

**OPINION
79-112**

July 19, 1979 (OPINION)

Mr. Tom P. Slorby

Ward County State's Attorney

Ward County Courthouse

Minot, North Dakota 58701

RE: Senate Bill 2253 (N.D.C.C. section 14-09-09.5; Docketing of Child
Judgments and Order)

Dear Mr. Slorby:

This is in response to your letter dated June 12, 1979, in which you requested an opinion regarding the mechanics to be followed by the clerks of court in administering Section 5 of Senate Bill 2253 which will be cited as N.D.C.C. section 14-09-09.5.

You asked two related questions and offered your interpretation of the statute in regard to those two issues:

1. May a judgment containing a child support provision which merely states an obligation in monthly amounts and does not disclose on its face an arrearage, if any, be docketed in the judgment docket of the clerk of court without any other supporting documentation?
2. May a judgment providing for installment payments of child support be docketed prior to any payments becoming due?

Briefly we would respond to your questions:

1. We would concur in your analysis in regard to this issue. The order itself or a judgment containing a support provision is the item being docketed. There is no longer a need for a judgment stating an amount certain for arrearages when we are dealing with child support.
2. A reading of the statute and a review of the legislative history of the bill would lead us to the conclusion that the judgment or order could be docketed prior to any installment coming due. Docketing prior to the maturation of an installment would in effect create an "inchoate" lien until such time as a payment is past due and then at that point a lien would attach as to the arrearage.

Before discussing the reasoning in support of the position taken above, we would note that we fully concur in your reading of the statute as placing the burden on the obligee under a child support order to docket the judgment or order. There is no duty here for the clerks to docket these unless the obligee requests the docketing and

complies with the statute and other applicable law in requesting such docketing. At that point, of course, the clerk would be under a duty to docket.

We further agree that there is nothing in N.D.C.C. section 14-09-09.5 that would negate the requirement of N.D.C.C. section 28-20-15 for an Affidavit of Identification. It would appear that that statutory requirement would be applicable to these cases as well.

The testimony offered by the Bill's sponsor, the Social Service Board, before the Senate Social Welfare and Veteran's Affairs Committee and the House Social Service Committee stated that the legislation was specifically aimed at " . . . eliminating the need to have arrearages under a child support order reduced to a judgment before proceeding against the property of the obligor. Under present (pre-Senate Bill No. 2253) law this reducing of arrearages to a judgment is at best a time consuming formality, since once a periodic payment has accrued it cannot be retroactively modified . . . This section recognizes the fact that a periodic payment once accrued under a child support order is a nonmodifiable obligation and allows each periodic amount to become a lien against the obligor's real property located in a county where a Judgment of Divorce or other judgment or order containing provisions for child support payments is docketed."

As to procedures contemplated, it would appear that once a judgment has been entered in any county or an order for support issued by a judge in any county in North Dakota, that judgment or order may be docketed in that same county or any other county in the state where real property of the obligor is located.

The Social Service Board testimony on Senate Bill 2253 contemplated that " . . . once the judgment or order is docketed it will serve as notice to any prospective secured creditors or purchasers that there may be a prior lien. In order to convey the realty or to secure financing the obligor would simply have to include a sworn affidavit with the other papers necessary to complete the transaction. This affidavit would certify that all amounts and installments which had matured under the judgment or order on the date of the certification had been paid in full. When filed with the deed or other papers it would serve to clear the title. In cases where the child support payments are being sent through a clerk of court under section 14-08-07 for example, the certification would also require the written approval of the clerk of court who has charge of the payment records under the judgment or order."

The words of the statute make clear that there need be only one docketing by the clerk at the request of the obligee. This would be the docketing of the judgment or order for periodic payments. Then nothing more is required of the clerk until a transaction involving the real property is to take place. At that point the burden would be on the obligor to prepare an affidavit with a space included for certification by the clerk having charge of the payment record for the child support obligation that the payments are current. This may be a clerk other than the one in the county where the real estate transaction is taking place depending on which county is responsible for actually collecting the child support.

As the Social Service Board testified: "A careful reading of this section 5 (Now N.D.C.C. section 14-09-09.5) of the bill will make it apparent that no new duties are being added to burden the clerks since they already docket judgments and must keep daily updated records of child support payments as part of their duties under the child support enforcement program. So, upon request, they would simply need to check their child support records in order to certify that the judgment or order in question had no arrearages."

Section 5 of Senate Bill 2253 was drafted to be quite similar to a provision in California (Code of Civil Procedure section 674.5) which has been in effect in that state since 1959 with no apparent impairment in the transfer of property there. It was amended in California in 1976 to add spousal support and a provision for the approval in writing by an officer of the court in cases where payments are made through such officer.

As to your question regarding the proper time for filing such judgments and orders: We would read the statute to allow docketing at any time after it is originally entered by a clerk in the original county or after it is issued by the judge in the case of an order.

In *Heller Properties Inc. v. Rothschild*, 90 Cal. Reporter 133 (1970), the Court, interpreting California's essentially identical provision, held that such order or judgment creates a lien at the time it is docketed even for periodic payments coming due after the filing but the lien as to after-accruing installments remains "inchoate" until they become respectively due and payable.

There is considerable case law dealing with this provision in California which may be able to provide some guidance in administering and interpreting our law during the initial period.

We hope that the analysis and review of the legislative history of this new legislation will be of assistance to you in advising your clerk of court in regard to administering this new enforcement option for the collection of child support.

Sincerely,

ALLEN I. OLSON

Attorney General