

NORTH CAROLINA LAWYERS WEEKLY

FEBRUARY 11, 2013 | VOL. 25, NO. 49 | NCLAWYERSWEEKLY.COM | \$9.00 PER COPY

Wife's attorney sanctioned for leaving husband in jail

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Legal battles between ex-spouses can be bitterly contentious, but a recent decision by the federal Bankruptcy Court for the Eastern District of North Carolina set some ground rules attorneys may wish to heed.



Cort Walker

A lawyer in a Granville County case got her client's ex-husband thrown in jail for failing to pay his debts, but now finds herself out over \$9,000 when she failed to help him get out of jail once he declared bankruptcy.



Travis Sasser

Justin Raprager and his ex-wife, Kara Swenson, separated in 2007. In 2008, they entered into a consent order that obligated Raprager to pay Swenson \$250,000 by June 2011 as a buyout of her marital interest in Raprager's business. By April 2012, Raprager still had paid very little of it, and Swenson's

attorney, Lori Dutra, filed motions in Granville County District Court to enforce the consent order.

Dutra asked the court to incarcerate Raprager until the debt was paid. The court agreed to give Raprager until August to pay the balance. When he failed to do so, he was arrested in Wake County the Wednesday before Labor Day. The next day, Raprager's bankruptcy attorney, Cort Walker, filed a Chapter 13 bankruptcy petition on Raprager's behalf. The petition placed an automatic stay on all creditors seeking to collect debts from Raprager, including his ex-wife.

A mere 17 minutes later, Dutra received a fax notifying her of the petition, and asking her to cease all collection efforts against Raprager. Dutra later testified that she didn't believe there was anything she could do to help get Raprager released, although Raprager's attorneys said Dutra communicated that she was both unable and unwilling to do anything about Raprager's incarceration.

Raprager spent Labor Day weekend in the Granville County Jail. When court re-opened on Tuesday, Dutra filed a motion to modify the custody agreement between the ex-spouses and give Swenson temporary custody of their children. The motion did not mention the pending bankruptcy

case, but stated that the debtor had "the personal ability to determine the extent of his incarceration, as he has been ordered to pay an amount of money owed to purge himself of the contempt which is holding him in custody."

Meanwhile, Raprager's domestic attorney, Alicia Whitlock, was trying to spring Raprager from jail. A Wake County judge denied her habeas corpus motion around 4:37 on Friday afternoon. Because it was so late in the day before a holiday weekend, Whitlock did not attempt to contact the district court in Granville County, where Raprager had just been transferred. She filed her motion late Tuesday morning, and Raprager wound up getting out that Wednesday, after Whitlock and Dutra jointly drafted an order for release.

Using jail as an incentive

Walker asked the bankruptcy court to order sanctions against Dutra and Swenson for a willful violation of the automatic stay on collection efforts because of their failure to act to seek his release after learning about the bankruptcy petition. Raprager testified that he felt terrified of what would happen to him in jail, fearing he could potentially be raped once he was in a cell with six other men, and

embarrassed that his children knew he was in jail. He also said the incarceration forced him to miss a custodial weekend with his two eldest children.

Judge Stephani W. Humrickhouse agreed, finding that the continuation of a contempt action in a domestic proceeding constitutes a willful violation of an automatic stay because the arrest and subsequent incarceration are a part of the overall collection process. Dutra's actions, such as the reference to Raprager's ability to determine the extent of his incarceration, Humrickhouse said, provided evidence that his incarceration was being used as an incentive to enforce payment.

"It appears that [Dutra] first wanted to take advantage of the debtor's incarceration before taking any action for his release, since she attempted to use the fact of his incarceration as a basis for changing the custodial arrangements between the debtor and [Swenson]," Humrickhouse wrote. "Dutra's motion can only be interpreted to suggest that she and [Swenson] intended the debtor to remain incarcerated until he paid the purge amount owed to Defendants."

Dutra argued that she believed that she was unable to achieve Raprager's release, and therefore her inaction didn't warrant sanctions. Humrickhouse disagreed, saying Dutra never made any attempts to have him released, so there is no way to know whether she could have. The fact that Dutra had enough time to draft the custody motion, but failed to take any action to even attempt to secure a release supported a finding of willful behavior.

It is a creditor's responsibility to stop a collection, the court said, and if a creditor is uncertain about the scope of the automatic stay, she takes the risk of being assessed for damages if she fails to obtain clarification from the bankruptcy court.

Understand the stay

The court awarded Raprager \$9,356 in attorneys' fees for both Walker and Whitlock and compensation for emotional distress and phone bills incurred in jail. That reflects a deduction of \$2,000 from the fee award to Whitlock for failure to adequately file appropriate and timely motions to procure Raprager's release, which

would have mitigated his emotional distress.

Walker and Travis Sasser of Sasser Law Firm in Cary represented Raprager.

Walker said that most debtors, including Raprager, owe debts to more than one creditor, and the automatic stay on collection efforts is designed to place all creditors on equal footing, so one creditor can't get more than its fair share by applying undue pressure. Attorneys who practice in other areas may run into trouble if they're not familiar with the implications of a bankruptcy petition.

"I really do think it's important for parties to understand that when a bankruptcy case is filed, if they're not familiar with the parameters of the automatic stay, they should seek counsel and get advice," Walker said.

Dutra, of Currin & Dutra in Oxford, represented herself and Swenson. She declined to return calls for comment.

The 12-page decision is *In re Raprager* (Lawyers Weekly No. 13-05-0105). A full opinion brief can be found online at nclawyersweekly.com.

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