

N.D.A.G. Letter to Mehrer (March 16, 1990)

March 16, 1990

Mr. Owen K. Mehrer
Stark County State's Attorney
P.O. Box 130
Dickinson, ND 58602

Dear Mr. Mehrer:

Thank you for your January 23, 1990, letter regarding interstate income withholding orders.

You ask if it is appropriate under North Dakota law for a clerk of court to send an income withholding order to an out-of-state military pay center when an obligor is in the military service. You note that the alternative procedure would be to send the income withholding order to the state in which the obligor is located. You also note that the military prefers that child support collections be handled through pay centers.

As a condition of approval for a state plan for child and spousal support, provided for under title IV-D of the Social Security Act, a state is required to have in effect procedures under which all child support orders issued or modified in the state will include a provision for withholding from wages in order to assure the collection of child support. 42 U.S.C. § 666(a)(8). Federal law details requirements for such wage withholding laws, which must be met in order for a state to secure approval of its child and spousal support plan. Included is a requirement that each state extend its withholding system to include withholding from income derived within that state in cases in which the applicable support orders were issued in other states. 42 U.S.C. § 666(b)(9). This process is commonly referred to as "interstate withholding."

North Dakota law conforms to the requirements for interstate withholding, see N.D.C.C. §§ 14-09-09.19 through 14-09-09.22, and it may be assumed that most states have similarly conformed or attempted to conform with the federal requirement. The civilian interstate child support enforcement network to which you refer, which was initially limited to operation of the Uniform Reciprocal Enforcement of Support Act, has been expanded to include interstate withholding.

Residents of North Dakota may apply for interstate income withholding, and the North Dakota Department of Human Services is required to compile and transmit to the child support agency of the other state all documentation required to effectuate that purpose. N.D.C.C. § 14-09-09.18. You ask if the interstate withholding process can be avoided by the clerk of court issuing an income withholding order directly to the military pay center.

The clerk of court is obliged to serve an income withholding order on the income payor in the manner provided for service of a summons in a civil action. N.D.C.C. § 14-09-09.16. Service of process in a civil matter is governed by Rule 4 of the North Dakota Rules of Civil Procedure. Provision is made for service outside the state under Rule 4(d)(3). It is possible to conform to the service requirements of N.D.C.C. § 14-09-09.16 with respect to an income payor who is out of state. A corollary question arises as to the effectiveness of service to effectuate jurisdiction based upon presence, enduring relationships, or contacts. See N.D.R. Civ. P. 4(b)(2). These provisions encompass the concept of "long-arm" jurisdiction in the state of North Dakota. While the exercise of personal jurisdiction based upon contacts requires a factual determination, it appears unlikely that any of the military services of the United States would contend, or could successfully contend, that none of the listed circumstances exist. All branches of military services have active recruitment programs in North Dakota, and some have military bases as well. All enjoy legal status within the state. It appears, therefore, that long-arm jurisdiction may properly be exercised.

Finally, it is necessary to determine if the exercise of such long-term jurisdiction has been preempted or prevented by federal law governing interstate income withholding.

The federal statutes governing interstate income withholding are cast as requirements imposed upon the several states. The first requirement is that an income withholding system be in place within the state. The second requirement is that the income withholding system in the state be available for use when the state receives an applicable support order issued in another state. The statute does not specifically oblige a state to send its income withholding orders to other states for collection in any particular fashion.

The Office of Child Support Enforcement, Family Support Administration, of the United States Department of Health and Human Services, has promulgated regulations to implement the statutory income withholding procedures. Those regulations are found at 45 C.F.R. § 303.100, and were published on May 9, 1985, in 50 F.R. 19, 623-27 (1985). The regulations again do not specifically address the concern you raise. However, the introductory material and description of the comments made to the proposed regulations is helpful. The relevant observation is:

Several commentors questioned whether States would be prohibited from using their long arm statutes in interstate cases. These commentors felt that the IV-D agency in one State should be able to contact an employer in another State directly. This is a matter of State law and we agree that a State may use its long arm statute for wage withholding if the State statute allows the state to acquire long arm jurisdiction over an employer in another State. Otherwise, the State must contact the IV-D agency in the State where the absent parent is employed to initiate withholding.

50 F.R. 19, 627 (emphasis supplied). These observations did not result in any specific change to the federal regulations. However, they represent an analysis of the governing federal law made contemporaneously with the issuance of federal regulations by the

agency responsible for the administration of the federal law in question. Considerable weight should be accorded to an agency's construction of a statutory scheme it is entrusted to administer. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979).

Based upon the foregoing discussion, it is my opinion that an income withholding order may issue to an income payor over whom the jurisdiction of North Dakota courts may be exercised, including any income payor over whom jurisdiction could be secured pursuant to Rule 4(b) of the North Dakota Rules of Civil Procedure. Thus, if the exercise of long-arm jurisdiction is possible, child support officials have a choice between the use of interstate income withholding and the use of in-state income withholding combined with the exercise of long-arm jurisdiction. It is appropriate for child support enforcement officials to pursue whichever avenue is most efficient and effective. The information contained in your inquiry suggests that the issuance of an income withholding order to a military pay center would be most efficient and effective.

I hope this responds adequately to your concerns.

Sincerely,

Nicholas J. Spaeth

cv