FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 14, 2010
STATE OF NORTH DAKOTA

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

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| R.F., individually and as Personal Representative of the Estate of E.F., deceased,<br><br>Plaintiff/Appellee,<br><br>vs.<br><br>M.M. and R.J.M., a minor child, by and through her guardian, M.M.,<br><br>Defendant/Appellant. | Supreme Court Case No. 20100046 |

# BRIEF OF PLAINTIFF/APPELLEE

On Appeal from the Memorandum Opinion and Order entered February 1, 2010,
and From the Judgment entered February 19, 2010
East Central Judicial District
Cass County, North Dakota
Cass County Civil No. 09-09-R-00222
The Honorable Douglas R. Herman

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## STATEMENT OF THE CASE

9. On February 27, 2009, Appellee commenced an action for grandparent visitation rights and to have his son adjudicated the father of his grandchild. On March 5, 2009, Appellant served her Notice of Rule 12 (b) Motion to Dismiss

Complaint. On March 20, 2009, Appellee Responded to Appellant's Motion to Dismiss Complaint and, in the alternative, made a Motion to Amend Complaint.

10. On April 9, 2009, the District Court held a hearing on the Motions mentioned above. The District Court requested, at this hearing, that Appellee and Appellant draft letter briefs to the District Court regarding the issue of standing. On April 20, 2009, Appellee and Appellant submitted their respective letter briefs. On April 21, 2009, the District Court issued an Order denying Appellant's Motion to Dismiss Appellee's Complaint.

11. On May 6, 2009, Appellee served Appellant with a Motion to Amend Complaint. On May 19, 2009, Appellant responded to the same. On May 28, 2009, the District Court granted Appellee's Motion to Amend Complaint. Appellant's Amended Complaint was served upon Appellee on May 29, 2009.

12. On June 1, 2009, Appellant Requested that the Court Vacate the Order allowing Appellee to Amend his Complaint. On June 11, 2009, Appellant Answered the Amended Complaint. On July 21, 2009, the District Court denied Appellant's Request to Vacate the Order allowing Appellee to Amend his Complaint.

13. A one day hearing was scheduled to take place on January 4, 2010, which took place as scheduled. On February 1, 2010, the District Court entered its Memorandum Opinion and Order allowing Appellee grandparent visitation rights with his granddaughter. On February 19, 2010, a Judgment was entered regarding the same. This appeal follows.

## STATEMENT OF THE FACTS

14. This is a case, first and foremost, for grandparental rights to visitation with a grandchild. (App. 12 and 13). In fact, Appellee was excited about getting a potential grandchild from the very beginning. (Transcript 143) (Appellee stating that he was excited when he heard that his son, E.F., was going to have a child)

15. Appellee was supportive of E.F. and Appellant during the pregnancy. (Transcript 144-145) In fact, during the pregnancy Appellee, among other things, bought clothes, toys and a portable crib for E.F., Appellant and the child. (Transcript 146 and 148)

16. Eventually, E.F. and Appellant had a child and named her R.J.M. Appellant admitted E.F.'s paternity to this child at the hearing:

> Q: (Mr. Liebl): So, would you admit that you had sex with E.F. on the day that R.J.M. was conceived?
>
> A: (Appellant): Yes.
>
> Q: (Mr. Liebl): Would you admit that there is no genetic testing in this action to determine the paternity of R.J.M., whose date of birth is [XX-XX-XXXX] because E.F. is her biological father?
>
> A: (Appellant): Correct.

(Transcript 22)

17. After R.J.M.'s birth, Appellee and his wife traveled from their home in Illinois, approximately 640 miles, or approximately nine to ten hours, to Fargo to see the child. (Transcript 150) Appellee was excited to see his new granddaughter and apprehensive at the same time due to her health concerns.

(Transcript 152) Appellee took pictures with his granddaughter and was looking forward to having a relationship with her, through his son, E.F. (App. 88-94) (Transcript 156)

18. Unfortunately, E.F. died. (Transcript 141) Prior to E.F.'s death, Appellee was kept up to date regarding R.J.M. through his son, to the extent possible. (Transcript 155) During this time, Appellee was not having much luck with talking with Appellant directly and even E.F. was having a hard time getting to see R.J.M. (Transcript 154 and 158)

19. Eventually, Appellant cut Appellee and his wife out of the child's life. In fact, she readily admitted that she did not allow Appellee or his wife to see R.J.M. after E.F.'s death. (Transcript 33) Appellant also admitted on cross-examination that she prevented Appellee from having a relationship with his granddaughter:

> Q: (Mr. Liebl): Okay. Would you agree that it's been hard for Appellee and L.F. to establish a relationship with the child?
>
> A: (Appellant): I guess after [E.F.] died, yes. But, they didn't want one while he was alive.
>
> Q: (Mr. Liebl): Is there – would you agree that their inability to establish a relationship since [E.F.]'s death has been because you have prevented it?
>
> A: I guess so. Yeah.

(App. 105) (Transcript pg. 57)

20. This did not stop Appellee from trying. In this regard, Appellee testified that he and his wife tried calling, checking with family members, and tried emailing to keep in touch. (Transcript 159) Eventually, once the child was

cognitively appropriate, Appellee started sending letters, gifts, cds, and pictures so the child could start to know him. (App. 50-62)

21. At wits end, Appellee decided he needed to bring an action for grandparental visitation rights. (App. 10-13) A trial on this action was held in January of 2010. At this trial, Appellee not only conveyed the facts listed above to the District Court, he also testified regarding the best interests of the child factors pursuant to North Dakota Law. (Transcript 131-199) After hearing both his testimony and the testimony of the Appellant, the District Court found that: 1) Appellee was a grandparent of R.J.M., 2) It was in R.J.M.'s best interests to have visitation with Appellee, and 3) Visitation with Appellee would not interfere with the parent-child relationship. (App. 103-112)

## LAW AND ARGUMENT

### I. APPELLEE HAD STANDING TO BRING A GRANDPARENT VISITATION ACTION PURSUANT TO THE PLAIN LANGUAGE OF NORTH DAKOTA CENTURY CODE SECTION 14-09-05.1.

22. This is an action in which Appellee, first and foremost, sought grandparental rights to visitation with his granddaughter pursuant to North Dakota Century Code Section 14-09-05.1. Appellee has always had standing to bring such an action pursuant to the plain and unambiguous language of this statute.

23. Statutory interpretation is a question of law fully reviewable on appeal. McDowell v. Gillie, 2001 ND 91, ¶ 11, 626 N.W.2d 666. The Court's primary objective is to ascertain legislative intent, which must be sought initially from the language of the statute. Western Gas Resources v. Heitkamp, 489 N.W.2d 869,

871 (N.D. 1992). In construing a statute, words are to be understood in their ordinary sense. N.D.C.C. § 1-02-02. When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. N.D.C.C. § 1-02-05; Hilton v. N.D. Educ. Ass'n, 2002 ND 209, ¶ 10, 655 N.W.2d 60. Furthermore, "**[w]hen a statute is clear and unambiguous, it will not be 'interpret[ed] … as though language not present should be added**." Ralston v. Ralston, 2003 ND 160, ¶ 7, 670 N.W.2d 334 (citing Bouchard v. Johnson, 555 N.W.2d 81, 83 (N.D. 1996)).

24. North Dakota Century Code Section 14-09-05.1 states:

> 1. The grandparents and great grandparents of an unmarried minor child may be granted reasonable visitation rights to the child by the district court upon a finding that visitation would be in the best interests of the child and would not interfere with the parent-child relationship.
> 2. The court shall consider the amount of personal contact that has occurred between the grandparents or great-grandparents and the child and the child's parents.
> 3. This section does not apply to agency adoptions or when the child has been adopted by a person other than a stepparent or grandparent. Any visitation rights granted under this section before the adoption of the child may be terminated upon the adoption if termination of the rights is in the best interest of the child.
> 4. An application for visitation rights under this section may be considered by the district court in conjunction with a divorce proceeding involving the parent of the minor child. If any district court of this state retains jurisdiction over the residential placement of the minor child or children by virtue of any prior proceedings, the rights conferred by this section may be enforced by the grandparents or the great-grandparents through motion under the prior

> proceeding. If no district court otherwise has jurisdiction, a proceeding to enforce grandparental rights may be brought against the parent having primary residential responsibility as a civil action and venued in the county of residence of the minor child.
> 5. The district court may require mediation of the matter under chapter 14-09.1. If mediation fails and if the mediator agrees, the court may order the dispute arbitrated by the person who attempted mediation. Joinder of grandparents or of great-grandparents awarded visitation rights under this section must occur in any proceeding to terminate parental rights.

25. As can be seen from this statute, an alleged grandparent clearly has standing to bring an action for grandparental visitation rights. In this regard, the statute clearly and unambiguously states that a "grandparent" may obtain visitation rights to a child. As such, "grandparent" is just one of several factors a person must prove in order to obtain grandparental visitation rights to their grandchild under this section. In other words, "grandparent" is an element that Appellee had to prove at trial in order to obtain his grandparental visitation rights.

26. In the case at hand, Appellee followed the requirements of North Dakota Century Code Section 14-09-05.1 by alleging that he was the grandfather of the child subject to this action within his Complaint, and eventually proving it at trial! (App. 11 and 12) (Trans. Pg. 22). In this regard, Appellee proved the relationship through Appellant's *admissions* and a birth certificate showing he was the father of E.F. (Trans. Pg. 22) (App. 49) Simply put, this is all that is required by the applicable statute.

27. Appellant argues within her Brief that Appellee lacked standing to bring a *paternity* action under North Dakota Century Code Section 14-20-37. However,

this argument is nothing more than a red herring. This is because there is obviously no requirement contained within North Dakota Century Code Section 14-09-05.1 that a person bring a paternity action prior to bringing a grandparent rights action. In fact, clearly missing from North Dakota Century Code Section 14-09-05.1 is a requirement that a person prove paternity or a biological connection to a child *prior* to bringing their action. In other words, there is absolutely no requirement within the applicable statute that Appellant prove his case before it starts!

28. Furthermore, nowhere within Appellant's Brief does she even allege that a failure to have standing in a *paternity* action precludes a *grandparental visitation rights* action. This is likely because she knows these are two separate and independent statutes that do not depend on one another. In essence, *Appellant is trying to add in language* to North Dakota Century Code Section 14-09-05.1 that is not contained within the applicable statute. Simply put, Appellant is trying to add the requirements contained within North Dakota Century Code Section 14-20-37 into Section 14-09-05.1 –a completely different chapter of the Century Code! For obvious reasons, this is prohibited under North Dakota law. See Ralston v. Ralston, 2003 ND 160, ¶ 7, 670 N.W.2d 334 (citing Bouchard v. Johnson, 555 N.W.2d 81, 83 (N.D. 1996)) ("[w]hen a statute is clear and unambiguous, it will not be 'interpret[ed] … as though language not present should be added.").

29. In conclusion, Appellant's argument that a failure to have standing in a *paternity* action really has no bearing whatsoever on this case. Simply put,

Appellee had standing under the applicable statute and proved his case, as he needed to, at a trial on the merits.

## II. IF STANDING FOR A PATERNITY ACTION IS NEEDED IN A GRANDPARENT VISITATION ACTION, THE DISTRICT COURT CURED THE DEFECT, IF ANY, THROUGH NORTH DAKOTA RULE OF CIVIL PROCEDURE 17.

30. In the case at hand, Appellant has made an argument that North Dakota Rule of Civil Procedure 17 does not allow a person to cure a standing defect. This argument should not carry any weight with the Court for several reasons.

31. First of all, this argument should not carry any weight with the Court because the Appellant's objection, no matter what label was put on it, was to the Appellee not being the real party in interest. It is believed the Appellant admits this herself when she stated within her brief at page 12: "[t]hat is, even [Appellee]'s counsel seemed to recognize that *the cause of action regarding paternity belonged to E.F.'s estate and not [Appellee]*." (emphasis added). As can be seen from this statement, Appellant's argument was not as much regarding standing as it was who had brought the action.

32. When a person makes such an objection, North Dakota Rule of Civil Procedure 17 applies. This Rule states, in pertinent part, as follows:

> (a) Real party in interest. Every action must be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and if a statute so provides, an action

> for the use or benefit of another must be brought in the name of the state of North Dakota. **No action may be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after the objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and the ratification, joinder, or substitution has the same effect as if the action had been commenced in the name of the real party in interest**.

See N.D.R. Civ. P. 17(a) (emphasis added). As can be seen from the plain language of this rule, the District Court could not have "dismissed" this action until Appellee had adequate time, after Appellant's objection, to substitute the correct party. Appellee did this as a precautionary matter, and the District Court allowed this under the plain language of Rule 17(a); finding it did not prejudice Appellant and allowed the district court to reach the merits of the case. (Appellant's App. 1-4)

33. This being said, even if Appellant is correct in her assertion that she made an objection to "standing" rather than an objection to bringing the "real party in interest," it still does not make any difference. This is because Appellant's argument that N.D.R.Civ.P. Rule 17 cannot cure a potential defect in regard to "standing" is also without merit. Upon diligent research and belief, support for such a position could not be found, whatsoever. In fact, exactly the opposite was found to be is true.

34. In this regard, this Court has remanded an action back to the District Court, on at least one occasion, to give a party reasonable time to substitute the correct party in interest, under North Dakota Rule of Civil Procedure 17, where it was found that party did not have "standing." See Goodleft v. Gullickson, 556 N.W.2d 303, 309-10 (N.D. 1996) (stating personal representative should have been allowed reasonable time for the substitution of decedent child's parents as Appellees, after

determination that representative did not have standing to bring wrongful death action). Strikingly absent from this opinion was some alleged requirement that the party "file a new law suit" once the new party with standing was named. This is because there is no such requirement.

35. The fact of the matter is, Appellant made an objection to an alleged defect within Appellee's Complaint, and Appellee had a reasonable period of time to cure that alleged defect, which he did. In fact, Appellant admits that Appellee had standing at the time he served his Amended Complaint. (Appellant Brief pg. 15) (stating "[Appellant] acknowledges that once [Appellee became the personal representative for the estate of E.F., he then had standing to commence an action to adjudicate paternity…"); see also (Appellant App. 13) ("[Appellant] acknowledges that on or after March 17, 2009, the date upon which [Appellee] was appointed Co-Personal Representative of the estate of E.F., he had standing to bring an action to adjudicate paternity pursuant to N.D.C.C. 14-20-37.") To allege the only defect currently in front of this Court is that Appellee did not "start a new action" after gaining standing is preposterous and goes against the spirit of the Rules of Civil Procedure. See N.D.R.Civ.P. 1.

## III. IF STANDING FOR A PATERNITY ACTION IS NEEDED IN A GRANDPARENT VISITATION ACTION, THE AMENDED COMPLAINT RELATES BACK TO THE DATE THE ACTION COMMENCED.

36. If the Court wants to address whether Appellee's Amended Complaint "relates back" to the date of the original Complaint (which is not necessary because

Appellee had standing from the beginning and, if not, followed Rule 17) it will still come to the same conclusion i.e., Appellee has had standing at any applicable time during this action. This is because the *plain language* of North Dakota Rule of Civil Procedure 15(c) states that an Amended Complaint relates back to the date of the original pleading. In this regard, North Dakota Rule of Civil Procedure 15(c) states:

> Whenever the claim or defense asserted in an amended pleading has arisen out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, **the amendment relates back to the date of the original pleading**.

See N.D.R. Civ. P. 15(c) (emphasis added). According to the plain language of this Rule, which is to be construed to secure the just, speedy, and inexpensive determination of every action, Appellee's Amended Complaint related back to the date the original Complaint was served.

37. Despite the plain language of North Dakota Rule of Civil Procedure 15, Appellant appears to allege that the Amended Complaint in this action should not relate back to the date of the original Complaint because Appellee did not have standing when he served the same. In support of this argument, Appellant cites B.H. v. K.D., 506 N.W.2d 368 (N.D. 1993). With all due respect, this is not what the B.H. case stands for and said case is highly distinguishable from the case at hand.

38. In this regard, in B.H. a man who had sexual intercourse with a married woman brought an action for paternity. According to the plain language of the applicable statute, that man could *never* gain standing through any action *independent* of the lawsuit he was involved in. Stated another way, said man was

not able to gain the standing needed pursue his lawsuit because he did not and could *never* have standing to obtain a DNA test under the applicable statute.

39. In contrast, in the case at hand, Appellee had standing under the Grandparents Rights Statute to bring an action for the same –from the beginning. Furthermore, he had standing to bring a paternity action when he was appointed Personal Representative. In other words, Appellee had standing under North Dakota Century Code Section 14-09-05.1 all by itself to pursue grandparent rights. And, Appellee has always had standing to bring an action to appoint himself as Personal Representative of his son's estate, which according to the plain language of the applicable statute, gave him standing to pursue paternity.

40. Second of all, because the man in B.H. could never gain standing through an independent action, *he never could have amended his complaint* for the Court to even entertain whether or not such a pleading would "relate back" to the original petition. Basically, Appellant has assumed that this Court would say our Amended Complaint could not "relate back" based on a case that does not even address this exact issue. Simply put, Appellee did not try to "bootstrap" his standing based on the "hope" of the outcome of this litigation, rather, he had an independent action.

41. Appellant also relies on Pearson v. Anthony, 254 N.W. 10 (Iowa 1934), as it is cited in B.H. for the proposition that Appellee lacks standing in this case. Again, this case is distinguishable.[1] The Appellee in Pearson brought a wrongful death

[1] In addition to this and the Bronner case being distinguishable, there are other cases which disagree with the holdings. See e.g., In Miller v. Accelerated Bureau of Collections, Inc., 932 P.2d 824 (Colo. 1997) (holding that Appellee not having standing at the outset of the litigation may acquire standing after an objection is raised and that the standing later acquired relates back to the commencement of the proceedings).

action before becoming the personal representative of the deceased's estate. Id. at 11. During the pendency of the litigation, *the statute of limitations passed* and she was not validly appointed personal representative until the limitations period passed. Id. at 11-12. The court specifically noted that no proceedings were taken to amend the petition or substitute the Appellee as personal representative after she was appointed by the Probate Court. Id. at 12.

42. Here, Appellee amended the Complaint to bring the paternity action as the representative of his deceased son's estate. Appellee *is not time barred* according to a statute of limitations nor does Appellee's standing depend on the trial court's decision in this litigation. Simply put, there is no prejudice to Appellant in this action, unlike the opposing party in the Pearson action.

43. Lastly, the Appellant's argument that the Amended Complaint cannot "relate back" to the date of the original complaint flies in the face of North Dakota Rule of Civil Procedure 1, which states the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Basically, Appellant is arguing that if Appellee would have just served a new Complaint stating the real party in interest on the Appellant after his appointment as personal representative she would have no issues or objections. Therefore, in essence, she is arguing that this Court should remand this matter to: 1) serve a new complaint (in which it is admitted Appellee has standing) and 2) re-try a case that has already been heard on its merits. Such action would be offensive to the purpose of Rule 1 of Civil Procedure. This is because such action would not only be futile; it would end up costing both parties substantial money to re-try a case that has already been tried.

## IV. IF STANDING FOR A PATERNITY ACTION IS NEEDED IN A GRANDPARENT VISITATION ACTION, A LACK OF STANDING AT THE COMMENCEMENT OF THE ACTION IS HARMLESS ERROR.

44. North Dakota Rule of Civil Procedure 61 states that "[n]o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or **in anything done** or omitted **by the court**, or by any of the parties is ground for a new trial or for setting aside a verdict, or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. **The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties**." N.D.Civ.P. 61 (emphasis added).

45. In Huesers v. Huesers, 1998 ND 54, 574 N.W.2d 880, this Court addressed this rule of civil procedure. Id. ¶ 11 (stating that "[e]rror not affecting substantial rights of the parties must be disregarded). In this regard, this Court explained, "[n]on-prejudicial mistakes by the trial court constitute harmless error and are not grounds for reversal." Id.

46. In the Huesers case, the appellant argued that because the district court did not consider an amendment to the best interest factors regarding the degree of domestic violence needed to invoke the presumption against custody, the trial court erred in its findings. This Court stated that because the appellant had committed a pattern of domestic violence leading up to the divorce action, the failure to consider the amendment was harmless error, resulting in no prejudice to the appellant.

47. Like that case, there is no prejudice to Appellant because, *admittedly*, Appellee currently has standing now to litigate this action. (Appellant's App. 13) Simply put, Appellant is hard pressed to show a substantial right has been affected by not starting a "new" action in March of 2009 when she readily admits that Appellant, as personal representative and grandfather of the minor child, has standing to pursue this litigation now.

48. Furthermore, to suggest that a court re-try a case that has been tried on the merits, after admitting that the alleged error has been resolved, is offensive to North Dakota Rule of Civil Procedure 1. Judicial time and resources are far too valuable to be spent re-trying a case after a "technical" objection that has no bearing on the outcome of the case. Simply put, why re-try a case that would have exactly the same outcome? Is Appellant planning on denying paternity if the action is remanded for a new trial? Obviously, such a question is ridiculous, but so is remanding a case to basically have a "do over." Judicial time and resources are far too precious for something like that.

## V. IF STANDING FOR A PATERNITY ACTION IS NEEDED IN A GRANDPARENT VISITATION ACTION, APPELLEE'S AMENDED COMPLAINT MUST BE SEEN AS A SUPPLEMENTAL PLEADING.

49. In Christofferson v. Wee, 139 N.W. 689, 692 (N.D. 1913), this Court stated that an additional pleading may be treated as supplemental, even though mistakenly designated as an amended pleading. When reading this case in combination with Dimond v. State Board of Higher Education, 2001 ND 208, 637

N.W.2d 692, it is plain to see that even if this Court does not believe the Amended Complaint could "relate back" pursuant to North Dakota Rule of Civil Procedure 15, it is appropriate for this Court to treat Appellee's Amended Complaint as a supplemental pleading, curing any alleged jurisdictional defects. In this regard, in Dimond, this Court stated that Rule 15, N.D.R.Civ.P., is adopted from Fed.R.Civ.P. 15, and interpretations of the corresponding federal rule by federal courts are highly persuasive in interpreting our rule. Dimond v. State Board of Higher Education, 2001 ND 208, ¶ 16, 637 N.W.2d 692, citing Wayne-Juntunen Fertilizer Co. v. Lassonde, 456 N.W.2d 519, 525 (N.D.1990). Under Fed.R.Civ.P. 15(d), federal courts have held that defects in a plaintiff's case, **even jurisdictional defects**, can be cured while the case is pending if the plaintiff obtains leave to file a supplemental pleading reciting post-filing events that have remedied the defect. See Mathews v. Diaz, 426 U.S. 67, 75, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976); Black v. Secretary of Health and Human Servs., 93 F.3d 781, 790 (Fed. Cir. 1996).

50. In this case, because Appellee asked for leave to amend his Complaint, the subsequent Amended Complaint drafted, served, and filed by Appellee can be seen as a "supplemental" pleading which cured any alleged jurisdictional defects.

51. By allowing the Amended Complaint to be seen as a "supplemental" pleading, this Court would also be construing and administering the rules of civil procedure to secure the just, speedy and most inexpensive determination of every action. Does the Appellee really think a remand to re-try a case (with absolutely no factual differences) would be just, speedy or inexpensive? The answer is

obviously: "no." Simply put, there is no prejudice to the Appellant by denying a "standing" objection –especially when she ADMITS PATERNITY!

## VI. IF STANDING FOR A PATERNITY ACTION IS NEEDED IN A GRANDPARENT VISITATION ACTION, APPELLEE'S PERSONAL REPRESENTATIVE STATUS MUST "RELATE BACK" TO THE DATE THE ACTION COMMENCED.

52. If this Court believes that a paternity action is needed prior to a grandparent rights action, it could also conserve precious judicial resources by allowing Appellee's Personal Representative status to commence on the date of Appellee's deceased son's death to avoid the cost and delay of having to retry this matter. There is legal support for the same.

53. In this regard, several other states have allowed a person's personal representative status to "relate back" to the date of the decedent's death or the date of the commencement of the action to allow an action to proceed on its merits. See Hanson v. State Farm Insurance Company, 661 N.W.2d 659, 662 (Minn. 2003) (stating the "relation back" doctrine applies to the authority of a personal representative which went back to date of death); Thorson v. Connelly, 248 S.W.3d 592 (Mo. 2008) (related back to time of filing action); and Osner v. Boughner, 394 N.W.2d 411, 411-12 (Mich. 1986) (went back to date legal action was commenced).

54. Like these cases, this Court could determine that the appointment of Appellee's Personal Representative status commenced on the date of Appellee's deceased son's death, or the date the action commenced. In this way, it would be construing the Rules of Civil Procedure to give them a just and speedy effect.

Again, Appellant admits Appellee now has standing in this matter. It would simply make no sense to have to re-try this case, when the rules can be read to bring this matter to a close –after a full trial on the merits was completed.

## VII. THE DISTRICT COURT'S FINDINGS ARE NOT CLEARLY ERRONEOUS.

55. North Dakota Supreme Court will not reverse the district court's Findings on visitation unless they are clearly erroneous. Lohstreter v. Lohstreter, 1998 ND 7, ¶ 10, 574 N.W.2d 790 (citation omitted); see also N.D.R. Civ. P. 52(a) ("Findings of fact, including findings in juvenile matters, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."). A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if after review of the evidence, this Court has a definite and firm conviction a mistake has been made. Id.

56. This standard of review is extremely difficult to overcome. In fact, even if this Court might have found facts differently, that does not make the District Court's Findings clearly erroneous. Wagner v. Wagner, 2000 ND 132, ¶ 12, 612 N.W.2d 555 ("We will not reverse a trial court's findings merely because we may have viewed the facts differently if we had been the trier of fact."); Wolf v. Wolf, 474 N.W.2d 257, 259 (N.D.1991) ("We may have viewed the evidence and weighed those factors differently had we been the trier of fact; but that is not the standard on appeal and we will not reverse a decision of the trial court simply because we would have done differently had we been the trial court.").

57. It is, at a minimum, arguable that this Court gives so much weight to a district court because it is the one that gets to hear the witnesses and make credibility determinations from those observations. In this regard, this Court has stated: "'The words used are by no means all that we rely on in making up our minds about the truth of a question.'" State v. Guthmiller, 2004 ND 100, ¶ 7, 680 N.W.2d 235 (quoting Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952)). A trial court judge "hears the witnesses, sees their demeanor on the stand, and is in a position to determine the credibility of witnesses," and is, therefore, "in a much better position to ascertain the true facts than an appellate court relying on a cold record" without "'the advantage . . . of the innumerable intangible indicia that are so valuable to a trial judge.'" Guthmiller, at ¶ 7 (quoting Doyle v. Doyle, 52 N.D. 380, 389, 202 N.W. 860, 863 (1925)). Therefore, this Court defers to the trial judge's opportunity to judge the credibility of witnesses. See e.g. Aamodt v. North Dakota Dep't of Transp., 2004 ND 134, ¶ 12, 682 N.W.2d 308 (defer to hearing officer). See also Reynolds v. North Dakota Workmen's Comp. Bureau, 328 N.W.2d 247, 251 (N.D. 1982) (defer to hearing officer).

58. Lastly, this Court must understand the basis for the district court's decision before it can decide whether the findings of fact are clearly erroneous. In re Griffey, 2002 ND 160, ¶ 8, 652 N.W.2d 351. This being said, the Supreme Court "will not reverse a district court's decision when 'valid reasons are fairly discernable, either by deduction or by inference.' " In re Spicer, 2006 ND 79, ¶ 8, 712 N.W.2d 640 (quoting Griffey, 2002 ND 160, at ¶ 8).

59. In the case at hand, there is more than ample support for the District Court's decision. In this regard, a review of the transcript shows that Appellee addressed all of the relevant factors when it comes to a grandparental visitation rights action. Appellee addressed his grandparent status, the best interest factors and the parent-child relationship, whether it be through his direct testimony or through the testimony of Appellant herself. Obviously, after hearing all of this testimony first hand, and after receiving all of the evidence, first hand, the District Court made a decision. Simply put, there is a plethora of evidence which supports the District Court's conclusions of law in this case.

60. Despite this fact, and probably because of this fact, Appellant tries to pick a couple different statements within the Court's Findings in an attempt to say there are grounds for reversal. Appellant is obviously forgetting about the majority of the evidence presented at the hearing and located within the Court's Findings! A few statements taken out of the Court's Findings cannot lead to a reversal because we are not operating in a vacuum. Simply put, there is a plethora of evidence within the record, which supports the District Court's conclusions.

61. Furthermore, Appellant is flat out wrong in regard to some of his arguments concerning the Findings. For instance, Appellant states that the statement "it is in R.J.M.'s best interests that she be allowed visitation and contact with [Appellee] so that he can continue to provide for her and [Appellant's] well being and upbringing" is not supported by the evidence. This is not correct. There was testimony regarding Appellee's purchasing of things for Appellant and the child prior to the child's birth. (Transcript 146 and 148) There was also evidence of Appellee "providing" for the

child after birth, including but not limited to, the setting up of a trust for the benefit of the child. (Transcript 146, 148 and 169)

62. Appellant then states that there is a Finding that states "[Appellee] has been involved with R.J.M. since her birth…and wants to continue to be a part of the child's life." This is not accurate and the Appellant has changed the verbiage of this Finding in an attempt to support her argument that the evidence does not support the Findings. The fact of the matter is, the actual Finding from the Court's Order states: "[Appellee] has been involved with R.J.M. since her birth **and has wanted to continue** to be a part of the child's life." (App. 105) (emphasis added). While it may have been better to use the words "at the time around" instead of the word "since," the meaning of this Finding is still clearly conveyed and supported by the evidence. In this regard, it is clear that Appellee was involved at the child's birth and shortly thereafter while Appellee's son was still alive. (App. 144-145, 150, 155, 156) Furthermore, the District Court's next sentence within its Findings explains the previous sentence: "[Appellee]'s contact with R.J.M., other than the face-to-face contact shortly after birth has been infrequent, but this is the result of long distance, **and not for [Appellant]'s lack of trying to have a relationship**." (App. 105) (emphasis added). Simply put, it is clear from the evidence and the District Court's Findings that Appellee has "wanted to" continue to be a part of the child's life ever since her birth.

Appellee could go on, but it is not necessary. The fact of the matter is, this Court has Findings of Fact that are clearly supported by the evidence in this matter. Let us not forget that this Court will not reverse a district court decision when 'valid

reasons are fairly discernable, either by deduction or by inference.' " In re Spicer, 2006 ND 79, ¶ 8, 712 N.W.2d 640 (quoting Griffey, 2002 ND 160 at ¶ 8). Here the Findings are not only "discernable by inference" they clearly address all of the things required by the statute. These Findings were and are still based on the evidence presented at trial, which is clearly evidenced by the transcript of the proceedings.

## VIII. THE DISTRICT COURT PROPERLY INTERPRETED AND APPLIED N.D.C.C. § 14-09-05.1.

63. Statutory interpretation is a question of law fully reviewable on appeal. McDowell v. Gillie, 2001 ND 91, ¶ 11, 626 N.W.2d 666. The Court's primary objective is to ascertain legislative intent, which must be sought initially form the language of the statute. Western Gas Resources v. Heitkamp, 489 N.W.2d 869, 871 (N.D. 1992). In construing a statute, words are to be understood in their ordinary sense. N.D.C.C. § 1-02-02. When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. N.D.C.C. § 1-02-05; Hilton v. N.D. Educ. Ass'n, 2002 ND 209, ¶ 10, 655 N.W.2d 60. Furthermore, "[w]hen a statute is clear and unambiguous, it will not be 'interpret[ed] … as though language not present should be added." Ralston v. Ralston, 2003 ND 160, ¶ 7, 670 N.W.2d 334 (citing Bouchard v. Johnson, 555 N.W.2d 81, 83 (N.D. 1996)).

64. In pertinent part, North Dakota Century Code Section 14-09-05.1 states:

> 2. The court shall **consider** the amount of personal contact that has occurred between the grandparents or great-grandparents and the child and the child's parents.

(emphasis added).

65. Somehow Appellant has interpreted this statute to mean that no person without a relationship with a child can *ever* gain grandparental rights with that child. This simply is not what the statute states.

66. First, the plain language of the statute does not support such an argument. In this regard, the applicable statute is totally void of any language that states the lack of a relationship *prevents* a person from obtaining grandparental visitation rights. Rather, the plain language of the statute explains that a court is simply to "consider" the amount of contact. If a statute is clear on its face and unambiguous, the wording of the statute should not be ignored as pretext to pursue its spirit. N.D.C.C. § 1-02-05. As such, there is no statutory support for the argument that there must be a relationship between a grandfather and a grandchild *prior to* a court allowing grandparental rights.

67. As explained more fully below, there is a very logical reason why a court is to simply "consider" the amount of time a parent has had with a child, rather than automatically "shooting down" a petition for grandparental rights due to lack of a relationship. The logical reason for being able to "consider" the amount of contact is there are situations in which it would be inequitable to prevent a grandparent from getting visitation with a grandchild due to the lack of a relationship. Therefore, by writing the statute the way they did, a Court is able to "consider" the factors contributing to the lack of a relationship.

68. Second the legislative history does not support the Defendant's argument. In fact, there is absolutely no discussion regarding the "necessity" of a

relationship prior to being able to obtain grandparental rights. To the contrary, Mrs. Darlene Finck of Reeder, North Dakota testified as to her personal experience regarding how, after her daughter died, her son-in-law remarried and she was not allowed to communicate with her granddaughter **for four years**. See N.D. H. Jud. Comm., Grandparental Rights of Visitation to Unmarried Minors, Hearings on N.D. H. 1274, at 1. The bill still passed into law, presumably, to help people like Mrs. Finck, who did not have a relationship with their grandchildren for four years!

69. Third, the Appellant's argument is flawed because the Appellant should not be able to benefit by her own wrong. See N.D.C.C. § 31-11-05 (8) (a person should not be able to benefit from that person's own wrong). In other words, Appellant should not be able to argue that a lack of a relationship prevents Appellee from obtaining grandparent rights, when she is the one that prevented the relationship![2] This simple maxim is supported by massive amounts of case law. For example, in Agusta v. Carousso, 617 N.Y.S.2d 189 (N.Y.A.D. 1994), the grandfather brought a petition for visitation rights for his granddaughters after his numerous attempts to establish a relationship was prevented by his daughters. In upholding the grandfather's right to bring a petition, the court noted that the grandfather established "a sufficient effort to establish one [relationship], so that the court perceives it as one deserving the court's intervention" and that "what is

[2] It is well known that North Dakota considers frustration of visitation in custody matters between parents. See e.g., Hendrickson v. Hendrickson, 2000 ND 1, 603 N.W.2d 896, 902 (The North Dakota legislature considers persistent frustration of visitation and the emotional and physical endangerment of children to be in the same behavioral class); see also Anderson v. Resler, 618 N.W.2d 480 (N.D. 2000)

required of grandparents must always be measured against what they could reasonably have done under the circumstances." Id. at 621 (noting that the grandfather "unavailingly wrote letters, sent gifts, made telephone calls, visited the home of one daughter, and enlisted the assistance of third-party intermediaries" in his quest).

70. Child Custody Practice and Procedure also reflects this maxim when it states:

> A 'substantial relationship' may not be a prerequisite to granting visitation in the case of a newborn or young child, or if the parent has denied the grandparent the opportunity to form that relationship. For example, paternal grandparents petitioned for visitation with their grandson whose father had died. The mother, in opposing the visitation, argued that the grandparents had failed to prove that they had established a substantial relationship with the child. The court held that the state's statute did not require a pre-existing relationship and that the grandparents had visited the child until the mother denied access. The Court stated 'that the relationship was as substantial as one might expect between grandparents and a child who is less than 1 year old.'

Child Custody Prac. & Proc. § 7:22 (citing) Snipes v. Carr, 526 So.2d 591 (Ala.Civ.App. 1988). This resource went on to state that visitation has been granted in situations such as ours, in which, the mother has prevented the grandparent from ever establishing a relationship. In pertinent part, it states:

> The parent(s) may have prevented the grandparent from ever establishing a relationship. In one case, a grandmother wanted to visit her daughter's three children. One child had been born to a first marriage, another child after divorce, and a third was born to a new marriage…Although the youngest child had been prevented by the conduct of the mother from forming a

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(In such cases involving frustration of visitation in custody cases, North Dakota has recognized that a change of custody is an appropriate remedy).

> substantial relationship with the grandmother, the court allowed grandparent visitation.

Id. (citing) Spradling v. Harris, 778 P.2d 365 (Kan. 1989).

71. This reasoning is sound and logical. Is there any reason why a person should be able to prevent a relationship and then use that very reason to deny visitation? The answer is that a person should not be allowed to deny visitation and then benefit from it because such an interpretation of the statute leads to an absurd result. It is well known that the Supreme Court wants to avoid absurdity. See e.g. Resolution Trust Corp. v. Dickinson Econo-Storage, 474 N.W.2d 50, (N.D. 1991).

72. Again, if the Appellant's interpretation of the statute is correct in this case, then North Dakota attorneys should be telling their clients: "as long as you prevent visitation from birth, the grandparents will not be able to obtain visitation –no questions asked." Such advice is ludicrous, among other reasons, because it would absolutely remove from the equation whether or not the visitation would be in the best interests of the child!

73. The Appellee certainly has met and exceeded his burden and cannot therefore be punished by the wanton disregard of his efforts by the Appellant. It is undisputed that Appellee has done everything in his power to continue to develop their relationship with their granddaughter, only to have his efforts frustrated by the Appellant. Appellee has attempted contact directly, through family members, through social media, and even through the mail service, with all of their efforts being thwarted by Appellant. (Transcript 159, 57, and 33)

74. Overall, if this Court allows Appellant's intentional frustration of

visitation to benefit her in this matter, it will be going against the law and general principles of equity. Please help Appellee to keep that which he has been desiring and expecting since the child was born –being able to contribute to the wellbeing of his granddaughter.

75. Furthermore, North Dakota Century Code legislative history supports the contention that North Dakota Century Code Section 14-09-05.1 is written for people just like Appellee.

76. Beginning in the 1960s, states began enacting grandparent visitation statutes with the end result being that every state enacted some form of a grandparent visitation statute. Michael K. Goldberg, A Survey of the Fifty States' Grandparent Visitation Statutes, 10 Marq. Eld. Adv. 245, 246 (Spring 2009). North Dakota's version of the grandparent visitation statute, Section 14-09-05.1, was enacted in 1983, at least in part, because at that time if a grandparent wanted visitation, their only recourse was to petition the court for guardianship – however, the grandparents did not want guardianship, they "just wanted the privilege of visiting their grandchild." See N.D. H. Jud. Comm., Grandparental Rights of Visitation to Unmarried Minors, Hearings on N.D. H. 1274, at 1.[3]

77. At the time House Bill 1274 was presented to the House Judiciary Committee, 39 states had grandparental rights legislation which could be broken into three separate categories: (1) reasonable rights of any grandparents, (2)

[3] In 1993, the statute was amended to give grandparent visitation the presumption of being in the best interest of the child. However, that 1993 amended portion of the statute giving grandparent visitation a presumption of being in the best interests of the child was declared unconstitutional in Hoff v. Berg, 595 N.W.2d 285 (N.D. 1999). In 2001, the statute was amended back to the 1983 original

visitation privileges to grandparents or anyone deemed appropriate, and (3) visitation rights of grandparents in the event of a death, divorce or custody. Id.

78. When reading the legislative history to House Bill 1274, and North Dakota Century Code Section 14-09-05.1, it becomes evident that the North Dakota legislature utilized a combination of the first and third "categories" when it formulated our statute giving grandparents the ability to request the "privilege of visiting their grandchild." And, in doing so, the North Dakota legislature contemplated two topics which are extremely applicable to the case at hand.

79. In this regard, when determining whether or not to pass House Bill 1274, the North Dakota legislature contemplated: "[t]he importance of exposure of the child to the heritage that a grandparent could provide." See N.D. H. Jud. Comm., Grandparental Rights of Visitation to Unmarried Minors, Hearings on N.D. H. 1274, at 1. North Dakota is not the only state to have recognized the importance of this relationship. For instance, the case of In Re Whitaker, 522 N.E.2d 563 (Ohio 1988), an Ohio Court found it fit to cite to a law review which discussed the importance and benefits of such a relationship:

> Sociological literature has documented and analyzed the benefits children receive from a healthy relationship with their grandparents. Contact with grandparents produces children who are rooted in and proud of their family culture, emotionally secure, and highly socialized. Additionally, interaction between grandparents and grandchildren mitigates ageism in children because older people love them, mitigates sexism because grandmothers and grandfathers do essentially the same thing, and eliminates fear of old age because grandparents serve as ancestor role models. Finally grandparents can give

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form. Therefore, the most relevant information from the legislative history comes from the 1983 legislative sessions.

> grandchildren 'an emotional sanctuary from the everyday world.'…

80. Furthermore, a Pennsylvania Court commented on the importance of such a relationship, especially one such as this, in which the child's parent dies while the child is still young:

> The relationship between a child and his or her grandparents is a special one. **When a child loses a natural parent at an early age, this relationship becomes even more special as the grandparents can help to fill the void which exists due to the loss of a parent**. Since the polestar of our analysis is the best interests and welfare of the child, we cannot overlook the ultimate result that grandparent visitation is beneficial for a child's development in that it establishes family ties which can continue long beyond childhood. Only when such visitation becomes counterproductive, will we intervene and deny it.

Commonwealth v. Miller, 478 A.2d 451 (P.A. 1984) (emphasis added). As can be seen from the North Dakota legislature and these quotes, a grandparent-grandchild relationship is something worth fighting for, especially, as is the case here, when the grandparent would be a positive influence for the child and the child's father died while she was young. (App. 103-112) Simply put, Appellee is the positive influence the legislature contemplated when adopting our statute.

81. In addition to contemplating the importance of the grandparent-grandchild relationship, it is also apparent that the North Dakota legislature contemplated the effects of **death** on the grandparent-grandchild relationship before it voted to adopt House Bill 1274 as a law. In this regard, the North Dakota legislature heard testimony from Mrs. Darlene Finck of Reeder, North Dakota who testified as to her personal experience of not being allowed to communicate with her

granddaughter for four years after her daughter died. See N.D. H. Jud. Comm., Grandparental Rights of Visitation to Unmarried Minors, Hearings on N.D. H. 1274, at 1. Such testimony is important to a grandparent's rights bill due to the fact it exemplifies the utter and complete helplessness grandparents would be faced with, in the event of death of their child, if there were no visitation statute to help them get visitation. Furthermore, this testimony exemplifies the well known fact that grandparents would normally be able to exercise their visitation rights during the time their son or daughter would have had their custody or visitation time with the child. Perhaps this reasoning was best stated in the case of Ray v. Ray, 657 So.2d 171, 173 (La.App. 3 Cir. 1995):

> As a result of the death of [the father and the absence of paternal grandfather], the natural conduits through which the [paternal] great-grandfather…might develop a relationship with the child are missing…Through this article, the law provides a means of maintaining family relationships where they might otherwise be lost to the child…

Although the Ray case has to do with a great-grandparent's quest for visitation rights, its reasoning is still sound and applicable to this case. In this regard, Appellee has no "natural conduit" through which to exercise visitation with his grandchild because his son is deceased. (Transcript 141 and 156) Should Appellant be further punished by the death of his son by then being told his son's death prevents him from obtaining time with his granddaughter? Such reasoning is not sound and is anything but just or equitable.

82. Overall, it is clear that North Dakota contemplated the positive benefits of a grandparent-grandchild relationship and the effect that death can have on a

grandparent-grandchild relationship prior to adopting North Dakota Century Code Section 14-09-05.1 as a law. This legislation is clear. The legislature's reasoning is sound. Appellee should be allowed time with his granddaughter so that she can enjoy the positive experiences he has to give and because he has no other means to give R.J.M. these positive experiences without this Court's help. Please allow R.J.M. to benefit from what Appellee has to offer by Affirming the District Court's decision.

## CONCLUSION

83. For the foregoing reasons, Appellee respectfully requests that this Court *affirm* the District Court's Memorandum Opinion and Order entered February 1, 2010, and the Judgment entered February 19, 2010.

Respectfully submitted this 14th day of June, 2010.

/s/ Greg W. Liebl

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## CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellee, R.F., individually and as Personal Representative of the estate of E.F., deceased, and the author the Brief of Apellee, hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 8,803 words from the portion of the brief entitled "Statement of the Case" through the signature block. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

Dated this 14th day of June, 2010.

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