

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-24

Date issued: December 31, 1996

Requested by: Doug Mattson, Ward County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether funds received by a clerk of court from or on behalf of a child support obligor in excess of the obligor's monthly child support obligation can be applied by the clerk to reduce or suspend the amount of child support required to be withheld and paid to the clerk under an income withholding order.

II.

How should funds received by a clerk of court from or on behalf of a child support obligor in excess of the obligor's monthly child support be treated by the clerk in relation to an obligor's future monthly support obligations and any arrears?

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that funds received by a clerk in excess of the obligor's monthly child support obligation do not affect the obligor's "current monthly support obligation" under a court order or judgment, and therefore cannot be applied by the clerk to reduce or suspend amounts due under an income withholding order unless the excess funds eliminate any arrearages owed by the obligor.

II.

It is my opinion that the amount of funds received by the clerk in excess of the obligor's monthly child support obligation must be applied to reduce any child support arrears owed by the obligor when the funds are received and may otherwise be returned to the obligor or treated as a voluntary payment for the immediate benefit of the supported child or children, but may not be treated as a prepayment of future monthly child support obligations.

- ANALYSES -

I.

State law requires that child support "be paid to the clerk of court, as trustee, for remittance to the obligee." N.D.C.C. § 14-09-08.1(1). The phrase "child support" is defined in N.D.C.C. § 14-09-09.10(1) to mean "payments for the support of children . . . if the payment is required by the order of a court." (Emphasis added.) The question presented results from cases where a clerk of court receives funds from or on behalf of a person owing child support (obligor) in excess of the monthly amount the obligor is required to pay by an order of the court.¹

Child support is frequently paid by an income payor under an income withholding order rather than by the obligor directly. See generally N.D.C.C. § 14-09-09.10(6), (7) ("income" and "income payor" defined); 1990 N.D. Op. Att'y Gen. 115, 117 (four types of income withholding). With limited exceptions not relevant to this opinion, every judgment or order requiring the payment of child support that is issued or modified after January 1, 1990, subjects the income of the obligor to immediate income withholding. N.D.C.C. § 14-09-09.24. Income withholding may also be required if an obligor is delinquent, upon request of the person to whom child support is owed (obligee), or if one of the exceptions to immediate income withholding no longer applies. N.D.C.C. § 14-09-09.13.

N.D.C.C. § 14-09-09.17 authorizes a clerk of court to amend or suspend an income withholding order under certain circumstances:

An income withholding order is to be amended by the clerk when the total amount of money to be withheld is changed by elimination of arrearages or by court-ordered change in amount of child support. An income withholding order is to be terminated when the duty to support ceases and all child support arrearages have been paid.

¹ This opinion assumes, when using the phrase "excess funds," that there is no current child support obligation in another state imposing a higher amount. An order or judgment imposing such an obligation would be entitled to full faith and credit in North Dakota until properly modified. See N.D.C.C. § 14-08.1-05 (arrearages); N.D.C.C. ch. 14-12.2 (future monthly support level); 28 U.S.C. § 1738B (same).

A payment of excess funds is not a court-ordered change in amount, nor does it terminate the obligor's duty to pay monthly child support. Thus, this section provides that a clerk may only amend an income withholding order upon receipt of excess funds if the excess funds eliminate any existing arrears. The use of excess funds to pay existing arrears is discussed later in this opinion.

N.D.C.C. § 14-09-09.17 does not expressly prohibit a clerk from otherwise modifying or terminating an income withholding order, but an examination of the statutory formula for determining the amount of child support to include in an income withholding order indicates that the clerk is precluded from treating the excess funds as a credit for purposes of reducing or suspending an income withholding order.

N.D.C.C. § 14-09-09.16 provides in part:

The income withholding order shall state . . . (1) [t]hat the obligor is properly subject to an income withholding order and that the income payor is therefore required to withhold a stated amount, determined under subsection 3 of section 14-09-09.13, from the obligor's income at the time the obligor is paid for transmittal to the clerk of court
. . . .

See also Letter from Attorney General Nicholas Spaeth to James Odegard (November 24, 1992). Under subsection 3 of N.D.C.C. § 14-09-09.13, the amount an income payor is required to withhold is the sum of the obligor's "current monthly support obligation" and the amount the obligor is ordered to pay towards any arrearages.² The phrase "current monthly support obligation" means "the monthly amount of support established under a judgment of divorce, separation, annulment or paternity (and, if modified, under the modification)." 1992 N.D. Op. Att'y Gen. 48. This definition does not include any funds received by the clerk in excess of the obligor's monthly child support obligation. Therefore, it is my opinion that a clerk of court may not treat the excess funds as a credit for purposes of reducing or suspending an income withholding order unless the excess funds eliminate any arrearages owed by the obligor.

² If there is an arrearage and no order to pay arrears exists, then the amount should include twenty percent of the current monthly obligation, if any, or else an amount equal to the obligor's most recent monthly support obligation. N.D.C.C. § 14-09-09.13(3).

"Ordinarily, the calculation of the amount of income to be withheld is a simple matter." 1990 N.D. Op. Att'y Gen. at 118. However, although the amount stated in the income withholding order is based on the obligor's current monthly support obligation and any arrears, the amount an income payor may withhold under the order "may not exceed fifty percent of the obligor's disposable income from this income payor." N.D.C.C. § 14-09-09.16(3). This limitation creates some uncertainty for an obligor whose disposable income from an income payor fluctuates from month to month, because the difference between these two amounts, which must be paid by the obligor directly or from other income payors, will also fluctuate from month to month. Nevertheless, it is the obligor's responsibility to assure that sufficient child support is paid to the clerk each month to comply with the court order.

II.

Although the receipt of excess funds from or on behalf of an obligor will not affect an income withholding order unless the funds eliminate existing arrears, the question remains how the clerk should treat those funds in terms of monitoring child support received from an obligor and paid to an obligee.

The presumptive amount of support computed under the child support guidelines is a minimum requirement and does not prohibit an obligor from voluntarily paying additional child support, whether under contract or through a gift. As the North Dakota Court of Appeals has indicated,

[a]lthough the scheduled amounts of child support have been elevated from suggested amounts to presumptively correct amounts, the scheduled amounts have not changed from minimum contributions which help provide some assurances that minor children will receive adequate support and maintenance.

O'Callaghan v. O'Callaghan, 515 N.W.2d 821, 825 (N.D. Ct. App. 1994).

The general rule from other jurisdictions is that overpayments may not reduce or be credited against future court-ordered child support obligations. Harner v. Harner, 434 N.E.2d 465, 468 (Ill. Ct. App. 1982); Pellar v. Pellar, 443 N.W.2d 427, 430 (Mich. Ct. App. 1989); Ingalls v. Ingalls, 888 P.2d 967, 970 (N.M. Ct. App. 1994). See generally Robert A. Brazener, Annotation, Right to Credit On Accrued

Support Payments For Time Child Is In Father's Custody Or For Other Voluntary Expenditures, 47 A.L.R.3d 1031, 1055-57, § 15 (1973).

[A]ny excess payment made [has] to be considered a gratuity or at least a voluntary contribution for the support of the children, and not a prepayment of future support obligations. If non-court approved prepayments . . . were to be permitted, it would be possible for a parent, who is obligated to pay support, to build up a substantial credit, then suddenly refuse to make support payments for several weeks, months, or even years, thus thwarting the court's purpose in setting the payments at certain specified intervals, that of providing regular, uninterrupted income for the benefit of that parent's children, who are in the custody of another. The regularity and continuity of court decreed support payments are as important as the overall dollar amount of those payments.

Haycraft v. Haycraft, 375 N.E.2d 252, 255 (Ind. Ct. App. 1978).

These decisions are consistent with North Dakota law. It is clear from the statutory scheme of N.D.C.C. ch. 14-09 and the child support guidelines that child support obligations are computed and required to be paid on a monthly basis. "[T]he purpose of structuring support in terms of periodic payments for the duration of the child's minority is to ensure that the child's needs are met on an ongoing, continuing basis." Pellar, 443 N.W.2d at 430. This statutory purpose cannot be served if overpayments are applied to future monthly child support obligations.³ A court will not be bound by agreements between parents that limit the court's authority to establish or modify child support obligations. See Smith v. Smith, 538 N.W.2d 222, 226 (N.D. 1995).⁴

³ Rules of equity may apply to arrears or overpayments of child support in proper circumstances. See Brakke v. Brakke, 525 N.W.2d 687 (N.D. 1994); In re Marriage of Yanda, 528 N.W.2d 642 (Iowa Ct. App. 1994).

⁴ A motion to the court should be used, rather than a separate agreement between the parents, to change the amount or timing of child support payments currently required in a court order or judgment. Brakke, 525 N.W.2d at 690.

The rule that overpayments may not reduce future monthly support obligations does not, however, prohibit an overpayment from being applied to reduce any existing arrears.

The rationale of the rule prohibiting prospective crediting of overpayments is totally inapplicable to an arrearage that exists at the time of the overpayment. A rule which failed to credit overpayments against an existing arrearage would create a disincentive for obligated parents to voluntarily fulfill their delinquent child support obligations. . . . Furthermore, the only reasonable inference from an overpayment, standing alone and made at the time an arrearage exists, is that it is a payment on the arrearage.

Holy v. Lanning, 552 N.E.2d 44, 46 (Ind. Ct. App. 1990) (footnote omitted). This decision is also consistent with North Dakota law.⁵ A payment of arrears is a payment of child support that is overdue. Not only is the clerk of court required to accept such child support payments under N.D.C.C. § 14-09-08.1, the clerk is required in the same section to send notice of arrears to the obligor or request a citation of contempt from the court. These obligations would not be satisfied if there are arrearages and the clerk returned the excess funds or applied the overpayment to future child support obligations rather than to past obligations that were overdue.

As long as there are no existing arrearages, nothing requires nor prohibits a clerk from notifying an obligor that the clerk has received excess funds before remitting the funds to the obligee. Without more information, the clerk would not know whether the overpayment was an error, possibly made by the income payor without the obligor's knowledge, or a voluntary payment on behalf of the child or children. Any fiduciary duty the clerk might owe to an obligee as "trustee" under N.D.C.C. § 14-09-08.1 would be limited to required payments of "child support" as the phrase is defined in N.D.C.C. § 14-09-09.10. However, based on the decisions cited in this opinion, it is my opinion that unless the clerk returns to the obligor any excess funds remaining after existing arrears are paid, the funds must be considered a voluntary payment for the immediate benefit of the supported child or children and cannot be treated as a prepayment of future monthly child support obligations.

⁵ N.D.C.C. § 14-09-08.1(8) requires that, when support rights are assigned to the state, payments be credited and transmitted in accordance with federal law. See 45 C.F.R. § 302.51.

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- EFFECT -

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 questions presented are decided by the courts.

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