

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-05

Date Issued: February 9, 1998

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

- QUESTION PRESENTED -

Whether a child support obligor has made an excess payment which should be returned to the obligor or forwarded to the obligee without credit against future child support obligations when the obligor is current with all obligations and makes a payment a few days before the next monthly support obligation is due.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a payment received by a clerk of court on behalf of a child support obligor who is current with all support obligations is not an excess payment which should be returned to the obligor or forwarded to the obligee without credit against future monthly child support obligations when that payment is received shortly before the next monthly child support obligation becomes due and, under the circumstances, it appears reasonable to believe that this payment is intended to be for the current monthly support obligation and that the payment does not appear intended to be a gift to the supported child or children or intended to build up a substantial credit or interfere with the obligor's duty to provide regular uninterrupted income on an ongoing, continuing basis.

- ANALYSIS -

1996 N.D. Att'y Gen. 127 stated that funds received by a clerk of court in excess of a child support obligor's monthly child support obligation do not affect the obligor's current monthly support obligation under a court order or judgment, and may not 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. This opinion further stated that any funds received in excess of the obligor's monthly child support obligation must be applied to reduce any child support arrears owned 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 that this payment may not be treated as a prepayment of future monthly child support obligations. You have asked whether a payment from an obligor with no arrears received a few days before the next date that a monthly support obligation is due is an excess payment which should be returned to the obligor or treated as a voluntary payment for the immediate benefit of the supported child or children.

1996 N.D. Att'y Gen. 127 stated a line of reasoning demonstrating that there is a public purpose for imposing a recurring, periodic obligation on a child support obligor for the support of his or her children:

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. 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).

1996 N.D. Op. Att'y Gen. 127, 130-131 (footnotes omitted). This situation is not presented when a current obligor makes a payment a few days before the next monthly support obligation becomes due.

Therefore, it is my opinion that a payment received from a child support obligor is not an excess payment when circumstances indicate that the payment was intended to meet the obligor's next monthly child support obligation and where the circumstances do not indicate that the payment was an error, a gift or voluntary payment on behalf of the child or children, or an attempt by the obligor to build up a substantial credit for the purpose of avoiding the duty to make periodic payments.

- 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 question presented is decided by the courts.

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