

**LETTER OPINION
2003-L-10**

February 21, 2003

Mr. Jeffrey K. Leadbetter
Ransom County State's Attorney
PO Box 511
Lisbon, ND 58054-0511

Dear Mr. Leadbetter:

The former Ransom County state's attorney asked whether the state or the county is responsible for the cost of incarcerating a person found in contempt of court for failure to pay child support.¹ Specifically, the question was whether the state is liable because the incarceration is related to child support enforcement, which is a civil matter, and because child support enforcement is a "state regulated function." Administration of the child support enforcement program is the responsibility of the counties, subject to the direction and supervision of the North Dakota Department of Human Services. N.D.C.C. § 50-09-02(16); N.D.C.C. § 50-09-03(5). Liability for the costs of incarceration, however, is determined not by the civil nature of the matter, nor by the

¹ N.D.C.C. § 27-10-01.1(1) defines "contempt of court" in terms of seven types of conduct. To be in contempt of court, a person must be before a "court," which is defined as a "court of record of this state." N.D.C.C. § 27-10-01.1(2). Where contempt of court is found to have occurred, the court may impose either a remedial or punitive sanction. N.D.C.C. § 27-10-01.2(1). A remedial sanction is one which "includes a sanction that is conditioned upon performance or nonperformance of an act required by court order." N.D.C.C. § 27-10-01.1(4). The North Dakota Supreme Court explained the nature of civil remedial contempt proceedings against an obligor who failed to pay court-ordered child support in Baier v. Hampton, 417 N.W.2d 801 (N.D. 1987): "Usually, in civil contempt, the sanction is conditional in nature so that contemnors carry 'the keys of their prison in their own pockets' and stand committed unless and until they perform an affirmative act." Id. at 805 (citing Shillitani v. United States, 384 U.S. 364, 368 (1966) (which quotes In Re Nevitt, 117 F. 448, 461 (8th Cir. 1902)). Thus, incarcerating a person for contempt of court for failure to pay past due child support unless and until the child support is paid is a remedial sanction that incorporates the traditional characteristics of civil contempt. See Endersbe v. Endersbe, 555 N.W.2d 580, 583 (N.D. 1996).

respective roles of the counties and state in child support enforcement. Rather, it is determined by the Legislature's allocation of the expense of maintaining county correctional facilities.²

This office addressed an analogous question in the past. The Attorney General was asked whether the state was responsible for the confinement costs incurred by the county in a felony criminal case. The Attorney General said:

The responsibility for confinement costs of persons charged with a felony offense rests with the county. N.D.C.C. § 11-10-20 requires the board of county commissioners to provide a jail. In addition, N.D.C.C. § 12-44.1-02(1) requires a county to establish and maintain a jail at county expense or to contract with other counties or cities for jail services or the establishment of a regional correction center.

N.D.A.G. Letter to Baer (Sept. 11, 1985). See also N.D.A.G. 2002-L-04 ("the Legislature has not authorized any procedure for the reimbursement [by a prisoner] of incarceration costs"); N.D.C.C. § 12-44.1-12.1 (authorizing a correctional facility to assess an inmate or seek reimbursement for certain medical costs).

The Attorney General further said:

The duty of a county to establish and maintain a county jail, to provide for jail services, and to insure adequate care of the prisoners within its custody is not dependent upon whether or not the person has been charged with a felony or misdemeanor. The Ohio Court of Appeals in Cuyahoga County Hospital v. City of Cleveland, 472 N.E.2d 757 (Ohio App. 1984), was faced with a similar question as presented in your letter. The Court held that the nature of the offense is not the determining factor in placing the responsibility for the care and confinement of prisoners. The Court stated at 759:

The responsibility for the care and sustenance of a prisoner falls upon the one who exerts actual, physical dominion and control over the prisoner. When physical control is transferred, the responsibility is transferred along with it and the cost of care can be properly prorated. The care the

² Whether a person is incarcerated in a county jail is determined by the court, the category of the offense, and the grade of the facility. See, e.g., N.D.C.C. §§ 12.1-33-02, 12-44.1-06(1), 12-44.1-07, 29-27-04, 29-27-05, and 29-27-07.

prisoner receives is not incident to the crime, but to the custody.

N.D.A.G. Letter to Baer (Sept. 11, 1985).

Chapter 12-44.1, N.D.C.C., has undergone extensive revision since the 1985 opinion. However, N.D.C.C. §§ 11-10-20 and 12-44.1-02(1) still require a county to establish and maintain a correctional facility at county expense. More recently, the Attorney General cited the 1985 opinion in support of the conclusion that “a county is ordinarily liable for the confinement costs of a person charged with a state law violation, even though the state law violation occurred within the city limits of a city located within a county.” N.D.A.G. Letter to Rohrich (Aug. 26, 1999).

Sections 11-10-20 and 12-44.1-02(1), N.D.C.C., do not contain any expression of legislative intent suggesting that responsibility for the costs of the remedial sanction of incarceration of a person found in contempt of court is different from responsibility for incarceration costs of a person charged with a state criminal law violation. Therefore, it is my opinion that a county is liable for the cost of the remedial sanction of incarceration of a person found in contempt of court for failure to pay past due child support.

Sincerely,

Wayne Stenehjem
Attorney General

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