

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 88-11

Date issued: March 21, 1988

Requested by: Tom Slorby, Ward County State's Attorney

- QUESTION PRESENTED -

Whether defense expense and witness fees, incurred by indigents responding to orders to show cause why a contempt citation should not issue for failure to pay child support, are payable pursuant to N. D. C. C. " 29-07-01.1 and 31-01-18.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that defense expenses and witness fees, incurred by indigents responding to orders to show cause why a contempt citation should not issue for failure to pay child support, are not payable pursuant to N. D. C. C. " 29-07-01.1 and 31-01-18.

- ANALYSIS -

The issuance of an order to appear and show cause why a contempt citation should not issue is an ordinary and commonplace response to a failure to comply with an order directing the payment of child support. A failure to comply with the provisions of a judgment or order of the court for the support of a child may be punished as civil contempt. N. D. C. C. ' 14-08.1-05(2). A court must provide in any decree with respect to payments for child support or alimony combined with child support that the payments must be made to the clerk of court. N. D. C. C. ' 14-08-07(1). When there is a failure to make the required payments, the clerk may request a judgment of the district court to issue a citation for contempt of court against the person who has failed to make the payment. N. D. C. C. ' 14-08-07(1).

The citation for contempt of court issued for failure to pay child support is invariably an indirect contempt (committed outside the immediate view and presence of the court). The citation may be served in the manner provided by the North Dakota Rules of Civil Procedure (N. D. C. C. ' 14-08-07(1)) or issued in accordance with N. D. C. C. ' 27-10-07. The penalty for civil contempt may include imprisonment. However, indemnification of the aggrieved party or conduct which corrects an omission to perform an act or duty will terminate the period of imprisonment. N. D. C. C. ' 27-10-04.

The North Dakota Supreme Court very recently discussed the distinction between civil and criminal contempt:

Generally, in distinguishing civil from criminal contempt, we look at the sanction and its nature and purpose, rather than the conduct If the sanction's purpose is coercive, that is, to induce performance of an act primarily for another's benefit, the contempt is civil If the contemptuous conduct has been concluded and the purpose of the sanction is to punish the offender and vindicate the authority of the court, the contempt is criminal.

Baier v. Hampton, 417 N.W.2d 801, 804 (N.D. 1987) (citations omitted). The patent purpose of the issuance of the citation for contempt is to coerce compliance with the court's prior directive for the payment of child support.

The provision for the payment of defense expenses for indigents may be found at N.D.C.C. ' 29-07-01.1. A similar provision for payment of witness fees is at N.D.C.C. ' 31-01-19. Both statutes impose the costs either on the city, the county, or the state, dependent upon where the action is prosecuted, and what type of action is involved. However, in all cases, the defense costs will be incurred in defense of a criminal charge. The issuance of a contempt citation pursuant to N.D.C.C. ' 14-08-07(1) does not commence a criminal action.

As a caveat, care must be taken to distinguish between conduct which constitutes a neglect or refusal to comply with the terms of an order, judgment, or decree directing the payment of child support, and other conduct of a person subject to such an order, judgment, or decree. Two very recent North Dakota Supreme Court cases make that point. Baier v. Hampton; Hartman v. Hartman, 417 N.W.2d 173 (N.D. 1987). In both cases, civil contempt proceedings were commenced as a consequence of a failure to pay child support.

However, in both cases, punitive jail sentences were handed down, not as a consequence of the failure to pay child support, but as a consequence of "deceitful and evasive testimony about . . . income" (Hampton, at 803) and "failing to divulge information about [certain real property] . . ." (Hartman, at 174). In such cases, the commencement of criminal proceedings in compliance with the procedural protections of N.D.R. Crim. P. 42(b) will signal the applicability of N.D.C.C. " 29-07-01.1.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Nicholas J. Spaeth
Attorney General

ATTORNEY GENERAL' S OPINION 88- 11
March 21, 1988
PAGE 3

Assisted by: Blaine L. Nordwall
Assistant Attorney General

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