

No. \_\_\_\_\_

## IN THE SUPREME COURT OF THE STATE OF MONTANA

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STATE EX REL. TODD ZIMBELMAN,

Petitioner,

v.

THE HONORABLE E. ROBERT OLSON, District Judge  
for the Montana Ninth Judicial District Court,  
and BRANDI C. ZIMBELMAN,Respondents.

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PETITION FOR WRIT OF CERTIORARI  
AND REQUEST FOR STAY OF PROCEEDINGS

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Petitioner Todd Zimbelman (Todd) petitions for a writ of certiorari reviewing orders from the Montana Ninth Judicial District Court holding him in contempt of court when no service of process was accomplished. Petitioner alleges as follows:

JURISDICTION

Section 3-1-523(1), M.C.A., provides that “in cases of contempt . . . the action of a district court or judge can be reviewed on a writ of certiorari by the supreme court or a justice of the supreme court . . . .” The review is limited “to see whether the District Court was within its jurisdiction and whether the

evidence supports the finding of the court.” In re Marriage of Sessions, 231 Mont. 437, 441, 753 P.2d 1306, 1308 (1988) (citing In re Marriage of Smith, 212 Mont. 223, 686 P.2d 912; and Schneider v. Ostwald, 190 Mont. 29, 617 P.2d 1293, 1295 (1980)).

### ISSUES ANTICIPATED OR EXPECTED TO BE RAISED

Petitioner anticipates and expects to raise the following issues in this proceeding:

1. Whether service of process of the contempt papers was accomplished on Todd?
2. Whether personal jurisdiction was obtained over Todd?
3. Whether a writ of certiorari should be issued?

### STATEMENT OF THE CASE

Brandi C. Zimbelman filed an action for dissolution of marriage in 2018. A temporary economic restraining order was provided for in the summons. The case was assigned to a standing master. On November 27, 2019, she filed a Motion For Contempt of Court And Brief In Support, asking “the Court for its order directing Respondent, Todd Zimbelman, to show cause why he should not be held in contempt of court for violation of th[e] Court’s December 28, 2018, Temporary Economic Restraining Order.”

No order to show cause was ever entered. Todd filed a brief opposing the motion for contempt and specifically objecting to Brandi's failure to have him personally served. The standing master entered an order finding Todd in contempt in October, 2021, and the district court affirmed the order.

Todd sought to appeal the order. This Court ruled that "the contempt order in this case is not an appealable order." (In re Marriage of Zimbelman, DA 22-0275, Order at 2) This makes clear that petitioning for a writ of certiorari is Todd's only remedy.

#### STATEMENT OF THE FACTS

Brandi filed a motion to have Todd held in contempt, requesting an order to show cause. (Ex. A) No order to show cause was entered, and no personal service of process was accomplished. Todd objected, including an objection to lack of service of process. (Ex. B, p. 2) The district court held Todd in contempt of court. (Exhibits C, D)

#### AUTHORITIES FOR ACCEPTING JURISDICTION

Rule 14(2) of the Montana Rules of Appellate Procedure states, "Proceedings commenced in the supreme court originally to obtain writs of habeas corpus, injunction, review or certiorari, mandate, quo warranto, and other remedial writs or orders, shall be commenced and conducted in the

manner prescribed by the applicable sections of the Montana Code Annotated for the conduct of such or analogous proceedings and by these rules.” Section 3-1-523(1), M.C.A., provides that “in cases of contempt . . . the action of a district court or judge can be reviewed on a writ of certiorari by the supreme court or a justice of the supreme court . . . .”

A. Papers To Bring A Person Into Contempt Must Be Personally Served.

A “contempt proceeding is separate and independent of the civil action from which it arose.” In re Marriage of Sessions, 231 Mont. 437, 441, 753 P.2d 1306, 1309 (1988) (citing Myhre v. Myhre, 168 Mont. 521, 522, 548 P.2d 1395, 1396 (1976) (“a contempt proceeding is entirely independent from the civil action out of which it arose”). It thus only makes sense that service of process should be made the same as with any other separate and independent proceeding. The law specifically provides this in contempt proceedings and is set forth in § 25-3-402, MCA:

**25-3-402. Persons to be served.** Subject to the provisions of Rule 5(b), M.R.Civ.P., whenever a plaintiff or a defendant who has appeared resides out of this state and has no attorney in the action or proceeding, service may be made on the clerk of court for that party. However, in all cases in which a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpoenas, writs, and other process issued in the suit and papers to bring the party into



**contempt, unless the court orders otherwise.**

(emphasis added). See Marriage of Edwards, 2010 Mont. Dist. LEXIS 375, \*4 (1<sup>st</sup> Judicial Dist, October 19, 2010) (“The Court finds it inappropriate to hold Craig in contempt. . . . [P]ursuant to Section 25-3-402, MCA, a party must be personally served with papers in order to bring him into contempt. In this case, notice of the hearing was given to Craig's attorney, but Craig was not personally served”).

B. Todd Was Not Personally Served.

Here, Todd was not personally served. He raised this in his response to Brandi's motion for contempt of court. (Ex. B, Todd's Answer Brief To Motion For Contempt, filed 9-25-2020, pp. 3-4) The Master's Order states that “[t]he Answer Brief to Motion for Contempt filed on September 25, 2020 . . . goes on to argue the Contempt motion is procedurally flawed as it was not personally served upon Todd” (Master's Order at 2), but then completely ignores it in the findings of fact, conclusions of law and order. (Ex. C)

C. Without Service of Process, A Court Lacks Personal Jurisdiction.

Without service of process, a court lacks jurisdiction. See Kroneberger v. Superior Court, 196 Cal. App. 2d 206, 210-11, 16 Cal. Rptr. 339, 342 (“There being an absolute lack of service of process on the defendant-wife or

upon her attorney of record in the matter now being reviewed, we must hold that respondent court was without jurisdiction to conduct an ex parte hearing and examine witnesses on the issue of contempt”). Here, there was no personal service as required by § 25-3-402, MCA.

D. The District Court Erred In Addressing This Issue.

Although the standing master recognized that Todd had objected to lack of service of process, his order failed to address this issue in his findings of fact or conclusions of law. (Ex. C)

Todd objected both to the lack of service of process and the standing master’s failure to address it in his order, and the district court affirmed. (Ex. D) The district court noted that § 25-3-402 requires personal service “unless the court orders otherwise,” the standing master did not order otherwise, but the standing master “clearly felt that personal service was not mandatory . . . .” (Exhibit \_\_, Order Affirming Standing Master’s Order on Contentment, at 2) This is error, however, because there is no exception in § 25-3-402's requirement of service for a mere “feeling” that service is not mandatory.

E. The Court Should Stay Proceedings In The District Court.

The standing master’s contempt order provides for the contempt sanction to be determined at trial. The district court has set a scheduling conference for

September 6, 2022, at which it presumably will set a trial date to address that contempt sanction and other issues. Rule 14(7)(c) of the Montana Rules of Appellate Procedure provides that this Court may “order a stay of further proceedings in the other court, pending the supreme court’s disposition of the petition.” A stay should be issued to permit this Court to consider and rule upon this petition while protecting the parties and the district court from waste of time and resources associated with litigation of an issue which must first be decided by this Court.

### CONCLUSION

The District Court did not have jurisdiction over Todd when it failed to issue an order to show cause and when there was no service of process of the papers relating to contempt. Likewise, the evidence does not show to the contrary or otherwise support the district court’s conclusion that service of process was unnecessary. It should also stay proceedings below until a decision is made on issuance of a writ.

DATED this 18th day of August, 2022.

STEVEN T. POTTS, PLLC

By /s/ Steven T. Potts  
625 Central Avenue West, Suite 200  
Great Falls MT 59404  
(Attorneys for Todd Zimbelman)

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I certify that this Application is printed with a proportionately spaced Times New Roman non-script text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and the word count calculated by WordPerfect 12.0 for Windows, in addition to a manual count of the words contained in footnotes, totals 1,389 words and is thus less than 4,000 words, excluding table of contents, table of authorities, appendix, certificate of service and certificate of compliance.

By /s/ Steven T. Potts



## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing was served upon the persons named below by mailing or electronically mailing to them a true and correct copy of said document

Daniel T. Jones  
GUSTAFSON LAW OFFICES  
400 South Main, Suite 101  
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Hon. ROBERT G. OLSON  
District Court Judge  
P.O. Box 822  
Shelby, MT 59474-0822

this 18th day of August, 2022.

/s/ Steven T. Potts

## **CERTIFICATE OF SERVICE**

I, Steven T. Potts, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 08-18-2022:

Daniel T Jones (Attorney)  
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Electronically Signed By: Steven T. Potts  
Dated: 08-18-2022