

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 90-14

Date issued: June 4, 1990

Requested by: Merle A. Torkelson  
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- QUESTIONS PRESENTED -

I.

Whether a clerk of court must issue an income withholding order with respect to each judgment or order that requires a payment of child support when the court has not made a finding regarding income withholding and the parties' agreement does not provide an assurance of payment beyond requiring that payments be made to the clerk.

II.

Whether a judgment or order that includes an order for the support of a minor child must conform to N. D. C. C. ' 14-09-09. 12 when immediate income withholding is required by N. D. C. C. ' 14-09-09. 24.

III.

Whether an assignee of support rights must agree to an alternative arrangement for assuring the regular payment of child support in order that immediate income withholding not be required by N. D. C. C. ' 14-09-09. 24.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a clerk of court must issue an income withholding order, with respect to each judgment or order that requires a payment of child support, when the court has not made a finding regarding income withholding and the parties' agreement does not provide an assurance of payment beyond requiring that payments be made to the clerk.

II.

It is my further opinion that a judgment or order that includes an order for the support of a minor child must conform to N. D. C. C. ' 14-09-09. 12 when immediate income withholding is required by N. D. C. C. ' 14-09-09. 24.

III.

It is my further opinion that an assignee of support rights must agree to an alternative arrangement for assuring the regular payment of child support in order that immediate income withholding not be required by N. D. C. C. ' 14-09-09.24.

- ANALYSES -

This opinion concerns the proper application of N. D. C. C. ' 14-09-09.24, which provides:

14-09-09.24. Immediate income withholding.

1. Except as provided in subsection 2, each judgment or order which requires the payment of child support, issued or modified on or after January 1, 1990, subjects the income of the obligor to income withholding, regardless of whether the obligor's support payments are delinquent.
2. If a party to a proceeding, who would otherwise be subject to immediate income withholding under subsection 1, demonstrates, and the court finds that there is good cause not to require immediate withholding, or if the parties, including any assignee of support rights, reach a written agreement that provides for an alternative arrangement for assuring the regular payment of child support, the court need not subject the income of the obligor to immediate withholding.

N. D. C. C. ' 14-09-09.24 makes immediate income withholding the rule, but creates two exceptions. The first exception requires a party to demonstrate, and the court to find, that there is good cause not to require immediate income withholding. The second allows the parties to assure payment by a written agreement.

I.

Your first question assumes the only basis for avoiding immediate income withholding is the parties' agreement. You indicate that the parties have signed a written agreement to the effect that "the obligor shall pay all child support payments to the clerk of court." Such a term in the parties' agreement does not conform to the requirements of N. D. C. C. ' 14-09-09.24(2).

If the statutory requirements are to be met, the parties must both agree in writing and provide "for an alternative arrangement for assuring the regular payment of child support." N. D. C. C. ' 14-09-09.24(2). "Assure" means "[t]o make certain and put beyond doubt." Black's Law Dictionary 113 (5th ed. 1979). A requirement that payments be made to the clerk of court does not afford any assurance of regular payment.

Subsection 1 of N. D. C. C. ' 14-09-08.1 provides that "[i]n any action in which a court orders that payments for child support be made, the court shall provide in its order that the payments be paid to the clerk of court, as trustee, for remittance to the obligee." Thus, by statute the obligor must make child support payments to the clerk, whether or not the parties agree. This subsection concludes with instructions as to what the clerk should do "[w]henever there is a failure to make the payments as required." N. D. C. C. ' 14-09-08.1(1). A provision for payment of child support obligations to the clerk does not "assure" regular payment of those obligations. An assurance requires more, perhaps a bond, a pledge, or some other commitment that makes the regular payment of child support a certainty. The parties are free to structure the kind of arrangement they choose, but they must reduce the arrangement to writing, and provide for some alternative to immediate income withholding that "assures" the regular payment of child support.

A court's statement in a divorce order or judgment simply requiring payment of child support to the clerk of court will also not suffice to avoid immediate income withholding. Subsection 2 of ' 14-09-09.24 authorizes the court to exempt the obligor from immediate income withholding only "[i]f a party to the proceeding . . . demonstrates and the court finds that there is good cause not to require immediate withholding." N. D. C. C. ' 14-09-09.24 requires a factual determination by the court, based upon evidence. If the court makes such a finding, the court also may specify in the order or judgment that the obligor is to make payments to the clerk of court, but the court may not substitute that specification for a finding that there is good cause not to require immediate income withholding. In any event, N. D. C. C. ' 14-09-08.1(1) mandates that payments be made to the clerk of court even if the order or judgment is silent on the subject.

## II.

North Dakota statutorily requires a notice of the impact of the income withholding law. N. D. C. C. ' 14-09-09.12 provides:

Each judgment or order issued by a court in this state which includes an order for support of minor children must include a statement that a delinquency in payment of the support due or the approved request of the obligee will result in an income withholding order being issued in accordance with this chapter.

The statute mandates the court to include the required statement in each judgment or order. The statute makes no exception for situations in which the obligor is already subject to income withholding by virtue of N. D. C. C. ' 14-09-09.24(1). In a situation in which the obligor is already subject to income withholding, N. D. C. C. ' 14-09-09.12 is not in conflict with N. D. C. C. ' 14-09-09.24. Rather, the statement required by N. D. C. C. ' 14-09-09.12 only appears meaningless because income withholding has commenced in the absence of either a delinquency or an approved request of the obligee.

The Legislative Assembly enacted N.D.C.C. ' 14-09-09.12 as section 3 of House Bill No. 1903 in the 1986 special session. 1987 N.D. Sess. Laws ch. 183, '3. At the time of its enactment, no statute provided for immediate income withholding or for income withholding upon the approved request of an obligee. See N.D.C.C. " 14-09-09.24, - 09.25. The 1989 Legislative Assembly enacted the provisions concerning immediate income withholding and income withholding due to the approval of an obligee's income withholding request as sections 7 and 8 of Senate Bill No. 2245. 1989 N.D. Sess Laws ch. 148, " 7, 8. Section 9 of Senate Bill No. 2245 amended N.D.C.C. ' 14-09-09.12 to include notice of the impact of an approved request of the obligee. Id. ' 9. The legislature did not, at that time, remove the requirement for the notice in cases in which income withholding was already required. The legislative history of Senate Bill No. 2245 reveals no explanation for this omission.

While the required notice may serve little purpose in the case of orders or judgments in which the obligor is already subject to immediate income withholding, the law nonetheless requires the court to provide such a notice. Although no specific language is required, it may be a useful practice to incorporate the required notice in a statement such as:

North Dakota law requires that this order include a statement that a delinquency in the payment of the support due or the approved request of the obligee will result in an income withholding order being issued in accordance with N.D.C.C. ch. 14-09. A separate provision of law requires, in this case, that the income of the obligor be subject to income withholding, regardless of whether the obligor's support payments are delinquent.

### III.

When the parties reach a written agreement that provides for an alternative arrangement for assuring the regular payment of child support, the income of a person required to pay child support may not be subject to immediate income withholding. N.D.C.C. ' 14-09-09.24(2). N.D.C.C. ' 14-09-09.24(2) provides that this exception to the immediate income withholding requirement applies "if the parties, including any assignee of support rights," reach such an agreement. The statute specifically contemplates that in cases in which support rights have been assigned, the assignee of the support rights must participate in that written agreement. The participation of an assignee is essential because if the support right has been assigned, an agreement made by the assignor following the assignment may be in derogation of the assignment, and would not be effective to bind the assignee. Thus, the agreement of the assignee is necessary to assure that all real parties in interest are satisfied with the assurance of regular support.

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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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