

## N.D.A.G. Letter to Mehrer (March 18, 1991)

March 18, 1991

Mr. Owen K. Mehrer  
Stark County State's Attorney  
P.O. Box 130  
Dickinson, ND 58602-0130

Dear Mr. Mehrer:

Thank you for your February 8, 1991, letter requesting my opinion concerning the application of N.D.C.C. § 14-09-08.2 to modifications of judgments or orders.

N.D.C.C. § 14-09-08.2 is the codification of section 1 of 1989 Senate Bill No. 2356. That section provides:

14-09-08.2. Modification of support for children after majority.

1. In the absence of a written agreement to the contrary entered into after July 1, 1989, a judgment or order requiring the payment of child support until the child attains majority is deemed to be modified to continue as to the child until the end of the month during which the child is graduated from high school or attains the age of nineteen years, whichever occurs first, if:
  - a. The child is enrolled and attending high school and is eighteen years of age prior to the date the child is expected to be graduated; and
  - b. The child resides with the person to whom the duty of support is owed.
2. The person to whom the duty of support is owed shall file an affidavit with the district court stating that the child has been continuously enrolled in high school and is, or will be, eighteen years of age prior to the date the child is expected to be graduated. The affidavit must be served by the person to whom the duty of support is owed upon the person owing the duty of support. Upon the filing of the affidavit, the judgment or order is deemed modified pursuant to subsection 1, unless the person owing the duty of support files a motion with the court, within twenty days subsequent to service of the affidavit, requesting a hearing on the need to modify the judgment or order.

(Emphasis supplied.)

Section 14-09-08.2 affords a simple procedure for the modification of orders for the support of children to provide a mechanism for continuing support, after the child's 18th birthday, until high school graduation or age 19. The statute specifies that the "judgment or order requiring the payment of child support . . . is deemed to be modified to continue as to the child . . . ."

Judgments or orders requiring the payment of child support take various forms. In their various forms, those judgments or orders may touch upon many subjects. However, section 14-09-08.2(1) authorizes modification only "as to the child." Your first question concerns the extent of the modification of those parts of the orders which relate to the child.

In section 14-09-08.2(1), the phrase "requiring the payment of child support" modifies the phrase "judgment or order." Literally, the modifying phrase may be understood as serving only to define the sorts of orders and judgments which are addressed by the statute. However, the legislative history suggests that the phrase "requiring the payment of child support" had a broader purpose.

The legislative history is limited. The only written statements were made by the bill's sponsors, Senator Wayne Stenehjem and Representative Judy L. DeMers. Representative DeMers described the bill thusly: "It permits support orders to be continued for children who turn 18 years of age prior to high school graduation and for those orders to be continued through the final day of the month when high school graduation occurs." (Emphasis supplied.) Hearing on S. 2356 Before the House Judiciary Comm., 51st ND Leg. (March 6, 1989) (Statement of Rep. DeMers). Senator Stenehjem described the bill as being intended to streamline the process for continuing child support payments. Hearing on S. 2356 Before the House Judiciary Comm., 51st ND Leg. (March 6, 1989) (Statement of Sen. Stenehjem). In remarks to the Senate Judiciary Committee, Senator Stenehjem explained that the bill was intended to implement an August 1988 Supreme Court ruling which held "that a noncustodial parent can continue to pay support as long as that child is in high school." Hearing on S. 2356 Before the Senate Judiciary Comm., 51st ND Leg. (Jan. 25, 1989) (Statement of Sen. Stenehjem). Thus, it is apparent that the Legislature intended the phrase "requiring the payment of child support" to both describe the types of judgments or orders which were addressed by the bill, and to describe the parts of those judgments or orders which are subject to modification under section 14-09-08.2.

In determining the parts of an order subject to modification under section 14-09-08.2, it is important to be mindful of the definition of child support. That phrase is defined, for purposes of N.D.C.C. ch. 14-09, as: "payment for the support of children and combined payments for the support of children and spouses or former spouses, however denominated, 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) (emphasis supplied). Thus, a requirement for the provision of "medical support" or its appearance as

an order to pay a portion of the cost of dental care or other services necessary to the child's well-being is within the definition of "child support."

Your second question is whether a modification is retroactive to the child's eighteenth birthday if the affidavit is filed after the support order terminates. The final sentence of section 14-09-08.2(2) establishes the usual time that the judgment or order is deemed modified. That occurs "upon the filing of the affidavit." Both the bill's sponsors contemplated that the modification is prospective, though Representative DeMers and Senator Stenehjem appear to have differed slightly. Representative DeMers stated: "The persons whom the duty of support is owed only needs to file an affidavit with the district court. The judgment is then modified unless the person owing the support requests a hearing within 20 days of the filing." (Emphasis supplied.) Hearing on S. 2356 Before the House Judiciary Comm., 51st ND Leg. (March 6, 1989) (Statement of Rep. DeMers). Senator Stenehjem described the same process thusly: "An affidavit can be prepared by the parent with whom the child resides, serve it [sic - served] on the payor and the decree is then automatically amended." (Emphasis supplied.) Hearing on S. 2356 Before the House Judiciary Comm., 51st ND Leg. (March 6, 1989) (Statement of Sen. Stenehjem). The House Judiciary Committee also recognized that there could be a hiatus in support payments if the proceedings were not commenced before the child reaches age 18. In response to a question from Representative Ring, Senator Stenehjem "indicated it would be advisable to start the proceedings before the child reaches age 18 so payments are continued." Hearing on S. 2356 Before the House Judiciary Comm., 51st ND Leg. (March 6, 1989) (Statement of Sen. Stenehjem).

It is therefore my opinion the modification of a judgment or order pursuant to N.D.C.C. § 14-09-08.2 is not effective earlier than the filing of the affidavit of high school enrollment.

Sincerely,

Nicholas J. Spaeth

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