
State of Minnesota
In Court of Appeals

In Re the Marriage of:

BLANCA MARGARITA ZALDIVAR (n/k/a Parada),
Petitioner,

vs.

LUIS ROBERTO RODRIGUEZ ZALDIVAR (a/k/a Ramiro Lazo),
Respondent,

And

COUNTY OF WATONWAN,
Intervenor.

APPELLANT'S PRINCIPAL BRIEF, ADDENDUM AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

<u>CONTENTS</u>	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
I. Summary of Evidence Tending to Sustain Determination that Appellant is in Contempt	4
II. Summary of Other Evidence Relevant to Contempt	6
ARGUMENT	10
I. STANDARD OF REVIEW	10
II. THE DISTRICT COURT CLEARLY ERRED IN MAKING VARIOUS FINDINGS REGARDING JUSTIFICATION, ABILITY TO PAY, AND CONFINEMENT PRODUCING COMPLIANCE	10
A. Justification for Noncompliance	11
B. Ability to Pay	13
C. Incarceration Likely to Produce Compliance	15
III. THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING APPELLANT TO, AMONG OTHER THINGS, SEEK EMPLOYMENT	15
IV. THE DISTRICT COURT ERRED IN NOT GIVING APPELLANT “THE KEYS TO THE JAIL” TO GAIN HIS RELEASE	17
CONCLUSION	18
CERTIFICATE OF COMPLIANCE	19

ADDENDUM 20

INDEX TO APPENDIX & APPENDIX AA-1

TABLE OF AUTHORITIES

CASES

<u>Counselman v. Hitchcock</u> , 142 U.S. 547 (1892).	16
<u>Glus v. Brooklyn E. Dist. Terminal</u> , 359 U.S. 231 (1959).	12
<u>Gorz v. Gorz</u> , 552 N.W.2d 566 (Minn. App. 1996).	13
<u>Mahady v. Mahady</u> , 448 N.W.2d 888 (Minn. App. 1989).	1, 13, 14, 17
<u>Malloy v. Hogan</u> , 378 U.S. 1 (1964).	16
<u>McCarthy v. Arndstein</u> , 266 U.S. 34 (1924).	16
<u>Minnesota State Bar Ass’n v. Divorce Assistance Ass’n, Inc.</u> , 248 N.W.2d 733 (Minn. 1976).	17
<u>Mower Cnty. Human Servs. v. Swancutt</u> , 551 N.W.2d 219 (Minn. 1996).	10
<u>Time-Share Systems, Inc. v. Schmidt</u> , 397 N.W.2d 438 (Minn. App. 1986).	17
<u>Zaldivar v. Zaldivar</u> , WL 2008 3290537, No. A07-2057 (Minn. App. August 5, 2008).	3, 11

STATUTES

8 U.S.C. § 1324(a).	1, 11, 15
Minn. Stat. § 588.12 (1988).	17

CONSTITUTIONS

United States Constitution, Amend. V.	16
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RULES

Minn. R. Civ. App. P. 105.	3
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STATEMENT OF THE ISSUES

- I. Did the District Court clearly err in finding that: 1) Appellant did not offer any justification for noncompliance; 2) Appellant has the ability to pay the court ordered child support; and 3) that conditionally confining Appellant would likely produce compliance?**

District Court Findings Claimed as Error:

- Findings 6, 7, and 8 in the February 25, 2011 Court Order.
- Findings 16, 17, and 18 in the July 14, 2011 Court Order.

- II. Was it an abuse of discretion for the District Court to order Appellant to, among other things, engage in seeking employment?**

District Court Ruling:

The District Court stayed Appellant's initial jail sentence on the condition that he, among other things, apply for employment and supply proof of such applications to Watonwan County. February 25, 2011 Court Order.

Apposite Authorities:

8 U.S.C. § 1324(a).

- III. Did the District Court err in ordering Appellant to report for a 90-day jail sentence without stating conditions with which Appellant's compliance could secure his release?**

District Court Ruling:

The District Court ordered Appellant to report to jail without setting purge conditions that could secure Appellant's release. July 14, 2011 Court Order.

Apposite Authorities:

Mahady v. Mahady, 448 N.W.2d 888 (Minn. App. 1989).

STATEMENT OF THE CASE

On August 20, 2007, Appellant was court ordered to pay child support. Appellant appealed and the Order was affirmed. Zaldivar v. Zaldivar, WL 3290537, No. A07-2057 (Minn. App. August 5, 2008).¹ On July 30, 2010, Watonwan County brought contempt proceedings against Appellant (the Obligor) for the failure to pay court ordered child support. Meanwhile, Watonwan County brought a motion to modify child support to have Appellant's child support increased.

On October 11, 2010, a modification hearing was held before a Child Support Magistrate. Upon that hearing, the Magistrate increased Appellant's child support obligation through Court Order, filed October 14, 2010.

A contempt hearing (initial contempt hearing otherwise known as a Hopp hearing) was then held on November 15, 2010, in District Court, County of Watonwan, before the Honorable Gregory J. Anderson. The District Court then found Appellant in contempt by Court Order, filed February 25, 2011. The District Court stayed a jail sentence on certain conditions. Appellant sought permission to appeal this Order (Minn. R. Civ. App. P. 105) and such request was denied by Appellate Court Order, dated May 3, 2011 (Appellate Case Number A11-513).

¹ Although not "argued" herein, a copy of this case is attached at Appellant's Appendix, pg. AA-5.

A hearing was then held before the Honorable Gregory J. Anderson, on July 11, 2011, on the issue of whether the stayed jail sentence should be revoked (final contempt hearing otherwise known as a Mahady hearing) for a failure to comply with the court ordered conditions. By Court Order filed July 14, 2011, the District Court found that Appellant had violated the conditions of his stayed sentence and Appellant was ordered to report to jail.

Appellant filed a Notice of Appeal on September 14, 2011. Appellant requests the Order finding him in contempt for failure to pay child support and sentencing him to jail be reversed.

STATEMENT OF FACTS

Although there was no testimony at the Hopp hearing on November 15, 2010 hearing, the parties stipulated to the following facts and/or exhibits:

- Exhibit 1: August 20, 2007 Court Order.
- Exhibit 2: October 14, 2010 Court Order.
- Affidavit of Child Support Officer, Marcia Flohrs.
- Appellant is unable to work legally in the U.S. based on his immigration status.²

I. Summary of Evidence Tending to Sustain Determination that Appellant is in Contempt.

Appellant was ordered to pay \$320.00 per month for child support by Court Order, dated August 20, 2007.³ In October 2010, Appellant's obligation for child support was modified to \$375.00 per month.⁴ At the modification hearing, Appellant, "refused to testify concerning how long he had been in the United States or what efforts he has made to obtain a work permit."⁵

As of October 31, 2010, Appellant's arrears totaled \$17,626.83.⁶ Although Appellant claimed he could not legally work, the Child Support Officer (Ms.

² Transcript of November 15, 2010 hearing, pg. 2, ln.13.

³ August 20, 2007 Court Order, Addendum, pg. ADD. 29.

⁴ October 14, 2010 Court Order, Addendum, pgs. ADD. 24 – ADD. 25.

⁵ Id., at Addendum, pg. ADD. 23.

⁶ Child Support Officer Affidavit, Addendum, pg. ADD. 16.

Flohers) received a letter from the Obligees on July 10, 2010, stating that the Obligees knew Appellant had worked at two places in the past.⁷

Upon being found in contempt, Appellant's jail sentence was stayed on the following conditions:

- a. [Appellant] shall pay his child support obligation in full.
- b. [Appellant] shall continue to make payments until the child covered by the Order reaches the age of 18, or age 20 if still in secondary school; or until the child becomes emancipated or dies; or until further order.
- c. [Appellant] shall provide proof of at least two job searches per week to the Watonwan County Child Support Office, including copies of all applications and rejection letters from employers.
- d. [Appellant] shall contact the child support office at least once per week.
- e. [Appellant] shall immediately notify the County of all changes in employment and address.⁸

At the Mahady hearing, the District Court heard testimony that as of July 8, 2011, Appellant's total child support arrears were \$21,094.21.⁹ Between the date of the initial Contempt Order (February 25, 2011) and the Mahady hearing (July 11, 2011), Appellant submitted 23 applications for employment to the Child Support Officer, as compared to the 38 applications he should have submitted.¹⁰ During the same period, Appellant failed to contact the Child Support Officer at least once per week.¹¹

⁷ Child Support Officer Affidavit, Addendum, pg. ADD. 16.

⁸ February 25, 2011 Court Order, Addendum, pg. ADD. 6.

⁹ Transcript of July 11, 2011 hearing, pg. 4, ln. 4.

¹⁰ Id., pg. 3, ln. 19.

¹¹ Id., pg. 3, ln. 23.

II. Summary of Other Evidence Relevant to Contempt.

The stipulated facts and exhibits at the Hopp hearing include the fact that Appellant explained via affidavit that he does not have a social security number so he cannot work in the United States and that he is not a legal resident.¹² At the Hopp hearing, the parties stipulated that Appellant is “unable to work legally in the U.S. based on his immigration status.”¹³

At the Mahady hearing, Mr. Ramos explained that he has known Appellant for over two years.¹⁴ During this time, Mr. Ramos has seen Appellant almost every day.¹⁵ Mr. Ramos explained that Appellant has never owned a car,¹⁶ and Mr. Ramos has never observed Appellant with new/extravagant clothes or personal property.¹⁷ Whenever Mr. Ramos observed Appellant going somewhere, Appellant was either walking or getting a ride from someone.¹⁸ Mr. Ramos is legally eligible to work in the United States, so Appellant would go with Mr. Ramos to apply for jobs with him, applying to about 40 places.¹⁹

Mr. Ramos estimated that over the last two years, he had given or lent Appellant about \$4,000.00.²⁰ However, this money was given on a week-to-week

¹² October 14, 2010 Court Order, Addendum, pg. ADD. 18.

¹³ Transcript of November 15, 2010 hearing, pg. 2, ln. 24.

¹⁴ Transcript of July 11, 2011 hearing, pg. 10, ln. 24.

¹⁵ Id., pg. 11, ln. 4.

¹⁶ Id., pg. 11, ln. 23.

¹⁷ Id., pg. 12, ln. 1.

¹⁸ Id., pg. 12, ln. 4.

¹⁹ Id., pg. 12, ln. 8.

²⁰ Id., pg. 12, ln. 17.

basis,²¹ and Appellant has not paid back any of this money because Appellant is unable to work.²²

At the Mahady hearing, Ms. Wegner testified that she has known Appellant for three and a half years,²³ during which she commonly saw Appellant on weekends.²⁴ During this time, Appellant has not had employment.²⁵ Ms. Wegner has never known Appellant to own or possess a car,²⁶ and Appellant typically walked from one place to another.²⁷ Ms. Wegner has never seen Appellant at a restaurant when he is paying for food.²⁸ In three and a half years, Ms. Wegner has never seen Appellant with particularly nice clothes or personal items that appeared to be new.²⁹

At the Mahady hearing, Mr. Castillo explained that he has known Appellant for four years.³⁰ Mr. Castillo lives in the same apartment building as Appellant, and Mr. Castillo sees Appellant on a daily basis.³¹ In the last four years, Mr. Castillo has never known Appellant to have employment.³²

21 Transcript of July 11, 2011 hearing, pg. 12, ln. 13.

22 Id., pg. 12, ln. 18.

23 Id., pg. 15, ln. 12.

24 Id., pg. 15, ln. 17.

25 Id., pg. 15, ln. 14.

26 Id., pg. 15, ln. 25.

27 Id., pg. 16, ln. 7.

28 Id., pg. 16, ln. 1.

29 Id., pg. 16, ln. 4.

30 Id., pg. 18, ln. 25.

31 Id., pg. 19, ln. 8.

32 Id., pg. 19, ln. 3.

Mr. Castillo estimated that he had given Appellant \$10,000.00.³³ However, Mr. Castillo gave this money to Appellant in small amounts over the course of two years.³⁴ Typically, Mr. Castillo would give Appellant \$300 for rent or other costs.³⁵

Mr. Castillo also explained that Appellant does not possess or own a car.³⁶ Mr. Castillo has never seen Appellant in new clothes or with new personal property, except on occasions when Mr. Castillo purchased something for Appellant.³⁷ Mr. Castillo has never seen Appellant out at restaurants except for when Mr. Castillo took the Appellant to a restaurant.³⁸

Appellant testified at the Mahady hearing through an interpreter, explaining that he has applied for a social security number, but was denied.³⁹ As stipulated to at the Hopp hearing, Appellant was still unable to legally work in the United States because of his immigration status.⁴⁰ Appellant explained that, in addition to the financial costs of hiring someone to help him request permission to work,⁴¹ there are certain requirements that need to be met in order to be able to receive work authorization and he did not meet those requirements.⁴²

³³ Transcript of July 11, 2011 hearing, pg. 19, ln. 14.

³⁴ Id., pg. 19, ln. 14.

³⁵ Id., pg. 19, ln. 14.

³⁶ Id., pg. 20, ln. 1.

³⁷ Id., pg. 20, ln. 4.

³⁸ Id., pg. 20, ln. 7.

³⁹ Id., pg. 22, ln. 17.

⁴⁰ Id., pg. 22, ln. 2.

⁴¹ Id., pg. 25, ln. 8.

⁴² Id., pg. 25, ln. 7.

Specifically, Appellant explained that in order to qualify for work authorization, you must be legally present in the United States.⁴³ Appellant is not legally allowed to be present in the United States.⁴⁴

Appellant has not paid back any of the money given or lent to him by others,⁴⁵ and Appellant confirmed that he did not possess or own a car.⁴⁶ Regardless of his ineligibility to work, Appellant applied for employment and submitted 23 applications to the Child Support Officer as proof of his efforts to obtain employment.⁴⁷

Based upon the February 25, 2011 Court Order requiring Appellant to submit “copies of all applications and rejection letters from employers,”⁴⁸ Appellant requested denial letters from prospective employers.⁴⁹ The Child Support Officer admitted that communicating with Appellant could be difficult because she does not speak Spanish and Appellant needs an interpreter to communicate.⁵⁰

When asked, “[a]nd did you make an effort to stay in touch with [the Child Support Officer]?” Appellant testified through the interpreter that:

Yes. But the difficulty comes with the language. Well, she speaks English and I speak very poor English. And on one occasion she

⁴³ Transcript of July 11, 2011 hearing, pg. 34, ln. 3.

⁴⁴ Id., pg. 34, ln. 8.

⁴⁵ Id., pg. 23, ln. 13.

⁴⁶ Id., pg. 23, ln. 21.

⁴⁷ Id., pg. 3, ln. 19.

⁴⁸ February 25, 2011 Court Order, Addendum, pg. ADD. 6.

⁴⁹ Transcript of July 11, 2011 hearing, pg. 22, ln. 24.

⁵⁰ Id., pg. 5, ln. 19.

brought a person that was in the same situation. She didn't speak very well so -- What was determined in that conversation was -- or at least this is what I understood through the translation that if there was no money that there was no reason to keep calling her every week.⁵¹

In the July 14, 2011 Court Order, the District Court's entire conclusion and order consisted of the following statement:

The Court concludes that the [Appellant] has violated the conditions of the stayed jail in the Court's February 25, 2011 Order. [Appellant] is ordered to report to the Watonwan County jail to begin serving 90 days in jail at 7:00 p.m. on July 29, 2011. Good time and work release are not allowed.⁵²

ARGUMENT

I. STANDARD OF REVIEW.

In reviewing a district court's decision whether to hold a party in contempt, the factual findings are subject to reversal only if they are clearly erroneous, while the district court's decision to invoke its contempt powers is subject to reversal only for an abuse of discretion. Mower Cnty. Human Servs. v. Swancutt, 551 N.W.2d 219, 222 (Minn. 1996).

II. THE DISTRICT COURT CLEARLY ERRED IN MAKING VARIOUS FINDINGS REGARDING JUSTIFICATION, ABILITY TO PAY, AND CONFINEMENT PRODUCING COMPLIANCE.

There are six findings made by the District Court that are disputed by Appellant. Specifically, Appellant claims error in Findings 6, 7, and 8 in the

⁵¹ Transcript of July 11, 2011 hearing, pg. 24, ln. 6.

⁵² July 14, 2011 Court Order, Addendum, pg. ADD. 1.

February 25, 2011 Court Order; and Findings 16, 17, and 18 in the July 14, 2011 Court Order.

The above-identified findings focus on: 1) Appellant's lack of justification for not paying; 2) Appellant's ability to pay child support; and 3) the finding that confinement is likely to produce compliance.

A. Justification for Noncompliance.

It has been stipulated that Appellant cannot legally work and the evidence indicates that he is not eligible to get work authorization (no evidence was presented to the contrary). Further, it is a federal felony to employ someone that the employer reasonably should know is illegally in the United States or who lacks employment authorization. 8 U.S.C. § 1324(a).

In the District Court's Memorandum of Law (attached to the February 25, 2011 Court Order, and also incorporated into the July 14, 2011 Court Order), the District Court relied heavily upon the reasoning that the Appellate Court had already ruled that unemployment due to immigration status does not support a finding of *involuntary* unemployment. Zaldivar v. Zaldivar, WL 3290537, No. A07-2057 (Minn. App. August 5, 2008). However, this unpublished opinion was decided in the context of voluntary vs. involuntary unemployment where the Appellant had not presented any evidence regarding his status and generally he invoked his 5th Amendment right to remain silent.

The status of this case is markedly different from the circumstances reviewed by the Appellate Court in Zaldivar. In the case at hand, the record has

been fully developed and clarified. For example, the parties do not dispute that Appellant cannot legally obtain employment. Appellant further presented sworn testimony from various witnesses. Appellant also personally testified, as compared to when he had previously invoked his 5th Amendment right to not testify.

Appellant explained that he not only lacks work authorization, but he is also not eligible *to get* work authorization based upon his immigration status. In other words, the evidence presented indicates that Appellant's inability to obtain employment is not the result of a refusal to simply apply for the proper work authorization.

Finding that Appellant has "failed to offer any justification for noncompliance," (Finding 6 of February 25, 2011 Court Order; Finding 16 of July 14, 2011 Court Order), may have applied to matters where Appellant had previously invoked his 5th Amendment right to not testify. But in this case, there is no longer reasonable evidentiary support for such a finding.

Further, the District Court improperly invoked the forfeiture-by-wrongdoing doctrine, cited in the Memorandum attached to the February 25, 2011 Court Order. In short, the doctrine forces a party to defend a legal action where the primary basis of dismissal was brought about by the defending parties wrongdoing. *See* Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232-33 (1959)(statute of limitations defense cannot be claimed when claiming party

wrongfully misled the other party about the time in which the claim could be made).

It appears that the District Court invoked the forfeiture-by-wrongdoing doctrine to support a finding that Appellant has offered no justification for noncompliance. The District Court then ordered Appellant to illegally engage in employment searches where Appellant does not have work authorization and he is not eligible to get authorization. In effect, the District Court extended the “forfeiture-by-wrongdoing” so as to force Appellant into wrongdoing, where the doctrine is premised upon discouraging wrongdoing.

B. Ability to Pay.

In finding an obligor in contempt, the District Court must determine, among other things, the alleged contemnor’s “then-current ability to pay.” Gorz v. Gorz, 552 N.W.2d 566, 570 (Minn. App. 1996). Further, the ability-to-pay determination must assess the alleged contemnor’s ability to pay “the obligations as they come due.” Id.; Mahady v. Mahady, 448 N.W.2d 888, 890 (Minn. App. 1989). The contemnor’s financial condition is at issue in both the initial contempt hearing and the final contempt hearing. Mahady v. Mahady, 448 N.W.2d 888, 891 (Minn. App. 1989).

In this case, the District Court found that Appellant has the ability to pay the court ordered child support. (Finding 6 of the February 25, 2011 Court Order; and Finding 17 of the July 14, 2011 Court Order).

Admittedly, there is evidentiary support for the finding that Appellant, “has received \$14,000 apparently tax free and has used none of it to pay his child support,” (Finding 17, July 14, 2011 Court Order). However, a reasonable review of the evidence indicates that the individuals who gave money to Appellant did so solely at their own discretion. In other words, this was not money *earned* by Appellant such that would enable Appellant to spend it freely as he may desire.

Nor is there any evidence to support the notion that the individuals who have given money to Appellant in the past would somehow feel obligated to give Appellant money in the future to pay child support. To the contrary, when asked about giving money in the future, Ms. Ramos responded, “Well, I mean it’s not like I’m a millionaire, but if I’m still working and if I see that he doesn’t have an income or anything, and he can’t pay his rent, and he doesn’t have any money to eat, then I am going to try to help him.” Transcript of July 14, 2011 hearing, pg. 13, ln. 12.

Regardless, pursuant to Mahady, it is not sufficient to find the contemnor “had” the ability to pay. The contemnor must “have” the current ability to pay.

In short, the finding that Appellant has the ability to pay the court-ordered child support appears implicitly premised upon the hope that Appellant can continue to convince well-doers to freely give him money. This strains the concept of an “ability” to pay such that the findings are clearly erroneous.

C. Incarceration Likely to Produce Compliance.

Interwoven with the District Court's erroneous findings regarding a lack of justification for noncompliance and an ability to pay is the District Court's finding that conditional incarceration is reasonably likely to produce compliance. (Finding 8, February 25, 2011 Court Order).

Simply put, the evidence indicates that Appellant in fact offered a justification for noncompliance and that Appellant in fact does not have the ability to pay child support. Given these circumstances, it is clear err to find that it is reasonably likely that confining Appellant will produce compliance.

For these reasons, the aforementioned findings should be found to be clearly erroneous.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING APPELLANT TO, AMONG OTHER THINGS, SEEK EMPLOYMENT.

Upon finding Appellant in contempt, the District Court stayed Appellant's jail sentence on the condition that Appellant apply for employment and provide proof of applications.

As previously stated herein, Appellant is not able to legally work in the United States and Appellant is not eligible to get employment authorization due to his immigration status. Further, it is illegal for an employer to hire an individual that the employer should reasonably know does not have employment authorization. 8 U.S.C. § 1324(a).

No one “shall be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V. Appellant’s 5th Amendment right against self-incrimination may be invoked in civil as well as criminal proceedings. McCarthy v. Arndstein, 266 U.S. 34, 45 (1924); Counselman v. Hitchcock, 142 U.S. 547 (1892); Malloy v. Hogan, 378 U.S. 1 (1964).

In this case, the District Court ordered Appellant to engage in illegal practices by applying for employment. Further, the District Court ordered that Appellant must, “provide proof of at least two job searches per week to the Watonwan County Child Support Office, including copies of all applications and rejection letters from employers.”

By ordering Appellant to provide proof of his own illegal activity to Watonwan County, the District Court over-stepped the 5th Amendment of the United States Constitution by forcing Appellant to be a “witness against himself.”

Furthermore, basic concepts of public policy expose the inappropriateness of the District Court’s Order. It is true that “Public Policy” is oft cited to support any number of positions and such policies may easily contradict each other. However, it seems that the most prominent policy underlying the voluminous code and case law that constitute *the law* is the most basic of all public policies – “violating the law is bad.” Appellant’s court ordered job search violates precisely this policy. Along the way, the Order also violated Appellant’s 5th Amendment rights under the United States Constitution.

IV. THE DISTRICT COURT ERRED IN NOT GIVING APPELLANT “THE KEYS TO THE JAIL” TO GAIN HIS RELEASE.

The District Court’s July 14, 2011 Court Order required Appellant “to report to the Watonwan County jail to begin serving 90 days in jail at 7:00 p.m. on July 29, 2011. Good time and work release are not allowed.” The District Court’s July 14, 2011 Court Order had no purge conditions such that Appellant could secure his release by complying with such conditions (a.k.a. the “keys to the jail”).

“Civil contempt proceedings are designed to induce future performance of a valid court order, not to punish for past failure to perform.” Mahady v. Mahady, 448 N.W.2d 888, 890 (Minn. App. 1989)(citing Minn. Stat. § 588.12 (1988); Minnesota State Bar Ass’n v. Divorce Assistance Ass’n, Inc., 248 N.W.2d 733, 741 (1976); and Time-Share Systems, Inc. v. Schmidt, 397 N.W.2d 438, 441 (Minn. App. 1986)).

“[C]ivil contempt is said to give the contemnor the keys to the jail cell, because compliance with the order allows him to purge himself and end the sanction.” Mahady, 448 N.W.2d at 890. “A civil contempt order cannot impose a fixed sentence, but must allow the contemnor to obtain release by compliance.” Id.

In this case, the July 14, 2011 Court Order required Appellant to report to jail to serve a 90 day sentence. No conditions were given to afford Appellant the opportunity to secure his release. Accordingly, the District Court’s July 14, 2011 Court Order must be reversed.

CONCLUSION

The evidence does not support various findings made by the District Court. It was an abuse of discretion to find Appellant in Contempt. The conditions placed on Appellant constitute an abuse of discretion and a violation of Appellant's 5th Amendment right to not be compelled to testify against himself. It was error to not state conditions that would give Appellant the "keys to the jail cell."

For all the reasons stated herein, Appellant requests that the Order finding him in contempt and the Order requiring him to report to jail be reversed.

Respectfully Submitted,

Dated: October 28, 2011



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CERTIFICATE OF COMPLIANCE

Minn. R. Civ. App. P. 132.01, subd. 3

Pursuant to Minn. R. Civ. App. P. 132.01, subd. 3, the author of signature of this principal brief hereby certifies that this principal brief complies with applicable word count limitations and typeface requirements. Exclusive of the table of contents, table of authorities, addendum, appendix, and the certificate of compliance, this principal brief contains 3,950 words. This word count is done in reliance upon Microsoft Word 2004 for Mac, Version 11.6.3.

Dated: October 28, 2011



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