

**LETTER OPINION  
2004-L-24**

March 31, 2004

Ms. Carol Olson  
Executive Director  
North Dakota Department of Human Services  
600 E Boulevard Ave Dept 325  
Bismarck, ND 58505-0250

Dear Ms. Olson:

Thank you for your letter asking whether a court order is necessary before the official child support payment records maintained by the Department of Human Services (Department) under N.D.C.C. § 50-09-02.1 may be revised to reflect the payment of children's benefits to or on behalf of a child for whom an obligor owes a duty of support for periods of time on or after January 1, 1995.

For the reasons discussed below, it is my opinion a court order is not necessary to revise the official child support payment records to reflect the payment of children's benefits, as long as the payment is intended to cover a period of time occurring on or after January 1, 1995, and the amount to be credited by month does not exceed the amount of child support owed for the period of time intended to be covered by the payment.

**ANALYSIS**

The presumptively correct amount of child support that is owed in a case is determined under the child support guidelines ("Guidelines") adopted as administrative rules by the Department of Human Services.<sup>1</sup> See N.D.C.C. § 14-09-09.7. Beginning on January 1, 1995, the Guidelines have included the following provision:

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<sup>1</sup> This opinion is limited to child support accruing under an order governed by North Dakota law and not to orders issued by other states that are being enforced in North Dakota. See N.D.C.C. §14-12.2-38 (law of issuing state governs nature of current payments).

A payment of children's benefits<sup>2</sup> made to or on behalf of a child who is not living with the obligor must be credited as a payment toward the obligor's child support obligation in the month (or other period) the payment is intended to cover, but may not be credited as a payment toward the child support obligation for any other month or period.

N.D.A.C. § 75-02-04.1-02(11) (emphasis added). The most common form of "children's benefits" is social security disability dependency benefits. See, e.g., Tibor v. Bendrick, 593 N.W.2d 395 (N.D. 1999).

After the initial 1995 amendments to the Guidelines were proposed, N.D.A.C. § 75-02-04.1-02(11) was added in response to several comments to "[address] the proper crediting of payments [as opposed to the computation of a child support amount under the Guidelines]." Summary of Comments Received in Regard to Proposed Amendments to N.D. Admin. Code Ch. 75-02-04.1, at p.11 (Nov. 14, 1994). Thus, although the Guidelines generally address the question "how much should the obligor pay?", this particular provision addresses a permitted method of satisfying the Guideline amount of support, i.e. through the payment of children's benefits to or on behalf of the child or children.

The North Dakota Supreme Court interpreted N.D.A.C. § 75-02-04.1-02(11) in Tibor v. Bendrick, 593 N.W.2d 395 (N.D. 1999). In Tibor, the Supreme Court stated that "the guidelines expressly provide that benefits, including social security disability dependency benefits, must be credited as a payment towards Bendrick's child support obligation for the particular months or period the payment was intended to cover." Id. at 397 (emphasis added).

Section 75-02-04.1-02(11), N.D.A.C., provides, in effect, that payment of children's benefits is the equivalent of cash and must be applied dollar-for-dollar to the obligor's child support obligation. The rule, particularly as interpreted in Tibor, does not leave any room for discretion to refuse to give the obligor credit for children's benefits up to the amount due in the period covered by the benefits.

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<sup>2</sup> The phrase "children's benefits" is defined in the Guidelines as:

[A] payment, to or on behalf of a child of the person whose income is being determined, made by a government, insurance company, trust, pension fund, or similar entity, derivative of the parent's benefits or a result of the relationship of parent and child between such person and such child. Children's benefits do not mean benefits received from means tested public assistance programs.

The sole purpose of a court hearing on a request for credit for children's benefits would appear to be to confirm the date and amount of benefits that were paid to or on behalf of the child or children to whom the obligor owes a duty of support. When there is sufficient documentation, such as when an obligor provides a copy of a benefit statement from the Social Security Administration or other government agency, or agreement between the parties regarding the date and amount of benefits, obtaining a court order to receive credit for those benefits simply adds expense to the parties and consumes judicial resources to produce an outcome that is specified by the rule.

Thus, it is my opinion a court order is not necessary to revise the official child support payment records to reflect the payment of children's benefits, as long as the payment is intended to cover a period of time occurring on or after January 1, 1995, and the amount to be credited by month does not exceed the amount of child support owed for the period of time intended to be covered by the payment.<sup>3</sup>

I understand an obligor who has not yet received credit for children's benefits as permitted in this opinion has often made full or partial child support payments during a time period that is covered by those benefits. Once the credit for the children's benefits is given for prior months, a "surplus" may be created for those months as a result of the actual collections. Consistent with the discussion of child support overpayments in N.D.A.G. 96-F-24, the "surplus" created by the actual collections should first be applied to any existing arrearage, but any remaining balance should not be considered a pre-payment of future child support without a court order providing that the collections should be applied to future support rather than be refunded by the custodial parent or assignee. C.f. N.D.C.C. § 14-09-09.33(4); N.D.A.G. 96-F-24 (public policy of periodic child support payments is to ensure that the child's needs are met on an ongoing, continuous basis).

Sincerely,

Wayne Stenehjem  
Attorney General

jcf/vkk

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<sup>3</sup> This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).