

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 90-30

Date issued: December 11, 1990
Requested by: Tom P. Slorby
Ward County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether an unsatisfied money judgment for liability for child support obtained under N. D. C. C. ' 14-08.1-01 may be enforced by an income withholding order.

II.

Whether the immediate income withholding procedures or the income withholding procedures attendant upon delinquent child support payments should be applied to unsatisfied money judgments for liability for child support.

III.

Whether an amount of withholding can be calculated where no monthly amount of child support or monthly arrearage payment has ever been ordered.

IV.

Whether an income withholding order may issue for judgments which were entered prior to the effective date of the income withholding statute.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that an unsatisfied money judgment for liability for child support obtained under N. D. C. C. ' 14-08.1-01 may be enforced by an income withholding order.

II.

It is my further opinion that the immediate income withholding procedures under N. D. C. C. ' 14-09-09.24 may be applied to each such judgment issued after January 1, 1990, unless the court acts pursuant to N. D. C. C. ' 14-09-09.24(2) to refrain from subjecting the payor to immediate income withholding; and that the income withholding procedures attendant upon delinquent child support payments may be applied in cases not subject to immediate income withholding.

III.

It is my further opinion that an amount of withholding cannot be calculated where no monthly amount of child support or arrearage payment has ever been ordered.

IV.

It is my further opinion that an income withholding order may issue for judgments which were entered prior to the effective date of the income withholding statute.

- ANALYSES -

I.

N. D. C. C. ' 14-08.1-01 provides:

14-08.1-01. Liability for support. A person legally responsible for the support of a child under the age of eighteen years who is not subject to any subsisting court order for the support of the child and who fails to provide support, subsistence, education, or other necessary care for the child, regardless of whether the child is not or was not in destitute circumstances, is liable for the reasonable value of physical and custodial care or support which has been furnished to the child by any person, institution, agency, or county social service board. Any payment of public assistance money made to or for the benefit of any dependent child creates a presumption that such payment equals the reasonable value of physical and custodial care or support.

Any person who has supported a child has a claim for recovery of the value of the child support furnished from a person who is legally responsible for the support of a child. N. D. C. C. ' 14-08.1-01. "Child support" is defined as "payments for the support of children . . . if the payment is required by the order of a court or other governmental agency having authority to issue such orders." N. D. C. C. ' 14-09-09. 10(1).

In practice, public agencies are often called upon to support children and N. D. C. C. ' 14-08.1-01 is commonly used in attempts to recover the cost of that support. When support orders are entered in actions brought under N. D. C. C. ' 14-08.1-01, a money judgment may be entered requiring payment for child support previously furnished in the form of public assistance.

It is my opinion that a judgment or order requiring the payment of child support may be enforced by an income withholding order, as provided in N. D. C. C. ch. 14-09, in addition to any other remedies provided by law. N. D. C. C. ' 14-09-09. 11. A judgment entered under N. D. C. C. ' 14-08.1-01 also requires the payment of "child support," as that term is defined by law, and

may be enforced by an income withholding order in addition to any other remedies provided by law. N. D. C. C. ' 14-09-09. 11.

II.

An income withholding order is directed to an "income payor" who owes income to an "obligor." N. D. C. C. ' 14-09-09. 10(7). An "obligor" is "any person owing a duty of support." N. D. C. C. ' 14-09-09. 10(9). There are four types of income withholding remedies under North Dakota law.

Voluntary income withholding allows the obligor to pay support through a self-initiated payroll deduction system. N. D. C. C. ' 14-09-09. 6.

Delinquency related withholding may be used only when the obligor becomes "delinquent" in child support payments. The fact of delinquency triggers a process which obligates the income payor to pay money otherwise due to the obligor to the clerk of court in satisfaction of the obligor's child support obligation. N. D. C. C. " 14-09-09. 13 through 14-09-09. 16.

The third type of income withholding is "immediate" income withholding. N. D. C. C. ' 14-09-09. 24. Immediate income withholding of the obligor's income applies if a judgment or order which requires the payment of child support was issued or modified on or after January 1, 1990, unless the judgment or order provides there is good cause not to require income withholding or the parties reach a written agreement providing for an alternative method of assuring payment of child support. In this circumstance the obligor's income is subject to withholding regardless of whether support payments are delinquent.

The fourth type of income withholding is obligee requested income withholding. N. D. C. C. ' 14-09-09. 25. In this type, the "obligee" (defined as "a person including a state or political subdivision to whom a duty of support is owed." N. D. C. C. ' 14-09-09. 10(8)) applies to a child support agency for approval of an income withholding request. If the request is approved, the income of the obligor becomes subject to income withholding.

This opinion addresses whether the second type, delinquency related withholding, and the third type, immediate income withholding, are applicable to judgments secured under N. D. C. C. ' 14-08. 1-01.

If a judgment for child support obtained under N. D. C. C. ' 14-08. 1-01 is issued on or after January 1, 1990, the immediate income withholding provisions apply unless one of the exceptions applies. N. D. C. C. ' 14-09-09. 24. If immediate income withholding procedures were not implemented, either because of the application of an exception or because the judgment (or the order upon which the judgment is based) was issued prior to January 1, 1990, payments on the judgment must be "delinquent" before the withholding procedures of N. D. C. C. " 14-09-09. 13 through 14-09-09. 16 may be implemented.

An obligor is "delinquent" on the first working day after the day upon which a child support payment was identified as due and unpaid, and the total amount

of unpaid child support is at least equal to the amount of child support payable in one month. N. D. C. C. ' 14-09-09.10(3). Under this definition of "delinquent," if the judgment obtained under N. D. C. C. ' 14-08.1-01 is for an amount at least equal to the monthly child support obligation, and if that judgment is not immediately satisfied, the income withholding procedures attendant upon delinquent payments may be followed. See N. D. C. C. " 14-09-09.13 through 14-09-09.16. Thus, with respect to judgments issued after January 1, 1990, it is my opinion immediate income withholding is applicable unless at least one of the two statutory exceptions applies. N. D. C. C. ' 14-09-09.24. For judgments issued before January 1, 1990, and cases falling within the exceptions that arise after January 1, 1990, the delinquency withholding procedures may be applied.

III.

Ordinarily, the calculation of the amount of income to be withheld is a simple matter. The amount of withholding is described in N. D. C. C. ' 14-09-09.13(3) as the sum of:

- a. The obligor's current monthly support obligation.
- b. The amount the obligor is ordered to pay toward any outstanding arrearage, or if no order to repay an arrearage exists, then an amount equal to twenty percent of the obligor's current support obligation, if any, or equal to the most recent monthly support obligation if there is no current support obligation, for application towards any arrearage subject to the limitations of section 14-09-09.16.

The amount to be withheld is separately limited to fifty percent of the obligor's disposable income from any particular income payor. N. D. C. C. ' 14-09-09.16(3). The statute does not contemplate a case where there is no current monthly support obligation and no monthly support obligation was ever established. Such a circumstance might arise, in an action brought pursuant to N. D. C. C. ' 14-08.1-01, where the children have reached adulthood or become deceased before the entry of the order. It is therefore my opinion that in these cases, if the court has not ordered the obligor to pay a monthly amount toward any outstanding arrearage, the amount to be withheld cannot be calculated.

While N. D. C. C. ' 14-09-09.13 does not provide a means of calculating the amount of withholding in these cases, the statute does suggest a method to resolve the problem. The statute describes a calculation of withholding for arrearages if the court has said nothing about the payment of arrearages. N. D. C. C. ' 14-09-09.13(3)(b); Bloom v. Fyllesvold, 420 N. W. 2d 327 (N. D. 1988).

The court is authorized to establish the amount which may be withheld for arrearages. Thus, the solution is merely a matter of asking the court to do so. Id. at 332.

IV.

Immediate income withholding undertaken pursuant to N.D.C.C. ' 14-09-09.24 is necessarily prospective in operation. That is so because the section became effective July 12, 1989, but only applies to judgments or orders "issued or modified on or after January 1, 1990." Very different language is used in N.D.C.C. ' 14-09-09.11, which provides, in relevant part: "When a judgment or order requires the payment of child support, it may be enforced by an income withholding order" On its face, this language applies to orders in existence prior to the statute's March 1, 1987, effective date. However, because of North Dakota law respecting the retroactive application of statutes, further analysis is necessary.

N.D.C.C. ' 1-02-10 provides that "[a]n act of the legislature is presumed to be prospective unless the legislature clearly manifests a contrary intention." The North Dakota Supreme Court has held that this applies to substantive statutes, but has "rendered various decisions regarding the retroactivity of procedural statutes." Reiling v. Bhattacharyya, 276 N.W.2d 237, 239 (N.D. 1979). In clarifying the court's position on the subject, the Reiling court concluded that both substantive and procedural statutes are subject to section 1-02-10 because the distinction between substantive and procedural law "is frequently unclear and artificial because few statutes are solely substantive or solely procedural." Id. at 240.

The North Dakota Supreme Court has expressly held that retroactive application is not limited to statutes which contain the word "retroactive." Instead, that court, "in determining whether or not a statute could be applied retroactively, has looked at the language of the statute to determine the legislative intent." In Interest of W.M.V., 268 N.W.2d 781, 783 (N.D. 1978). In W.M.V., the court held that the Legislature intended that the Uniform Parentage Act, N.D.C.C. ch. 14-17, "be applied retroactively to children born prior to the effective date of the act." 268 N.W.2d at 785. Thus, it is appropriate to examine the intent of the Legislature in order to determine if retroactive application was intended.

Income withholding was established in North Dakota through the enactment of House Bill No. 1903 in the 1986 Special Session. The bill was introduced at the request of the Department of Human Services. In testimony before the Special Select Committee on Social Services and Veterans Affairs, Human Services Director John Graham and legal counsel Blaine Nordwall explained that the bill's purpose was to comply with the requirements of the Child Support Enforcement Amendments of 1984, P.L. 98-378, which required that states enact certain specific remedies and procedures to improve child support collections. Hearing on H. 1903 Before the Special Select Committee on Social Services, 1986 Special Session N.D. Leg. (Dec. 3, 1986) (Statements of Mr. Graham and Mr. Nordwall). Under the federal law, income withholding "must occur without the need for any amendment to the support order . . . or any further action . . . by the court or entity that issued [it]." 42 U.S.C. ' 666(b)(2) (Supp. III, 1985).

In discussing section 2 of House Bill No. 1903, now codified at N.D.C.C. ' 14-09-09.11, Mr. Nordwall advised the Committee:

The CSEA [Child Support Enforcement Amendments of 1984] requires that withholding be available in all child support cases, regardless of whether the original order dealt with the subject. This section is intended to give all child support cases equal remedies. No amendment to existing orders would be necessary to provide for income withholding. We do not believe that there is any constitutional infirmity in making the withholding remedy available to enforce already existing support orders.

Hearing on H. 1903 Before the Special Select Committee on Social Services, 1986 Special Session N.D. Leg. (Dec. 3, 1986) (Statement of Mr. Nordwall). Section 2 of House Bill No. 1903 was adopted as introduced. Because the Legislature understood that the language it adopted would apply retroactively to existing court orders it must be concluded that the Legislature intended that result. It is therefore my opinion that an income withholding order may issue for judgments entered prior to the effective date of the income withholding statute.

- 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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