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ACTIONS TO ENFORCE STATUTORY PROVISIONS

This memorandum addresses the issue of whether a state agency or political subdivision may be subject to liability for failing to implement a statutorily mandated program and the type of legal action that may be brought against the agency or political subdivision for failing to implement the program.

BACKGROUND

In 1989, the Legislative Assembly enacted North Dakota Century Code Chapter 50-25.2 which provided for a vulnerable adult protective services program to be implemented and enforced by the Department of Human Services. The legislation, however, contained a provision that makes implementation of the program contingent upon an appropriation by the Legislative Assembly. Section 50-25.2-14 provides:

The department and county social service boards are not required to implement or enforce this chapter with respect to any region, area, or county of this state if the legislative assembly does not provide an appropriation to support the implementation and enforcement of this chapter within that region, area, or county.

This section is generally interpreted as relieving the Department of Human Services and county social service boards from the duty of providing vulnerable adult protective services unless the program is funded by the Legislative Assembly. This interpretation raises the issue of whether the repeal of Section 50-25.2-14 along with failure to provide funding would subject the department and county social service boards to possible civil liability for failing to implement the program.

Because the provision of adult protective services is intended to protect vulnerable adults from abuse or neglect, failure to provide the services mandated by law could result in continued harm to a vulnerable adult. If that harm resulted in provable damages, the failure of the department or county social service boards to provide protective services that could have prevented the harm may give rise to allegations of liability. Section 50-25.2-14 provides immunity for officials in any area in which the program is not funded.

AGENCY AUTHORITY TO REFUSE TO IMPLEMENT A STATUTORILY MANDATED PROGRAM

There is no general statutory authority for a state agency or political subdivision to refuse to implement a statutorily mandated program. There are statutes

authorizing agencies to eliminate specific programs, e.g., subsections 17 and 19 of North Dakota Century Code Section 50-06-05.1 authorize the Department of Human Services, with the consent of the Budget Section, to terminate the food stamp program and the energy assistance program if the rate of federal financial participation in administrative costs is decreased or limited. No similar statutory authority is granted an agency with respect to the implementation of the vulnerable adult protective services program.

Several statutes impose liability upon public servants for refusing to perform a statutorily imposed duty. Section 12.1-11-06 provides that "[a]ny public servant who knowingly refuses to perform any duty imposed upon him by law is guilty of a class A misdemeanor." Section 57-45-05 provides:

Every officer or employee of any political subdivision of this state who in any case knowingly refuses to perform any duty enjoined upon him by any provision in this title, or who consents to or connives at any evasion of the provisions of this title whereby any proceeding is prevented or hindered, is guilty of malfeasance in office, and is subject to removal from office. Any person aggrieved by the failure of any officer or employee to perform his duties as provided in this title may file a complaint under section 12.1-11-06. In addition, the state's attorney or any aggrieved party may proceed to obtain a writ of mandamus to compel performance by such officer or employee. Any failure of an officer or employee to do any act at the particular time specified in this title in no manner invalidates any tax levy, or any certificate of tax sale, or tax deed.

Note, however, that the vulnerable adult protective services program duties are imposed by Chapter 50-25.2. Thus, Section 57-45-05 would not apply in this instance because it refers to duties imposed by Title 54 (State Government).

ACTIONS TO ENFORCE STATUTORILY MANDATED DUTIES

An action to require a state agency or political subdivision to implement a statutorily mandated program would be finalized only by a decision of the North Dakota Supreme Court. An Attorney General's opinion does not require an official to act, and a district court decision can be appealed. The means to get the issue before the Supreme Court could either be through a district court action or through a proceeding under the original jurisdiction of the Supreme Court.

Section 2 of Article VI of the Constitution of North Dakota provides that the Supreme Court has "original jurisdiction with authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its jurisdiction." North Dakota Century Code Section 27-02-04 concerns the jurisdiction of the Supreme Court and provides, in part:

Such court, in the exercise of its original jurisdiction, may issue writs of habeas corpus, mandamus, quo warranto, certiorari, and injunction. In the exercise of its appellate jurisdiction, and in its superintending control over inferior courts, it may issue such original and remedial writs as are necessary to the proper exercise of such jurisdiction. Such court shall exercise its original jurisdiction only in habeas corpus cases and in such cases of strictly public concern as involve questions affecting the sovereign rights of this state or its franchises or privileges.

Original Jurisdiction

Writ of Mandamus

North Dakota Century Code Chapter 32-34 governs the writ of mandamus. Section 32-34-01 provides that the writ of mandamus may be issued by the Supreme Court and district courts to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station.

The Supreme Court has held that a petition for a writ of mandamus will be granted only if the petitioner has a clear and legal right to the performance of the act sought to be compelled, and mandamus does not lie to compel a discretionary act. *Keidel v. Mehrer*, 464 N.W.2d 815 (N.D. 1991).

Writ of Certiorari

North Dakota Century Code Chapter 32-33 governs the writ of certiorari. Section 32-33-01 provides that a writ of certiorari will be granted by the Supreme Court or district court when an officer, board, tribunal, or inferior court has exceeded the jurisdiction of that officer, board, tribunal, or inferior court, as the case may be, and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy, and also when, in the judgment of the court, it is deemed necessary to prevent miscarriage of justice.

Injunction

North Dakota Century Code Section 32-06-02 authorizes an injunction to be granted in certain enumerated cases. An injunction is a court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury. Generally, it is a preventive and protective remedy,

aimed at future acts, and is not intended to redress past wrongs.

Appellate Jurisdiction

Declaratory Judgment

North Dakota Century Code Chapter 32-23 governs declaratory judgments. Section 32-23-01 authorizes a court to declare rights, status, and other legal relations whether or not further relief is or could be claimed. The declaration may be either affirmative or negative in effect, and the declaration has the force and effect of a final judgment or decree. Section 32-23-02 provides that any person whose rights, status, or other legal relations are affected by statute may have any question of construction or validity arising under the statute determined and may obtain a declaration of rights, status, or other legal relations under the statute. The Supreme Court, in *Langer v. State*, 284 N.W. 238 (1939) had before it a declaratory judgment action. In *Langer*, members of the state budget board brought an action for declaratory judgment to determine whether certain state officials were required to furnish statements of expenses under a 1915 law. The appeal to the Supreme Court was from a declaratory judgment of the district court. The court cited the conditions which must be met for a party to obtain declaratory relief. The conditions were: (1) a justiciable controversy must exist (a controversy in which a claim of right is asserted against one who has an interest in contesting it); (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legally protectable interest; and (4) the issue must be ripe for judicial determination.

Writ of Prohibition

North Dakota Century Code Chapter 32-35 provides for a writ of prohibition. The writ of prohibition is the counterpart of the writ of mandamus in that it arrests or suspends the proceedings of any person when the proceedings are without or in excess of the jurisdiction of that person. The writ may be issued by the Supreme Court and district courts when there is not a plain, speedy, and adequate remedy in the ordinary course of law.

Criminal Action

As discussed earlier in this memorandum, North Dakota Century Code Section 12.1-11-06 provides that any public servant who knowingly refuses to perform any duty imposed upon him by law is guilty of a Class A misdemeanor.

CONCLUSION

North Dakota Century Code Section 50-25.2-14 provides that, in the absence of a legislative appropriation for the vulnerable adult protective services program, the Department of Human Services and

county social service boards are not required to implement and enforce the program. Thus, it is likely that, in the absence of funding, the Department of Human Services and county social service boards would be immune from liability for failing to enforce Chapter 50-25.2. If Section 50-25.2-14 is repealed, it appears that liability may exist. Other than statutes addressing specific programs, there is no statutory authority for any official of a state agency or political

subdivision to refuse to implement a program mandated by the Legislative Assembly.

Various judicial remedies exist to require the Department of Human Services to implement a mandated program. Depending upon the specific relief sought, the action may be in the nature of seeking a writ of mandamus to compel the department to implement the program.