20180013

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 15, 2018
STATE OF NORTH DAKOTA

In the Supreme Court
State Of North Dakota

May 14, 2018

Supreme Court No. 20180013

Grand Forks County Case No. 18-2017-CV-00020

David Knapp,

Petitioner and Appellant,

v.

Minnesota Department of Revenue, et al,

Respondent and Appellee

APPEAL FROM FINAL JUDGMENT OF
THE DISTRICT COURT OF GRAND FORKS COUNTY,
NORTH DAKOTA, NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE LOLITA HARTL ROMANICK, PRESIDING

INITIAL BRIEF OF PETITIONER AND APPELLANT DAVID KNAPP

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[¶2] STATEMENT OF THE CASE

[¶3] Appellant David Knapp (hereinafter "Appellant" or "Knapp") appeals from a final judgment and denial of Knapp's post-judgment motions issued by Order of the District Court. [**App 56; Doc. 106**], [**App 68; Doc. 153**], and [**App 87; Doc. 162**].

[¶4] The subject matter of this appeal is the unlawful invasion into the State of North Dakota by a foreign state agency, in this case the Minnesota Department of Revenue (hereinafter MN. Rev.") attempting to seize the property of a North Dakota citizen without judicial process or jurisdiction over the property sought to be seized.

[¶5] Knapp filed an application to the District Court of Grand Forks County requesting that the Court issue a Preliminary Writ of Prohibition pursuant to N.D.C.C. §32-35, which by incorporation of N.D.C.C. §32-34-04 through N.D.C.C. §32-34-13, states that a writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. [**App 7; Doc. 1**].

[¶6] Knapp became aware of a Notice of Levy mailed to Edward Jones on December 22, 2016 which indicated that an order staying Edward Jones compliance was needed to which Knapp secured the Preliminary Writ of Prohibition and to Dissolve a Levy staying said compliance. [**App 21; Doc. 5**].

[¶7] The District Court in this above captioned case issued an Order entitled Notice of Preliminary Writ of Prohibition and to Dissolve a Levy. [**App 33; Doc. 11**].

[¶8] The caption of this matter in both the lower court and this Court sets out the parties and the matter as David Knapp, Petitioner, and Minnesota Department of Revenue and Edward Jones as Respondent.

[¶9] The substance of the dispute pertains to and is the disposition of IRA Account # XXX-XX108-1-6. Knapp states that MN. Rev. is unable to invade a North Dakota IRA without a valid Court Order and even if IRA Account # XXX-XX108-1-6 was available to MN. Rev Knapp has North Dakota statutory exemptions in excess of the amount of funds available in IRA Account # XXX-XX108-1-6.

[¶10] STATEMENT OF THE FACTS

[¶11] Knapp is a resident of North Dakota and has been for decades. [**App. 13, Doc. 3**].

[¶12] In 2016, MN. Rev. assessed a personal sales and use tax obligation on Knapp for alleged operations of a limited partnership registered with the State of Minnesota as Modern Operations, LP. [**App 20; Doc. 4**].

[¶13] Knapp was at all times a limited partner shielded from personal liability for operations of the business. [**App 20; Doc. 4**].

[¶14] That the Minnesota Department of Revenue served a notice of levy on Edward Jones as the custodian of my IRA—account number XXX-XX108-1-6. [**App 21; Doc. 5**].

[¶15] MN. Rev. does not have any valid or legal judicial process nor has a judgment been rendered in favor of MN. Rev. against Knapp by a court of competent jurisdiction. [**App. 14, Doc. 3**].

[¶16] MN. Rev. has not filed a foreign judgment in the State of North Dakota. [**App. 14, Doc. 3**].

[¶17] Knapp has claimed the exemptions available to him under North Dakota Law. [**App. 14, Doc. 3**].

[¶18] The Notice of Levy served by MN. Rev. explicitly states that Edward Jones is not to send funds that are exempt. [**App 21; Doc. 5**].

[¶19] Over the course of his lifetime of work Knapp has built up and IRA invested by Edward Jones identified as account number XXX-XX108-1-6. [**App. 13, Doc. 3**].

[¶20] At the time this litigation began the IRA referenced as IRA Account # XXX-XX108-1-6 had a current market value in securities of approximately $174,000.00. [**App. 13, Doc. 3**].

[¶21] That due to Knapp's health and limited income the entire $174,000.00 contained in IRA Account # XXX-XX108-1-6 is properly exempt from levy. [**App. 13, Doc. 3**].

[¶22] Knapp is in "stage V renal failure". [**App. 4, Doc. 20**].

[¶23] That the following nonexclusive list of facts support Knapp's claim to exempt the entire $174,000.00 as it is property that is reasonably necessary for the "support of the resident and that resident's dependents":

a. Knapp is in "Stage V Renal Kidney Failure". *See* [**App 23; Doc. 6**] - Medical Progress Notes December 15, 2016 and [**App 30; Doc. 9**] - David Knapp Benefit Flier.

b. A majority of the pharmacological regimen of pills are not prescribed and as such not covered by insurance requiring Knapp to pay out-of-pocket roughly $1,428.00 per month. Although these medications are not prescribed, Knapp's treating physician has indicated that Knapp should continue to take all of the medications currently on the list. *See* [**App. 27, Doc. 4**]. - Post-doctor Visits Summary dated December 15, 2016.

c. Knapp's wife collects Social Security and does not work outside of the home as to maintain a somewhat normal lifestyle Knapp requires her daily help. [**App. 15, Doc. 3**].

d. That I will require continual periods of hospitalization and treatments until the day I die. [**App. 15, Doc. 3**].

[¶24] That Knapp and his wife are responsible for a disabled adult son who does not receive enough money per month from his Social Security disability, food stamps, and other miscellaneous program benefits to meet his ongoing needs. [**App. 16, Doc. 3**].

[¶25] STANDARD OF REVIEW

[¶26] The dispositive issues presented by Appellant Knapp in the instant appeal implicate questions of law and are thus reviewed under the *De Novo* standard of review. *Bolinske v. Herd*, 2004 ND 217, ¶ 7, 689 N.W.2d 397, 400 (N.D. 2004); (stating *de novo* standard of review is used for legal conclusions and a clearly erroneous standard for factual findings). Finally, whether a court has jurisdiction over a thing or a person is a matter of law.

[¶27] Issues of fact may become issues of law if reasonable persons could reach only one conclusion from those facts, and the Supreme Court reviews questions of law under a *de novo* standard of review. *State v. B.B.*, 2013 ND 242, ¶7, 840 N.W.2d 651, (N.D. 2013); *Schipper Construction, Inc. v. American Crystal Sugar Company*, 2008 ND 226, ¶12, 758 N.W.2d 744, 748 (N.D. 2008).

[¶28] Abuse of discretion is the standard of review for Preliminary Writ of Prohibition orders. *Prchal v. Prchal*, 2011 ND 62, ¶ 5, 795 N.W.2d 693, 696 (N.D. 2011). The party

asserting the court abused its authority bears the heavy burden of establishing relief is appropriate. *Investors Title Ins. Co. v. Herzig*, 2010 ND 169, ¶ 38, 788 N.W.2d 312 (N.D. 2010) (quoting *Martin v. Trinity Hosp.*, 2008 ND 176, ¶ 17, 755 N.W.2d 900 (N.D. 2008). "The district court abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination. The party seeking relief must show more than the district court made a "poor" decision, but that it positively abused the discretion it has under the rule." *Martin*, 2008 ND at ¶ 17.

[¶29] LAW AND ARGUMENT

[¶30] The party petitioning for the writ must demonstrate that there is no other plain, speedy and adequate remedy in the ordinary course of law.

> The circumstances supporting injunctive relief in Ladd parallel the criteria for a ***writ of prohibition***, which "arrests the proceedings of any tribunal, corporation, board, or person, when such proceedings are without or in excess of the jurisdiction," and "there is not a plain, speedy, and adequate remedy in the ordinary course of law." N.D.C.C. §§ 32-35-01, 32-35-02. See also Linde, supra (***original writ of prohibition to restrain Tax Commissioner from exceeding authority***).
>
> *See generally, Black Gold OilField Servs., LLC v. City of Williston*, 2016 ND 30, ¶ 14, 875 N.W.2d 515, 522.

[¶31] Being required to submit to the jurisdiction of a foreign state cannot be justified as an adequate remedy. All the respondent in this action has made the personal jurisdiction a focal point of its appearance in pursuing the North Dakota funds it is more poignant to understand that Knapp should not be required to submit to the jurisdiction of Minnesota for the purpose of defending an action to which Minnesota has no jurisdiction. The court is erroneously requiring Knapp to submit himself to the jurisdiction of Minnesota in its order dismissing the writ of Prohibition at ¶11 and ¶15. stating:

> 11. … Knapp asserts the Commissioner's actions result from a "nonjudicial levy" "in complete absence of a court order of any kind." (Doc. 1, p.2.) ***Knapp could have appealed the tax assessment at issue. (See, e.g. Minn. Stat. §270C.35 (providing for appeal through a request for Administrative Review before the Department of Revenue); Minn. Stat. § 271.06 (providing appeal to the Minnesota Tax Court.) The Minnesota Tax Court is a court of record and "an independent agency of the executive branch of the government" in Minnesota. Minn. Stat. § 271.01. Appeals heard by the Minnesota Tax Court may be appealed to the Minnesota Supreme Court. Minn. Stat. §271.10***. Knapp

> acknowledges that he did not pursue process that was available to him with respect to the tax assessment in Minnesota. On the basis of this record, the Court finds Knapp has not alleged facts showing an abuse of process in this case. …
>
> 15. Finally, the Court finds that Knapp has not met the preliminary requirements for issuance of a writ of prohibition. The statute states that "[t]he writ of prohibition may be issued by the supreme and district courts to an inferior tribunal, or to a corporation, board, or person in any case, if there is not a plain, speedy, and adequate remedy in the ordinary course of law." N.D.C.C. § 32-35-02. ***Knapp has failed to show that ordinary civil remedies in Minnesota, some of which are addressed in paragraph 11 above, were not available to remedy any harm he has alleged***. Therefore, the Court finds that a writ of prohibition is not appropriate in this case
>
> Order Dismissing the Preliminary Writ of Prohibition. [**App 46, 48; Doc. 98**] (emphasis added).

[¶32] The court had also mentioned Knapp availing himself of Minnesota's jurisdiction as a remedy:

> THE COURT: Well, it would seem that if you have some issues, that's a civil remedy that would be available. If you have issues with the levy in Minnesota, that you could pursue an injunction in Minnesota to – either a temporary injunction or a permanent injunction. You know, you can investigate that, but that seems a fairly readily available remedy, as well as civil litigation, as to the appropriateness of the levy or collection.
>
> Transcript of the April 28, 2017 motion hearing, Pg. 76 ln. 22-25 and Pg. 77 ln. 1-5. [Doc 11].

[¶33] The United States Supreme Court has overtly rejected the contention held by the District Court inasmuch as Knapp is required to submit himself to the jurisdiction of a foreign state:

> As we have put it, restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson* v. *Denckla*, 357 U. S. 235, 251, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958). "[T]he States retain many essential attributes of

> sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States." *World-Wide Volkswagen*, 444 U. S., at 293, 100 S. Ct. 559, 62 L. Ed. 2d 490. And at times, this federalism interest may be decisive. As we explained in World-Wide Volkswagen, "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." Id., at 294, 100 S. Ct. 559, 62 L. Ed. 2d 490.
>
> *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780-81 (2017).

[¶34] Although, MN. Rev seeks to employ the protection of personal jurisdiction in this case it is misplaced as to the subject matter of the litigation were as Knapp being forced by the District Court to submit to Minnesota to remedy the unlawful taking of North Dakota property is an error of law as well as an abuse of discretion. The District Court also misinterprets the adequate remedy provision of Chapter 32-35:

> The remedy by appeal would exist if the injunction be granted. ***The mere fact that an appeal would lie is not enough. It must be speedy and adequate***. The granting of the writ to inferior courts is seldom a matter of absolute right as the remedy by appeal generally exists, and whether the appeal is speedy or adequate is a matter within the discretion of the appellate court, depending upon the particular facts of each case. The court cannot accurately determine when a trial in the case at bar would come on nor when the appeal would reach this court if an appeal were necessary. Inasmuch as the district court has exceeded its jurisdiction, a trial is unnecessary, and would be expensive and vexatious to each party; and ***that the result of a trial and appeal could not under the most favorable circumstances, be as speedy as a decision upon this original proceeding, we deem it a proper case for issuing a writ. The application for the writ is made to hasten a public improvement deemed to be of importance, at least to the petitioner and a large number of interested persons. There being a plain case of want of jurisdiction presented, and the appeal not being***

> ***as speedy or adequate as this proceeding, we are satisfied that the petitioner is entitled to this summary and extraordinary remedy***. We appreciate that this remedy should be cautiously granted. But, in view of the nature of the act that was enjoined, we have no doubt of the propriety and legality of assuming original jurisdiction.
>
> *State ex rel. Dorgan v. Fisk*, 15 N.D. 219, 229, 107 N.W. 191, 194 (1906). (Emphasis added).

[¶35] By focusing on the parties rather than the subject matter of the litigation the District Court improperly relied exclusively upon the in *personam* jurisdiction related to MN. Rev. The caption of this matter in both the lower court and this Court captions the matter as David Knapp as Petitioner and Minnesota Department of Revenue and Edward Jones as Respondent, however the dispute pertains to and the disposition of the IRA Account # XXX-XX108-1-6 the nexus of interest between the parties. This Court values and will affix in the interest of justice, the merits of the dispute and will not allow substance to be marred by form:

> This Court has used judicial economy in various instances. In *City of Bismarck v. Altevogt*, 353 N.W.2d 760, 766 (N.D. 1984), judicial economy was the basis to decide an issue of excusable neglect, rather than remand it to a lower court. … *State v. Olson*, 285 N.W.2d 575, 577 (N.D. 1979). In *State v. Robideaux*, 475 N.W.2d 915, 916-17 (N.D. 1991), this Court addressed issues not properly raised by defendants in the interest of judicial economy. In *Beck v. Smith*, 296 N.W.2d 886, 889 (N.D. 1980), judicial economy was the rationale to exercise this Court's discretionary authority to issue original and remedial writs. In *State v. Faber*, 343 N.W.2d 659, 660 (Minn. 1984), the ***Minnesota Supreme Court used judicial economy as the basis to "put substance over form.***"
>
> *State v. Whitman*, 2013 ND 183, ¶ 16, 838 N.W.2d 401, 406. (Emphasis added).

[¶36] The IRA Account # XXX-XX108-1-6 funds are the substance of the matter before the court and there has been no court order issued allowing MN. Rev. access to the IRA Account # XXX-XX108-1-6 funds nor has there been anything more than an attempt to

access the IRA Account # XXX-XX108-1-6 funds on behalf of MN. Rev. MN Rev. attempts without merit to imply a writ is not appropriate during argument. Transcript of the August 10, 2017 hearing (pg. 52, ln. 6-18).

> With regard to the writ of prohibition, this Court stated in *Mor-Gran-Sou Elec. Coop v. Montana-Dakota Util. Co*., 160 N.W.2d 521 (N.D. 1968):
>
> > "The writ is not a writ of right. It is an extraordinary writ, to be issued with caution, in cases of extreme necessity, and is available only when the inferior court, body or tribunal is about to act without or in excess of jurisdiction.
> >
> > "It is not an appropriate writ to revoke an order already made, for its proper use is to prohibit the doing of something, not the undoing of something already done." 160 N.W.2d at 523. [Case cites omitted.]
>
> Upon issuing the ex parte order the District Court completed the act for which Carol now seeks a writ of prohibition. Consequently, we conclude that this is not a proper case for issuance of a writ of prohibition, but that does not prevent us from granting appropriate relief. *State ex rel. Link v. Olson*, 286 N.W.2d 262 (N.D.1979). In *Olson, supra*, we stated:
>
> > "***Even though we conclude here that a writ of prohibition is unavailable, we are not thereby prevented from deciding the significant issues raised in the case. Long ago we held that 'this court, in the exercise of its original jurisdiction, may frame its process as the exigencies require***. *State v. Archibald*, 5 N.D. 359, 362, 66 N.W. 234.' *State v. Langer, supra*, 177 N.W.2d at 413." 286 N.W.2d at 268.
>
> *Beck v. Smith*, 296 N.W.2d 886, 889 (N.D. 1980) (emphasis added).

[¶37] Nowhere in the record is there any indication that Knapp did not timely act in the State of North Dakota. Knapp became aware of a Notice of Levy mailed to Edward Jones on December 22, 2016 which indicated that Knapp would be required to intervene or Edward Jones planned to comply with the notice of levy and submit funds to MN Rev. Knapp secured the Preliminary Writ of Prohibition and to Dissolve a Levy staying

Edward Jones transfer of any funds to MN Rev. (APP 21; Doc 5). Minnesota law requires notice of levy 30 days prior to levy:

> **Subd. 3. Notice and demand**; collection by levy. — Before a levy is made, notice and demand for payment of the amount due must be given to the person liable for the payment or collection of the tax at least 30 days prior to the levy. The notice required under this subdivision must be sent to the taxpayer's last known address … .
>
> Minn. Stat. Ann. § 270C.67

[¶38] Knapp properly responded to the notice of levy by obtaining the court order at issue in this appeal. [**App 33; Doc. 11**].

[¶39] I. Whether the District Court erred in Denying the Petitioner a Hearing on the Petition for a Preliminary Writ of Prohibition and to Dissolve a Levy.

[¶40] N.D.C.C. § 32-34-10 specifically states:

> 32-34-10. Hearing.
>
> If no answer is made, the case must be heard on the papers of the applicant. ***If the answer raises only questions of law or puts in issue only immaterial statements not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case***. (Emphasis added)

[¶41] Knapp had the right to have a hearing after issuance of the Preliminary Writ of Prohibition and to Dissolve a Levy.

[¶42] II. Whether North Dakota is the Situs of the Retirement Account for the Purposes of Jurisdiction and North Dakota is the Proper Forum State for *In Rem* Jurisdiction.

[¶43] It is impermissible for the State of Minnesota to implicate its state law against a company that is a resident of Missouri in relation to property in the State of North

Dakota owned by a resident of the State of North Dakota in the absence of a judicial determination. *See* Chicago, R.I. & P.R. Co. v. Sturm, 174 U.S. 710, 717-718 (1899).

[¶44] The exemptions applicable to David Knapp and the IRA at issue must be construed according to the law in the State of North Dakota which has not been contested by the answer of the Minnesota Department of Revenue. David Knapp possesses the ability to exercise the exemption in relation to the entire amount of the IRA Account # XXX-XX108-1-6 value:

> Retirement funds that have been in effect for at least one year, to the extent those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986. The value of those assets exempted may not exceed one hundred thousand dollars for any one account or two hundred thousand dollars in aggregate for all accounts. ***The dollar limit does not apply to the extent this property is reasonably necessary for the support of the resident and that resident's dependents***. ... ***As used in this subsection, "reasonably necessary for the support" means required to meet present and future needs, as determined by the court after consideration of the resident's responsibilities and all the present and anticipated property and income of the resident, including that which is exempt***.

N.D.C.C. §28-22-3.1 (emphasis added)

[¶45] David Knapp is a resident of North Dakota and legal process would need to take place through the jurisdiction of a North Dakota Court even in the instance of something as simple as applying the full faith and credit to a foreign judgment—one cannot argue that the foreign judgment must still be recorded in a North Dakota Court. Regarding application of state law in the context of applying the exemption to judicial process and the non-judicial levy from a foreign state our North Dakota decisional law is not well established.

[¶46] However, our sister state and the state from whose law the Minnesota Department of Revenue came into being clearly has set forth the test that would guide the analysis:

> In conclusion, the general rule that exemptions are determined solely by the law of the forum is consistent with Minnesota precedent and with our supreme court's refusal to apply the five-factor conflict-of-law test to matters of procedure and remedies. The general rule therefore controls, and the district court did not err by applying Minnesota exemption law.
>
> *Nagel v. Westen*, 865 N.W.2d 325, 341 (Minn. Ct. App. 2015)

[¶47] Because North Dakota law allows as exempt the full amount of an Knapp's IRA—ordinarily limited to $100,000.00—with the showing by the person claiming the exemption that Knapp has made a clear showing in his petition that the full extent of the IRA is reasonably necessary for the support of the resident and that resident's dependents. Therefore, no amount of the IRA Account # XXX-XX108-1-6 is nonexempt.

[¶48] This action should proceed to hearing on the matter of exemption wherein Knapp can present the full factual body of evidence upon which the full amount of the IRA Account # XXX-XX108-1-6 shall be deemed exempt.

[¶49] III. The jurisdictional argument regarding MN. Rev. as a party is not dispositive and the action should be construed as *In the Interest of IRA Account # XXX-XX108-1-6* to avoid incorrectly placing form over substance relative to the subject matter of the litigation or in the alternative a finding that the State of Minnesota has the necessary minimum contacts with the State of North Dakota.

[¶50] The North Dakota District Court has the ability to acquire jurisdiction in this matter:

> … ***In other cases, where the proceedings are in form in personam, but the court is unable to acquire jurisdiction of the person of the***

> ***defendant, by actual or constructive service of process, the action may proceed, as one in rem against the property of which a preliminary seizure or its equivalent has been made; or, jurisdiction may be exercised without such preliminary seizure, where the relief sought is an adjudication respecting the title to or validity of alleged liens upon real estate situate within the jurisdiction of the court***. *Roller v. Holly*, 176 U.S. 398. To the class of cases where the proceedings are in form in rem may be added those connected with the grant of letters either testamentary or of administration
>
> *Overby v. Gordon*, 177 U.S. 214, 221, 20 S. Ct. 603, 606 (1900) (emphasis added)

[¶51] The following case law does not support the District Court's Memorandum Order dismissing the Writ of Prohibition and Dissolution of Levy:

> Judgments for certain purposes are divided into three classes, and which are designated as personal judgments, judgments in rem, and judgments quasi in rem. In determining the question involved, it becomes necessary to consider briefly those classifications. The text in 33 C. J. 1063, sec. 19, in defining and differentiating judgments in rem, and personal (in personam) judgments, says: "A judgment or decree *in rem* is an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for that purpose. It differs from a judgment or decree *in personam* in this, that the latter is in form as well as in substance between the parties claiming the right in controversy, and does not directly affect the status of the res, but only through the action of the parties."
>
> Mr. Black in his work on *Judgments*, volume II, sec. 792, quotes with approval the definitions and distinctions between those two classes of judgments as given by the Vermont Supreme Court in the case of *Woodruff v. Taylor*, 20 Vt. 65, to this effect: "A judgment *in rem* I understand to be an adjudication, pronounced upon the status of some particular subject matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this, that the latter judgment is, in form as well as substance, between the parties claiming the right; and that it is so inter partes appears by the record itself. It is binding only upon the parties appearing to be such by the record and those claiming by them. A judgment in rem is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject matter itself, whose state, or condition, is to be determined. It is a proceeding to determine the state, or condition, of the thing itself; and the judgment is a

solemn declaration upon the status of the thing, and it *ipso facto* renders it what it declares it to be."

Mr. Freeman in his work on *Judgments* (5th Ed.) vol. 3, sec. 1517, quotes and adopts the same definition from the same court, and also from volume II of *Phillips' on Evidence* ***defining judgments in rem "to be the judgment of a court of exclusive, or at least peculiar, jurisdiction, declaratory either of the nature and condition of some particular thing," or of the condition and status of some particular person***. Other authorities are cited and quoted by each of the eminent authors referred to. The difficulty of accurate definitions and differentiations between them is not lost sight of by Mr. Freeman, since he prefaces his discussion of judgments in rem with this remark: "***We now come to the consideration of a class of judgments very well understood, but quite difficult to describe***." Such general definitions are of universal recognition and application. Accurately speaking, a proceeding strictly *in rem* is one against the thing itself with no cognizance taken of its owner or persons having a beneficial interest in it; a prominent illustration of which is maritime proceedings to enforce claims against vessels. The vessel itself is seized, as is the *res* in all other strictly *in rem* proceedings, and thereby brought in *custodia legis* for its title and status to be adjudicated by the court, and which adjudication when acquired by the proper procedure is binding upon the world. The doctrine has been extended to the status, not only of things, but of individuals and their relations to others, a prominent illustration of which is that of divorce. ***Adjudications in such strictly in rem proceedings do not require personal service of process on interested parties in order to make the judgment harmonize with the "due process clause" of our Federal and State Constitutions*** (*Const. U.S. Amend*. 14; *Const. Ky*. sec. 14). The courts of this country apply such constitutional guaranties to the protection of personal obligations and rights as between individuals wholly divorced from rights issuing from the res, of which only the court has jurisdiction. Proceedings to enforce such personal rights and obligations are what is termed in law "*in personam*" ones, and in which personal judgments are rendered adjusting the rights and obligations between the affected parties, and which may not be done except upon personal service or entry of appearance by defendant in some of the modes by which that may be done.

Between the extremes of strictly *in rem* proceedings and those that are strictly *in personam* is a class designated by courts and law-writers as proceedings *quasi in rem*, and which are so characterized because judgments in such actions affect not only the title to the *res*, but likewise rights in and to it possessed by individuals. Mr. Black in his volume *supra*, section 793, thus points out the nature and characteristics of such proceedings. "There is, however, a large class of cases which are not

> strictly actions in rem, but are frequently spoken of as actions quasi in rem, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages and other liens." That excerpt is taken from the opinion of the Supreme Court of the United States in the case of *Freeman v. Alderson*, 119 U.S. 185, 7 S. Ct. 165, 30 L. Ed. 372, and is in complete accord with all opinions and texts dealing with the subject. In such cases it is thoroughly settled that the personal rights of the defendant in and to the res within the custody of the court may be dealt with and adjudicated in so far as it adjudicates the status of the particular res, including the title thereto; and such an adjudication, if the defendant were properly proceeded against even by constructive process, would be binding and obligatory on defendant in any court of any state.
>
> *Combs v. Combs*, 249 Ky. 155, 159-61, 60 S.W.2d 368, 369-70 (1933). (Emphasis added).

[¶52] As indicated above a judgment is not being sought against the Commissioner nor Edward Jones but rather the right in and to the self-directed IRA domiciled in the State of North Dakota and subject to the putative notice of levy attempted by the Commissioner of the Department of Revenue. Case law on the subject of in rem jurisdiction has progressed however nothing has disturbed the classification under which the Writ of Prohibition operates.

> The Court in *Shaffer* thus recognized that ***in rem*** jurisdiction can be exercised without acquiring *in personam* jurisdiction over a party, but concluded that due process requires that there be minimum contacts between the party and the forum state. ***Id.* at 212**; *see also Smith*, 459 N.W.2d at 787-88. ***There is no due process problem in this case***. As the Court noted in ***Schaffer*,** 433 U.S. at 207-08 (footnotes omitted):
>
> > The presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. ***For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would***

> ***normally indicate that he expected to benefit from the State's protection of his interest***. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State.
>
> *Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land*, 2002 ND 83, ¶ 10, 643 N.W.2d 685, 689-90

Further,

> This effort to narrow the reach of the *Shaffer* holding does not appear altogether consistent with the reasoning of the *Shaffer* opinion or subsequent Supreme Court precedent. Rather, when read closely, *Shaffer* appears to demand that the Fourteenth Amendment be read to prohibit all *in rem* jurisdiction ***except when the person whose property rights are being extinguished has had "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice***.'" *International Shoe*, 326 U.S. at 316. Nothing that the Supreme Court has done subsequently casts doubt on that holding.
>
> *Fleetboston Fin. Corp. v. Fleetbostonfinancial.com*, 138 F. Supp. 2d 121 (D. Mass. 2001). (Emphasis added).

Further Yet,

> The court stated that "when attachment is used to serve as a jurisdictional predicate"—*i.e*. "where personal jurisdiction is lacking" before attachment—"a New York court cannot attach property not within its jurisdiction." *Id*. at 311 (internal quotation marks omitted); *see Allied Mar., Inc. v. Descatrade SA*, 620 F.3d 70, 74 (2d Cir. 2010) ("In cases where the District Court has no basis for personal jurisdiction over a party, jurisdiction can be established 'based on the court's power over property within its territory. In such cases, the District Court must have jurisdiction over the defendant's property in order to be able to affect the defendant's interests." (quoting *Shaffer v. Heitner*, 433 U.S. 186, 199, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)). The court continued: "On the other hand, where a court acquires jurisdiction over the person of one who owns or controls property, it is equally well settled that the court can compel observance of its decrees by proceedings *in personam* against the owner within the jurisdiction."

> *Hotel 71*, 14 N.Y.3d at 312 (alterations and internal quotation marks omitted).
>
> *Mishcon De Reya N.Y. LLP v. Grail Semiconductor, Inc.*, 2011 U.S. Dist. LEXIS 150998, at *18-20 (S.D.N.Y. Dec. 28, 2011).

[¶53] The levy subject to the writ of Prohibition was obtained without judicial involvement and the Commissioner of the Department of Revenue admits to the absence of a judicial order or judgment, serving process beyond the territorial boundaries of the State of Minnesota. *See* Transcript of the April 28, 2017 hearing Pg. 36 ln. 18-23 [Doc. 111]. MN. Rev. is operating without a judgment or other valid judicial process. [**App 20; Doc. 4**]. In the absence of the valid judicial process MN. Rev. is limited in its ability to move against Knapp but nothing limits the ability of the State of North Dakota Judiciary to adjudicate the right to Knapp's IRA and lawful exemption from any claimed collection process:

> Unlike *Shaffer*, this case involves a postjudgment exercise of in rem jurisdiction, in which respondents attempt to enforce appellants' existing obligation. Unlike the res in *Shaffer*, Ameriprise's debt to appellants is the subject of respondents' garnishment action and its role in the litigation is not merely to bring appellants into Minnesota court. In *Shaffer*, the Supreme Court suggested, in dicta, that its treatment of such a postjudgment in rem action might differ from its treatment of prejudgment actions, stating:
>
> > ***[o]nce it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.***
>
> *Id.* at 210 n.36, 97 S. Ct. at 2583 n.36 (note 36).
>
> *Nagel v. Westen*, 865 N.W.2d 325, 336. (emphasis added).

[¶54] Alternatively, the due process analysis brings the Commissioner squarely within the jurisdiction of the North Dakota Court for the purposes of this Writ of Prohibition.

> Comparable reasoning justifies the imposition of the collection duty on a mail-order house that is engaged in continuous and widespread solicitation of business within a State. Such a corporation clearly has "fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign." *Shaffer* v. *Heitner*, 433 U.S. at 218 (STEVENS, J., concurring in judgment). In "modern commercial life" it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State. Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process.
>
> In this case, there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to the State. We therefore agree with the North Dakota Supreme Court's conclusion that the Due Process Clause does not bar enforcement of that State's use tax against Quill.
>
> *Quill Corp. v. N.D.*, 504 U.S. 298, 308, 112 S. Ct. 1904, 1911 (1992)

[¶55] The Quill case is analogous in the due process context to the State of Minnesota representing to this Court that its lack of physical presence is a determining factor.

> "Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities . . . . Thus 'the forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State' and those products subsequently injure forum consumers. . . . Similarly, a publisher who distributes magazines in a distant State may fairly be held accountable in

that forum for damages resulting there from an allegedly defamatory story. . . . And with respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities. . . ." (Citations omitted.)

It is clear that Quill has "purposefully directed" its activities at North Dakota residents, has "reached out . . . and created continuing relationships and obligations with citizens" of this State, and has gone beyond placing its products into a general stream of commerce - it has sold and delivered its products directly to North Dakota consumers. It is therefore clear that Quill could, consistent with Due Process, be brought into a North Dakota court to litigate claims arising from those activities.

More significant, however, is the Court's clear recognition that technological advances have made physical presence within the jurisdiction meaningless in modern commerce:

> "Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Burger King, supra,* 471 [*213] U.S. at 476, 105 S.Ct. at 2184, 85 L.Ed.2d at 543. … .

We are particularly mindful of the illogical results which can flow from a strict requirement of physical presence within the taxing state in light of the contemporary legal and commercial landscape. For example, a small out-of-state seller with minimal sales in the taxing state solicited through an independent-contractor traveling salesperson would have sufficient nexus to support a duty to collect and remit the use tax [see *Tyler Pipe, supra,* and *Scripto,* supra], yet a mail order leviathan with millions of dollars of annual sales solicited by innumerable catalogs and flyers, and consummated by telephone, fax, telex, or direct computer contact, would be deemed unreachable because it has insufficient nexus with the state. Such a result merely propounds the legal fiction that the fire and police

protection provided to one salesperson hawking wares in the state provides a more significant "benefit" than does creating and maintaining a social and commercial climate that enables the out-of-state seller to exploit the state's consumer market to the tune of millions of dollars. See, e.g., Hartman, *Collection of the Use Tax, supra;* Simet, *The Concept of "Nexus" and State Use and Unapportioned Gross Receipts Taxes,* 73 Nw.U.L.Rev. 112 (1978).

The Court's current personal jurisdiction analysis also strongly suggests a retrenchment from physical presence as a benchmark in Due Process analysis. A corporation that merely delivers its product into the stream of commerce with the expectation that it will be purchased by a consumer in another state may be subjected to litigation there *[Burger King, supra],* yet Quill asserts that subjecting it to collection of the use tax, in spite of its continuous, intentional, and massive exploitation of this State's consumer market, would be violative of Due Process. It would be illogical indeed to hold that Quill, which could clearly be haled into a North Dakota court if one of its products injured a North Dakota consumer, could not be saddled with the purely *administrative* burden of collecting a use tax. See *National Geographic, supra.*

Finally, we note the irony in Quill's reliance upon the Due Process Clause and the Commerce Clause in seeking to maintain a tax-free mail order haven and thereby retain an economic advantage over its local competitors. The touchstone of Due Process is fundamental fairness. *Burger King, supra; Bearden v. Georgia,* 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). The "very object" of the Commerce Clause is protection of interstate commerce from discriminatory local practices. *Welton v. Missouri,* 91 U.S. (1 Otto) 275, 280, 23 L.Ed. 347, 349 (1875); see also, L. Tribe, American Constitutional Law, *supra,* at § 6-17. However, rather than employing the Commerce Clause as a shield against unfair, discriminatory practices favoring local merchants, Quill now raises the Commerce Clause as a sword to carve out a tax-free mail order niche and gain an unfair competitive advantage over local retailers. It would be odd indeed if we were to hold that out-of-state sellers may invoke the Due Process Clause to promote a fundamentally unfair economic advantage over local sellers.

We conclude that Quill's asserted lack of physical presence is not fatal to the State's attempt to require Quill to collect and remit use tax on its sales into North Dakota. Applying *Bellas Hess* in light of subsequent case law, and within the context of contemporary society and commercial practice, we conclude that the concept of nexus encompasses more than mere

> physical presence within the state, and that the determination of nexus should take into consideration all connections between the out-of-state seller and the state, all benefits and opportunities provided by the state, and should stress economic realities rather than artificial benchmarks.
>
> *State by Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 214-15 (N.D. 1991)(Writ of certiorari granted 502 U.S. 808) (rev'd on other grounds).

[¶56] CONCLUSION

[¶57] Knapp requests the Court find the requisite jurisdiction to forward reverse the District Court's order and subsequent judgment dismissing the Preliminary Writ of Prohibition and to Dissolve a Levy and remand the matter with instructions to conduct a hearing. Invoking this Court's original jurisdiction it would be appropriate to enter based upon the record before it a final Writ of Prohibition and to Dissolve a Levy. Further, this Court should award Knapp his costs, fees, and a reasonable amount of attorney's fees.

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No. 20180013

In the Supreme Court
State Of North Dakota

David Knapp, Petitioner/Appellant, vs. Minnesota Department of Revenue, et al., Respondent/Appellee.	)	Supreme Court No. 20180013 [Dist. Ct. No. 18-2017-CV-00020],

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the North Dakota Rules of Appellate Procedure, the undersigned counsel, DeWayne Johnston, hereby certificates that at approximately 12:17 a.m. on May 15, 2018, the following

1. **APPELLANT'S INITIAL BRIEF;**
2. **APPENDIX PURSUANT TO RULE 25(c) OF THE NORTH DAKOTA RULES OF APPELLATE PROCEDURE**

were electronically transmitted to:

Thomas Madison thomas.madison@ag.state.mn.us

Pursuant to Rule 25 of the North Dakota Rules of Appellate Procedure, the undersigned counsel, DeWayne Johnston, hereby certificates that on May 15, 2018 the above referenced documents were electronically transmitted to:

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Dated this 15th day of May, 2018,

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