



Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

January 8, 1990

The Honorable Margaret Toot
Clerk of the Superior Court
Gila County
1400 East Ash
Globe, Arizona 85501

Re: I90-001 (R87-119)

Dear Ms. Toot:

You have asked whether A.R.S. §§ 12-941 and -942 are applicable when, for lack of a current address, the clerk of court is unable to deliver to the payee/custodial parent child support monies which were paid without benefit of a wage assignment. We conclude that these statutes do not apply in this situation. Moreover, we conclude that these funds do not escheat but, as you suggested, should be returned to their source.

A.R.S. § 12-941(A) provides:

All money or property used as evidence and remaining unclaimed in the hands of a state, county, city or town officer, after final disposition of the cause in which so used, or seized by a peace officer as being used unlawfully or for an unlawful purpose and held unclaimed from date of seizure, or coming into the hands of any state, county, city or town officer as lost, unclaimed or contraband, shall, if no other disposal is prescribed by law, be delivered to the clerk of the superior court if held by a state or county officer, or to the clerk of a city court if held by a city officer, or to the justice of the peace if held by a town officer. Those items that have

a useful value to a law enforcement agency may be retained and utilized by that law enforcement agency.

(Emphasis added.) A.R.S. § 12-942 provides:

If any such money or property as described in § 12-941 is not claimed and taken away within ninety days after the time it has been delivered to the officer receiving custody of the property pursuant to § 12-941, the officer may at any time thereafter proceed to dispose of it in the manner provided in this article.

Child support monies are not "evidence" and have not been "seized by a peace officer" as having been used for unlawful purposes. Furthermore, a clerk of court does not come into possession of child support monies as "lost, unclaimed or contraband." Rather, child support monies come into the hands of the clerk of court pursuant to a court order and the clerk's duties are to receive and disburse the child support.^{1/} See A.R.S. §§ 12-2454, 12-2457(A), 25-322 and 25-323. We conclude that A.R.S. §§ 12-941 and 12-942 do not apply. Therefore, the child support monies do not escheat to the county pursuant to the procedures of A.R.S. § 12-946.

As you stated, under A.R.S. §§ 12-2454(M) and 25-323(M), child support monies received by the clerk of court pursuant to a wage assignment are returned "to their source" if, for lack of an adequate current address, the clerk has been unable to deliver the child support payments to the payee/custodial parent for a period of three months. Moreover, under such circumstances, these statutes require the court, upon request, to terminate the wage assignment, i.e., the requirement that the obligor's employer/payor make the child support payments to the clerk of court.

^{1/} "Support monies" are included in "monies received in trust" or in a fiduciary capacity by the clerk. A.R.S. § 12-286(D)(10). The clerk may invest monies received in trust in interest bearing savings accounts or certificates of deposit while held in trust, *id.* subsection A; interest earned on such investments shall be deposited in the county general fund, *id.* subsection B.

There are no similar statutory procedures applicable to child support payments paid directly to the clerk of court by the parent obligated to pay support (parent/obligor). However, A.R.S. § 25-320(A) provides that the court may order either or both parents to pay an amount reasonable and necessary for child support. Unless the parties agree otherwise, such payments are to be made to the clerk of the court for remittance to the person entitled to receive them. A.R.S. § 25-322(A). Parties affected by the child support order are required to keep the clerk informed of their residential addresses. Id. subsection C.

In custody and child support matters the primary consideration is "the best interests of the child." A.R.S. § 25-332. See also A.R.S. § 25-320(A). It is also public policy to recognize the rights of both parents as well as their duties. Morales v. Glenn, 114 Ariz. 327, 330, 560 P.2d 1234, 1237 (1977); Ward v. Ward, 88 Ariz. 130, 137, 353 P.2d 895, 900, modified 88 Ariz. 285, 356 P.2d 30 (1960). Cf. In re Appeal in Maricopa County Juvenile Action No. JS-5209 and No. JS-4963, 143 Ariz. 178, 182, 692 P.2d 1027, 1031 (App. 1984) (In context of termination of parental rights the court stated: "It is now well established that a parent's right to the custody and control of his or her children is a fundamental right guaranteed by the United States Constitution.") The plain intent of the Legislature in enacting the child support and wage assignment statutes was to provide parental financial support in the best interest of the child. Nowhere in this statutory scheme is a legislative intent evidenced that child support monies should escheat^{2/} to either the county or state^{3/} because the custodial parent has failed to advise the clerk where to forward payments.

2/ Another elementary principle of law is that forfeitures are not favored, DeAlmada v. Sovereign Camp of the Woodmen of the World, 49 Ariz. 433, 436, 67 P.2d 474, 475 (1937), and every reasonable presumption is against a forfeiture, Yank v. Juhrend, 151 Ariz. 587, 590, 729 P.2d 941, 944 (App. 1986).

3/ In the event that the clerk of court is in possession of child support monies for which neither the address of the payee/custodial parent nor the obligor is known, the Uniform Unclaimed Property Act, A.R.S. §§ 44-301 to -340, applies. Specifically, A.R.S. § 44-313 provides: "Intangible property held for the owner by a . . . governmental subdivision or agency . . . which remains unclaimed by the owner for more than five years after becoming payable or distributable is presumed abandoned." These abandoned monies escheat to the state general fund pursuant to A.R.S. § 44-323. Therefore, in those instances in which the clerk of the court cannot
(continued)

The first principal of statutory construction is to determine and give effect to the legislative intent behind the statute. Appropriate matters to consider are the context, the language, the subject matter, the historical background, the effects and consequences and the spirit and purpose of the law. Martin v. Martin, 156 Ariz. 452, 457, 752 P.2d 1038, 1043 (1988). "It is the spirit of the law which is considered and which prevails." Navajo Tribe v. Arizona Department of Administration, 111 Ariz. 279, 281, 528 P.2d 623, 625 (1974); City of Phoenix v. Superior Court, 101 Ariz. 265, 267, 419 P.2d 49, 51 (1966).

To give effect to these principles of statutory construction, one should treat a child support payment made directly to the clerk of court by the parent/obligor pursuant to A.R.S. §§ 25-320(A) and 25-322(A) in the same manner as a child support payment made pursuant to a wage assignment. Thus, when a child support payment cannot be sent to the payee/custodial parent for three months for want of a current address, the payment should be returned to its source, as is provided for wage assignment payments in A.R.S. §§ 12-2454(M) and 25-323(M).^{4/}

Additionally, although the Legislature has not specifically provided direction to the clerk of court in the cases in which the parent/obligor pays child support directly

(footnote 3 continued)

distribute child support monies to either the payee/custodial parent or the parent/obligor for want of a current address, A.R.S. § 44-313 requires that these monies be held for a period of five years. After five years, the clerk must prepare a report to the Arizona Department of Revenue to be filed before November 1 of each year specifically describing the intangible property being held. A.R.S. § 44-317. At the same time as the final date for filing the report as required by A.R.S. § 44-317, the clerk must deliver the abandoned property to the Department of Revenue. A.R.S. § 44-319.

^{4/} In the context of the wage-assignment statutes, A.R.S. §§ 12-2454 to -2454.03 and 25-323 to -323.02, "source" means the employer or other payor of monies due the obligor. See A.R.S. §§ 12-2454(E), (G), (H); 12-2454.01(C), (E), (F), (G), (I), (J); 12-2454.02(B); 25-323(E), (G), (H); 25-323.01(C), (E), (F), (G), (I), (J); 25-323.02(B). "Source" is defined as "a point of origin." Webster's New Third International Dictionary 2177 (1976). Thus, when child support payments are paid directly to the clerk of court by the parent/obligor, the parent/obligor is the source of such payments.

I 90-001

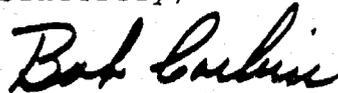
The Honorable Margaret Toot
Page 5

to the clerk rather than pursuant to a wage assignment, a policy of treating both payments similarly enhances the payee/custodial parent's subsequent ability to collect child support arrearages. A.R.S. § 12-2453(E) allows specified parties entitled to receive child support payments to "file an action within three years after the emancipation of the youngest of all the children who were the subject of [a court order to pay child support] . . . for all of the unpaid child support arrearages for the entire minority of the children." A parent/obligor whose child support payments were not disbursed to the payee/custodial parent, but which escheated to the state or county, could defend an action under A.R.S. § 12-2453(E) on the basis that such child support had been paid as ordered.

Moreover, return of such payments to a non-custodial parent source facilitates rather than thwarts the intent of the Legislature that parents support their children. A non-custodial parent would then be alerted that child support payments were not reaching the children, and could take whatever legal steps were appropriate in the best interest of the children.

We conclude that when the clerk of court cannot distribute child support monies to the payee/custodial parent for a period of three months for want of an adequate current address, these monies should be returned to their source irrespective of the manner in which they were paid to the clerk.

Sincerely,



BOB CORBIN
Attorney General

BC:SSS:ksl