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**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-3111

Rachel Evens
Appellant

v.

David Gilbertson, et al.
Appellees

Appeal from U.S. District Court for the District of
South Dakota - Western (5:22-cv-05057-LLP)

ORDER

The petition for rehearing by the panel is denied.

January 10, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-3111

Rachel Evens

Plaintiff - Appellant

v.

David Gilbertson; Steven R. Jensen; Janine M. Kern;
Mark E. Salter; Patricia J. Devaney; Scott P. Myren
Defendants – Appellees

Appeal from U.S. District Court for the District of
South Dakota - Western
(5:22-cv-05057-LLP)

JUDGMENT

Before LOKEN, ERICKSON, and STRAS, Circuit
Judges.

This court has reviewed the original file of the
United States District Court. It is ordered by the
court that the judgment of the district court is sum-
marily affirmed. See Eighth Circuit Rule 47A(a).

The emergency motion for stay pending appeal is
denied.

December 13, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION**

<p>RACHEL EVENS Plaintiff</p> <p>vs.</p> <p>DAVID GILBERTSON; STEVEN R. JENSEN; JANINE M. KERN; MARK E. SALTER; PATRICIA J. DEVANEY; SCOTT P MYREN Defendants</p>	<p>5:22-cv-5057-CBK</p> <p>MEMORANDUM AND ORDER</p>
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Pending before the Court is Defendants' Motion to Dismiss (Doc.6) the Complaint (Doc. 1). Plaintiff has responded (Doc. 10) and Defendants have replied (Doc.9). Plaintiff requests relief in the form of money damages and a restraining order preventing further litigation of her divorce and custody case, 51DIV18-41, in Pennington County, SD. Plaintiff supports her 96-page Complaint and attachments with an additional 43-page document entitled "Information to Support Complaint." (Doc.2). Defendants offer several rationales for dismissal. (Doc.7).

Plaintiff has filed a number of lawsuits related to this one. She sued South Dakota Circuit Court Judge Connolly and the South Dakota Supreme Court Justices in the United States District Court for the District of Montana (9:20-cv- 00165); South Dakota Circuit Judge Linngren in the same court (9:20-cv-

00172); and South Dakota Circuit Judge Gusinsky in the United States District Court for the District of South Dakota (5:22-cv-5054). The Court takes Judicial Notice of these court records. Fed. R. Evid. 201.

I. Background

Plaintiffs husband at the time filed for divorce in the Circuit Court of the Seventh Judicial District, Rapid City, SD, 51DIV 18-41. The case was assigned to Judge Connolly who granted the divorce on the grounds of extreme cruelty, and made determinations concerning child custody and support, property division, attorneys' fees, and costs. *Evans v. Evans*, 951 N.W.2d 268, 274-75 (S.D.2020). He also issued an Order holding Plaintiff in contempt of court. *Id.* at 276. Plaintiff appealed to the South Dakota Supreme Court, which resolved the issues against her in a lengthy opinion. *Evans*, 951 N.W.2d at 277-83. Plaintiffs Petition for Rehearing was denied. (Doc. 1-1, PgID 75).

Dissatisfied with the result of her efforts in the South Dakota courts. Plaintiff turned to the federal courts. Her lawsuit against Judge Connolly and the South Dakota Supreme Court based on the outcome of the divorce proceeding was dismissed for lack of personal jurisdiction. *Evans v. Connolly*, 2021 WL 1050455, *3 (D.MT.2021). The case against Judge Linngren, who had issued orders concerning child custody, met the same fate for the same reason. *Evans v. Linngren*, 2021 WL 1248624, *2 (D.MX.2021). Both Judges recused themselves after Plaintiff sued them, and Judge Gusinsky was assigned the case. Plaintiff sued him alleging he had engaged in "egregious discrimination" and violations of her rights, (5:22-cv-

5054, PgID 133), and the case was dismissed. *Evens v. Gusinsky*, 2022WL 2981649, *4 (D.S.D.2022).

In the case before this Court, Plaintiff alleges Defendants have failed "to uphold their sworn duties of their judicial office through violating their state's constitution, and refusing to uphold equal justice for all citizens by stark retaliation and blatantly discriminating against a pro se' litigant." (Doc. 1, PgID 1). She claims there was an "illegal divorce action" involving herself and her former husband, based on an alleged lack of jurisdiction. (Doc. 1, Pg ID6). She claims "fraudulent and false allegations" were made in the divorce proceeding. (*Id.*). Although she fails to delineate her claims, she presents a narrative raising four "issues" in the current proceeding, including lack of judicial immunity, judicial discrimination against her as a pro se litigant, lack of jurisdiction for the divorce proceeding, and "cruel and undue" punishment. (*Id.*). As noted, she requests money damages and an injunction prohibiting the litigation of all matters relating to 51DIV 18-41 because it is "nullified and void." (*Id.*, PgID 16). She alleges as a basis for jurisdiction that the Defendants have violated 18 U.S.C § 241, 18 U.S.C. § 242, 42 U.S.C. § 1981 and 42 U.S.C. § 1983. She has indicated that the parties are residents of different states. (*Id.*, PgID 17).

The Defendants have moved to dismiss, asserting lack of subject matter jurisdiction, the need for abstention, inapplicability of 42 U.S.C § 1983 as the basis for an injunction, and judicial immunity.

II. Discussion

A. Legal Standard- Motion to Dismiss

The Defendants have moved to dismiss Plaintiffs complaint under F.R.C.P. 12(b)(1), lack of subject matter jurisdiction, and 12(b)(6), failure to state a claim upon which relief can be granted. (Doc. 6). The standard governing dismissal pursuant to a motion to dismiss was set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) as follows: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). See *Spagna v. Phi Kappa Psi, Inc.*, 30 F.4th 710, 715 (8th Cir. 2022) (dismissal proper where factual allegations failed to state a plausible claim for relief and amounted to only a possibility that relief was warranted); *Faulk v. City of St. Louis*, 30 F.4th 739, 744 (8th Cir. 2022) (quoting *Iqbal* standard and reversing denial of motion to dismiss).

When a plaintiff proceeds pro se, the court must construe the complaint liberally, but the pleading "must allege sufficient facts to support the claims advanced." *Stone v. Harry*, 364 F.3d 912,914 (8th Cir. 2004) (cleaned up). The court is not required to "construct a legal theory" for a plaintiff. *Id.* As the *Iqbal* Court noted, "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). See also *Marglon v. City of Sioux Falls Police Dept.*, 2020 WL 906521, *2 (D.S.D. 2020).

Plaintiff asserts that she and the Defendants are residents of different states, and the Court acknowledges jurisdiction based on diversity of citizenship. 28 U.S.C. § 1332. She has requested damages in the amount of "as much as is allowable by law." (Doc. 1,

PgID 17). Although it is not clear that Plaintiffs complaint meets the standard of *Twombly* and *Iqbal*, the nature of her allegations against these Defendants prompts the Court to resolve them.

B. 42 U.S.C. § 1983 claim- Judicial Immunity

Plaintiff has relied upon 42 U.S.C. § 1983 as the basis of her suit against the Justices. Section 1983 provides a remedy for violations of all "rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. To state a claim under § 1983, a plaintiff must establish: (1) the violation of a right secured by the Constitution or laws of the United States and (2) the alleged deprivation of that right was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Furthermore, the Supreme Court has reinforced that § 1983 "merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (citing *Baker v. McCollan*, 443 U.S. 137, 144, n.3 (1979)). See also *Marglon*, 2020 WL 906521, *3.

The nature of this lawsuit has prompted both Plaintiff and Defendants to invoke the doctrine of judicial immunity. Absolute judicial immunity from lawsuits brought pursuant to 42 U.S.C. § 1983 has long been recognized. *Mireles v. Waco*, 502 U.S. 9 (1991) (citing authority); *Robinson v. Freeze*, 15 F.3d 107, 108 (8th Cir. 1994) ("Judges performing judicial functions enjoy absolute immunity from §1983 liability"). See also *Hamilton v. City of Hayti, Missouri*, 948 F.3d 921, 925 (8th Cir. 2020) (same). The rationale supplied by the Supreme Court is the "long-settled understanding that the independent and impartial

exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435 (1993). As the *Mireles* Court stated, "a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." 502 U.S. at 10. Judges are protected when they act in their "judicial capacity," which is gauged by "the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Mireles*, 502 U.S. at 12 (quoting *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)). See also *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967). As the Eighth Circuit has explained, "A judge is absolutely immune from liability if (1) the judge had subject matter jurisdiction, and (2) the acts complained of were judicial acts." *Smith v. Bacon*, 699 F.2d 434, 436 (8th Cir. 1983) (cleaned up).

These principles were applied in *Stanko v. South Dakota*, where an individual had been charged with several misdemeanors and later sued the magistrate judge who handled his case. 2019 WL 10890199, *2 (D.S.D. 2019). The plaintiff alleged the judge had no jurisdiction over him and that probable cause had not been established. *Id.*, *8. The court rejected the arguments, explaining the judge had subject matter jurisdiction because she was the magistrate judge assigned to that court to handle misdemeanor cases. *Id.* The court quoted Eighth Circuit precedent to the effect that a judge's act is "judicial" if "it is one normally performed by a judge and if the complaining party is dealing with the judge in his judicial capacity." *Id.*, *8

(quoting *Birch v. Mazander*, 678 F.2d 754, 756 (8th Cir. 1982)). Because the magistrate was exercising jurisdiction in the case, and was performing a judicial function, she had absolute judicial immunity and the claim was properly dismissed. *Id.*, *9. Similarly, in *Meyer v. Pfeifle*, a litigant dissatisfied with the outcomes of two criminal cases and a divorce action sued the three South Dakota Circuit Court judges who had presided over the actions. 2019 WL 1208776 (D.S.D. 2019). Plaintiff alleged violations of her civil rights and other claims. *Id.*, *1. In dismissing, the court reasoned the judges were full-time judges in positions authorized by the state legislature whose actions were "those normally performed by a judge," and the actions were done by the named judges "in their judicial capacity." *Id.*, *7. The court concluded the judges had subject matter jurisdiction, and their contact with the defendant was only because they were assigned to hear the case. *Id.* Therefore, they had "absolute judicial immunity," thus depriving the federal court of subject matter jurisdiction to hear the claims against them and mandating dismissal of the plaintiffs claims. *Id.*

Pertinent to this case and the question of the South Dakota Supreme Court's jurisdiction, the Constitution of the State of South Dakota provides as follows: "The Supreme Court shall have such appellate jurisdiction as may be provided by the Legislature, and the Supreme Court or any justice thereof may issue any original or remedial writ which shall then be heard and determined by that court." S.D. CONST. art. V, § 5. The South Dakota Legislature has provided general rules pertaining to the Supreme Court at S.D.C.L. Ch. 16-1 and 16-3. In the case at bar, the Justices of the South Dakota Supreme Court addressed the case of

Evans v. Evans on appeal from the Circuit Court of the Seventh Judicial District and issued an opinion deciding the issues raised. 951 N.W.2d 277-284. The Justices were acting in their judicial capacity when they did so. Contrary to Plaintiffs theories, the subject matter jurisdiction referenced in cases such as *Smith v. Bacon*, above, refers to the court dealing with an issue within its purview, and not to the ultimate decision on a jurisdictional question raised by a party to the case. Plaintiff may disagree with the outcome of the case, but it is clear the Justices were acting in their official capacity and are immune from suit.

With respect to the issues raised in the Complaint, Plaintiffs Issue I appears to be a pre-emptive strike couched as an issue, arguing the Defendants do not have Judicial Immunity "when intentionally disregarding jurisdiction." (Doc. 1, PgID 7). She is mistaken. As explained above, the South Dakota Supreme Court Justices have judicial immunity in this lawsuit. When engaged in appellate review of the divorce case of *Evans v. Evans*, they were performing a judicial function in their judicial capacities, as set forth in the Constitution of the State of South Dakota.

Plaintiffs Issue II alleges discrimination against Plaintiff as a pro se litigant, specifically alleging the Justices have a conflict of interest, lack impartiality, and ignored fraud upon the court. (Id.). These claims are not supported by a legal theory cognizable under 42 U.S.C. § 1983. Furthermore, it appears Plaintiff bases her claim of conflict of interest and lack of impartiality on the fact that she sued them in *Evans v. Connolly*, as discussed above. If that is the basis of her allegation, she should understand that she cannot create a potential conflict by suing the Justices and then

force their removal from the case. If that is not the basis of her allegation, none other appears. With respect to any possible fraud upon the court, the Justices have the authority to address an allegation of fraud and resolve it if they find it legally and factually established. Judicial immunity protects them from a lawsuit when a litigant disagrees with their handling of such an issue.

Plaintiffs Issue III alleges that subject matter jurisdiction in her divorce action was not established, thus creating a due process violation. (Id., PgID 8). Plaintiff then appears to re-litigate the divorce action. Judicial immunity prevents her from succeeding in her re-litigation efforts by seeking damages against the Justices who affirmed the trial court on appeal in *Evens v. Evens*. Furthermore, her claim does not amount to a theory cognizable under 42 U.S.C. § 1983.

Plaintiffs Issue IV alleges "Cruel Undue Punishment Prohibited." (Id., PgID 13). Plaintiff asserts there was no jurisdiction in the divorce proceeding and the Justices erred by affirming the grant of the divorce on the grounds of extreme cruelty. Plaintiffs effort to sue the Justices for damages on this basis fails once again based on the grounds of judicial immunity. Furthermore, this is not a claim cognizable under 42 U.S.C. §1983.

In sum, Plaintiff seeks money damages from the Justices of the South Dakota Supreme Court, who acted in their judicial capacity when they resolved the issues in her appeal. Her claims fail, as the Justices are absolutely immune from the liability she asks this Court to recognize. Because they are immune, the Court does not have subject matter jurisdiction to determine Plaintiffs claims against them. For this

reason, Defendants' motion to dismiss (Doc. 6) is granted and Plaintiffs claims are dismissed in their entirety.

C. Abstention

In accordance with *Younger v. Harris*, 401 U.S. 37 (1971), federal courts must abstain from intervening in a variety of state court proceedings. As the Eighth Circuit has explained, abstention is required when: "(1) there is an ongoing state proceeding, (2) that implicates important state interests, and (3) that provides an adequate opportunity to raise any relevant federal questions." *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1249 (8th Cir. 2012) (citing *Plouffe v. Ligon*, 606 F.3d 890, 894-95 (8th Cir. 2010)). The doctrine "reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff." *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 610 (8th Cir. 2018) (quoting *Moore v. Sims*, 442 U.S. 415, 423 (1979)). Thus, in *Oglala Sioux Tribe*, the Eighth Circuit held that the federal court should not intervene in a dispute between South Dakota officials and the Oglala Sioux Tribe, Rosebud Sioux Tribe, and others over procedures for hearings in connection with the temporary removal of children from their homes. The ongoing nature of the dispute dictated that the federal courts refrain from deciding the issues raised. *Id.* at 611-13.

Likewise in the case at bar, based on Plaintiffs request for injunctive relief, it appears there may be ongoing litigation in connection with the dispute over the custody of her children. (Doc. 1; Doc. 7,

PgID 158). As other courts have recognized, abstention in cases involving ongoing child custody disputes is particularly appropriate. See, e.g., *Evans v. Gusinsky*, 2022 WL 2981649, *3; *Lewis v. Seventh Circuit Court-South Dakota Unified Judicial System*, 2018 WL 7247048, *2 (D.S.D. 2018); *Carlson v. County of Ramsey, Minnesota*, 2016 WL 3352196, *6 (D. Minn. 2016). This is so because of the state's interest in handling domestic relations issues which are a matter of state, not federal, law. Therefore, this Court abstains from exercising jurisdiction over Plaintiffs ongoing divorce and custody issues in the Seventh Judicial Circuit of South Dakota.

D. Additional issues

1. Plaintiff has alleged that Defendants violated 18 U.S.C. §§ 241 and 242 in conspiring to and depriving her of various rights. Courts repeatedly have held that there is no private right of action under 18 U.S.C. § 241. Federal authorities have the task of determining whether to pursue criminal charges. *United States v. Wadena*, 152 F.3d 831, 846 (8th Cir. 1998) (cleaned up); *Coku. Cosentino*, 876F.2d 1, 2 (1st Cir. 1989) (no private right of action under 18 U.S.C. §§ 241 and 242 against judge sued by litigant in divorce action). See also *Mousseaux v. United States Comm'r of Indian Affairs*, 806 F. Supp. 1433, 1437 (D.S.D. 1992). Because there is no private right of action under these provisions, nor evidence to support the allegations in this case, this claim is dismissed.

2. Plaintiff has alleged that one or more Justices have violated the Judicial Code of Ethics. Plaintiff

has offered no facts to support this allegation and the Court finds none in the Complaint. Even if Plaintiff had supported her claim with facts, this Court is not the proper forum in which to resolve such a claim. For this reason, the Court grants the Defendants' Motion to Dismiss.

CONCLUSION

Plaintiff has endeavored to have this Court provide a federal forum for her lawsuit which emanated from the outcome in *Evans v. Evans* that she perceives as adverse. This Court has determined that the Defendant South Dakota Supreme Court Justices have judicial immunity, and therefore dismisses Plaintiffs claims for money damages in their entirety. In addition, to the extent Plaintiffs claims concern ongoing litigation, this Court abstains.

Accordingly, IT IS ORDERED that Defendants' Motion to Dismiss (Doc. 6) is granted in its entirety and Plaintiffs claims (Doc. 1) are dismissed.

Dated this 27th day of September, 2022.

BY THE COURT:

(s:) Lawrence L. Piersol

Lawrence L. Piersol

United States District Judge

ATTEST:

MATTHEW W. THELEN, CLERK

Appendix 4: Relevant Constitution of the State of Montana

Mont. Const. art. II, §2: Self-government. The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary.

Mont. Const. art. II, §3: Inalienable rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

Mont. Const. art. II, §4: Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws.

Mont. Const. art. II, §15: Rights of persons not adults. The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.

Mont. Const. art. II, §16: The administration of justice. Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. ... Right and justice shall be administered without sale, denial, or delay.

Mont. Const. art. II, §17: Due process of law. No person shall be deprived of life, liberty, or property without due process of law.

Appendix 5: Relevant Montana Code Annotated

§1-1-215(7), MCA: Residence — rules for determining. Every person has, in law, a residence. In determining the place of residence, the following rules are to be observed:

(1) It is the place where a person remains when not called elsewhere for labor or other special or temporary purpose and to which the person returns in seasons of repose.

(2) There may be only one residence. If a person claims a residence within Montana for any purpose, then that location is the person's residence for all purposes unless there is a specific statutory exception.

(3) A residence cannot be lost until another is gained.

(7) The residence can be changed only by the union of act and intent.

§13-1-111(1)(c), MCA: Qualifications of voter.

(1) A person may not vote at elections unless the person is:

(c) a resident of the state of Montana and of the county in which the person offers to vote for at least 30 days, except as provided in 13-2-514;

§15-30-2112, MCA: Change from nonresident to resident or vice versa. If a taxpayer changes status from that of resident to that of nonresident or

from that of nonresident to that of resident during the tax year, the taxpayer shall file a return. If a resident obtains employment outside the state, income from the employment is taxable in Montana.

§40-4-104, MCA: Dissolution of marriage – legal separation. (1) The district court shall enter a decree of dissolution of marriage if:

(a) the court finds that one of the parties, at the time the action was commenced, was domiciled in this state, as provided in 25-2-118, or was stationed in this state while a member of the armed services and that the domicile or military presence has been maintained for 90 days preceding the filing of the action;

(b) the court finds that the marriage is irretrievably broken, which findings must be supported by evidence:

(i) that the parties have lived separate and apart for a period of more than 180 days preceding the commencement of this proceeding; or

(ii) that there is serious marital discord that adversely affects the attitude of one or both of the parties towards the marriage; and

(c) to the extent it has jurisdiction to do so, the court has considered, approved, or made provision for parenting, the support of any child entitled to support, the maintenance of either spouse, and the disposition of property.

§40-4-211, MCA: Jurisdiction – commencement of parenting proceedings.

(1) A court of this state competent to decide parenting matters has jurisdiction to make a parenting determination by initial or amended decree if:

(a) this state:

(i) is the home state of the child at the time of commencement of the proceedings; or

(ii) had been the child's home state within 6 months before commencement of the proceedings and the child is absent from this state because of the child's removal or retention by any person and a parent or person acting as parent continues to live in this state;

§87-2-102, MCA: Resident defined. In determining whether a person is a resident for the purpose of issuing resident hunting, fishing, and trapping licenses, the following provisions apply:

(1) (a) A member of the regular armed forces of the United States, a member's spouse or dependent, as defined in subsection (1)(c), who resides in the member's household, or a member of the armed forces of a foreign government attached to the regular armed forces of the United States is considered a resident for the purposes of this chapter if:

(i) the member was a resident of Montana under the provisions of subsection (4) and continues to meet the residency criteria of subsections (4)(b) through (4)(e);

(c) The term "dependent" means any of the following individuals over half of whose support was received from the member:

(i) a son or daughter of the taxpayer or a descendant of either;

(ii) a stepson or stepdaughter of the taxpayer;

(2) A person who has physically resided in Montana as the person's principal or primary home or place of abode for 180 consecutive days and who meets

the criteria of subsection (4) immediately before making application for any license is eligible to receive resident hunting, fishing, and trapping licenses. As used in this section, a vacant lot or a premises used solely for business purposes is not considered a principal or primary home or place of abode.

(3) A person who obtains residency under subsection (2) may continue to be a resident for purposes of this section by physically residing in Montana as the person's principal or primary home or place of abode for not less than 120 days a year and by meeting the criteria of subsection (4) prior to making application for any resident hunting, fishing, or trapping license.

(4) In addition to the requirements of subsection (2) or (3), a person shall meet the following criteria to be considered a resident for purposes of this section:

(a) the person's principal or primary home or place of abode is in Montana;

(b) the person files Montana state income tax returns as a resident if required to file;

(c) the person licenses and titles in Montana as required by law any vehicles that the person owns and operates in Montana;

(d) except as provided in subsection (1)(b), the person does not possess or apply for any resident hunting, fishing, or trapping licenses from another state or country or exercise resident hunting, fishing, or trapping privileges in another state or country; and

(e) if the person registers to vote, the person registers only in Montana.

(8) An unmarried minor is considered a resident for the purposes of this section if the minor's parents, legal guardian, or parent with joint custody, sole custody, or visitation rights is a resident for purposes of

this section. The minor is considered a resident for purposes of this section regardless of whether the minor resides primarily in the state or otherwise qualifies as a resident. The resident parent or guardian of the minor may be required to show proof of the parental, guardianship, or custodial relationship to the minor.

(9) A person is not considered a resident for the purposes of this section if the person:

(a) claims residence in any other state or country for any purpose; or

(b) is an absentee property owner paying property tax on property in Montana.

§87-2-106(1), MCA: Application for license.

(1) A license may be procured from the director, a warden, or an authorized agent of the director. The applicant shall state the applicant's name, age, [last four digits of the applicant's social security number,] street address of permanent residence, mailing address, qualifying length of time as a resident in the state of Montana, and status as a citizen of the United States or as an alien and other facts, data, or descriptions as may be required by the department. An applicant for a resident license shall present a valid Montana driver's license, Montana driver's examiner's identification card, tribal identification card, or other identification specified by the department to substantiate the required information. It is the applicant's burden to provide documentation establishing the applicant's identity and qualifications to purchase a license. Except as provided in subsections (2) through (4), the statements made by the applicant must be subscribed to by the applicant.

(3) To apply for a license under the provisions of 87-2-102(7), the applicant shall apply to the director and shall subscribe to fulfillment of the requirements of 87-2-102(7). The director shall process the application in an expedient manner.

(4) A resident may apply for and purchase a wildlife conservation license, hunting license, or fishing license for the resident's spouse, parent, child, brother, or sister who is otherwise qualified to obtain the license.

§87-2-113, MCA: Application fees. (1) (a) Except as provided in subsection (1)(b), when the department determines a drawing is necessary prior to issuance of hunting licenses for any game species during a hunting season, it shall collect a \$5 per species application fee.

(b) The department shall collect the following per species special license application fees:

- (i) moose--resident, \$10; nonresident, \$50;
- (ii) mountain goat--resident, \$10; nonresident, \$50;
- (iii) mountain sheep--resident, \$10; nonresident, \$50;
- (iv) wild buffalo or bison--resident, \$10; nonresident, \$50.

§87-2-506, MCA: Restrictions on hunting licenses.

(1) The department may prescribe by rule the number of hunting licenses to be issued. Any license sold may be restricted to a specific administrative region, hunting district, or other designated area and may specify

the species, age, and sex to be taken and the time period for which the license is valid.

(2) When the number of valid resident applications for big game licenses or permits of a single class or type exceeds the number of licenses or permits the department desires to issue in an administrative region, hunting district, or other designated area, then the number of big game licenses or permits issued to non-resident license or permit holders in the region, district, or area may not exceed 10% of the total issued.

§87-6-302(1), MCA: Unlawful procurement of license, permit, or tag.

(1) A person may not:

(a) subscribe to or make any materially false statement on an application or license. Any materially false statement contained in an application renders the license issued pursuant to it void.

(b) purchase or apply for a hunting, fishing, or trapping license without first having obtained a wildlife conservation license pursuant to 87-2-201; or

(c) purposely or knowingly assist an unqualified applicant in obtaining a resident license.

(3) A person convicted of a violation of this section shall be fined not less than \$50 or more than \$1,000 or be imprisoned in the county detention center for not more than 6 months, or both. In addition, except as provided in subsection (4), the person, upon conviction or forfeiture of bond or bail, may be subject to forfeiture of any current hunting, fishing, or trapping license issued by this state and the privilege to hunt, fish, or trap in this state or to use state lands, as defined in 77-1-101, for recreational purposes for a period of time set by the court.

(4) A person convicted under subsection (1)(a) of unlawfully procuring a replacement license, permit, or tag shall forfeit any current hunting, fishing, or trapping license issued by this state and the privilege to hunt, fish, or trap in this state for 24 months from the date of conviction or forfeiture of bond or bail unless a court imposes a longer period. For each subsequent violation, the person shall forfeit any current hunting, fishing, or trapping license issued by this state and the privilege to hunt, fish, or trap in this state for the same period of time imposed by the court for the person's previous violation plus an additional 24 months.

§87-6-303, MCA: Nonresident license or permit offenses.

(1) A person who is not a resident may not:

(a) apply for or purchase for a nonresident's use the following resident licenses and permits:

- (i) wildlife conservation license;
- (ii) hunting license or permit; or
- (iii) fishing license or permit;

(b) affirm to or make a false statement to obtain a resident license.

(2) A person convicted of a violation of this section shall be fined not less than the greater of \$100 or twice the cost of the nonresident license that authorized the sought-after privilege or more than \$1,000 or be imprisoned in the county jail for not more than 6 months, or both. In addition, the person, upon conviction or forfeiture of bond or bail, shall forfeit any current hunting, fishing, or trapping license issued by this state and the privilege to hunt, fish, or trap in this state for not less than 18 months.

Appendix 6: Relevant South Dakota Constitution

S.D. Const. art. V, §1: Judicial powers. The judicial power of the state is vested in a unified judicial system consisting of a Supreme Court, circuit courts of general jurisdiction and courts of limited original jurisdiction as established by the Legislature.

S.D. Const. art. V, §5: Jurisdiction of courts. The Supreme Court shall have such appellate jurisdiction as may be provided by the Legislature, and the Supreme Court or any justice thereof may issue any original or remedial writ which shall then be heard and determined by that court. The Governor has authority to require opinions of the Supreme Court upon important questions of law involved in the exercise of his executive power and upon solemn occasions.

The circuit courts have original jurisdiction in all cases except as to any limited original jurisdiction granted to other courts by the Legislature. The circuit courts and judges thereof have the power to issue, hear and determine all original and remedial writs. The circuit courts have such appellate jurisdiction as may be provided by law.

S.D. Const. art. VI, §2: Due process—Right to work. No person shall be deprived of life, liberty or property without due process of law.

Appendix 7: Relevant South Dakota Codified Law

SDCL §12-1-4: Criteria for determining voting residence.

For the purposes of this title, the term, residence, means the place in which a person has fixed his or her habitation and to which the person, whenever absent, intends to return.

A person who has left home and gone into another state or territory or county of this state for a temporary purpose only has not changed his or her residence.

A person is considered to have gained a residence in any county or municipality of this state in which the person actually lives, if the person has no present intention of leaving.

If a person moves to another state, or to any of the other territories, with the intention of making it his or her permanent home, the person thereby loses residence in this state.

SDCL §12-4-5: Entry of applicants in registration file--Deadline--List for runoff election.

The county auditor shall enter in the master registration file the name of each eligible person whose completed application for registration and mail registration card is received no later than 5:00 p.m. local time at least fifteen days preceding the election by the county auditor or the local, state, or federal agency responsible for conducting voter registration under this chapter.

SDCL §15-26A: RULES OF CIVIL APPELLATE PROCEDURE

SDCL §15-26A-16: Response to petition.

Within seven days after the service of the petition, any party to the action may serve and file a response thereto. The original and five copies of the answer shall be filed with the clerk of the Supreme Court.

SDCL §15-7-2(9): Acts within the state subjecting persons to jurisdiction of the courts.

Any person is subject to the jurisdiction of the courts of this state as to any cause of action arising from the doing personally, through any employee, through an agent or through a subsidiary, of any of the following acts:

- (9) With respect to any action for divorce, separate maintenance, or spousal support the maintenance in this state of a matrimonial domicile at the time the claim arose or the commission in this state of an act giving rise to the claim, subject to the provisions of § 25-4-30;

SDCL § 21-18-51: Maximum amount subject to garnishment.

The maximum part of the aggregate disposable earnings of a wage earner for any workweek which is subject to garnishment may not exceed the lesser of:

- (1) Twenty percent of disposable earnings for that week;

SDCL §21-18-52: Maximum garnishment allowed for support of any person.

The maximum part of the aggregate disposable earnings of an individual for any work week which is subject to garnishment to enforce any order for the support of any person may not exceed:

- (1) If the individual is supporting a spouse or dependent child other than a spouse or child with respect to whose support the order is used, fifty percent of the individual's disposable earnings for that week; and
- (2) If the individual is not supporting a spouse or dependent child other than a spouse or child with respect to whose support the order is used, sixty percent of the individual's disposable earnings for that week;

except that with respect to the disposable earnings of any individual for any workweek, the fifty percent specified in subdivision (1) shall be deemed to be fifty-five percent and the sixty percent specified in subdivision (2) shall be deemed to be sixty-five percent, if and to the extent that the earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve week period which ends with the beginning of the workweek.

No court of this state may make, execute, or enforce any order or process in violation of this section.

SDCL §25-4-30. Residence requirements for divorce or separate maintenance. The plaintiff in an action for divorce or separate maintenance must, at the time the action is commenced, be a resident of this state, or be stationed in this state while a member of the armed services. Subsequently, the plaintiff need not maintain that residence or military presence to be entitled to the entry of a decree or judgment of divorce or separate maintenance.

SDCL §25-4-45: Child custody provisions—Modification—Preference of child.

In an action for divorce, the court may, before or after judgment, give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same.

SDCL §26-5B-201: Initial child-custody jurisdiction.

(a) Except as otherwise provided in § 26-5B-204, a court of this state has jurisdiction to make an initial child-custody determination only if:

- (1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;
- (2) A court of another state does not have jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under § 26-5B-207 or 26-5B-208, and:
 - (A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and
 - (B) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;
- (3) All courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is

the more appropriate forum to determine the custody of the child under § 26-5B-207 or 26-5B-208; or

- (4) No court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).

(b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

SDCL §41-1-1.1: Persons deemed state residents.

For the purposes of this title, the following are deemed to be residents of this state:

- (1) ~~Any person who previously had a domicile in~~ this state who is absent due to business of the United States or of this state, or is serving in the armed forces of the United States or the spouse of an active duty military person;
- (10) Any person who is a minor dependent of a resident of this state; and
- (11) For the purpose of acquiring resident small game and fishing licenses, any person who does not reside in South Dakota but who is a member of the South Dakota National Guard or of any other unit of a reserve component of the armed forces of the United States that is located in South Dakota.

SDCL §41-1-1.2: Termination of resident status.

Except for a person who continues to qualify for resident privileges as provided in § 41-1-1.1, a person is deemed to have terminated the person's South

Dakota resident status if the person applies for, purchases, or accepts a resident hunting, fishing, or trapping license issued by another state or foreign country; registers to vote in another state or foreign country; accepts a driver's license issued by another state or foreign country; or moves to any other state or foreign country and makes it the person's domicile or makes any claim of residency for any purpose in the other state or foreign country. However, a person who has lawfully acquired a resident hunting, fishing, or trapping license and who leaves the state after acquiring the license to take up residency elsewhere may continue to exercise all the privileges granted by the license until the license expires if the person's respective privileges are not revoked or suspended pursuant to §§ 41-6-75 to 41-6-75.2, inclusive.
