

**N.D.A.G. Letter to Odegard (Nov. 24, 1992)**

November 24, 1992

Mr. James T. Odegard  
Grand Forks County State's Attorney  
Grand Forks County Courthouse  
PO Box 607  
Grand Forks, ND 58206-0607

RE: Income Withholding for Child Support

Dear Mr. Odegard:

On September 15, 1992, Sonja Clapp, Assistant State's Attorney, wrote to request my opinion on whether the clerk of district court was required to give notice prior to issuing income withholding orders which included an amount for arrearages.

Subsection 1 of N.D.C.C. § 14-09-09.24, concerning immediate income withholding, provides (with an exception not relevant to the question): "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." Ms. Clapp indicates that a problem arises in Grand Forks County when the court orders immediate income withholding pursuant to N.D.C.C. § 14-09-09.24, but initial monthly support payments are not received because the judgment is not filed promptly or there are late payments by either the obligor or the employer. The law permits the issuance of an income withholding order which withholds additional funds for the purpose of satisfying these late payments, or "arrearages". Currently the clerk of court is sending the obligor a notice of delinquency, pursuant to section 14-09-09.13, before implementing the collection of arrearage amounts. Ms. Clapp asks if this section 14-09-09.13 notice, which advises that the obligor may contest the issuance of an income withholding order, is required by the law or by due process.

N.D.C.C. § 14-09-09.13 provides a procedure for initiating income withholding once an obligor is delinquent "if immediate income withholding under section 14-09-09.24 has not been implemented." If immediate withholding under section 14-09-09.24 has been implemented, section 14-09-09.13 by its own terms does not apply.

N.D.C.C. § 14-09-09.16 governs the service of an income withholding order. That section provides, in relevant part:

If the obligor is subject to immediate income withholding under section 14-09-09.24, an income withholding order and a copy of . . . chapter [14-09] must be served on any known income payor within five working days of the issuance of the judgment or order which requires the payment of child

support. . . . The income withholding order shall state all of the following:

1. That the obligor is properly subject to an income withholding order and that the income payor is therefore required to withhold an amount, determined under subsection 3 of section 14-09-09.13, from the obligor's income. . . .

(Emphasis supplied.) This cross-reference to subsection 3 of section 14-09-09.13 does not serve to import all the procedural requirements of section 14-09-09.13 into the service of the income withholding order. Rather, it imports only the method of calculating or determining the amount of the income withholding order.

The fundamental requirements of due process are a right to notice and an opportunity to be heard. Those due process rights are afforded in the very creation of the judgment or order which requires the payment of child support. Because N.D.C.C. § 14-09-09.24 requires that provision for immediate income withholding be made a part of each judgment or order which requires the payment of child support (with limited exceptions), and because such a judgment or order cannot be issued without first affording due process, no further process is due before the issuance of the income withholding order.

Section 14-09-09.13, which provides a procedure by which the obligor receives notice and a right to be heard, applies only to those cases where the judgment or order did not provide for an immediate income withholding order. In those cases the obligor would have the right to notice and an opportunity to be heard with respect to the issue of income withholding before such an order could be issued.

In my opinion, the clerk need not send a notice of income withholding pursuant to N.D.C.C. § 14-09-09.13 to collect child support arrearages owed by an obligor who is subject to immediate income withholding under section 14-09-09.24. Any arrearages would be included in the amount for which the income withholding order was issued pursuant to the formula in N.D.C.C. § 14-09-09.13(3). In my opinion, compliance with the provisions of N.D.C.C. § 14-09-09.16 which are applicable to obligors subject to immediate income withholding under section 14-09-09.24 does not violate the obligor's right to due process.

Sincerely,

Nicholas J. Spaeth

bln/vkk