 8<sup>th</sup>, 2003.

5) Rebecca Lynn Curtiss, hereafter Plaintiff (Appellee), filed for Divorce, so as reason for Spencer Kerry Curtiss, hereafter Defendant (Appellant), being identified as such in actions in title.

6) First minor child D.C., was born just prior to marriage, second minor child, P.B.L.C. was born to both parties after the divorce of parties.

7) Defendant alone moved to North Dakota September 16<sup>th</sup>, 2007, and resided in Bismarck, North Dakota. Defendant had continuous phone and letter contact with children through May 2008. A visit to Wichita, Kansas in May of 2008 to visit with all four children had taken place; and upon return to North Dakota with two older children and their mother from a prior marriage; a CINC was filed for minor children in this case June 4<sup>th</sup>, 2008.

8) A court case in the 18<sup>th</sup> Judicial District Court, Juvenile Department, Wichita, Kansas was held, that being Permanency Hearing Order-CINC Case #'s 08 JC 298, 08 JC 299[Id. # 85, 86, 87] in the interests of D.L.C. and P.B.L.C. which time frames of June 4<sup>th</sup>, 2008 thru October 26<sup>th</sup>, 2009 and ended with district court order 06 DM 1271 granting Defendant primary custody of minor children.

9) Defendant, with all four minor children and current wife, Savannah R. Curtiss, did move back to Bismarck North Dakota September 2009. Plaintiff remained in Kansas.

10) Upon the minor children being brought to this state, Defendant, the Father, did have Primary Residential Custody of the minor children as directed from Kansas case 06-DM-1271 granting this custody.

11) Only due to effect of Defendant's physical state of incarceration has lead to Plaintiff's having circumstances of the Primary physical custody of the minor children.

12) On court record, an agreed upon Parenting Plan/ Parental Responsibility was filed in this state on March 30<sup>th</sup>, 2011 and the Judgment/ Amended Order [App#. 3, pg.12-23] entered on October 3<sup>rd</sup>, 2011. In this Parenting Plan the fact that Spencer K. Curtiss is incarcerated is a part of the visitation, as it is to be supervised at the North Dakota State Penitentiary.

13) Through and up until December of 2014, Defendant was in some form of contact with the minor children. Defendant had attempted to first encourage Plaintiff to respond and continue communication and visitation after disruption of such with several written correspondences.

14) With the failure to receive any communication with minor children, Defendant secondly corresponded with appropriate agencies for assistance in this matter. However, the agencies have both listed the courts as the only avenue for resolution for this dispute. Defendant then filed Motion to help assist in restoring disrupted communication and visits.

## STATEMENT OF THE FACTS

15) Spencer Kerry Curtiss has initiated a motion in district court to assist in enforcement of a existing parenting plan with the filing of Brief, and Notice of Motion for Visitation Assistance, following with two Motions to Appear through IVN, a Request for Court Order for Mediation and numerous other filings to present exhibits displaying correspondence between both parties displaying when phone commutation was disrupted and the exhibit displaying when visit contact was disrupted [Id. # 53].

16) Defendant filed a Request to Lift Restriction on Written Correspondence [See Id. # 127] in an attempt to regain direct communication with custodial parent, sent and filed Interrogatories, filed a Request of parent to appear, filed a Motion for reconsideration, and finally a Motion in opposition to motion to amend parenting time which was denied by Order.

17) Plaintiff's continued resistance to complying with the visitation and communicative rights given the noncustodial parent in Amended Judgment has resulted in that the noncustodial parent must either forgo the right to visitation and communication or must constantly seek the assistance of the court to enforce these rights.

## JURISDICTION

18) "Appeals shall be allowed from decisions of lower court to the Supreme Court as may be provided by law." N.D.Const. art. VI, § 6. A properly filed Notice of Appeal was accepted.

19) Jurisdiction is the authority to hear and determine a cause; and the power to hear and determine the subject matter in controversy. 15 C.J. 723 § 13.

## STANDARD OF REVIEW

### Best interests of children

20) Under N.D.C.C. § 14-09-06.2 it is stated that “for the purpose of parental rights and responsibility, 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”

21) Under N.D.C.C. § 14-05-22(2) it is states that “the court, upon request of the other parent, shall grant such right 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.”

### Abuse of discretion

22) A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law. *State v. Randall*, 2002 ND 16, ¶16, 639 N.W.2d 439.

### Constitution

23) United States Constitution Art. VI states that “judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding; and shall be bound by oath or affirmation to support this Constitution;

24) United States Constitution 14<sup>th</sup> Amendment states “...nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

25) North Dakota Constitution Article 1 § 9 states that “All courts shall be open and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and the right of justice administered without sale, denial or delay.

## ARGUMENT

26) Court acted in and with abuse of discretion with the creation of Third Amended Judgment, thus modifying and amending the Amended Judgment with no express application of statutory language as pursuant to Best interest and welfare of a Child N.D.C.C. § 14-05-06.2 in Third Amended Judgment, and holding no hearing with both parties present as dictated under N.D.C.C. § 14-05-22(2) and enabled and directed with N.D.R.Ct. 8.5.

27) Further, abuse of discretion with allowance of religious prejudice slurs; and the denied right to confront witness, give testimony and right to claim perjury against witnesses; and denied access to the court by N.D.D.O.C.R. policy.

28) Abuse of discretion in failing to acknowledge and make ruling on properly filed motions and with such denied any application of a "Parenting Coordinator," or mediator.

29) Ultimately, District judge was without jurisdiction over Defendant, as should have recused herself from case due to prior involvement and implied bias towards Defendant.

30) The minor children in this action do have the legal interest at the very least pursuant to N.D.C.C. § 14-09-06.2; and the Defendant has the legal interest in this action of due process, the right to be heard, the right to testify, the right to cross-examine witness against him, the right to challenge and declare perjury on testimony in a judicial proceeding.

31) The Defendant has the vested interest in his children to support them, guide them, to share and express love and affection, to communicate ideas, and to listen to them in times of difficulty and comfort them, this being the very idea of a family. And the

children also share this vested interest to be able, without restriction to express their feelings and ask questions of their parents.

32) However, these children do not comprehend the detriment that these revised legal provisions have in the course of interpretation by others of authority; especially with no language pertinent to N.D.D.O.C.R. such as directives to integrate and establish two way open communication, and privileged communication with appointed therapist; and that goes against the best interests of these children to have a biased court enabling the failure of their father to be informed of there welfare prior and after to this judgment.

33) The actions leading to this action are the frustrated and complete denial of any communication bringing to the surface the opinions and feeling of neither the minor children, nor any communicated issues brought forth by the family therapist. So this frustration of the Parenting plan did constitute a material change in circumstances, but, not in the favor of the Defendant.

34) There was not a full and fair presentation of facts given at the hearing, especially no prior reading of Amended Judgment to acknowledge the provisional language already in place under Residential Responsibility and Parenting Schedule C. [(App. # 3, Pg. 9] “parenting time will occur every other weekend or as otherwise mutually agreed upon by Rebecca and Spencer...”(emphasis added) as is to be done for providing the best interest and welfare of these two children. There simply can be no mutual agreement where there is no communication.

**I        Whether the district court erred in failing to Order Defendant to Appear for hearing December 4<sup>th</sup>, 2015?**

35) Had Defendant been at the hearing as pursuant to N.D.R.Ct. 8.5 and by and through the displayed diligence of two filed requests to appear by IVN, the very reasons for the Motion for visitation assistance would have been clarified as a request for the end of disrupted communication, the presence of a mediator if required and the proper required response and reaction and challenges in the hearing of testimony. There would have been displayed a need for a parenting coordinator to resolve the differences between parents with a more peaceful and less emotional resolution for the best of the minor children. There would have been clear language to instruct N.D.D.O.C.R. in regard to confidentiality of children and therapist through the fact of release of privileged communication concerning the mental and medical information of children, and an arrangement for therapeutic setting. The finalized judgment did not take any testimony or opinion or requests of Spencer Kerry Curtiss in the decision of creating such, it only took privileges and rights which has separated the family unit.

36) Defendant stated in Motion to Appear through IVN that he “respectfully requests the court to allow Spencer K. Curtiss to appear in court through Interactive Video Network (IVN) from the North Dakota State Penitentiary to the Burleigh County Courthouse for the Visitation-Assistance Hearing,” also Defendant stated in Request to Appear Through IVN for Hearing that he “respectfully requests the court to specifically request Spencer K. Curtiss to appear in court through Interactive Video Network (IVN) from the North Dakota State Penitentiary to the Burleigh County Courthouse for the Visitation Assistance Hearing on December 4<sup>th</sup>, 2015 from 9:30 a.m. to 11:30 a.m.; this

to present testimony and evidence in his behalf for filed motion. Spencer K. Curtiss is currently being held at the North Dakota State Penitentiary.”

37) The language presented in the two requests to appear are clear in that Defendant displayed due diligence in receiving an order to appear at hearing. There has been no expressed reason behind not making order for appearance by IVN.

The district court’s unexplained denial of an individual’s request to appear at the hearing by telephone deprived the prisoner of “a meaningful opportunity for a hearing appropriate to the nature of the case” and was an abuse of discretion. *Walbert v. Walbert*, 1997 ND 164, 567 N.W. 2d 829 (1997)

38) With the denial of court to Order Defendant to appear and the N.D.D.O.C.R. failing to allow appearance by IVN, these parties did indeed “significantly alter or extinguish” the right of due process, right to confront witnesses against me, right to present testimony, right to present exhibits at hearing, and right to protect my reputation from religious discrimination.

39) Defendant filed an N.D.D.O.C.R. declared policy “Civil Cases” to the court [Id. #. 72], however, that policy is not enforceable upon Appellant in this instance for the following. ‘Civil cases’ authority for this policy with procedures is found in N.D.C.C. § 54-23.3 and N.D.C.C. § 12-47; and expressly declares only telephone conference and thirty minute time limit, only at the discretion of N.D.C.O.C.R. when testimony is required and then only under warden’s discretion.

40) In testimony by telephone the image of the witness cannot be seen nor does it disclose if the witness is using or relying upon any notes or documents, and as a result, meaningful communication is effectively curtailed or prevented.

Above all, in testimony by telephone the trier of facts is put in a difficult, if not impossible, position to take into account the demeanor of the witness, in determining the witness’s credibility. *Gust v. Gust*, 345 N.W.2d 42, 45 (ND 1984)

As declared in *Ky. V Stincer*, 482 U.s. 730, 737 (1987) “confrontation right designed to provide truth-finding function of trial”

41) Defendant declares therefore that the policy invoked by the Department of Corrections and Rehabilitation is an invalid delegation of power and unenforceable.

42) According to N.D.C.C. § 54-23.3-01 there is hereby created a department of corrections and rehabilitation that is responsible to the governor. The powers of the governor as listed as pursuant to N.D.C.C. § 54-07-01 and are given from the North Dakota Constitution art V § 1 as the executive power is vested in the governor and powers listed under § 7.

43) The powers given to N.D.D.O.C.R are given under N.D.C.C. § 54-23.3-03 as the Director is appointed by the governor with N.D.C.C. § 54-23.3-04 listing the Powers and Duties as: 1) to manage and control all institutions and programs within the department and to administer and enforce the law with which the department is charged; 5) to establish policies and procedures to carry out the responsibilities of the department; 9) to delegate authority to subordinates as necessary and appropriate, clearly delineating the delegated authority and limitation.

44) Further under N.D.C.C. § 12-47-12 that the warden to make rules, but “shall not make rules in conflict with the rules of the state”

45) Nowhere in the granting of or delegating of power is the authority to create a policy, regulation that violates state law or constitution; this delegated power cannot enlarge the jurisdiction granted by statutory authority.

46) The three departments of government are co-ordinate, of equal dignity; each is alike supreme in the exercise of its proper function, and cannot directly or indirectly,

while acting within the limits of its authority, is subjected to the control or supervision of the other.

47) The judicial department is vested with the judicial power. It is the province of the courts, and the sworn duty of the judges thereof, to faithfully interpret and apply the law in every case coming before them for determination.

48) Under the Constitution of North Dakota all governmental power is vested in the legislature except as is granted to the other departments of the government.

Except as authorized by the Constitution the legislative power of the legislature must be exercised by it alone and cannot be delegated. *State ex rel. Rusk v. Budge*, 14 ND 532, 105 N.W.724

An agency regulation which exceeds the agency's authority is void and without force. *Berger v. State Personnel Board*, 502 N.W.2d 539 (1993)

49) The department of corrections is an agency created by the legislature under the governor with granted executive powers only to individuals under the care and custody of N.D.D.O.C.R. by order of Judgment by judicial authority in district court.

50) The North Dakota Department of Correction and rehabilitation have no jurisdiction on individuals not under their care and custody; in this instance, the best interests and welfare of the minor children.

Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid. *Procunier v. Martinez*, 416 US 396, 419, 94 S. Ct. 1800 (1974)

In *Heinrich ex. Rel. Heinrich v. Sweet*, 62 F.Supp. 2d 282, 315 (D.Mass 1999), it states " that the right of court access is violated when government officials wrongfully and intentionally conceal information crucial to judicial redress, do so in order to frustrate the right, and substantially reduce the likelihood of obtaining redress"

51) As it states under N.D.C.C. § 54-01-18: “every person while in this state is subject to its jurisdiction are entitled to its protection” and therefore applies to the minor children in this action.

52) Under N.D.R.Civ.P. 43 Evidence it is stated: a court may permit testimony in open court by contemporaneous transmission from a different location. A party must give notice if a witness is unable to testify orally or if testimony by contemporaneous transmission may be necessary.

53) Defendant has requested from the court to be granted appearance through Interactive Television, (currently Administrative Rule 52-Contemporaneous transmission by reliable means- effective March 1<sup>st</sup>, 2015)

54) In a civil action, a district court may conduct a hearing, conference, or other proceeding, or take testimony, by reliable electronic means.

55) Appellant in the event that there was to be no “Order for Appearance” by court did request that with the fact also of obstruction by N.D.D.O.C.R. in appearance by IVN that his parents with power-of-attorney are permitted to stand in his behalf. In these legal documents, the Defendant did grant powers as such to Ruth Volk and Fabian Volk [See Id. #132,133]

56) However, the district court judge made absolutely clear in opening statements at Motion Hearing that no-one was to represent, stand in for, or be included in any way in the interests of Spencer Kerry Curtiss [See Motion Hearing, pg.2]. Court denied any legal aspects of a legal power of attorney to rest assure no exhibits would be presented on behalf of Defendant.

57) Spencer Kerry Curtiss presents that Motion for Visitation Assistance was requested and pursuant under N.D.C.C. §§ 14-05-22 & 14-09-6.2, and Motion to Amend Parenting Time filed by Appellee was pursuant to N.D.C.C. § 14-05-22.

58) Defendant presents that Order for Third Amended Judgment declares the court has reviewed the Motion to Amend Judgment, not any motion filed by Defendant, but most important is declaration that “The defendant was not present” especially with all requests to be present and attempts to have any party present when Appellant’s testimony was required and according to N.D.R.Ct. 8.5 that both parties must be present.

59) Spencer Curtiss was not represented by counsel and both parties declared filing pursuant to N.D.C.C. § 14-05-22.

According to N.D.R.Ct. 8.5 Hearing proceeding (a)(1) it states: A summary proceeding may be used by parties to settle a controversy, dispose of a case, or conduct a trial when a party seeks an order, judgment, or amended judgment, under N.D.C.C. 14-04, 14-05, and 14-09.

Further, under N.D.R.Ct. 8.5 (e)(1) Hearing procedures it states: Any hearing of the action must be informal. The court must conduct the hearings and may make its own inquiry during the hearings. The hearings must be of record and all testimony must be under oath or affirmation. A trial by jury is not permitted and attorneys may participate. Attorney’s fees and costs may be assessed as provided by law. The rules of evidence do not apply to a summary proceeding.

And finally under N.D.R.Ct. 8.5 (e)(2) it states: the court must hold the initial hearing with both parties present.

60) The court played the part that N.D.D.O.C.R. must provide Defendant’s appearance all the while N.D.D.O.C.R. claims the court must order the use of their equipment (IVN) and by such Defendant was denied any appearance at a hearing that by N.D.Ct.R 8.5 pursuant to N.D.C.C. § 14-05 was to be present.

61) There was no consideration of best interest factors under N.D.C.C § 14-09-6.2 to justify significantly realigning and diminishing the father’s parenting time. As well “A

parent does have a duty to not turn a child away from the other parent by poisoning the well. Notwithstanding the perceived imperfections in the other parent, a custodial parent should, in the best interests of the children, nurture the children's relationship with the noncustodial parent." *McAdams v. McAdams*, 530 N.W.2d 647, 650 (ND 1995)

This court has said that "parenting time between a parent without primary responsibility and a child is presumed to be in the child's best interests and that it is not merely a privilege of the parent, but a 'right of the child'" *Seibold v. Leverington*, 2013 Nd 173, ¶ 19, 837 N.W.2d 342.

"A material change in circumstances can exist when one parent attempts to alienate a child's affection for the other parent, when parents are openly hostile towards each other and that hostility negatively affects the child, or when the non-custodial parent's situation improves by a general decline in the child's condition with the other parent over the same period" *Kruger v. Tran*, 2012 ND 227, ¶ 14, 822 N.W.2d 44.

If officials authorize a system to deprive persons of life, liberty, or property, it is irrelevant whether they intended that it violate due process. *Sample v. Diecks*, 885 F.2d 1099, 1114 (3<sup>rd</sup> cir 1989)

The court held that the trial court committed reversible error when it relied upon the investigator's report without affording defendant an opportunity to review the material underlying the report or to cross examine the investigator. *Quarne v. Quarne*, 1999 ND 188, 601 N.W.2d 256.

62) The court found that the testimony at the Motion hearing was almost exclusively focused on Defendant's alleged character flaws and other shortcomings. The question that should have been in the court's mind is whether or not D.C.'s behavior is an unexpected development or a natural occurrence in the course of events to be anticipated under the circumstances of this and similar cases. He is bound to be impacted by the displayed animosities between his parents and has undoubtedly intuitively learned how to respond to his advantage.

63) In *Regan v. Lervold*, 2014 ND 56, 844 N.W.2d 576, the Court found that the district court erred in concluding that evidence of the mother's failure to communicate and lack of cooperation... could not constitute a material change; also in *Curtiss* the Defendant did supply evidence of the mother's failure to communicate and her lack of cooperation and with such only requested enforcement of communication so the welfare of the children was known.

When a person assumes a relation of personal confidence with another, he becomes a trustee, and any transaction he enters into with the other person by which he gains an advantage is presumed to be made under undue influence. If a party establishes sufficient fact to give rise to the presumption, the burden then shifts to the other party to prove the non-existence of the presumed fact is more probable than its existence. *Estate of Zins ex rel Kelsh V. Zims*, 420 N.W. 2d 729 (N.D. 1988)

65) Steve's personal confidence with Plaintiff declared so the possibility of any unbiased comment towards defendant is bleak prior to the actual assessment of Defendant done by and according to therapy protocols by Steve.

66) Spencer Kerry Curtiss asserts that complete lack of communication created this action. The Defendant has the right to know of "biochemical and inheritable characteristics" of his minor child, especially when it is claimed minor child "doesn't feel like anyone listens to his desires, and hasn't for a while" [motion hearing Pg. 7, Ln. 15-16]. But the therapist involved claimed "I never was able to talk to him directly", "I will never send records to the penitentiary," and "I've not had a single response" [ from Shannon Davison, his case manager at N.D.D.O.C.R. at the time] [motion hearing Pg. 8, Ln. 6-7; Pg. 8, Ln. 24; and Pg. 9, Ln 24 respectfully]

67) And with the custodial parent declared stopping of all contact in [Id. # 100] there can be no other option but the involvement of the court to help assist or ...to simply let all non-custodial parental responsibility simply dissolve and abandon children.

68) Appellant calls to the Courts' attention that the presented language of testimony of: "Lucifer", the devil, is constitutionally protected material and cannot be introduced into hearing proceedings. (See Motion Hearing Pg.12, Ln15-22) Direct Examination Rebecca Curtiss A: About Lucifer, about them being special, about his son being Damien. Q: Okay. And is that all devil stuff? I mean, I don't know what Lucifer is. A: Witchcraft, just them being special, them having abilities, them being special more than anybody else."

69) Cannot unring the bell once rung, by the allowance of religious slur in hearing by Plaintiff and restated by counsel sullied my reputation and this ideology it and of itself presented to court establishes that plaintiff herself has supplied this to the minor child, not the Defendant.

When a party exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessary defamatory of the plaintiff, he will not be protected, and the fact that a duty, a common interest, or a confidential relation existed to a limited degree is not a defense, even though he acted in good faith. *Landon v. Watkins*, 61 Minn 137, 63 N.W.615; 25 Cyc 386

70) Because of the well known maxim in jurisprudence that for every wrong there is a remedy, the courts are loath to extend the scope of absolute privilege. The comments that Plaintiff made on record were unnecessary defamation of character and only displayed the animosity felt towards Defendant and were conduct/ activity that Defendant is protected from by North Dakota Constitution art. XIII.

71) In the findings of Bendwald v. Ley, 39 ND 272, 168 N.W. 693, 1917, we find that by each constitution, U.S. and North Dakota, the civil authorities are denied the right to control or in any manner interfere in purely ecclesiastical matters. Whether he shall adopt any religious views, or, if so, what shall be the character of these views and the persons with whom he shall associate in carrying out the particular views, are all questions addressed to his individual conscience, which no human authority has a right, even in the slightest way, to interfere, so long as his practices in carrying out his particular views are not inconsistent with the peace and good order of society.

72) In this case the religious practice of or worship character of the character of the Defendant is not an essential element of the claim, or defense; also, most importantly, there was no cross-examination of Plaintiff or direct inquiry of religion or beliefs to any defense witness, especially the Defendant. There was no express language that district court did not rely upon neither the religious slurs presented to court as to morality of Defendant, or presumption of statements by Plaintiff on not paying attention to children during visits [Motion Hearing, Pg 12 Ln 23-25; Pg. 13, Ln 1-7] “he would ignore them more than usual” how is that possible when no indication or exhibit of conduct when Plaintiff did not bring in children for visits, a very presumptive statement held detrimental against Defendant; also how could talk of “getting back together; where would we move,” be inappropriate talk in front of children begotten from both parents?

73) Any infringement on protected transcendental subject matter will always be a manifest injustice. The presentation of any supernatural material that will affect the influences of the court must be highly scrutinized and holding that any violation of constitutional protection must have relief.

74) The constitutional restrictions expressly prescribed in the North Dakota Constitution prohibit the Plaintiff's comments on "Lucifer", the devil and is protected by express words. The expressed prohibited conduct is consistent with the both the letter and the spirit of the constitution, and therefore constitutional.

This protection of religious sentiment is declared in the:

- United States Constitution, Amend. I Religious and Political Freedom ;
- North Dakota Constitution, Art. XIII § 1 Toleration of religious sentiment ;
- North Dakota Constitution, Art. 1 § 3 Freedom of Religion ;
- Please see "Respondent's Response to Motion to Amend Parenting Time" [listed Id.# 130] for previous argument to district court on such.

75) At 25 Am. Jur. 2d Duress and Undue Influence, § 47 it is said: "Undue influence is ordinarily not the subject of, and is seldom established by direct evidence, rather, it is usually established by proof of a collection of facts and circumstances from which an inference of undue influence may be drawn, therefore a great latitude of proof is allowed in order to determine whether a legal inference of undue influence may be present, and the evidence may embrace all the facts and circumstances which go to make up the transaction, disclose its true character, and explain the acts of the parties in order to throw light on their objects and intentions" [citing Scurry V. Cook, 206 Ga 876, 59 S.E. 2d 37, 373 (1950)]

76) The very question of influence in the children's opinion and feelings cannot be left to the open display of religious slurs, negative talking in front of children, [See Motion Hearing Pg.10, Ln 8-10] will affect young impressionable minds, especially when the person actually performing the detrimental ideology is person in authority to raise

children and responsible to carry out communication with other parent. And also the documented involvement of Steve with Plaintiff creates a great conflict of interest at hearing due to fact of confidentiality with Plaintiff, as her clinical therapist, so any discussion ill of Defendant spoken to Therapist will be privileged communication and can not be presented in a hearing, even sadly, when such statements would support Defendant's stance and claims.

### **III Whether the district court erred in failing to acknowledge any motions filed by Defendant?**

77) Under rule 3.2 when a party requests a hearing under subdivision (c), such a hearing must be held and it is not discretionary with the trial court. *Anton v. Anton*, 442 N.W.2d 445 (ND 1989)

78) Spencer Kerry Curtiss asserts that court did not schedule any hearing for Defendant's pleadings, albeit Defendant filed motions, requests with Notice under N.D.R.Ct. 3.2 and requested an oral hearing; however, no oral hearing was ever held with or for Defendant, but only for Plaintiff, as is clearly established with opening lines in Order for Third Amended Judgment as "the Court has reviewed the Motion to Amend Judgment." [App. # 8, pg.29-30]

79) The court permitted delay of court action to allow plaintiff to have attorney request withdrawal, retain another attorney, and reschedule hearing, all the while denying Defendant prompt action on his properly filed motions and cause more harm to minor children opinions.

80) Defendants motions and request were answered with Order August 24<sup>th</sup>, 2015 [App. # 5, pg.26] simply acknowledgement of request for assistance and that a

hearing may be scheduled, and to file documents prior to hearing; but no hearing held on this very motion.

81) Defendant received Notice [App. # 7, pg.28] November 10<sup>th</sup>, 2015, declaring on issue of being allowed to participate in a hearing for the second time by IVN from State Penitentiary. However, the court made presumption on intent of Defendant with statement “specifically requests that the Court require Rebecca Curtiss to bring their children to visit him at the Penitentiary.” There has been no review of any exhibits presented, no analysis of pleadings and remedy requested to make a presumption of such magnitude.

82) Defendant’s next received Order December 21<sup>st</sup>, 2015, states that “Court will not stay or delay entry of an order in this action,” with no express language of what action, at least until the filing of the Order for Third Amended Judgment, and also that “the Court will consider further amendment of the Order if there is evidence which establishes such amendment is necessary and in the best interest of the children.” However, no such statutory language by Court in best interest of children was ever made.

83) Defendant final received Order dated January 26<sup>th</sup>, 2015 [Id. # 152] stating “motion for reconsideration in this matter is denied,” again the matter to the court was Plaintiff’s motion, not Defendant’s. It continues with “Spencer Curtiss did not appear at the hearing he had requested because he was incarcerated.” This clearly established the fact no proper rebuttal permitted, no presentation of testimony by Defendant simply because of incarceration. This denied due process to the minor children by not permitting Father to be present on issues of communications with him, and enabling a strict restriction of all communications.

84) Most importantly is the time frame involved in this action, the Defendant initially filed Motion for Visitation Assistance JULY 24<sup>TH</sup>, 2015, and all during this time, and continuing now, there is no communication from or to minor children. The children more likely than not believe and feel their father does not care or love them by the amount of time gone by with no communication, especially when children are not honestly told why they do not/can not hear from their father.

85) Spencer Curtiss asserts that the filing by the court clearly show and establishes no equal application of due process as defined by the Constitution, as Plaintiff was granted all benefits of due process and Defendant was denied all the very same benefits, thus Order for Third Amended Judgment was determined in violation of due process to Defendant.

86) Appellant requests reverse and remand back to district court for full and fair review of all motions and requests with and through due process of law.

### **III Whether the district court erred in amending Second Amended Judgment and filing third amended judgment**

87) Appellant presents argument for “clear absence of all jurisdiction” by presiding judge.

(“[T]he mandatory [term] ‘shall’...normally creates an obligation impervious to judicial discretion”) *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 US 26, 118 S.Ct.

88) Under North Dakota Code of Judicial Conduct, Appellant presents the following from Cannon I: “A judge shall uphold and promote the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety;” Rule 2.6: “A judge shall accord to every person who has a legal interest in

a proceeding, the right to be heard according to law;” and from Rule 1.1: “A judge shall comply with the law, including the Code of Judicial Conduct.”

89) Under North Dakota Code of Judicial Conduct Appellant also presents the following from Canon II, Rule 2.7 Responsibility to decide: “A judge shall hear and decide matters assigned to the judge, except when disqualification is required by rule 2.11 or other law;” and Rule 2.11 Disqualification: A. “A judge shall disqualify in any proceeding in which the judges impartiality might reasonably be questioned, including the following circumstances: 1) the judge: 5) previously presided as a judge over the matter in another court.”

90) And under such it is stated [2] “A judge’s obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.”

91) In the case proceedings no immediate judicial action was taken and no disclosure on the record that the judge believed Defendant might reasonably consider relevant to a possible motion for disqualification, even if the judge did believe there is no basis for disqualification.

92) The previous involvement of presiding judge in criminal proceeding, that being Preliminary Hearing on criminal child abuse, (08-10-K-1650) [See App. # 9, pg.31] for judicial notice, with such subject matter in conviction did set the tone for legal recourse discretionarily given to and denied to Defendant.

93) The Constitution created the judicial department to interpret and apply the laws. And as a condition precedent to the performance of any official act, each judge is required to take an official oath, whereby he, in the most solemn manner, pledges himself

to support the Federal and State Constitution and to faithfully discharge the duties of his office. The first duty assumed by each judge under his oath of office is to support the Federal and State Constitutions. N.D.Const. § 211, U.S.Const. art. 6.

And “Prison walls do not form a barrier separating prison inmate from the protection of the Constitution”. *Turner v. Safley*, 482 US 78, 84, 107 S. Ct. 2254 (1987).

94) Simply because Defendant incarcerated does not permit district court to deny substantial rights and protections under the Constitution and the presiding Judge should have been disqualified from this action for no jurisdiction; and because of continued presence and authority over fact-finding and determinations involved in “Third Amended Judgment,” the judgments and orders made are void and unenforceable.

95) Wording in provisions stated in Third Amended Judgment apply sanctions from N.D.C.C. § 14-09-29 in effect to violence and abuse which mandate an intermediation restriction of all contact with children. There is no evidence provided to validate this strict of provision, and again prejudice by presiding judge with previous knowledge and bias from criminal conviction. [See Id. # 88- Domestic violence worksheet- no domestic violence arrest/charge, no prior in 10 years, “no complaints issued”]

96) Arbitrary action of a judge to sit upon a case that she should not be, deny acknowledgment of properly filed motion, deny ordering appearance in pursuance of N.D.R.Ct 8.5 and to defraud Defendant simply due to fact of being incarcerated, allow religious discrimination, and overall deny equal protection of law and fair due process of law as stated under the United States Constitution and sworn to obey and uphold by Oath of Office and United States Constitution Art VI.

Definition of Defraud: To commit acts, omission or concealments, which involve a breach of legal or equitable duty, trust, or confidence justly, reposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another. *Petrovitzky v. Braghum*, 14 Utah 472, 47, p666.

Abuse of Discretion also can be defined as: "Decision by whim or caprice, arbitrarily, or from a bad motive which amounts practically to a denial of justice as a clearly erroneous conclusion, on that is clearly against logic and effect of the fact presented." *5 Am J2d A&E § 774*.

As stated in *US v. Guarino*, 517 F3d 1067, 1068 (8<sup>th</sup> cir 2008) an 'appellate court may exercise discretion to correct an error seriously affecting fairness, integrity, or public reputation of judicial proceedings;' and "The touchstone of due process is the protection of the individual against arbitrary action of government" *Wolf v. McDonnell*, 418 US 539, 558, 94 S.Ct. 2963 (1974)

The words "due process of law" when applied to judicial proceedings mean a course of legal proceeding according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings and validity there must be a tribunal competent by its constitution to pass upon the subject matter of the suit. See *Hassal v. Wilcox*, 130 US 493; *Hovey v. Elliott*, 167 US 409; *Selig v. Hamilton*, 234 US 263

97) Appellant presents here, and invokes the provisions of the United States Constitution as follows:

**U.S. Constitution Article VI Miscellaneous Provisions**

This Constitution, and the laws of the United States which shall be made in pursuance thereof,... shall be the Supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

... all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this Constitution;

but no religious test shall ever be required as a qualification to any officer or public trust under the United States.

**U.S. Constitution 14<sup>th</sup> Amendment § 1**

“No state shall make or enforce any law which shall abridge the privileges or immunities of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

Appellant presents and invokes the provisions of the North Dakota Constitution as follows:

**N.D. Constitution Article 1 § 9**

“All courts shall be open and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and the right of justice administered without sale, denial or delay.

[The] “protection of constitutional rights is always in the public interest”. *Phelps-Roper v. Nixon*, 545 F 3d 685, 690 (8<sup>th</sup> Cir 2008).

98) The United States Constitution and the North Dakota Constitution give our court direction, obligation, and duty for judges to conform to guidelines set forth in Constitutions to follow, mandates to duty beyond discretion, boundaries they cannot cross as by Oath it is sworn to be upheld and conformed to.

99) Under N.D.C.C. § 14-02-01 General Personal Rights it is stated: Every person subject to the qualifications and restrictions provided by law has the right of protection from bodily restraint of harm, from personal insult, from defamation, and from injury to the person’s personal relations.

100) The rights granted by statutes and Constitution to the Appellant, and which have been invoked and are retained, have been infringed upon by the abuse of discretion through abuse of power of creating policy and directly interfering with and withholding any due process of law to the detriment not only of Appellant but of his minor children

101) There here is clearly legal and vested interests which have been interfered with by the state with bias due to fact of pro se status and subject matter of conviction. The very thought of fair and equality is being denied to Spencer Curtiss and minor children simply because of these conditions. The rights of the minor children to communicate and express themselves, and visit with their non-custodial parent has be interfered with and obstructed with bias court intervention. With the court allowing an aggravated parent to openly display animosity, defamation, prejudice with leaving other parent aggrieved demonstrates ulterior motives at hand. Simple failure of the court to order mediation between parties to determine facts of dissolved communication between all parties in the best interest of children; even as therapist does state in hearing D.C. wanted to have us listen to him, not keep him from father. Even opposing party suggested time frame until relationship repaired.

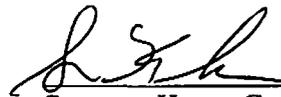
### CONCLUSION

102) Appellant requests this Court Reverse and remand to district court for rehearing with Spencer Kerry Curtiss “physically present” as district court judge Hagerty did not have proper jurisdiction, therefore Orders, Notice, and Third Amended Judgment void and unenforceable; Defendant was not present; defamation by religious slur; and motions properly filed are required to ruled upon by competent court.

103) Spencer Kerry Curtiss prays this Court to reverse and remand to district court for fair and proper review of all motions filed by Defendant and to review Amended Judgment and apply such in true best interests of the children; and to Order re-hearing before another judge not having any previous legal connection with Appellant.

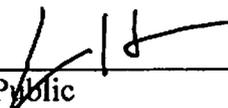
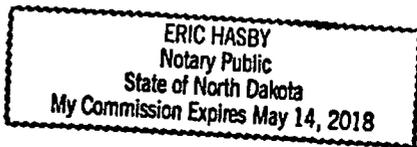
Honorably submitted this 24 day of May, 2016.

I declare under penalty of perjury that the foregoing is true and correct.



\_\_\_\_\_  
Spencer Kerry Curtiss  
P.O.Box 5521  
Bismarck, North Dakota 58506-5521

Subscribed and sworn before me this 24 day of May, 2016,  
In the county of Burleigh.



\_\_\_\_\_  
Notary Public

CERTIFICATE OF SERVICE BY MAIL

STATE OF NORTH DAKOTA )  
 ) SS.  
COUNTY OF BURLEIGH )

The undersigned, being duly sworn under penalty of perjury, deposes and says: I'm over the age of

eighteen years and on the 24 Day of May, 2016, 10 A M, I mailed the following:

*Appellant Brief*  
*Appellant Appendix*

By placing it/them in a prepaid envelope, and addressed as follows:

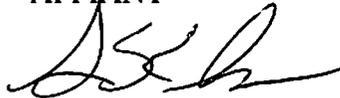
*North Dakota Supreme Court*  
*Judicial Wing*  
*600 E. Boulevard Ave*  
*Bismarck, North Dakota*  
*58505-0530*

*Bobbi Weiler*  
*418 E. Rosser Ave*  
*Ste 320*  
*Bismarck, North Dakota*  
*58501*

*Sheila Keller*  
*316 N. 5<sup>th</sup> St.*  
*Ste 300*  
*Bismarck, North Dakota*  
*58507-7310*

And depositing said envelope in the Mail, at the NDSP, P.O.Box 5521, Bismarck, North Dakota 58506-5521.

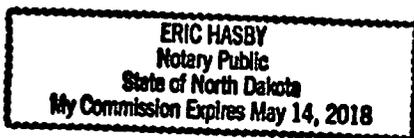
AFFIANT



P.O.Box 5521  
Bismarck, North Dakota 58506-5521

Subscribed and Sworn to before me this 24 day of May, 2016.

In the County of Burleigh.



Notary Public 