

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 92-11

Date issued: May 29, 1992

Requested by: Owen K. Mehrer  
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- QUESTION PRESENTED -

Whether the term "current monthly support obligation" as used in N.D.C.C. ' 14-09-09.13 refers to the monthly amount of support established under a judgment of divorce, separation, annulment or paternity (and, if modified, under the modification) or to an amount set by a subsequent "ability to pay" order.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the term "current monthly support obligation" as used in N.D.C.C. ' 14-09-09.13 refers to the monthly amount of support established under a judgment of divorce, separation, annulment or paternity (and, if modified, under the modification) and not to an amount set by a subsequent "ability to pay" order.

- ANALYSIS -

N.D.C.C. ' 14-09-09.11 provides that any judgment or order requiring payment of child support may be enforced by an income withholding order. If the judgment or order setting the child support obligation does not require immediate income withholding, and an income withholding order is subsequently sought, a notice must be sent to the child support payor (obligor). N.D.C.C. ' 14-09-09.13 describes the notice which must be sent. The notice must state:

1. That the obligor is delinquent in the payment of child support, that a request for withholding has been made by the obligee and approved by a child support agency, or that there is no longer good cause not to require immediate income withholding, as the case may be, and the obligor is therefore subject to an income withholding order on all income.
2. The amount of child support owed and the amount of arrearage, if any.
3. The total amount of money that will be withheld by the income payor from the obligor's income in each month and that the amount is the sum of both of the following:
  - 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 monthly support obligation, if any, or equal to the most recent monthly support obligation if there is no current monthly support obligation, for application towards any arrearage subject to the limitations of section 14-09-09.16.

. . . . .  
N. D. C. C. ' 14-09-09.13 (Emphasis supplied).

The term "current monthly support obligation" is not defined in statute, and no reported North Dakota case law provides a definition. The question proposes two alternative meanings. I conclude that the phrase necessarily refers to the monthly amount of support established under a judgment of divorce, separation, annulment, or paternity (or modification to that support amount determined in modification proceedings), rather than to an amount set by an "ability to pay" order. There are two equally compelling reasons for this conclusion. In order to make those reasons more understandable, some explanation of terms is appropriate.

- Explanation of Terms -

"Child support", under North Dakota law, includes payments established by a court in a judgment of divorce, separation or annulment and those established by a court order adjudicating paternity. N. D. C. C. ' 14-09-09.10(1). North Dakota law is not specific as to the type of action which can result in an order for child support (see N. D. C. C. ' 14-09-08.1(1)). However, most child support orders arise out of interim or final proceedings for separation or divorce. A smaller, but significant, number of orders arise out of paternity proceedings. See N. D. C. C. " 14-17-07(1), 14-17-14(3), (4). The person owing a duty of support is the "obligor." N. D. C. C. ' 14-09-09.10(9). The person to whom a duty of support is owed is the "obligee." N. D. C. C. ' 14-09-09.10(8). When an obligee secures AFDC or foster care for a child, the right to receive child support is assigned to the agency furnishing those benefits, by operation of law, for as long as the benefits are received. N. D. C. C. " 50-09-06 and 50-09-06.1. When the obligee's support rights are assigned, the assignee also becomes an obligee. N. D. C. C. ' 14-09-09.10(8).

The "ability to pay" order issues out of contempt proceedings. The contempt of court procedures are set forth in N. D. C. C. ch. 27-10. Contempt proceedings are appropriate for failure to pay child support. Kitchen v. Kitchen, 304 N. W.2d 694, 697 (N. D. 1981). These procedures are applicable whether initiated by the obligee through affidavit pursuant to N. D. C. C. ' 27-10-07, the clerk of court pursuant to N. D. C. C. ' 14-09-08.1(1), or by the state's attorney (in a Uniform Reciprocal Enforcement of Support Act matter (hereafter URESA)) pursuant to N. D. C. C. ' 14-12.1-09 or 14-12.1-26. In actual practice

in North Dakota, most proceedings alleging contempt of a child support order are initiated by the clerk of court pursuant to N. D. C. C. ' 14-09-08.1(1). In such cases, an "order to show cause" is issued pursuant to N. D. C. C. ' 27-10-07.

At the hearing of the order to show cause, the alleged contemner may show cause why he or she should not be held in contempt of court for failure to obey the child support order. "Inability to comply with an order is a defense to contempt proceedings based on a violation of the order." Hodous v. Hodous, 36 N.W.2d 554, 559-60 (N.D. 1949). (Cites omitted.) In such a proceeding, the court may determine that the alleged contemner is unable to pay the full amount of ordered child support, but has the ability to pay some lesser amount. After such a determination, the court may issue an order to the effect that the alleged contemner is in contempt of court only if he or she fails to pay the amount which he or she has the ability to pay. Such orders are commonly termed "ability to pay" orders.

"Ability to pay" orders derive from consideration of the obligor's defense to contempt. The monthly amount of support established under a judgment of divorce, separation, annulment or paternity is not modified in this contempt proceeding. The obligor's "obligation" is not changed by the "ability to pay" order. Consequently, arrearages accrue, in an amount equal to the difference between the support amount in the "ability to pay" order and the monthly amount of support established under a judgment, even though the obligor makes all payments required by the "ability to pay" order.

- The Intent of the Legislature -

The phrase "current monthly support obligation" was included with the initial adoption of N. D. C. C. ' 14-09-09.13, as section 4 of House Bill No. 1903 in the 1986 Special Session of the North Dakota Legislature. There is limited legislative history concerning section 4, and none which provides a direct explanation of the intended meaning of "current monthly support obligation." However, the legislative history clearly indicates that House Bill No. 1903 was intended to comply with the 1984 child support enforcement amendments, Public Law 98-378 (codified as amended at 42 U.S.C. " 651-667 (1988)), which amended Title IV-D of the Social Security Act. Hearing on H. 1903 Before the Special Select Committee on Social Services and Veterans Affairs, 1986 Special Session (December 3, 1986) (Statement of Blaine L. Nordwall, Chief Legal Counsel for the North Dakota Department of Human Services). (House Bill No. 1903 was introduced by that committee at the request of the Department of Human Services.)

The 1984 child support enforcement amendments established mandatory state procedures for child support collection. (See 42 U.S.C. ' 666(a)(1) and (b) (1988)). The federal requirements for withholding, from income, amounts payable as support include the following:

In the case of each absent parent against whom a support order is or has been issued or modified . . . so much of such parent's wages . . . must be withheld . . . as is necessary to comply with the order . . . . If there are arrearages to be collected, amounts withheld to satisfy such arrearages, when added to the amounts withheld to pay current support . . . may not exceed . . . [the maximum permitted under the Consumer Credit Protection Act, 15 U. S. C. ' 1673(b) (1988)].

42 U. S. C. ' 666(b)(1) (1988). (Emphasis added.)

In federal regulations which implement these provisions, the second sentence quoted above is implemented by the statement: "In addition to the amount to be withheld to pay the current month's obligation, the amount to be withheld must include an amount to be applied toward liquidation of overdue support." 45 C. F. R. ' 303.100(a)(2) (1990). The new section 4 created by House Bill No. 1903 (now codified at N. D. C. C. ' 14-09-09.13) was intended to comply with the notice of income withholding required by the 1984 child support enforcement amendments. Hearing on H. 1903 Before the Special Select Committee on Social Services and Veterans Affairs, 1986 Special Session (December 3, 1986) (Statement of Nordwall, regarding section 3 of House Bill No. 1903. After amendments, section 3 of the bill became section 4.) Plainly, the provisions of N. D. C. C. ' 14-09-09.13(3) were to conform to the requirements of 42 U.S.C. ' 666(b)(1) (1988) and 45 C. F. R. ' 303.100(a)(2) (1990). The phrase "current monthly support obligation" appears to be derived from the phrase "current month's obligation," found in 45 C. F. R. ' 303.100(a)(2) (1990).

The federal law requires the notice of income withholding to describe withholding "necessary to comply with the order." "[T]he order" is a support order which "is . . . issued or [has been] modified." When there are arrearages, the amount withheld must "pay current support" and additional amounts to "satisfy such arrearages." 42 U.S.C. ' 666 (b)(1) (1988). The federal regulation requires the withholding to be in an amount sufficient to "pay the current month's obligation" in addition to "an amount to be applied toward liquidation of overdue support." 45 C.F.R. ' 303.100(a)(2) (1990). These requirements cannot be conformed to if the "ability to pay" order is treated as the "current month's obligation."

The "ability to pay" order leads to the creation (rather than satisfaction) of arrearages. The "ability to pay" order is neither the support order issued nor a modification of that order. Further, the underlying obligation, based on the divorce, separation, annulment or paternity judgment (or, if modified, a modification of that judgment), may be enforced by techniques other than contempt of court. For instance, an "ability to pay" order does not inhibit collection of a judgment through execution, or the collection of arrearages through income tax refund intercept (provided under 42 U.S.C. ' 664 (1988) with respect to federal tax refunds and under N.D.C.C. ch. 57-38.3 with respect to state tax refunds).

The legislature evidenced its intention to conform to the federal requirements in its adoption of income withholding laws for collection of child support. A conclusion that "current monthly support obligation" means a support amount determined in an "ability to pay" order would conflict with that intention. A conclusion that "current monthly support obligation" means a monthly amount established under a judgment of divorce or paternity (and, if modified, under the modification) is consistent with and supports that legislative intent.

- Due Process Consideration -

A court with jurisdiction over a divorce proceeding has continuing jurisdiction to modify a child support obligation. N.D.C.C. ' 14-05-24. The same is true with respect to separation proceedings. Fedora v. Fedora, 403 N.W.2d 10 (N.D. 1987); to paternity proceedings, N.D.C.C. ' 14-17-17(1). Also see Michels v. Fennell, 107 N.W.53 (N.D. 1906) with respect to obligations toward children of an annulled marriage. Traditionally, a modification of the support amount required a material change of circumstances. See Addy v. Addy, 456 N.W.2d 506 (N.D. 1990). North Dakota now provides for the amendment of the child support order to conform to child support guidelines, whether or not a material change of circumstances has taken place, in cases where the order sought to be amended was entered at least one year prior to the filing of a motion for an amendment. N.D.C.C. ' 14-09-08.4(3). North Dakota law also provides that a determination of eligibility for public benefits on behalf of a child or the availability of health insurance at a reasonable cost to a child constitutes a material change of circumstances. N.D.C.C. ' 14-09-08.4(4). Whatever legal standard must be met for an amendment, the parties to the divorce proceeding are entitled to notice of a motion for amendment. Rule

5(a), N. D. R. Civ. P. That is so whether the amendment is sought directly by one of the parties or whether the motion for amendment follows a periodic review of a child support order made by the child support agency.

In a contempt proceeding, the party to the divorce or paternity matter, other than the alleged contemner, is not served with notice of the proceeding. If the contempt proceedings are commenced by warrant of attachment, the attachment is deemed an original special proceeding by the state as plaintiff against the accused as defendant. N. D. C. C. ' 27-10-08. The other party to the underlying divorce or paternity proceeding is not a party in this special proceeding. If the contempt proceeding is commenced by an order to show cause, the order to show cause is almost always issued at the behest of public officials. The clerk of court may request the district judge to issue a contempt citation under N. D. C. C. ' 14-09-08.1(1) to an obligor who failed to make support payments. In URESA cases, the state's attorney may initiate contempt proceedings under N. D. C. C. ' 14-12.1-09 or 14-12.1-26. Service of those citations for contempt of court is made on "the person who has failed to make the payments." N. D. C. C. ' 14-09-08.1(1). There is no provision for service of the order to show cause on any party other than the alleged contemner when the contempt citation is issued by public officials.

If, during hearing of the "show cause" order, the alleged contemner admits to failing to pay the support amount, but offers the defense of inability to comply, an "ability to pay" order may result. If the "ability to pay" order were to be treated as a de facto modification of the order against which the contempt was alleged, the obligee would be deprived of support rights without due process of law. It is presumed that the legislature intended to enact a constitutional statute. N. D. C. C. ' 1-02-38(1). The statute may not be construed so as to defeat that presumption.

An "ability to pay" order is properly understood as an order which, if conformed to, will allow the obligor to avoid a finding of contempt of court for failure to pay the support amount required by a judgment. The "ability to pay" order has no other effect. It does not alter the amount of the support obligation imposed by a judgment. Neither may it impede the collection of child support, in the amount required by a judgment through any lawful method except exercise of the court's contempt powers.

The obligor who is subject to an "ability to pay" order may have evidence that supports a modification of the support amount provided in a judgment. The obligor has the right to seek a modification. However, the modification is available only after the obligee is afforded notice, an opportunity to be heard and present evidence, and an opportunity to dispute evidence and cross-examine witnesses. Then, and only then, may the court exercise its authority to modify support provisions of a judgment.

- EFFECT -

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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 question presented is decided by the courts.

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