

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Danel Jacobs-Raak,
Plaintiff and Appellee,

vs.

Daniel Raak,
Defendant and Appellant,
And

State of North Dakota,
Statutory Real Party in Interest and
Appellee.

Case No. 20190123

Appellant's Brief

**Appeal from October 31, 2018, Order Denying Defendant's Motion to Redistribute
Property and Request for Hearing, February 15, 2019, Order on Contempt,
and May 13, 2019, Third Amended Judgment
District Court of Burleigh County
South Central Judicial District
Case No. 08-2013-DM-00716
The Honorable Bruce Romanick, District Judge, Presiding**

ORAL ARGUMENT REQUESTED

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Table of Contents

	<u>Page No.</u>
Table of Contents	2
Table of Authorities	3
	<u>Paragraph No.</u>
I. Oral Argument Statement	1
II. Statement of the Issues Presented for Review	2
III. Statement of the Case	3
IV. Statement of Facts.....	4
V. Law and Arguments	16
A. The District Court erred in denying Raak’s Motion to Redistribute Property	17
B. The District Court erred in denying Raak’s Motion for Evidentiary Hearing on Motion to Redistribute Property	18
C. The District Court erred in finding Raak in contempt	19
D. The District Court erred in determining each of the parties’ child support obligations for the three periods from August of 2017 through January of 2018; from February of 2018, through December of 2018; and from January of 2019, until further order of the Court or the termination of their individual monthly support obligations.....	20
E. The District Court erred in its failure to allow evidence on the over \$76,000 financial windfall Jacobs received from her parents between February of 2015 and the January 25, 2019, evidentiary hearing.....	29
VI. Conclusion and Prayer for Relief	30
Certificate of Compliance with Page Limitation	33
Certificate of Service	34

Table of Authorities

<u>Cases</u>	<u>Paragraph Nos.</u>
<i>Anheluk v. Kubik</i> , 374 N.W.2d 67, 69 (N.D. 1985)	25
<i>Brakke v. Brakke</i> , 525 N.W.2d 687, 690 (N.D. 1994)	24
<i>Crandall v. Crandall</i> , 2011 ND 136, ¶4, 799 N.W.2d 388.....	24
<i>Dupay v. Dupay</i> , 2010 N.D. 87, ¶¶ 9-14, 782 N.W.2d 42	27, 28
<i>Ferguson v. Wallace-Ferguson</i> , 2018 ND 122, ¶ 21, 911 N.W.2d 324	24
<i>Helbling v. Helbling</i> , 541 N.W.2d 443, 446-447 (N.D. 1995)	27, 28
<i>Holkesvig v. Welte</i> , 2012 N.D. 14, ¶9, 809 N.W.2d 323	19
<i>Hougen v. T.W.</i> , 1997 ND 101, ¶7-8, 564 N.W.2d 281	24
<i>Knudson v. Knudson</i> , 2018 N.D. 199, ¶25, 916 N.W.2d 793	20, 24
<i>Langwald v. Langwald</i> , 2016 ND 81, ¶16, 878 N.W.2d 71	20
<i>Mahoney v. Mahoney</i> , 1997 N.D. 149, ¶17, 567 N.W.2d 206.....	24
<i>Raak-Jacobs v. Raak</i> , 2016 N.D. 240, 888 N.W.2d 770	3
<i>Raap v. Lenton</i> , 2016 ND 195, ¶5, 885 N.W.2d 777.....	20
<i>Shaver v. Kopp</i> , 545 N.W.2d 170, 176 (N.D. 1996)	26
<i>Thompson v. Johnson</i> , 2018 ND 142, ¶9, 912 N.W.2d 315	20
<i>Walstad v. Walstad</i> , 2012 ND 204, ¶13, 821 N.W.2d 770	17
 <u>N.D. Admin. Code</u>	
N.D. Admin. Code ch. 75-02-04.1	20
N.D. Admin. Code § 75-02-04.1-02(7)	20
N.D. Admin. Code § 75-02-04.1-02(8).....	20, 26, 27

Table of Authorities (Continued)

N.D. Admin. Code (Continued)

	<u>Paragraph Nos.</u>
N.D. Admin. Code § 75-02-04.1-07(3)(b).....	28
N.D. Admin. Code § 75-02-04.1-05(4)	22
N.D. Admin. Code § 75-02-04.1-07	23
N.D. Admin. Code § 75-02-04.1-13	20
N.D. Admin. Code § 75-02-04.1-07(3).....	23
N.D. Admin. Code § 75-02-04.1-07(6).....	23
N.D. Admin. Code § 75-02-04.1-07(7).....	13

Misc.

N.D.C.C. § 14-05-24(3)	3, 17
N.D.C.C. ch. 27-10	19
N.D.R.Civ.P. Rule 60(b)(vi).....	24

I. Oral Argument Statement

[¶1] The District Court, in the opinion of the undersigned, and as explained in the rest of this Brief, ignored undisputed relevant evidence introduced at the evidentiary hearing regarding Jacobs' actual employment income and over \$76,000 in financial aid that Jacobs received from her parents, precluded entry of additional relevant evidence at the hearing, and then ignored the applicable law on legal issues, in what appears to have been a concerted effort by the Court to rule in favor of the Appellee, Danel Jacobs-Raak (hereinafter Jacobs), on all of the issues in contention. Evidence of the bias against the Appellant, Daniel Raak (hereinafter Raak), by the District Court was established relatively early in the evidentiary hearing, when the Court admonished Raak for referring to the former District Court Judge, who had presided over the original divorce trial in this divorce action and retired during the pendency of these post-judgment proceedings, simply as "Anderson," and not as "Judge Anderson." Tr., p.83, l.20, to p.84, l.5. Evidence of the bias against Raak by the District Court is also evidenced by the fact that the Court initially adopted every word of the 21 pages of proposed findings and conclusion that Jacobs' attorney had proposed in resolving the post-judgment motions from which this appeal lies (*compare* Index # 272 *with* Index # 285), and then, after the State filed its motion to amend or adjust the Court's findings and conclusions, the Court adopted the findings and conclusions that the State had proposed in its motion to amend or adjust the Court's findings and conclusions regarding the child support issues raised by the State in its motion to amend or adjust the original findings and conclusions of the Court (*compare* Index # 300 *with* Index # 312). Oral argument is needed to help to ensure that this Court is made fully aware of all the injustices that have been bestowed on Raak by the District Court.

II. Statement of the Issues Presented for Review

[¶2] The following issues are raised in the appeal by Raak:

A. Whether the District Court erred in denying Raak's Motion to Redistribute Property?

B. Whether the District Court erred in denying Raak's Motion for Evidentiary Hearing on Motion to Redistribute Property?

C. Whether the District Court erred in finding Raak in contempt?

D. Whether the District Court erred in determining each of the parties' child support obligations for the three periods from August of 2017 through January of 2018; from February of 2018, through December of 2018; and from January of 2019, until further order of the Court or the termination of their individual monthly support obligations?

E. Whether the District Court erred in its failure to allow evidence on the over \$76,000 financial windfall Jacobs received from her parents between February of 2015, the last date Jacobs father testified about the financial aid he and his wife had provided to Jacobs, and the January 25, 2019, evidentiary hearing, the date that Jacobs admitted to receiving since February of 2015 over \$76,000 in financial aid from her father to purchase a 2016 Ford Explorer and pay her attorney?

III. Statement of the Case

[¶3] This is an appeal from post-judgment proceedings in a divorce action wherein Jacobs had originally been awarded primary residential responsibility over all three of the parties' children. This is the second appeal to this Court from this case. See, *Raak-Jacobs v. Raak*, 2016 N.D. 240, 888 N.W.2d 770. In this appeal, this Court is being asked to address issues that arise from post-judgment proceedings in which the District Court denied, without an hearing, Raak's motion to redistribute property under N.D.C.C. § 14-05-24(3) for Jacobs' alleged failure to provide Raak with half of the family's photo scrapbooks and photo copies of the other half, as ordered in the original judgment; found Raak in contempt for allegedly failing to reimburse Jacobs for half of the costs of the parties' children's extracurricular activities and non-covered health care expenses that allegedly had been incurred by Jacobs, since entry of the original judgment; and imposed new child support obligations on the parties after the parties' oldest child, with the mutual consent of Jacobs and Raak, began living with Raak in the State of Iowa, where Raak had relocated in May of 2016.

IV. Statement of Facts

[¶4] Raak and Jacobs were divorced in October 2015. In *Raak-Jacobs v. Raak*, 2016 N.D. 240, 888 N.W.2d 770, this Court affirmed the original divorce judgment in part and reversed the judgment in part, and remanded the case for further proceedings on the issue of the district court's division of the parties' mineral interests. On remand the District Court ordered that the remainder interests in the minerals be divided equally between the parties, with the provision each party's share be a life estate interest only with the remainder interest of each party's share being awarded to the parties' children equally, by

representation, upon the death of each party. Index # 184. Jacobs was awarded the primary residential responsibility of the parties' three children in the original judgment, subject to Raak's right to parenting time. App., pp. 31-33. In January of 2016, Raak was forced to sell his interest in an accounting business in which he was employed in Bismarck as a tax preparer, due to unethical conduct by one of his business partners, and in May of 2016 moved back to Spirit Lake, Iowa, where he had been raised as a child, to be near his extended family and to start a new accounting practice. Tr., p.58 ,l.12-25; p. 86, l.14-24; p.141, l.16, to p.142, l.6. Jacobs also agreed that the move was good for Raak's business. Tr., p. 35,l.6, to p.36, l.10.

[¶5] In May of 2017 the parties agreed that their oldest child would be allowed to live with her father, Raak, in Spirit Lake, because of the child's desire to live with her father, the child's dislike of her mother, Jacobs, and Jacobs inability to control the child. App., pp.42-44; Tr., p.30,l.10-19; Index ## 189,190,205,207. By verbal agreement of the parties, on August 5, 2017, the oldest child moved in with Raak in a house in Spirit Lake, where the child has primarily resided ever since. App., p.139-141. Because of the 525 mile distance between Bismarck and Spirit Lake, the parties also agreed to meeting at places for the exchange of the children for parenting time that required each parent to drive roughly half of the distance. Tr., p.69,l.1, to p.70,l.10. Jacobs was often 2 to 4 hours late in arriving at the pre-approved meeting places and sometimes simply refused to undertake any of the transportation responsibilities of the children, in which events, when Jacobs was late, Raak was forced to wait for Jacobs to arrive and, in the situations, Jacobs refused to do any of the driving, to undertake all the parenting time transportation responsibilities of the children. Tr., p.68, l.8-25, p.80,l.5-25.

[¶6] From May through early September of 2017, the parties, through their respective attorneys, negotiated a written agreement that temporarily resolved the issues of primary residential responsibility, parenting time, transportation responsibilities, and child support that was entitled “Informal Agreement of Parties re: [S.R.]” and was executed by the parties in September 2017. App., pp.139-141; Tr., p.30,1.10-19. At Jacobs’ insistence, the Informal Agreement was not to be filed with the court and the child support provisions were not calculated in accord with the North Dakota Child Support Guidelines. App., pp.139-141; Tr., p.41,1.10, to p.42,1.18, p.70,1.14, to p.71,1.2; Index ## 205, 207. Raak had wanted the child support provisions to be calculated in accord with the Guidelines and the signed agreement to be filed with the court. Index ## 205, 207. At the January 25, 2019, hearing, the District Court, on objection by Jacobs’ counsel, refused to allow testimony from the parties’ attorneys or introduction of the emails that were exchanged by the attorneys in the negotiation of the agreement, Index # 207, to establish the child support obligations in the agreement were not in accord with the Child Support Guidelines. Tr., p.9,1.3, to p.11,1.14.

[¶7] The agreement set out a child support obligation that required Jacobs to refund \$425 to the defendant by the tenth day of each month, commencing with the month of September 2017, while retaining the monthly child support payment of \$1,452 for Raak that he was required to pay under the October 5, 2015, Judgment. *Compare* Index # 136 with App., pp.139-141. Jacobs only provided two refund payments of \$425 each to Raak on November 2 and 10, 2017. Tr., p.165,1.19, to p.166,1.2; Index # 267.

[¶8] After S.R. had been living with Raak for approximately 6 months, Raak filed a motion on February 1, 2018, seeking a modification of the judgment to award him primary

residential responsibility of S.R. and relief under Rule 60(b)(vi) from the child support provisions of the judgment effective retroactively to the month of August 2017, the month in which S.R. moved in with Raak and Raak assumed the primary responsibility to care for S.R.. App., pp. 42-43. The terms of the Informal Agreement did not allow for Raak to file for a change of primary custody of S.R. for at least one school year after S.R. had started living with Raak and had provisions which did not allow for Raak to seek retroactive relief from the child support provisions contained within the Agreement. App., pp. 139-141. As explained in ¶ 6 above, the child support provisions of the Agreement do not conform to the North Dakota Child Support Guidelines.

[¶9] In her response to the motion Jacobs conceded that it was in S.R. best interest to modify the judgment to award Raak the primary residential responsibility of S.R, both in her February 15, 2018, written response to the motion, and again during her testimony at the January 25, 2019, evidentiary hearing. App., pp.45-46; Index ## 196, 197; Tr., p.30,l.10-19. S.R. also testified at hearing on the motion that she preferred to continue to live with Raak and made it clear she did not want to even see Jacobs. Tr., p.150,l.18, to p.152,l.16.

[¶10] Raak's 2015, 2016, 2017, and 2018 Income Tax Returns were admitted as evidence. Tr., p.60,l.1, to p.61,l.8, p.63,l.6, to p.64,l.15, p.139,l.24, to p.134,l.5; Index ## 260, 261, 262, 263, 264. The District Court denied admission of a computer generated report of Raak's 2014 income, that was offered in place of a copy of Raak's 2014 Income Tax Returns because Raak was unable to find a copy of his 2014 returns. Tr., p.64.,l.17, to p.65,l.20. The returns show that after he sold his interest in the accounting practice in 2016, he has not been able to earn much income from his practice in Spirit Lake, since he started

it from scratch in 2016. Index ## 260, 261, 262, 263, 264; TR., p.57,1.16, to p.58,1.4. Raak also received a \$20,000 cash gift from his parents in December of 2018, which he does not anticipate will reoccur in the future due to the fact his parents will be moving into an assisted living facility later in 2019, where his parent's cost of living will be much higher. Tr., p.104,1.19-25, p.136,1.19, to p.137,1.3. The District court concluded the evidence Raak introduced on his income from 2014, 2015, 2016, 2017, and 2018, did not constitute reliable evidence of his taxable income during the time period from 2014 through 2018. App., p. 219, ¶9.

[¶11] In accord with a stipulation of the parties, the District Court took judicial notice of the average annual wage paid to tax preparers in North Dakota as of 2017 was \$47,310 and of the average wage paid to accountants in North Dakota as of 2017 was \$60,550. Tr., p. 28,1.1-15; Index ## 258, 259.

[¶12] Jacobs has been employed at, at least, 4 jobs since the divorce judgment was entered in this action in 2015, including working part time as a limosine driver; as an assistant at Horizon Middle School, a job from which she was terminated as the result of having not followed leave policy when she took off work to attend a funeral; a part time job as a check out clerk at Menards that she has held for at least a couple of years and still worked at the time of the hearing; and a full time job at Job Services of North Dakota, that she started around the second week in April of 2018 and continues to work as of the date of the hearing. Tr., p.18,1.4, to p.30,1.9; Index ## 253, 254, 255, 256. Jacobs' 2015-2017 tax returns were introduced as evidence, along with her 2018 W-2 statements that she had received from Menards and Job Service. Id; Tr., p.8,1.7-19; Index ## 248, 249, 250. Jacobs also admitted to having received over \$76,000 in cash from her parents since the February 13, 2015,

divorce trial in this action, for which she has no obligation to repay, which includes payments made to her attorney, a over \$34,000 payment that her parents paid for a 2016 Ford Explorer in November of 2016 that is owned and used exclusively by Jacobs, and forgiveness of the approximate \$25,000, she owed her parents at the end of the divorce trial. Tr., p.36,1.10, to p.41,1.8. Raak was precluded from obtaining more details on the over \$76,000 in financial aid Jacobs received from her parents by the District Court upon objection by Jacobs' attorney that the financial aid provided to Jacobs by her parents was not relevant to the child support issues, on the claim the money was given as loans despite Jacobs' admission she does not have to repay the loans if she chooses not to. Id. The undersigned had also subpoenaed Jacobs' father to appear at the hearing and testify about the money he had given to Jacobs, but Jacobs' father failed to appear in response to the subpoena based on advice he received from Jacobs' attorney. Tr., p.11,1.16, to p.13,1.7. Later on in the hearing, in response to questions from the State, Jacobs admitted to receiving an additional \$42,000 from her parents over and above the \$34,000 plus payment her parents had paid for the Explorer, for which she has no obligation to repay her parents if she chooses not to repay her parents. Tr., p.172,1.23, to p.174,1.14.

[¶13] Raak offered testimony on his self-employment as a tax preparer ever since he purchased an accounting practice in Bismarck, late in 2009, which included a merger with another accounting business in 2014 and then in 2016, due to differences with his new partners, arising from the violent and unethical behavior of one the partners, the sale of his interest in the business, and then his relocation to Spirit Lake in May 2016 to be near family in an effort to find happiness after his failed marriage and recover from the depression he experienced as a result of the divorce that was ongoing, where he started another accounting

practice, which he continued to pursue through the date of the January 25, 2019, hearing. Tr., p.55,l.15, to p.59,l.22, p.141,l.5, to p.142,l.19. The District Court, despite the undisputed evidence on Raak's reasons for selling his interest in the Bismarck accounting business and his employment as a tax preparer continually from the beginning of 2010, when Raak first moved to Bismarck with his family, to the time of the hearing, and the undisputed fact S.R. commenced living with him on August 5, 2017, in its calculation of Raak's child support obligation imposed the child support obligations set forth in the Informal Agreement from September 2017 to January 2018, the month before the filing of Raak's February 1, 2018, motion to modify and for relief from judgement, imputed income to Raak at 100% of the state wide average for an experienced accountant under the mandate of N.D. Admin. Code 75-02-04.1-07(7), and imposed an additional \$5,000 in annual income based on the a one time gift of \$20,000 Raak received from his parents in December of 2018, in determining Raak's monthly child support obligation for the month of February 2018 and thereafter. App., p. 215; Index # 298. And despite, undisputed evidence of the facts that Jacobs was only employed by Job Service of North Dakota since sometime in April 2018, after she had been fired from her employment with Horizon Middle School in January of 2018, had received raises in her pay in 2018 from both her current employers, Job Service and Menards, another employer of Jacobs for whom she had been working part time for at least two years prior to the January 25, 2019, hearing, and had received over \$76,000 in financial aid fom her parents since the Febrary 2014 trial dates in the case, calculated Jacobs' monthly child support obligation for the months of January 2019 and after, based solely on what she had earned in income in 2018, with no adjustments for the

raises in pay she received in 2018 and the substantial financial windfall that Jacobs had received from her parents since entry of the judgment in 2015. *Id.*

[¶14] With respect to Jacobs motion to hold Raak in contempt Jacobs introduced as evidence a “Shared Expense Invoice,” which consists of Jacobs’ accounting of all the expenses she claimed where owed to her by Raak under the health care and extracurricular activity provisions of the Judgment. *Tr.*, p.166,l.10, to p.168,l.7; *App.*, pp.149-151; *Index # 269*. In a review of the accounting Raak noted that he had similar expenses for the children, including having driven one of the parties’ two younger children to one of the activities for which Jacobs was seeking reimbursement from Raak within her accounting. *Tr.*, p.128,l.9-16. It was also revealed during the testimony of Raak that Raak had paid for some of the eye care expenses through a credit that arose from an overpayment Raak had made to the eyecare provider, Raak had driven the children to one of the parties’ son extracurricular activities for which Raak was seeking a mileage reimbursement from Raak, that Jacobs in some instances had not provided Raak with an explanation of benefits to prove her claimed health care expenses were in fact not covered by insurance, and that Jacobs was seeking reimbursement for items that did not fall under the health care and extracurricular activity reimbursement provisions of the Judgment. *Tr.* p.109,l.12-18, p.110,l.16-24, p.111,l.4, to p.112,l.2, p.112,l.17, to p.113,l.24, p.114,l.11, to p.115,l.21, p.118,l.12-15, p.119,l.3-7, p.120,l.4, to p.122,l.6, p.122,l.20, to p.124,l.3, p.125,l.3-23, p.126,l.2-14, p.127,l.6-11, p.128,l.2-22. Raak also presented a summary of his similar expenses for the children which exceeded in total the amount Jacobs claimed was owed to her by more than \$4,000. *Tr.*, p.71,l.6, to p.73,l.11; *Index # 265*. Other than to object to there being no receipts for the list of Raak’s expenditures and questioning the value Raak

placed on the family photo scrapbooks that Jacobs failed to provide to Raak as required in the original divorce judgment, Jacobs offered no testimony or other evidence to dispute Raak's claimed expenditures or his reasons for not paying some of Jacobs' claimed expenditures. Tr., pp. 73-176. The District Court found Raak in contempt and ordered him to pay Jacobs all of the amount she had claimed, despite the undisputed evidence that she was not entitled to all the expenditures she claimed and Jacobs, at least, owed Raak for some if not all of his claimed expenditures. App., p.171, ¶51.

[¶15] After Jacobs filed her motion to hold Raak in contempt in response to Raak's motion wherein Raak sought to modify the judgment and for relief from the child support provisions of the judgment, Raak filed a motion to redistribute property under N.D.C.C. § 14-05-24(3) for Jacobs' failure to provide Raak with half of the family's original photo scrapbooks and photo copies of the other half of the family's original photo scrapbooks that Jacobs was entitled to keep for herself under the original judgment. App., pp. 118-119; Index # 221. Raak had sought to be financially compensated for the failure of Jacobs to provide him with half of the original scrapbooks and photo copies of the other half of the scrapbooks. Id. Raak had also sought that there be an evidentiary hearing on his motion to redistribute property and that the hearing be consolidated with the evidentiary hearing on his motion to modify and for relief from judgment and Jacobs' motion to hold Raak in contempt, based on the common questions of law and fact that arose in both his motion to redistribute property and Jacobs' motion to hold Raak in contempt. App., pp. 122-123; Index # 225. The District Court denied Raak's motion to redistribute property without a hearing based on a conclusion N.D.C.C. § 14-05-24(3) required a contempt proceeding be commenced and decided in Raak's favor on the claim Jacobs failed to provide Raak with

family's photo scrapbooks, before Raak could proceed with a motion to redistribute property under N.D.C.C. § 14-05-24(3). App., pp. 136-138; Index # 241, ¶¶8-9.

V. Law and Arguments

[¶16] The District Court erred on all the following issues, which creates grounds for the requested at the conclusion of this brief.

A. The District Court erred in denying Raak's Motion to Redistribute Property.

[¶17] N.D.C.C. § 14-05-24(3) specifically allows for a party in a divorce action to seek redistribution of property "in a postjudgment proceeding." There is no requirement to first proceed with a contempt motion or order to show cause hearing, as had been ruled by the District Court, in its order deny Raak's motion without a hearing. See *Walstad v. Walstad*, 2012 ND 204, ¶13, 821 N.W.2d 770. Section 14-05-24(3) clearly allows for a separate remedy in a separate postjudgment proceeding, in an apparent attempt by the legislature to allow an innocent spouse to bring one proceeding to resolve his or her claim against his or her former spouse, not the potential for two proceedings as ruled by the District Court. *Id.*

B. The District Court erred in denying Raak's Motion for Evidentiary Hearing on Motion to Redistribute Property.

[¶18] Given the similar factual and legal issues that existed in connection with Raak's Motion to Redistribute Property an Jacobs' motion to hold Raak in contempt, with respect to the issue of whether money is owed by one to the other, the motions should have been consolidated for hearing, to conserve the resources of the court and the parties. Unfortunately, now that there already has been a hearing on Jacobs' motion to hold Raak in contempt, a separate evidentiary hearing will have to be had on Raak's Motion to Redistribute Property.

C. The District Court erred in finding Raak in contempt.

[¶19] Intentional, willful and inexcusable disobedience of a court order constitutes contempt of court. *Holkesvig v. Welte*, 2012 N.D. 14, ¶9, 809 N.W.2d 323. A party seeking a contempt sanction under N.D.C.C. ch. 27–10 must clearly and satisfactorily show that the alleged contempt was committed. *Id.* In light of Jacobs’ failure to introduce any evidence, other than to object to there being no receipts for the list of Raak’s expenditures and questioning the value Raak placed on the family photo scrapbooks that Jacobs failed to provide to Raak as required in the original divorce judgment, disputing Raak’s claimed expenditures and his reasons for not paying some of Jacobs’ claimed expenditures, Jacobs failed to meet her burden of clearly and satisfactorily showing that the alleged contempt had been committed. There was sufficient testimony and evidence presented by Raak to support a conclusion that Raak did not intentionally, willfully or inexcusable disobey the judgment provisions on the parties’ mutual obligation to reimburse the other for one half of the expenses necessarily incurred by the other for extracurricular activities of the children that have been approved by both of the parties or the reasonable and necessary health care costs of the children that have not been covered by insurance. Furthermore, the failure of the District Court to hear Raak’s Motion to Redistribute Property, still leaves the issue of how much is owed by one party to the other still in question. Wherefore, the order of the District Court finding Raak in contempt and ordering him to pay Jacobs all of her claimed expenses, even those that do not fall into either category of an expense reasonably related to an extracurricular activity of the children that had been approved by both of the parties in advance or of a reasonable and necessary health care cost of the children that has not been covered by insurance, must be reversed.

D. The District Court erred in determining each of the parties' child support obligations for the three periods from August of 2017 through January of 2018; from February of 2018, through December of 2018; and from January of 2019, until further order of the Court or the termination of their individual monthly support obligations.

[¶20] In *Langwald v. Langwald* , 2016 ND 81, ¶16, 878 N.W.2d 71, this Court stated:

"Child support determinations involve questions of law which are subject to the de novo standard of review, findings of fact which are subject to the clearly erroneous standard of review, and may, in some limited areas, be matters of discretion subject to the abuse of discretion standard of review." (citations omitted). "If the district court fails to comply with the child support guidelines in determining an obligor's child support obligation, the court errs as a matter of law." (citations omitted).

And, more recently, this Court in *Knudson v. Knudson*, 2018 N.D. 199, ¶25, 916 N.W.2d

793, stated:

A court errs as a matter of law if it does not comply with the requirements of the child support guidelines. *Ferguson v. Wallace-Ferguson*, 2018 ND 122, ¶ 21, 911 N.W.2d 324.

The child support guidelines, N.D. Admin. Code ch. 75-02-04.1, govern child support determinations. The amount of child support calculated under the guidelines is rebuttably presumed to be the correct amount of child support. N.D. Admin. Code § 75-02-04.1-13. "A correct finding of an obligor's net income is essential to determining the proper amount of child support." *Thompson v. Johnson* , 2018 ND 142, ¶ 9, 912 N.W.2d 315 (quoting *Raap v. Lenton* , 2016 ND 195, ¶ 5, 885 N.W.2d 777). "Income must be sufficiently documented through the use of tax returns, current wage statements, and other information to fully apprise the court of all gross income." N.D. Admin. Code § 75-02-04.1-02(7). Child support calculations "are ordinarily based upon recent past circumstances because past circumstances are typically a reliable indicator of future circumstances, particularly circumstances concerning income." N.D. Admin. Code § 75-02-04.1-02(8).

[¶21] In this appeal, the District Court failed to comply with the child support guidelines in determining both Raak's and Jacobs' child support obligations for the three periods identified in the caption set forth above for this subpart D of this brief, thus has erred as a matter of law.

[¶22] The fact that the undisputed testimony of Raak established that through the merger of his accounting business with another accounting business in Bismarck in 2014 and then

the sale of his interest in the newly merged accounting business in 2016, and his move in 2016 to Spirit Lake, Iowa, to be near his parents and only sibling which resulted in the Defendant having to re-start from scratch an accounting business there, and constant efforts to grow the business, including his more recent purchase, at the end of 2018, of an additional accounting practice from or near Spirit Lake, indicates Raak has not operated his accounting business practice on “a substantially similar scale” under N.D. Admin. Code § 75-02-04.1-05(4) in any of the last 5 complete calendar years, which precludes any averaging of Raak’s annual income that was done by the District Court to allow for the determination of the Defendant’s child support obligation based on any kind of extended period.

[¶23] N.D. Admin. Code § 75-02-04.1-07 does not allow for imputing income to any obligor at 100% of the average income paid to a person with similar work history and occupational qualifications. The imputing of income under N.D. Admin. Code § 75-02-04.1-07(7) only applies to imposing an obligation on an obligor who voluntarily changes his employment that results in less income for the obligor, and only allows imputing income based on the highest earnings of an obligor in the calendar year the motion to modify child support was filed or in one of the two previous calendar years, which, in this case, produces less income for Raak than if income is imputed to Raak at 60% of the average income paid to a person with similar work history and occupational qualifications under N.D. Admin. Code § 75-02-04.1-07(3) based on a finding of unemployment or underemployment. The provisions under N.D. Admin. Code § 75-02-04.1-07(6) are only applicable if the obligor receives a “reasonable request to furnish reliable income concerning the obligor’s gross income from earnings”... ”in any proceeding to establish or

review a child support obligation.” There was no evidence that was offered at the hearing that established Raak received such a request and Raak on his own produced his 2015, 2016, and 2017, income tax returns, along with information of his 2014 income tax returns that was produced with his 2015 income tax returns, and a draft of his 2018 returns that contained accurate information about his 2014 and 2018 earnings, even though Raak had not yet received all his 1099 Forms on income and withholdings from 2018 and the IRS was not yet accepting for filing returns for the 2018 calendar year on the date of the January 25, 2019, hearing. Even Jacobs did not produce her 2014, 2015, or 2018 income tax returns at the January 25, 2019, hearing. Thus, the District Court finding that Raak did not produce reliable income concerning his gross income from earnings, is also an error as a matter of law.

[¶24] In addition, the District Court applying the support obligations set forth in the Informal Agreement the parties signed in September of 2017 for the monthly obligations of the parties for the months of September 2017 through December of 2018, the last month before Raak filed his motion to modify and for relief from judgment on February 1, 2018, is also an error as matter of law, in that there was no determination of either parties’ net income under the Child Support Guidelines at the time or near the time of the signing of the agreement. See, *Knudson v. Knudson*, 2018 N.D. 199, ¶25, 916 N.W.2d; *Brakke v. Brakke*, 525 N.W.2d 687, 690 (N.D. 1994) (“when both parents agree to an actual change in custody for an extended period of time, Rule 60(b)(vi), N.D.R.Civ.P., can be used to provide relief from the unjust enforcement of the de facto custodial parent's support obligation.”); *Crandall v. Crandall*, 2011 ND 136, ¶ 4, 799 N.W.2d 388 (A court errs as a matter of law when it fails to comply with the requirements of the Child Support

Guidelines); Also see, *Mahoney v. Mahoney*, 1997 N.D. 149, ¶17, 567 N.W.2d 206 (Citing *Hougen v. T.W.*, 1997 ND 101, ¶ 7-8, 564 N.W.2d 281) (The child support guidelines also neither command nor contemplate use of averaging to establish a retroactive support obligation when the obligor's *actual income* for the year is known.).

[¶25] Furthermore, if there is any concern about the strength of the evidence that supports the fact that the support obligations set forth in the Informal Agreement fail to comply with the requirements of the Guidelines, this Court needs to reverse the District Court's ruling that precluded Raak from calling the attorneys to testify on the issue and remand the issue for a further hearing before the District Court, as it is undisputed the parties' attorneys negotiated the agreement on behalf of their respective clients and the law declares that an attorney acts as an agent of his or her client when representing the client. See, *Anheluk v. Kubik*, 374 N.W.2d 67, 69 (N.D. 1985).

[¶26] The District Court's failure to take into consideration the raises in pay Jacobs' received in 2018 from each of her employers and the fact Jacobs only started working for Job Service of North Dakota in April of 2018 in the determination of Jacob's monthly child support obligation for the year of 2019 and beyond, is also an error as matter of law, in that the decision by the Court to use Jacob's 2018 gross income to determine her 2019 monthly child support obligation fails to take into consideration recent past circumstances that are more typically a "reliable indicator of future circumstances, particularly circumstances concerning income," as mandated by N.D. Admin. Code § 75-02-04.1-02(8). The child support obligations for 2019 for the parties should be based on a reasonable projection of what each will earn in the next 12 months. See *Shaver v. Kopp*, 545 N.W.2d 170, 176 (N.D. 1996) (The Child Support Guidelines amplify the direction to use the most recent

information available by allowing use of circumstances that are very likely to change "in the near future" that "materially affect the child support obligation.").

[¶27] Under the holdings in *Helbling v. Helbling*, 541 N.W.2d 443, 446-447 (N.D. 1995) and *Dupay v. Dupay*, 2010 N.D. 87, ¶¶ 9-14, 782 N.W.2d 42, the more than \$76,000 that the Jacobs' parents gave to Jacob the parties' original divorce trial in February of 2015, that Jacobs has not yet repaid to her parents, constitutes a windfall, in light of the fact none of the money that was given to Jacobs has to be paid back to her parents by Jacobs by her own admission, requiring, at a minimum, that the \$76,000 still alleged owed to her parents be treated as a windfall as a matter of law in the determination of Jacobs' child support obligation that Jacobs must pay to Raak now that S.R. is living with Raak in Spirit Lake, Iowa. As required by *Helbling*, at 447 and *Dupay*, at ¶¶ 9-14, the District Court must direct that all of the children of the parties receive some portion of that \$76,000 while also ordering a future reduction in support when the effect of the windfall ceases. With the youngest of the parties' children to celebrate his 19th birthday in March of 2025 (See *Confidential Information Form*, p.2, Index # 181), the Court, at a minimum, should have elected to spread the benefit from the \$76,000 plus dollars over the 120 months that will expire between the February 13, 2015, divorce trial date to the month in which the parties' youngest child attains the age of 19 years old, which translates to \$633 per month in additional income to Jacobs, above and beyond the income she nets from her employment income.

[¶28] Though the \$20,000 Raak received as a gift in December of 2018 from his parents is also subject to the holdings in *Helbling*, at 446-447, and *Dupay*, at ¶¶ 9-14, the fact that his net monthly income from his self-employment plus the addition of the \$266.67 a month

from a proration of the \$20,000 over the 75 months between the month of receipt of the windfall and the month in which the parties' youngest child attains the age of 19 years old, does not increase Rack's net average annual income under the child support guidelines above \$28,386, the amount of income that may be imputed to Raak under N.D. Admin. Code § 75-02-04.1-07(3)(b) (Six-tenths of this state's statewide average for tax preparers, the primary occupation that the Defendant has held over the course of the last 9 years, every since he purchased his first accounting practice in 2009. See Index # 259. Wherefore, this Court should reverse the May 13, 2019, Third Amended Judgment and remand this case back to the District Court with instructions that Raak's monthly child support obligation for the years of 2017, 2018, and the foreseeable future, should be based on an annual imputation of \$28,386 in income to Raak, with the reduced monthly child support obligation for the two children who continue to reside primarily with Jacobs to commence retroactively to August 2017, the month in which S.R. first started residing with Raak and continuing until the end of the month the youngest child of the parties, A.R. (2006), either attains the age of 18 years old and graduates from high school or attains the age of 19 years old, whichever is the first to occur, unless modified by court order before then.

E. The District Court erred in its failure to allow evidence on the over \$76,000 financial windfall Jacobs received from her parents between February of 2015 and the January 25, 2019, evidentiary hearing

[¶29] If there is any question of the strength of the evidence on the issue of the over \$76,000 financial windfall Jacobs admitted she received from her parents between February of 2015, the month of the initial trial dates in this divorce action, and the January 25, 2019 evidentiary hearing, this Court must overturn the ruling of the District Court made during such hearing that evidence of the amount of money given to Jacobs by her parents

is not relevant to these proceedings based on the incorrect legal assumption that the money is not relevant to the issues of child support raised in these postjudgment proceedings, and remand this action back to the District Court for further proceedings on the issue of the financial windfall.

VI. Conclusion and Prayer for Relief

[¶30] For all of the foregoing reasons, it is respectfully requested that this Court reverse the District Courts' October 31, 2018, Order Denying Defendant's Motion to Redistribute Property and Request for Hearing, the February 21, 2019, Order on Contempt, and the May 13, 2019, Third Amended Judgment, and remand this case to the District Court with directions to: (1) hold an evidentiary hearing on Raak's Motion to Redistribute Property and resolve the issues raised by the motion based on the greater weight of the evidence introduced into evidence at the hearing; (2) enter an order on Jacobs' Motion to Hold Defendant in Contempt that concludes Raak is not in contempt; and (3) enter an order directing entry of an amended judgment that modifies the child support obligations of the parties retroactively to the month of August of 2017, as follows, consistent with the child support calculations contained in the worksheets found in the record as Index Nos. 280-283:

- a. Effective August 1, 2017, through December of 2017, Raak's monthly support payment to Jacobs shall be \$48 a month;
- b. Effective January 1, 2018, through December of 2018, Raak's monthly support payment to Jacobs shall be \$16 a month;

- c. Effective January 1, 2019, until the parties' oldest child attains the age of 18 and graduates from high school or attains the age of 19, whichever occurs first, Jacobs shall pay Raak a monthly child support payment of \$206; and
- d. After the parties' oldest child obtains the age of 18 and graduates from high school or attains the age of 19, whichever occurs first, Raak shall pay Jacobs a monthly child support payment of \$590, until the youngest child of the parties attains the age of 18 and graduates from high school or attains the age of 19, whichever occurs first.

¶31 Dated this 19th day of September, 2019.

¶32

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Certificate of Compliance with Page Limitation

¶33 I hereby certify that the foregoing document, *Appellant's Brief*, complies with the 38 page limit set out in Rule 32(a)(8)(A), N.D.R.App.P.

/s/ Arnold V. Fleck
Arnold V. Fleck (ND Bar ID# 04102)

Certificate of Service

¶34 I hereby certify that on the 25th day of September, 2019, the foregoing document, *Appellant's Brief*, was served on Sheila Keller, the attorney of record for the State of North Dakota, and Rodney Pagel, the attorney of record for the Appellee/Plaintiff, by emailing a digital/electronic copy of the *Brief* in *PDF* to the last known email addresses of each attorney as set out below and by requesting service of the document on each such attorney

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- d. After the parties' oldest child obtains the age of 18 and graduates from high school or attains the age of 19, whichever occurs first, Raak shall pay Jacobs a monthly child support payment of \$590, until the youngest child of the parties attains the age of 18 and graduates from high school or attains the age of 19, whichever occurs first.

[¶31] Dated this 19th day of September, 2019.

[¶32]

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Certificate of Service

[¶33] I hereby certify that on the 19th day of September, 2019, the foregoing document, *Appellant's Brief*, along with *Appellant's Appendix*, was served on Sheila Keller, the attorney of record for the State of North Dakota, and Rodney Pagel, the attorney of record for the Appellee/Plaintiff, by requesting service of the documents on each such attorney through the North Dakota Supreme Court E-Filing Portal operated by the North Dakota Court System at:

<https://scefile.ndcourts.gov/Main.aspx>

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