

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Adam Sather,)	
)	Supreme Court No. 20200137
Plaintiff/Appellee,)	Cass County District Court Civil No.
)	09-2019-DM-00781
)	
)	
vs.)	
)	
Amber Sather,)	
)	
Defendant/Appellant.)	

**APPEAL FROM THE
DISTRICT COURT OF THE EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE FRANK L. RACEK PRESIDING**

APPELLEE’S BRIEF

ORAL ARGUMENT IS REQUESTED
FOR THE REASONS SET FORTH IN
APPELLANT’S BRIEF AT PARAGRAPH 51.

Dated this 24th day of September, 2020.

/s/ Kristin Overboe

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[3.] JURISDICTIONAL STATEMENT

[4.] Defendant/Appellant (“Amber”) does not address whether this Court has jurisdiction. The Plaintiff/Appellee (“Adam”) asserts that the North Dakota Supreme Court does not have jurisdiction to hear this appeal. The right to appeal is governed by statute and, absent a statutory basis for the appeal, the Court must dismiss the appeal. Presswood v. Runyan, III, 2020 ND 8 (citing James Vault & Precast Co. v. B&B Hot Oil Serv., Inc., 2018 ND 63, ¶ 8, 908 N.W.2d 108). The jurisdiction of this Court to hear an appeal can only be acquired and exercised in the manner prescribed by N.D.C.C. §28-27-01. Bryan v. Miller, 73 N.D. 487, 16 N.W.2d 275 (1944). Huso v. Bismarck Public School Board, 219 N.W.2d 100 (1974); Hanson v. Dennis, 232 N.W.2d 49 (N.D. 1975).

[5.] While the right of appeal is determined by statute, the Supreme Court has authority to enact procedural rules to be followed under Art. VI § 3, N.D.Const. The taking of an appeal refers to the minimum procedure, such as filing the appeal and service to the parties within a specified time, to give the appellate court jurisdiction. City of Bismarck v. Dwayne Walker, 308 N.W.2d 360. N.D.C.C. § 28-27-05 provides that the North Dakota Rules of Appellate Procedure pertain to how an appeal is taken. In civil cases, under N.D.R. App. Rule 4(a)(1) the notice of appeal must be filed with the clerk of the supreme court within 60 days from the service of notice of entry of the judgment or the order being appealed. N.D.R. App. Rule 25(b) provides that “a party must, at or before the time of filing a document, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party’s counsel.” See N.D.R.App.P. 25(b). The North Dakota Supreme Court has long and consistently held that service of a notice of appeal is jurisdictional and necessary to properly perfect an appeal. See, e.g. Reliable, Inc. v. Stutsman Cnty. Comm’n, 409 N.W.2d 632, 634-35 (N.D. 1987); In re McIntyre’s Estate, 78 N.D.

10, 21, 47 N.W.2d 527, 531 (1951); Matter of the Opening of Gold Street v. Newton, 2 Dakota 39, 40, 3 N.W. 311, 312 (1879). Once service is completed in a manner prescribed by law, the court acquires personal jurisdiction and subject matter jurisdiction if the case is within the court's subject matter jurisdiction provided by law. United Accounts v. Teladvantage, Inc., 499 N.W.2d 115 (N.D. 1993).

[6.] A judgment or order in a civil action may be removed to the supreme court by appeal as provided in North Dakota Century Code § 28-07-02. Generally, a party must wait until the end of the case to appeal, when a final judgment has been entered. In re A.B., 2005 ND 216, ¶ 5, 707 N.W.2d 75). The following orders may be carried to the supreme court:

1. An order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;
2. A final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment;
3. An order which grants, refuses, continues, or modifies a provisional remedy, or grants, refuses, modifies, or dissolves an injunction or refuses to modify or dissolve an injunction, whether such injunction was issued in an action or special proceeding or pursuant to the provisions of section 35-22-04, or which sets aside or dismisses a writ of attachment for irregularity;
4. An order which grants or refuses a new trial or which sustains a demurrer;
5. An order which involves the merits of an action or some part thereof;
6. An order for judgment on application therefor on account of the frivolousness of a demurrer, answer, or reply; or
7. An order made by the district court or judge thereof without notice is not appealable, but an order made by the district court after a hearing is had upon notice which vacates or refuses to set aside an order previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice, had the same been made upon notice

N.D.C.C. § 28-07-02.

[7.] **STATEMENT OF ISSUES**

[8.] Whether the District Court erred as a matter of law in adopting the parties' agreement, and by not including the statutory language in Sections 14-09-07, 14-09-30(2), and 14-09-31 of 14-09-31 of the North Dakota Century Code, when no evidence was offered for the court to make findings or conclusions.

[9.] **STATEMENT OF THE CASE**

[10.] This is an action for divorce commenced by Adam on July 23rd, 2019. (App. 7). Amber filed an Answer and Counterclaim on August 14th, 2019. (A - 24). At the Trial was scheduled for January 17th, 2020 the parties did not present evidence. Rather, they made an agreement and the details of the agreement were read into the record by Amber's counsel. (Appellant's Brief ¶14). A proposed Order for Judgment was filed by Adam on February 19th, 2020. Amber objected to the proposed Order for Judgment alleging that: (1) the order contained language for the parties to share the children's expenses and she didn't agree to that; (2) the order did not contain "agreed upon language" regarding equal parenting time during the summer months; and (3) the order did not contain the statutorily required provisions regarding decision-making responsibility, parental rights, children's rights, residence of the children, and resolution of conflict. (A-71). Despite Amber's objection, the District Court entered the Order for Judgment on February 19th, 2020. (A -76). A hearing was later held on February 28th, 2020. The District Court removed the paragraph concerning shared children's expenses. (Feb. 28, Tr. 2:21-23). The District Court ordered the statutory language regarding parental rights, but declined to add provisions regarding decision-making responsibility until after a motion. (Feb. 28, Tr. 6:3-12). An Amended Order for Judgment was issued on March 3rd, 2020. (App. 87). No objection was made. Judgment was entered on March 5th, 2020 (App. 106). Notice of Entry of Judgment was served on March 9th, 2020. (App.

115). The Judgment provided that Kristin Overboe was discharged as Adam's attorney after 60 days of notice of judgment.

[11.] Amber filed her Notice of Appeal (App. 117), and Order for Transcript (App. 120), on May 14th, 2020. The Notice of Filing Notice of Appeal was filed on May 14th, 2020. (App. 122). The Clerk's Certificate on Appeal was entered on June 4th, 2020. (App. 124).

[12.] On August 3rd, 2020, Amber filed a Motion to Extend Time to file brief. On August 26th, 2020 Amber filed the Appellant's brief and appendix. On August 28th, 2020, a Notice of Appearance was filed on behalf of Adam. Adam thereafter brought a motion to dismiss for lack of jurisdiction. Amber filed a Response. Based on the submissions of the parties, disputed facts exist as to whether proper service of the Notice of Appeal.

[13.] **STATEMENT OF FACTS**

[14.] The parties were married on September 28th, 2001 and separated on April 21st, 2019. (App. 62). The parties have three minor children, namely M.O.S., born 2003; J.S.S., born 2009; and V.E.S., born 2012. (App. 62). M.O.S. is currently in the custody of the State of North Dakota. (App. 62). Adam was granted primary residential responsibility by agreement of the parties at both hearings. Decision-making responsibility has not been addressed by the District Court. Here, the parties entered into a stipulation on the record at a trial held on January 17th, 2020. Following the trial, there were disputes as to the parties' agreements made on the record at the trial. A further hearing was held on the Defendant/Appellant's Objections to the proposed order for judgment. After the hearing, an Order for Judgment was issued on March 3rd, and the Judgment was entered on March 5th, 2020. The Court reserved other issues for a hearing on motion. The Defendant did not bring a motion.

[15.] **STANDARD OF REVIEW**

[16.] If jurisdictional facts are not disputed, jurisdiction is a question of law reviewed de novo. Garaas v. Cass Cnty. Joint Water Res. Dist., 2016 ND 148, ¶ 6, 883 N.W.2d 436.

[17.] **LAW AND ARGUMENT**

[18.] The Appellant argues that the Court did not comply with N.D.C.C. §14-09-30 in establishing a parenting plan. Under N.D.C.C. §14-09-30, in any proceeding to establish ... a judgment providing for parenting time with a child, the parents shall develop and file with the court a parenting plan to be included in the court's decree. Id. If the parents are unable to agree on a parenting plan, the court shall issue a parenting plan considering the best interests of the child. Id. Here, the parties reached an agreement which the Appellant read into the record at the trial on January 17, 2020. Because the parties were able to agree on a parenting plan, the Court was not required to issue one.

[19.] Appellant argues that the Court erred as a matter of law by failing to include decision-making provisions under N.D.C.C. §14-09-30(2). Pursuant to this statute, [a] parenting plan must include, at a minimum, provisions regarding the following or an explanation as to why a provision is not included:

- a. Decision-making responsibility relative to:
 - (1) Routine or day-to-day decisions; and
 - (2) Major decisions such as education, health care, and spiritual development;
- b. Information sharing and access, including telephone and electronic access;
- c. Legal residence of a child for school attendance;

[20.] Here, the Court did not make findings regarding the best interest factors because the parties came to an agreement on some of the issues. The parties disagreed as to the decision-making provisions. If the parents have reached an agreement as to decision-making responsibility, the

court shall accept the agreement unless the court makes written findings that the agreement is not in the best interests of the child. Id. If the parents cannot agree on an allocation of decision-making responsibility, the court shall enter an order allocating decision-making responsibility in the best interests of the child. Id. An allocation of decision-making responsibility is not in the best interests of the child unless the order includes a method of resolving disputes when parents do not agree on an issue. Id. Here, the Court reserved the issue of decision-making responsibility to be heard on motion of the parties. Neither party has brought a motion. Because the Order does not include a method of resolving disputes, allocation of decision-making responsibility is not in the best interest of the children. The Court still needs to hear evidence on this issue to make a decision that is in the children's best interest.

[21.] Amber argues that the Judgment provides no specific times for the start or end of Amber's parenting time, or provisions for exchanges and responsibility for transporting the children. Appellant cites the case of State v. Andres to support her assertion that these provisions are required. According to Appellant's brief this court noted in Andres,

These provisions are especially important in cases, such as this, when the court creates a parenting plan as a result of the parents' inability to agree to one themselves. On remand, the district court must include these provisions or provide an explanation for their omission.

Andres, at ¶ 11. The Appellant is correct, as this case is easily distinguished from the current case. In Andres, the parties were unable to agree on a parenting plan and the court created one, whereas in this case the parties were able to agree on a parenting plan. Amber's citation of this case is frivolous as it does not support her position. It supports Adam's position.

[22.] Amber argues that the District Court's Order and Judgment does not mention summer parenting time, yet fails to mention that the parties' agreement on the record did not include summer parenting. Because the District Court accepted the parties agreement, and has not received

evidence or testimony from the parties, there was no evidence to make findings or conclusions on. The District Court expressed that the parties would need to bring a motion. Amber did not bring a motion.

[23.] This Court may award attorney's fees and costs if it determines an appeal is frivolous. N.D.R.App.P. 38. A review of the record and arguments presented shows that Amber's appeal was frivolous. Amsbaugh v. Amsbaugh, 2004 ND 11, ¶ 45, 673 N.W.2d 601.

[24.] **CONCLUSION**

[25.] The Judgment that Amber is appealing from is not final, and therefore the North Dakota Supreme Court does not have jurisdiction. The District Court did not fail to include required provisions for decision-making responsibility, the children's rights, the manner in which the children will be transported and exchanged, the framework for resolving disputes, as well as the provisions in Section 14-09-07 of the North Dakota Century Code. The parties agreement did not include these provisions. Although Amber argues that this matter should be remanded to the District Court with specific provisions for entry of Amended Findings wherein the parties are awarded joint decision-making responsibility, the Court cannot make findings and conclusions without an evidentiary hearing, and without testimony or evidence. There is no evidence to make findings on.

[26.] WHEREFORE, Adam requests the following:

- a. That this appeal be dismissed for lack of personal and subject-matter jurisdiction.
- b. Alternatively, Adam requests that the Judgment be affirmed.
- c. For the Court to grant attorney fees and costs to the Plaintiff/Appellee, and to be assessed against the Defendant/Appellant.

[27.] CERTIFICATE OF COMPLIANCE

[28.] This brief complies with the page limitation and consists of eleven (11) pages.

Dated this 24th day of September, 2020.

/s/ Kristin Overboe

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ATTORNEY'S CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

Adam Sather vs. Amber Sather
Case No. 08-2020-DM-00233
Supreme Court Case No. 20200137

1. I, Kristin A. Overboe, state, pursuant to Rule 5(f) of the North Dakota Rules of Civil Procedure, that I am an attorney licensed in the State of North Dakota. I further state that:
2. On the 24th day of September, 2020, I sent by electronic mail a true and correct copy of the following:
 1. **Appellee's Brief;**
 2. **Certificate of Service**
3. Copies of the foregoing were sent by E-MAIL/Electronic Service to the following addresses:

Josh Nyberg
josh@nyberglawoffice.com
Attorney for Defendant
4. To the best of my knowledge, the above listed email address is the actual address of the party intended to be served or his attorney.
5. Dated this 24th day of September, 2020.

PER N.D.R. Civ. P. 5(f)

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