

**OPINION**  
**78-4**

December 4, 1978                   (OPINION)

Mr. T. N. Tangedahl  
Executive Director  
Social Service Board of North Dakota  
State Capitol  
Bismarck, North Dakota 58505

Dear Mr. Tangedahl:

This is in response to your November 17, 1978, letter requesting a formal opinion relative to the method of handling a child support payment made on behalf of a former recipient of assistance under the Aid to Families with Dependent Children Program (AFDC). Apparently, a question has arisen as to whether the child support payment, which represented an arrearage, should be forwarded to the Social Service Board of North Dakota and used as repayment for the assistance provided the former recipient, or whether the payment should be turned over to the former recipient.

The facts, as presented, are as follows:

A former recipient initially applied for and became eligible for assistance under the AFDC Program in July, 1965, and was to receive her first monthly grant in September of that year. However, because of a change in circumstances, her case was closed prior to September 1, 1965. The former recipient again applied for and became eligible for AFDC in December, 1966. She continued receiving AFDC through January, 1970. Her case was closed effective February 1, 1977, as she moved to Montana. In March, 1971, she again applied for AFDC and began receiving assistance in May of that year. Her case remained open and she continued to receive assistance until April 1, 1975, when her case was closed. She has not received AFDC since that time.

The former recipient, while eligible for the program, was rightfully entitled to and correctly received AFDC. And, during her eligibility for AFDC, the former recipient never executed an assignment of child support either to the Social Service Board of North Dakota or to the county social service board in question.

In May, 1976, pursuant to an Order to show cause as to why the former recipient's ex-husband should not be adjudged guilty of civil contempt of court for failure to make required child support payments, the District Court for the Fifth Judicial District ordered that the ex-husband was guilty of civil contempt of court. The Court Order went on to provide that the former recipient's ex-husband was to commence making monthly child support payments of \$50 per month until the child support obligation was extinguished, with it further being order that, commencing on November 1, 1976, the ex-husband was to make six annual payments of \$625 each until the entire arrearage of

\$3,750 was extinguished and that all payments were to be made through the Office of the Clerk of the District Court for remittance to the former recipient or the appropriate public assistance agency. (Emphasis Added)

Pursuant to this Order, the ex-husband, some time prior to March, 1978, made the annual \$625 payment on the arrearage to the Clerk of the District Court. Upon receipt of this payment, the County Treasurer issued a check in the amount of \$625 and forwarded it to the Social Service Board of North Dakota. The check was returned by the Social Service Board on the basis that the payment of AFDC correctly issued does not constitute a debt owed by the former recipient of the assistance paid.

You also indicated in your letter that there does not appear to be any provision in Chapter 50-09 of the North Dakota Century Code which relates to the repayment of assistance provided under that chapter, although you did indicate that as of July 1, 1977, < 50-09-06 provides for the assignment to the state agency of all rights to child support by an applicant for assistance under Chapter 50-09.

In light of the foregoing information, you requested an opinion from this office as to whether the Social Service Board of North Dakota is "the appropriate public assistance agency" for purposes of the Court Order in question, in which case the child support payment should be accepted by the Social Service Board as repayment for assistance provided the former recipient; or, whether the former recipient is entitled to the amount of the payment.

As noted in your letter, Chapter 50-09 of the North Dakota Century Code contains the statutory provisions relative to the Aid to Families with Dependent Children (AFDC) Program in North Dakota. In reviewing the various sections of this chapter that were in effect during the former recipient's periods of eligibility, we are unable to find any provision which specifically relates to the repayment of assistance provided under that chapter. Therefore, it is our opinion that a former recipient cannot be required to and has no obligation to make repayment of assistance to which the former recipient was rightfully entitled and rightfully received.

It should be noted that < 50-09-02 of the North Dakota Century Code which sets forth the duties of the state agency (Social Service Board of North Dakota) with respect to the AFDC Program, provides in part that the state agency shall:

3. Take such action, give such directions, and promulgate such rules and regulations as may be necessary or desirable to carry out the provisions of this chapter, including the adoption and application of suitable standards and procedure to ensure uniform and equitable treatment of all applicants for aid to dependent child;"

Pursuant to this duty, the Social Service Board of North Dakota has promulgated rules and regulations for the AFDC Program in North Dakota. In reviewing these regulations, which have the force and effect of law, we are again unable to find anything which would require the repayment of assistance by a former recipient of AFDC

for assistance rightfully provided. It is noted that < 72-02-01-05 of these rules and regulations contains the provision regarding the recovery of an overpayment. However, this provision allows recovery only when the overpayment is the result of the recipient's willful withholding or misrepresenting of the facts or by a willful failure by the recipient to report the receipt of an excess payment which should have been known. As the former recipient was rightfully entitled to and rightfully received AFDC, it is our opinion that this regulation is inapplicable to the situation involved.

In 1977, the North Dakota Legislature amended portions to Chapter 50-09 of the North Dakota Century Code. One of these amendments was to < 50-09-06 which now provides:

"Application for aid to a dependent child under this chapter shall be made to the county agency in the manner and form prescribed by the state agency. The application shall contain such information as the state agency may require, except that application for aid to a dependent child living in a home maintained and operated or selected by a private agency may be made direct to the state agency, and the action of the state agency in approving and granting assistance in such case shall be final and binding on the county agency. An applicant for assistance under this chapter is deemed to have assigned to the state agency and county agency at the time of application all rights to child support from any other person an applicant may have in his own behalf or in behalf of any other family member for whom application is made. The assignment:

1. Is effective as to both current and accrued child support obligations.
2. Takes effect upon a determination that the applicant is eligible for assistance under this chapter.
3. Terminates when an applicant ceases to receive assistance under this chapter, except with respect to the amount of any unpaid support obligation accrued under the assignment."

This amendment to N.D.C.C. < 50-09-06 was prompted by the enactment of Public Law 93-647 at the federal level. Public Law 93-647 established Title IV-D of the Social Security Act regarding child support and the establishment of paternity. This law also amended < 402 (a)(26) of the Social Security Act (42 USC 601 et seq.) to require all applicants and recipients, as a condition of eligibility for AFDC, to assign to the state any rights to support from any other person the applicant/recipient may have. The provisions contained in Public Law 93-647 became effective July 1, 1975.

While such an assignment would seem to make the Social Service Board of North Dakota an appropriate public assistance agency for purposes of the Court Order in question, it is important to note that the former recipient ceased receiving AFDC in April, 1975. At that time, neither state nor federal law or regulation required repayment of assistance by a former recipient. And, neither state nor federal law or regulation required the assignment of child support payments to

the state agency and county agency as a condition of eligibility. Therefore, as there is no statutory or regulatory requirement of repayment of AFDC rightfully received, as well as the fact that there was no assignment of child support rights taken from the former recipient while she was an AFDC recipient, it is our opinion that the Social Service Board of North Dakota and the county social service board involved are in no way entitled to repayment of assistance granted out of the annual child support arrearage payment and, that the former recipient is entitled to the support payment in question.

In our opinion, before the Social Service Board of North Dakota or the county social service board involved becomes an appropriate public assistance agency, such an agency must have a right to the support payment involved. As there was neither a statute nor an assignment in effect when the former recipient received AFDC, nor a judgment in favor of the Social Service Board or the county social service board against the ex-husband which would entitle either of those agencies to the payment in question, we are of the opinion that in this case, there is no appropriate public assistance agency entitled to the child support payment pursuant to the Court Order, and therefore, the funds should be remitted to the former recipient.

Sincerely yours,

Allen I. Olson

Attorney General