N.D.A.G. Letter to Stenehjem (Sep. 19, 1991)

September 19, 1991

The Honorable Wayne Stenehjem
State Senator, District 42
2204 12th Avenue North
P.O. Box 52
Grand Forks, ND 58206-0052

RE: Attorney General's Opinion 90-30

Dear Senator Stenehjem:

Thank you for your letter of July 15, 1991 regarding Opinion 90-30. Your letter expresses several concerns about that opinion and the rationale which underlies it. You indicate that clerks of court may be faced with conflicting and uncertain duties as a result of that opinion. You ask that I reconsider the opinion. You also ask that I advise whether clerks are required to implement income withholding procedures in the circumstances described should I conclude that reconsideration of the opinion is unnecessary.

Your letter ("the letter") begins with an attempt to distinguish the recoupment of monies expended by public agencies for the reasonable value of physical and custodial care or support furnished to the child from "child support." The letter's analysis presumes that traditional remedies for the enforcement of a money judgment are the only means of enforcing a judgment, owed to a public agency, which has been secured after that agency furnished support to children. The letter offers two points in support of this contention. The letter's first point is the fact that N.D.C.C. § 14-08.1-02 identifies, as one venue in an action to recover agency expenditures, the county "wherein the defendant has assets subject to attachment, garnishment, or execution." The letter's second point is that the North Dakota Supreme Court described, in a summary of facts, a judgment secured under N.D.C.C. § 14-08.1-01 as a "reimbursement of support payments." See In the Interest of M.Z. ____ N.W.2d ____ (ND Civ. No. 900413, June 25, 1991). From this analysis the letter postulates that "a judgment obtained pursuant to Section 14-08.1-01 is not an order of a court requiring 'payment for the support of children.'" Neither of these points survives close scrutiny.

The notion that reduction of a child support obligation to a money judgment has the effect of precluding use of all but the traditional means of enforcement money judgments (i.e. attachment, garnishment, or execution), if ever it was the true status of North Dakota law, was ended with the enactment of N.D.C.C. § 14-08.1-05 and N.D.C.C. § 14-09-09.11.

N.D.C.C. § 14-08.1-05 provides, in relevant part:

> 1. Any order directing any payment or installment of money for the support of the child is, on and after the date it is due and unpaid . . .

[a] judgment by operation of law . . . .

2. Failure to comply with the provisions of a judgment or order of the court for the support of a child may be punished as a civil contempt. All remedies for the enforcement of judgments apply. (Emphasis added.)

N.D.C.C. § 14-09-09.11 provides: When a judgment or order requires the payment of child support, it may be enforced by an income withholding order, as provided in . . . chapter [14-09], in addition to any other remedies provided by law. (Emphasis added.) But there are other reasons why money judgments, which arise out of child support obligations, may be enforced in numerous ways.

The Legislature has defined "obligee" to mean "a person including a state or political subdivision to whom a duty of [child] support is owed." N.D.C.C. § 14-09-09.10(8). This definition was created as a part of 1987 N.D. Sess. Laws Ch. 183, an enactment which established the income withholding law in North Dakota. A state or political subdivision is owed a duty of support because of assignments respectively required and made pursuant to N.D.C.C. §§ 50-09-06, 50-09-06.1 and 50-24.1-02.1, in applications for aid to families with dependent children, foster care benefits and medicaid benefits. By so defining "obligee," the legislature gave the assignee the same status as any individual who is owed payment for child support.

The North Dakota Supreme Court has not directly ruled on the effect of assigning a child support obligation to a public agency or of converting an unpaid child support obligation to a money judgment. However, other courts have concluded, consistent with the provision of North Dakota statute law, that neither assignment nor conversion to a money judgment changes the qualitative nature of a child support obligation. Those holdings of the North Dakota court which do touch upon the subject recognize the effect of an assignment.

In State of Minn., County of Clay, on Behalf of Licha v. Doty, 326 N.W.2d 74, (N.D. 1982), the North Dakota Supreme Court recognized and approved the imposition of support duties on an obligor even though the duty of support is owed to a state or political subdivision which has expended benefits for the child's welfare, and which has been assigned that person's right to support. 326 N.W.2d at 76 - 77, n.2. The court has since recognized and treated assigned child support obligations in the same manner that it recognizes and treats non-assigned child support obligations. See, Guthmiller v. Department of Human Services, 421 N.W.2d 469 (N.D. 1988).

The North Dakota Supreme Court has also specifically held that the entry of a money judgment for child support arrears does not preclude the use of the court's contempt powers to enforce an order to pay those very arrears. Kitchen v. Kitchen, 304 N.W.2d 694 (N.D. 1981). The district court had found Kitchen in contempt for failure to pay ordered child support, and had issued a writ of attachment. When Kitchen was found to be living in Minnesota, the matter was transferred, under N.D.C.C. Ch. 14-12.1, the Uniform Reciprocal Enforcement of Support Act (URESA) to Clay County, Minnesota, where a judgment for the entire amount of arrears was entered. Following entry of the money

judgment in Minnesota, the North Dakota district court vacated the writ of attachment, theorizing that an adjudication of civil contempt for non-payment of child support was permitted only where, by law, execution cannot be awarded.

The North Dakota Supreme Court reversed, holding that the support order could be enforced by contempt proceedings even though payment of the money judgment could be enforced by execution. 304 N.W.2d at 696. The Kitchen court based its holding on at least two factors. One factor was N.D.C.C. § 14-12.1-03, a part of URESA which provides that the URESA remedies are in addition to any other remedy provided in law. The Minnesota judgment was a URESA remedy. The court also relied upon Gross v. Gross, 206 N.W. 793, 794 (N.D. 1925) in Gross the court held that a child support obligation is based on a duty which "is not necessarily discharged by the payment of a definite amount of money . . . after levy, notice, and sale upon execution." The court continued: "It is a duty which the court is authorized to compel . . . whether . . . [the obligor has] property subject to execution or not. . . . [T]he further fact that for these installments [of child support] . . . the plaintiff may have an execution, is . . . immaterial . . . for execution would not result in a full measure of compliance with the judgment." Quoting 206 N.W. at 794.

Finally, the Supreme Court has recognized and approved the practice of intercepting and offsetting state income tax returns to recover assigned and unpaid child support obligations, emphasizing that the tax intercept remedy is available whether or not there is an outstanding judgment for the debt. Guthmiller, 421 N.W.2d at 472, citing N.D.C.C. § 57-38.3-02(3).

In other states the issue of enforcing money judgments for unpaid child support, through means other than the traditional law remedies, first arose in interstate cases which preceded adoption of the Uniform Reciprocal Enforcement of Support Act. It was then usually necessary to reduce unpaid support obligations to judgment before those judgments would be enforced in another state under the Full Faith and Credit Clause of the United States Constitution. See Sistare v. Sistare, 218 U.S. 1 (1910). As an example, in Bruton v. Tearle, 59 P.2d 953 (Cal. 1936), the California Supreme Court held that another state's money judgment for support arrearages could be enforced with equitable remedies, affirming the appointment of a receiver to collect future earnings. The court held that, even though the judgment may be a money judgment in form, it retains the characteristics of the underlying support decree. 59 P.2d at 956. The Bruton court quoted with approval the holding of the often-cited case of Franchier v. Gammill, 114 So. 813, 814 (Miss. 1927):

> A judgment or decree for alimony carries with it a special power and right of enforcement not given in judgments at law. There is a difference between a judgment for money or property and that of a decree for alimony; and the decree for alimony, because of such difference in the character of the obligation, may be enforced by more efficient and effective means than those given to the enforcement of judgments at law.

59 P.2d at 957. Similarly, in Sackler v. Sackler, 47 So.2d 292, 294 (Fla. 1950), the Florida Supreme Court held that a decree for support is different than a judgment for money or

property in that it is a continuing obligation based on the duty of a parent to support his or her children. The Sackler court cited Rule v. Rule, 39 N.E.2d 379 (Ill. Ap. 1942), which in turn relied upon Franchier. The North Dakota Supreme Court reviewed many such cases in deciding that a California judgment for divorce, support and maintenance could be enforced by a North Dakota Court. Weldy v. Weldy, 20 N.W.2d 583 (N.D. 1945).

Cases concerning the effect of assignment of the child support obligation discuss Title IV-D of the Social Security Act, 42 U.S.C. § 651 et sec. (1988), and the state laws which it spawned.

Williams v. Department of Social and Health Services, 529 F.2d 1264 (9th Cir. 1976), was a bankruptcy decision entered before the bankruptcy code was amended to specifically provide for the nondischargeability of assigned child support debts. See 11 U.S.C. § 523(a)(5)(A) (1988) and 42 U.S.C. § 656(b) (1988) as amended by § 2334 of the Omnibus Budget Reconciliation Act of 1981. P.L. 97-35. See also Boschee v. Boschee, 340 N.W.2d 685 (N.D. 1983). The Williams court reviewed the history of the federal requirements enacted as Title IV-D of the Social Security Act, Social Services Amendments of 1974, P.L. 63-647, 88 Stat. 2337 (93rd Congress, 2d Session 1974), to discern the congressional intent in requiring assistance applicants to assign rights of support. See 42 U.S.C. § 602(a)(26) (1988). After determining that "the Department's payments . . . were substantially in lieu of the bankrupt's support obligations" (529 F.2d at 1270), the Williams court held that the "recoupment [owed to the department] is essentially an obligation for maintenance or support exempt from discharge . . . ." 529 F.2d at 1972.

In Lamm v. Chapman, 413 So.2d 749, 753 (Fla. 1982), a holding squarely on point, the court said: "the assignment of the child support obligation to the state . . . does not change the nature of that obligation, nor does it limit the means by which the obligation may be enforced" and "the acceptance of public assistance for the support of a dependent child vests in the department the authority to proceed with all remedies available to the child's custodian." (Emphasis in original.)

In Shepherd v. Shepherd, 467 N.W.2d 237 (Iowa 1991), the Iowa Supreme Court discussed the proper application of Iowa Code § 252C.2(2), which serves essentially the same function as does N.D.C.C. § 14-08.1-01. The Iowa law provides:

> The payment of public assistance to or for the benefit of a dependent child or a dependent child's caretaker creates a support debt due and owing to the department [of human services] by the responsible person in an amount equal to the public assistance payment . . . .

The Iowa court held that "the nature of the debt remains one for child support . . ." after the assignment is made. 467 N.W.2d at 240.

The same conclusion was very recently reached by the Court of Appeals for the Eighth Circuit in a review of the definition of "child support" as that term is used in Title IV-D of the Social Security Act, 42 U.S.C. § 662(b) (1988). The court held: "The assignment did

not change the character or nature of the debt, only the obligee." Knickerbocker v. Norman, ____ F.2d ____, 1991 WL124463, p.5 (8th Cir., 1991).

Courts reviewing these issues sometimes discuss the applicability of equitable remedies, sometimes discuss the law of assignment, and sometimes discuss statutes. Nonetheless, whatever legal theory imparted through the courts' discussions, the consistent conclusion is that child support obligations remain child support obligations both after reduction to money judgments and after assignment to public agencies.

The letter also asserts that the response to the second question addressed in Opinion 90-30 "seems inapt." This assertion is premised entirely on the letter's earlier assertion that the response to the first question in Opinion 90-30 is incorrect. I have explained why the response to the first question was correct.

The letter next raises concerns about "numerous . . . anomalies that flow from the conclusions to Questions I and II." I have reviewed the "anomalies" and compared the statutes mentioned with Opinion 90-30. I conclude that the anomalies do not represent true conflicts. Any practice problems described in the letter actually arise out of misapplication of existing laws.

The first such anomaly involves a perceived conflict between Section 14-09-08.1(1), which requires that child support payments be made to the clerk of the court, and practices concerning receipt of payments on money judgments. The letter asks: "If a Section 14-08.1-01 judgment requires the payment of child support then should not the court order that 'payments' be submitted to the clerk of court?" The letter answers the question: "Of course, that does not occur; the judgment requires the judgment debtor to pay the amount owed to the public agency or other party identified as the judgment creditor."

The answer furnished by the letter is not required by law. N.D.C.C. § 14-09-08.1(1) requires all child support payments to be made to the clerk of court, and § 14-09-09.16(1) specifically requires that payments made pursuant to an income withholding order be made to the clerk. The clerk receives the payments "as trustee, for remittance to the obligee" (per N.D.C.C. § 14-09-08.1(1)), so the payment to the clerk is, in effect, a payment to the judgment creditor.

The letter raises other anomalies for the purpose of showing that the word "judgment," as used in N.D.C.C. § 14-09-09.11 was only "intended to refer to divorce judgments in which the court imposes an obligation of child support, or a later order of the court imposing such an obligation separate from the judgment granting divorce." The letter states "it is unlikely that the term 'judgment' was intended to apply to money judgments of the type obtained under Section 14-08.1-01." No explanation of, or support for, this view is furnished.

N.D.C.C. § 14-09-09.11 was adopted as section 2 of House Bill No. 1903 in the 1986 special session. 1987 N.D. Sess. Laws, Ch. 183. House Bill No. 1903 was the first of four bills adopted during four successive meetings of the North Dakota legislature, all

intended to comply with federal directives concerning child support enforcement. See Senate Bill No. 2432, 1987 N.D. Sess. Laws, Ch. 181; Senate Bill No. 2245, 1989 N.D. Sess. Laws, Ch. 148; and Senate Bill No. 2203, 1991 N.D. Sess. Laws, Ch. 152. In each case the Legislature was concerned about compliance with federal requirements.

In adopting these bills, the legislature required that unpaid child support would become a judgment by operation of law, and that such "judgment[s] by operation of law" could become money judgments if entry is sought pursuant to Rule 58, NDRCivP. See N.D.C.C. § 14-08.1-05, passed to conform to 42 U.S.C. § 666(a)(9) (1988). See discussion in Baranyk v. McDowell, 442 N.W.2d 423, 425-426 (N.D. 1989). Similarly, the legislature required income withholding to comply with 42 U.S.C. § 666(b) (1988). The legislature has adopted these statutes, at least in part, to conform to federal requirements. The letter's narrow interpretation of the word "judgment," as used in N.D.C.C. § 14-09-09.11 would do violence to the legislative purpose. Opinion 90-30 construed the statute broadly, as befits a remedial statute. ("Remedial statutes must be liberally construed in favor of the purposes obviously intended." Newland v. Job Service North Dakota, 460 N.W.2d 118, 122 (N.D. 1990). Cite omitted.)

The letter concludes with a statement that Opinion 90-30 poses difficulties in its application to money judgments. Support for that view is offered in two areas.

The statement is first made: "There appears little doubt that . . . [a money judgment obtained under § 14-08.1-01] is a money judgment similar to any other money judgment." The authority cited is N.D.C.C. Chapter 14-08.1 and Mougey v. Salzwedel, 401 N.W.2d 509 (N.D. 1987).

As has been explained, a money judgment for child support, obtained by an agency through the assignment of child support rights (as in judgments obtained under § 14-08.1-01), retains its characteristics as an order for child support. Further, neither N.D.C.C. Chapter 14-08.1 or Mougey are authority for the proposition advanced. Rather, N.D.C.C. Chapter 14-08.1 includes provisions which specifically authorize remedies not available to enforce other money judgments, including civil contempt (N.D.C.C. § 14-08.1-05(2)), provision for security and appointment of a receiver (N.D.C.C. § 14-08.1-03 through reference to N.D.C.C. Chapter 14-08) and the use of "other appropriate remedies" (N.D.C.C. § 14-08.1-03) in addition to providing "[a]ll remedies for the enforcement of judgments apply." N.D.C.C. § 14-08.1-05(2). Mougey does not discuss the issue it is urged it supports.

The second source of support for the claimed procedural difficulty in applying Opinion 90-30 is based on the notion that "clerks of district court have no authority, statutory or otherwise, to satisfy a judgment." That notion is irrelevant and unsupported by the authority cited.

The lack of support becomes apparent in a review of the citation to authority for the next statement: "Receipt of money by a clerk of district court is not an official act of the clerk," citing Milburn-Stoddard Co. v. Stickney, 103 N.W. 752 (N.D. 1905) and 49 C.J.S. Judgments, § 551. The Milburn-Stoddard court states: "The statute gives the clerk no

authority to receive money . . . [in satisfaction of a judgment] except in certain cases, and the facts of this case do not bring it within any of the exceptions." (Emphasis added.) 103 N.W. at 752. Corpus Juris Secundum also explains that the rule is not absolute, but admits of exceptions "conferred expressly or impliedly by statute," 49 C.J.S. Judgments, § 551. N.D.C.C. §§ 14-09-08.1 and 14-09-09.16 are express statutory exceptions of the type mentioned in Milburn-Stoddard and 49 C.J.S. Judgments, § 551.

The irrelevance is apparent because the clerk is not asked or required to satisfy the judgment. The payment of an obligation which is the subject of a money judgment does not work a satisfaction of the judgment, and receipt of the payment does not require the clerk to satisfy the judgment either in part or in full. In fact, the Milburn-Stoddard court approved the clerk's removal of a satisfaction improvidently entered upon the clerk's receipt of a payment sufficient to satisfy the judgment. 103 N.W. at 753. If a judgment debtor wishes to have a satisfaction filed pursuant to N.D.C.C. § 28-20-25, the judgment debtor ordinarily secures the duly executed satisfaction from the judgment creditor. If the judgment creditor cannot be found, or refuses to provide the satisfaction, N.D.C.C. § 28-20-28 and NDROC 7.1(b) respectively describe methods for securing the satisfaction by affidavit and by motion. There is no requirement that a satisfaction or a partial satisfaction be furnished or filed at the time the clerk receives a payment on a judgment arising out of a child support obligation. It is sufficient that the judgment debtor has the power to assure that an appropriate satisfaction is subsequently filed.

Opinion 90-30 has been carefully reviewed with respect to each of the concerns raised in the latter. I conclude that a reconsideration of the opinion is not appropriate. However, the opinion does require clarification. The use of the word "may" in the response to Question I, is not to be understood as a permissive expression affording clerks of district court discretion to determine if income withholding procedures should be applied. Those income withholding procedures are mandatory (see N.D.C.C. § 14-09-09.13), and cannot be made permissive by an opinion of this office which advises that the procedures "may" be used.

I hope this letter responds adequately to your concerns.

Sincerely,

Nicholas J. Spaeth

krb
cc: William G. Bohn