

**FORMAL OPINION
2002-F-06**

DATE ISSUED: April 10, 2002

REQUESTED BY: Mike Schwindt, Director, Child Support Enforcement, North Dakota
Department of Human Services

QUESTIONS PRESENTED

I.

Whether the Child Support Enforcement Program's disbursement of the proceeds of an administrative or judicial execution is governed by the distribution provisions in N.D.C.C. § 14-09-25(6) and Title IV -D of the Social Security Act (42 U.S.C. § 651 et seq.).

II.

Whether the Child Support Program is required to inform the clerk of court (for judicial executions) that the applicable interest rate for a child support judgment is twelve percent per annum under N.D.C.C. § 28-20-34 and include that rate in an administrative writ of execution.

III.

Whether N.D.C.C. § 14-09-25(6) prohibits the Child Support Enforcement Program from applying any interest collected as a result of an administrative or judicial execution to the judgment interest that has accrued on the arrears, since that statute currently prohibits the Program from including judgment interest in its records.

ATTORNEY GENERAL'S OPINIONS

I.

It is my opinion that the Child Support Enforcement Program's disbursement of the proceeds of a judicial or administrative execution is governed by the distribution provisions in N.D.C.C. § 14-09-25(6) and Title IV-D of the Social Security Act (42 U.S.C. § 651 et seq.), even if disbursement under those provisions results in the proceeds

being applied to the debtor's current monthly obligation or to arrears other than the arrears that have been included in the docketed judgment and referred to in the writ of execution under N.D.C.C. § 28-21-06.

II.

It is my opinion that the Child Support Enforcement Program must inform the clerk of court (for judicial executions) that the applicable interest rate for the judgment is twelve percent per annum under N.D.C.C. § 28-20-34 and must include that rate in an administrative writ of execution.

III.

It is my opinion that N.D.C.C. § 14-09-25(6) prohibits the Child Support Enforcement Program from applying any interest collected as a result of an administrative or judicial execution to the judgment interest that has accrued on the docketed arrears unless the appropriate amount of interest has been calculated by an individual or entity other than the Program and approved by a court. In the absence of such a court order, any amounts collected as judgment interest should be applied to the obligor's current monthly obligation and to the principal balance of any arrears owed by the obligor under the distribution provisions in N.D.C.C. § 14-09-25(6) and Title IV-D.

ANALYSES

I.

State law authorizes a number of methods to enforce a person's child support obligation.¹ Many of these enforcement methods, such as income withholding and credit bureau reporting, may be implemented by the Child Support Enforcement Program (Program) itself without judicial involvement. Others, such as contempt of court and license suspension, require a court order. For administrative and judicial executions against property owned by a child support obligor, docketing of a certain amount of arrears is a prerequisite. Since docketing of arrears is unnecessary for many

¹ These methods include income withholding (N.D.C.C. § 14-09-09.24), liens (N.D.C.C. ch. 35-34), interception of state and federal income tax refunds (N.D.C.C. § 57-38.3-04, 42 U.S.C. § 664), credit bureau reporting (N.D.C.C. § 50-09-08.4), contempt of court (N.D.C.C. § 14-08.1-05(3)), suspension of certain occupational, professional, or recreational licenses (N.D.C.C. § 14-08.1-06), suspension of a motor vehicle operator's license (N.D.C.C. § 14-08.1-07), participation in work activities (N.D.C.C. § 14-08.1-05.1), criminal prosecution (N.D.C.C. § 12.1-37-01), and administrative and judicial executions on the person's property (N.D.C.C. §§ 28-21-05.2, 28-21-06).

of the enforcement methods used by the Program, it is common that all or part of the arrears owed by an obligor are undocketed.

Writs of execution, whether judicial or administrative, must include the amount of the docketed judgment on which the execution is based. N.D.C.C. § 28-21-06. Generally, the amount of funds that may be collected in an execution is limited to the docketed judgment amount; the sheriff is required to return any excess proceeds to the debtor. N.D.C.C. §§ 28-21-11; 28-23-09. The question presented involves the proper method for the Program to disburse the proceeds of an execution once the proceeds are collected by the sheriff and received by the Program.

Legislation was enacted in 1999 to clarify the general rule for disbursement of the proceeds of an execution or other post-judgment collections: post-judgment costs are paid first, then any interest due on the judgment, and the remaining proceeds are used to reduce the balance of the “judgment amount.” N.D.C.C. §28-20-36. During the Legislature’s consideration of the bill enacting N.D.C.C. § 28-20-36, it was informed that the bill as originally drafted would conflict with federal requirements for distribution of child support collections.² To prevent this conflict, the bill was amended to authorize the Program to comply with federal distribution rules in Title IV-D of the Social Security Act if those rules conflict with N.D.C.C. § 28-20-36.³ This amendment is included in current N.D.C.C. § 14-09-25(6). See 1999 N.D. Sess. Laws ch. 284, § 1.

Section 14-09-25(6), N.D.C.C., requires the Program to disburse collected child support payments in conformity with Title IV-D of the Social Security Act (42 U.S.C. § 651 et seq.). Title 42, Section 657 of the United States Code establishes a complicated formula for distribution of child support collections. It is not necessary in this opinion to discuss the details of that formula. In summary, child support collections generally must be applied first to the amount required to be paid for the month in which the amount is collected (current child support obligation), and then to any arrears based on when the arrears accrued and whether the arrears accrued when the recipient was on public assistance. The distribution formula in 42 U.S.C. § 657 makes no distinction between docketed and undocketed arrears.

The distribution formula in 42 U.S.C. § 657 for child support collected as a result of an administrative or judicial execution will, in many cases, conflict with the general rule in N.D.C.C. §28-20-36 that the proceeds of an execution are applied to the docketed

² See Hearing on S.B. 2287 Before the Senate Comm. on the Judiciary, 1999 N.D. Leg. (Feb. 1) (Written testimony of Barbara Siegel) (“Federal requirements mandate, at a significant level, the manner in which child support payments are to be distributed; there is little left to state option.”).

³ See Hearing on S.B. 2287 Before the House Comm. on the Judiciary, 1999 N.D. Leg. (Mar. 10) (Written testimony of Senator Wayne Stenehjem).

judgment (after payment of any costs and post-judgment interest). For example, the Program would violate 42 U.S.C. § 657 if it applied the proceeds of an execution to the docketed arrears owed by the obligor when the obligor's current monthly obligation is unsatisfied. If child support is collected through an execution, and the obligor has not paid the required amount of support for the current month, the proceeds must be applied to the current month's obligation before being applied to any arrears. 42 U.S.C. § 657(a)(2)(A).

The request for this opinion provides another example of a circumstance in which Title IV-D distribution rules will conflict with N.D.C.C. § 28-20-36. It is foreseeable that the Program will receive other child support collections from or on behalf of an obligor while waiting for the sheriff to execute on the obligor's property. Under 42 U.S.C. § 657, those collections will be applied first to the obligor's current monthly obligation and then to reduce the amount of arrears owed by the obligor. If the same arrears were included in the docketed judgment, it is possible that the proceeds of the execution will exceed the remaining amount of docketed arrears owed by the obligor. Normally, any excess proceeds from an execution must be returned to the judgment debtor. See N.D.C.C. §§ 28-21-11, 28-23-09. However, the distribution formula in 42 U.S.C. § 657 does not allow the Program to return any excess proceeds to the obligor if the obligor owes additional arrears that have not been docketed. Rather, if the proceeds of the execution exceed the remaining amount of docketed arrears owed by an obligor, the Program must apply the excess proceeds to any other arrears owed by the obligor before returning the balance of the proceeds to the obligor. 42 U.S.C. § 657.

To summarize, Title IV-D, particularly 42 U.S.C. § 657, governs the Program's disbursement of all child support collections, including the proceeds of an administrative or judicial execution. In many cases, the distribution provisions in Title IV-D will require the Program to apply the proceeds of the execution to the obligor's current monthly obligation or to arrears that have not been docketed. This distribution formula conflicts with the general rule for disbursement of execution proceeds in N.D.C.C. § 28-20-36. In the event of such a conflict, N.D.C.C. § 14-09-25(6) provides: "Notwithstanding section 28-20-36, the state disbursement unit shall disburse collected child support payments in conformity with title IV-D of the Social Security Act." Therefore, it is my opinion that the Program's disbursement of the proceeds of a judicial or administrative execution is governed by the distribution provisions in N.D.C.C. § 14-09-25(6) and Title IV-D of the Social Security Act (42 U.S.C. § 651 et seq.), even if disbursement under those provisions results in the proceeds being applied to the debtor's current monthly obligation or to arrears other than the arrears that have been included in the docketed judgment and referred to in the writ of execution under N.D.C.C. § 28-21-06.⁴

⁴ Section 50-09-08.5, N.D.C.C., authorizes the Program to issue writs of execution under N.D.C.C. ch. 28-21 to "satisfy any current support obligation and the past-due amount" If disbursement of the proceeds of an execution was limited to the

Notwithstanding this conclusion, I foresee a potential challenge for the Program in disbursing the proceeds of an execution as explained in this opinion. A writ of execution issued by the clerk of court is returned by the sheriff to the clerk of the court. N.D.C.C. § 28-21-07. The clerk of court must note on the judgment docket the amount of the judgment that is discharged or cancelled as a result of the execution. N.D.C.C. §§ 28-20-25, 28-20-26. The natural inclination of the clerk of court will be to subtract from the docketed amount of arrears the full amount collected by the sheriff, less post-docketing interest and costs. The Program will need to develop a way of advising the clerk of court of the portion of the proceeds of the execution that should be applied to the docketed arrears under N.D.C.C. § 14-09-25(6) and Title IV -D.⁵

It may seem odd to use one method for determining the amount of funds to be obtained by an execution and a different method for distributing the proceeds of an execution. However, the situation presented in this opinion is not one in which a creditor attempts to apply the proceeds of an execution to an additional debt the creditor claims against the debtor which is disputed and has not been adjudicated. Rather, all arrears owed by an obligor, whether docketed or undocketed, are already judgments by operation of law. N.D.C.C. § 14-08.1-05. In addition, the obligor's current monthly child support obligation is imposed under an existing judicial or administrative order of which the obligor has presumably been properly notified.

II.

Each unpaid monthly obligation is a separate judgment by operation of law and post-judgment interest begins to accrue on the date each month's obligation is due and unpaid. N.D.C.C. § 14-08.1-05; Darling v. Gosselin, 589 N.W.2d 192 (N.D. 1999); Baranyk v. McDowell, 442 N.W.2d 423 (N.D. 1989). While the total interest due in a child support case may be difficult to calculate because each unpaid monthly obligation is a separate judgment, the rate of interest is easy to determine. Under N.D.C.C. § 28-20-34, the rate of interest is twelve percent per annum. Baranyk, 442 N.W.2d at

docketed arrears or "judgment amount" under N.D.C.C. § 28-20-36, it would be impossible to apply the proceeds to the obligor's "current support obligation" as contemplated in the statute. The only way to use an administrative writ of execution to satisfy an obligor's current support obligation is to apply the distribution provisions in N.D.C.C. § 14-09-25(6) and Title IV-D rather than the general rule in N.D.C.C. § 28-20-36. Thus, the reference in N.D.C.C. § 50-09-08.5 to "current support obligation" lends additional support to my conclusion that the Program's disbursement of the proceeds of an administrative execution governed by Title IV-D distribution rules rather than N.D.C.C. § 28-20-36.

⁵ This problem does not arise for administrative executions because those executions are returned to the Program.

426. A writ of execution issued by a clerk of court must include “the rate of interest to be used in calculating interest due on the judgment pursuant to section 28-20-34.” N.D.C.C. § 28-21-06. The Program is not authorized to omit the interest rate when issuing its own writs of execution. See N.D.C.C. § 28-21-05.2. As discussed in Issue Three of this opinion, N.D.C.C. § 14-09-25(6) prohibits the Program from including an amount of judgment interest in its records unless calculated by a third party. However, the statute does not require the Program to ignore the applicable interest rate when it issues an administrative writ of execution or asks a clerk of court to issue a judicial writ of execution. It is my opinion the Program should inform the clerk of court (for judicial executions) that the applicable interest rate is twelve percent and it should include that rate in administrative executions.

III.

Determining the amount of interest owed in a child support case is a complicated calculation because a new obligation generally arises every month and multiple payments may be received in a particular case at different times in a given month. Recognizing the difficulty of performing these calculations for every child support case, the 2001 Legislative Assembly enacted the following provision:

The [Child Support Enforcement Program] may calculate judgment interest accrued only on child support obligations that first became arrearages after July 1, 2002. The [Child Support Enforcement Program] shall enter in its records judgment interest on child support obligations that first became arrearages on or before July 1, 2002, only if a court has ordered the interest amount to be calculated by some individual or entity other than the public authority and approved the calculated amount.

N.D.C.C. § 14-09-25(6). See also 2001 N.D. Sess. Laws ch. 156, § 1. This statute prohibits the Program from computing the interest that has accrued on an unpaid child support obligation and from including interest in its records of the amount of child support owed by an obligor unless an amount of interest has been approved by a court.

As explained in Issue One of this opinion, the general distribution rule for proceeds of executions in N.D.C.C. § 28-20-36 does not apply if federal distribution rules require a different method of distribution. Thus, the fact a sheriff collects an amount of post-judgment interest under an execution does not affect how the Program must disburse the proceeds it receives from the sheriff.

By prohibiting the Program from including interest in its records, which are used as the basis of disbursing the child support collected from or on behalf of an obligor, N.D.C.C. § 14-09-25(6) essentially requires the Program to disburse child support collections as if

no interest was owed on the arrears.⁶ Accordingly, it is my further opinion that that the Program should disburse any amounts collected as interest to satisfy the debtor's current support obligation and any arrears (including undocketed arrears) as provided in N.D.C.C. § 14-09-25(6) and Title IV-D distribution provisions.

EFFECT

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 questions presented are decided by the courts.

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⁶ After July 1, 2002, the Program may assess interest on child support arrearages. N.D.C.C. § 14-09-25(6).