

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF _____

_____ JUDICIAL DISTRICT

_____,)
)
 Plaintiff,)
)
 vs.)
)
 _____,)
)
 Defendant.)

Civil No. _____

BRIEF IN SUPPORT OF MOTION

Pursuant to Rule 3.2, NDROC, _____ submits this Brief in support of (his) (her) Motions for the issuance of an Order to Show Cause and for providing reasonable security to insure _____'s payments.

FACTS

A Judgment of divorce was entered in this action on _____. The pleadings together with additional testimony and evidence to be presented at the hearing _____, _____, will clearly demonstrate the _____'s blatant disregard and contempt for this Court's authority and directives within the _____, _____ Judgment.

Paragraph _____ of said Judgment provides, in pertinent part:

As shown by paragraph _____ of the Affidavit of _____, the _____ has failed to _____.

LAW AND ARGUMENT

North Dakota Century Code § 27-10-01.1 defines contempt of court, in pertinent part:

* * *

b. Intentional nonpayment of a sum of money ordered by the court to be paid in a case where by law execution cannot be awarded for the collection of the sum;

c. Intentional disobedience, resistance, or obstruction of the authority, process, or order of a court or other officer including a referee or magistrate;

* * *

f. Intentional behavior in derogation of any provision of a summons issued pursuant to Rule 8.4 of the North Dakota Rules of Court; or

g. Any other act or omission specified in the court rules or by law as a ground for contempt of court.

North Dakota Century Code § 14-05-25.1 specifically states:

Failure to comply with the provisions of a divorce decree relating to distribution of the property of the parties constitutes contempt of court.

North Dakota case law sets forth the degree of proof necessary to establish contempt as being "the offense must be clearly shown to have been committed." Buchmann v. Buchmann, 202 N.W.2d 677, 680 (ND 1972). That case also sets forth that the complainant's burden is to show that contemptuous acts were committed, and sets the burden on the _____ "to show that his contemptuous acts were legally justified." Id.

So too, North Dakota case law clearly provides that alimony or support payment orders are enforceable by the contempt proceedings or powers of the trial court. See, Kack v. Kack, 169 N.W.23d 111 (ND 1969); Thorlakson v. Wells, 207 N.W.2d 326 (ND 1976); and Dvorak v. Dvorak, 329 N.W.2d 868, 873 (ND 1983).

North Dakota Century Code § 27-10-01.4 further authorizes a court to impose remedial sanctions against the party in contempt. North Dakota Century Code § 14-05-25 authorizes the court to require either party to give reasonable security for maintenance or

other payments ordered in the context of a divorce. North Dakota Century Code § 14-05-25.1 also allows enforcement of any spousal support order to include automatic withholding.

_____ has the ability to take out a loan against (his) (her) pension. There are no tax penalties for borrowing against this pension, and the interest paid on the loan is credited to _____'s account as investment earnings. _____ continues to contribute no less than _____% of (his) (her) estimated \$_____ gross monthly wages to (his) (her) retirement savings account; together with additional contributions to (his) (her) pension account; and matching contributions to both accounts by the employer. _____'s intent is clearly to attempt to secure as much of (his) (her) monthly income into a potentially exempt asset—the retirement accounts—followed by an attempt to file bankruptcy.

_____ requests the Court issue an order clarifying that all the above-referenced payments owed to _____ are in the nature of support and thereby non-dischargeable in bankruptcy. _____ requests the Court order _____ to take out a loan from (his) (her) pension and pay off all debts owed to _____ and those that have _____ co-signed as a responsible party, including:

_____ further requests that the Court immediately issue a Qualified Domestic Relations Order (QDRO) which assigns to _____ a portion of both _____'s Retirement Savings Plan and Pension Plan as reasonable security for the above obligations pursuant to N.D.C.C. § 14-05-25 and ERISA § 206(d)(3)(A), 29 USCS § 1056(d)(3)(A). A reasonable amount assigned pursuant to this QDRO should be no less than the total of the above obligations (\$_____), together with additional funds or

specific provisions such that all taxes and penalties be the responsibility of _____. _____ and this Court have given _____ sufficient time and opportunity to voluntarily comply, to which _____ has responded with only contempt. Consequently, the expenses of that contempt should lie with _____. In the event _____ does comply with payment of the above referenced obligations owed to and affecting _____, the QDRO may be nullified. Attached hereto, for the Court's consideration is a proposed QDRO which would allocate the sum of \$_____ of the _____'s retirement savings and pension plans to _____. Said total is calculated to provide _____ a net distribution of \$_____ after _____ percent taxes and penalties. [$\$gross\ figure - (_\% \text{ tax/penalty} \times \$gross\ figure) = \$net\ figure$]

As an alternative, _____ requests the Court issue an order clarifying that all the above-referenced payments owed to _____ are in the nature of support and thereby non-dischargeable in bankruptcy. _____ requests that said obligations be reduced to money Judgment pursuant to N.D.C.C. § 14-05-25.1 and enforced by immediate income withholding or other collection means as necessary.

The _____'s argument that (he) (she) is without the ability to service (his) (her) debts is without merit. The _____ is enjoying a quite comfortable standard of living, well beyond that of _____, and is unwilling to compromise that status to meet (his) (her) obligations. Moreover, the _____'s intent is clearly to attempt to secure as much of (his) (her) monthly income into a potentially exempt asset—the retirement accounts—followed by an attempt to file bankruptcy. The _____ has found sufficient money and opportunities to purchase assets for (himself) (herself) and attend to (his) (her)

leisure activities. Nonetheless, (he) (she) claims no time and no ability to comply with (his) (her) obligations ordered by this Court.

As shown by the Affidavit of _____, the _____ has failed to comply with a majority of the provisions of the Judgment, all to the detriment of _____, including additional legal costs and attorneys fees incurred in bringing these motions. _____ has attempted to resolve such matters informally with the _____, to no avail.

CONCLUSION

Because the _____ had notice of the terms of the Judgment (see the Court's file for the Notice of Entry of Judgment) _____ submits there is no legal justification for the _____'s failure to comply with the terms of the Judgment. Accordingly, _____ asks this Court to issue an Order to Show Cause to the _____, granting the relief requested in _____'s motions and to also provide (him) (her) with reasonable security for the payments required to be made by the _____.

Dated this _____ day of _____, _____.

By _____
Name of Attorney
Address
Telephone:
ND License No. _____
ATTORNEYS FOR _____