

June 27, 2007

Cody Lidge, Family Court Representative
South Carolina Court Administration
1015 Sumter Street, Suite 200
Columbia, South Carolina 29201

Dear Mr. Lidge:

In a letter to this office you indicated that it has come to your attention that there are several different variations in the manner in which child and spousal support orders are indexed in the offices of the clerks of court in this State. You indicated that some clerks automatically index separate child and spousal support orders to the judgment rolls. Such indexing is based upon the clerks' belief that child or spousal support may affect title to real or personal property so they automatically enroll support orders even absent specific instructions from a judge and despite instances where the obligor pays on time. In your letter you stated that in automatically indexing separate child and spousal support orders to the judgment rolls, clerks rely on a statement in the Clerk's Manual, Section 7.11.12 which states, "unless otherwise ordered by the court, if the judgment affects real or personal property it must be enrolled." They also cite Rule 78(b), SCRCPC which states, "[t]he clerk shall enter an abstract of every final judgment or order affecting title to or lien upon real or personal property..." You also indicated that other clerks enroll such support orders only when instructed to do so by a judge or when an account is delinquent. Referencing such, you have questioned whether separate orders for child and spousal support should be automatically indexed to the judgment rolls in the office or a clerk of court.

As to judgments generally, S.C. Code Ann. § 15-35-510 states that "[t]he clerk...(of court)...shall keep among the records of the court a book for the entry of judgments, to be called the "abstract of judgments." S.C. Code Ann. § 15-35-520 states that "[i]n this book shall be entered each case wherein judgment may be signed...after judgment or final order..." I am unaware of any statutes that provide that clerks are to automatically index separate child and spousal support orders to the judgment rolls. However, S.C. Code Ann. § 20-7-1295 states that

(A) A child support obligation which is unpaid in an amount equal to or greater than one thousand dollars, as of the date on which it was due, is a lien in favor of the obligee in an amount sufficient to satisfy unpaid child support, whether the amount

due is a fixed sum or is accruing periodically. An amount of restitution established by the Department of Social Services, Child Support Enforcement Division, or its designee (division) or the family court is due and payable as of the date the amount is established. The lien shall incorporate any unpaid child support which may accrue in the future and does not terminate except as provided in subsection (D). Upon recordation or registration in accordance with subsection (C), the lien shall encumber all tangible and intangible property, whether real or personal, and an interest in property, whether legal or equitable, belonging to the obligor. An interest in property acquired by the obligor after the child support lien arises is subject to the lien, subject to the limitations provided in subsections (C) and (D).

(B) When the division determines that child support is unpaid in an amount equal to or greater than one thousand dollars, it shall send written notice to the obligor by first-class mail to the obligor's last known address, as filed with the tribunal pursuant to Section 20-7-854. The notice shall specify the amount unpaid as of the date of the notice or other date certain and the right of the obligor to request an administrative review by filing a written request with the division within thirty days of the date of the notice. If the obligor files a timely written request for an administrative review, the division shall conduct the review within thirty days of receiving the request.

(C) The division shall file notice of a lien with respect to real property with the register of deeds for any county in the State where the obligor owns property. The social security number, or the alien identification number assigned to a resident alien who does not have a social security number, of the obligor must be noted on the notice of the lien. The filing operates to perfect a lien when recorded, as to any interest in real property owned by the obligor that is located in the county where the lien is recorded. Liens created under this section must be maintained by the register of deeds of each county of the State, in accordance with established local procedures for recordation. If the obligor subsequently acquires an interest in real property, the lien is perfected upon the recording of the instrument by which the interest is obtained in the register of deeds where the notice of the lien was filed within six years prior thereto. A child support lien is perfected as to real property when both the notice thereof and a deed or other instrument in the name of the obligor are on file in the register of deeds for the county where the obligor owns property without respect to whether the lien or the deed or other instrument was recorded first. (emphasis added).

Additionally, S.C. Code Ann. §§ 20-7-1315 provides for withholding of income to secure payment of support obligations. Section 20-7-1315(A) defines "order for support" as "...any order of a court or an administrative agency of competent jurisdiction which provides for periodic

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payments of funds for the support of a child or maintenance of a spouse or former spouse and support of a child, whether temporary or final....” Section 20-7-1316 states that

[w]hen a delinquency¹ occurs as defined in Section 20-7-1315, the obligor must be given notice...of the proposed lien. Where no petition to stay service is timely filed or where no relief is granted to the obligor pursuant to Section 20-7-1315(D)...[concerning the withholding of income to secure payment of support obligations],... the arrearage may be recorded...in the appropriate index in the office of the Clerk of Court or Register of Deeds. Upon recordation the arrearage has the same force and effect as a judgment and it is cumulative to the extent of any and all past due support, until the arrearage is paid in full. The judgment may be recorded in any county in which the obligor resides or in which he owns real property by the filing of a transcript of judgment in that county....

Such statutes are apparently in compliance with mandates of federal law. For instance, 42 U.S.C. § 666(a)(4)(A) provides that each State must have in effect laws establishing “[p]rocedures under which...liens arise by operation of law against real and personal property for amounts of overdue support owed by a noncustodial parent who resides or owns property in the State....” (emphasis added). Such statutory requirements are consistent with statutes in other states that provide that overdue payments become judgments by operation of law. For instance, the Oklahoma Attorney General in an opinion dated October 18, 2000 referenced a statute, 43 O.S. Supp. 2000, § 137(A) which states that

[a]ny payment or installment of child support ordered pursuant to any order, judgment, or decree of the district court or administrative order of the Department of Human Services is, on and after the date it becomes past due, a judgment by operation of law. (emphasis added).

Similarly, the North Dakota Attorney General in an opinion dated November 26, 1999 referenced a North Dakota statute, Section 14-08.1-05, which provides that

[a]ny order directing any payment or installment of money for the support of a child is, on and after the date it is due and unpaid:

a. A judgment by operation of law, with the full force, effect, and attributes of a judgment of the district court, and must be entered in the judgment docket, upon

¹The term “delinquency” as used in such provisions is defined by subsection (2) of Section 20-7-1315 as occurring “...when a support payment owed by an obligor pursuant to an order of support is overdue in an amount equal to at least one month’s support obligation.”

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filing by the judgment creditor or the judgment creditor's assignee.... (emphasis added).

If it was intended that every child and spousal support order be indexed to the judgment rolls it would appear that provisions such as Sections 20-7-1295 and 20-7-1316 which authorize liens on property would have been unnecessary. As stated in an opinion of this office dated May 21, 1001, it is presumed that the General Assembly intended by its action to accomplish something and not to do a futile thing. See also: State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964). Consistent with the above, in the opinion of this office, separate orders for child and spousal support should not be automatically indexed to the judgment rolls. Instead, such orders should be indexed to the judgment rolls only when specifically mandated by statute, such as when such obligations are delinquent and unpaid, as required by Sections 20-7-1295 and 20-7-1316, or when specifically ordered by a court.

You also questioned whether state statutes, case law and or current court rules support a uniform policy to be applied to all clerks' offices. Article V, Section 1 of the State Constitution provides for a unified judicial system. Prior opinions of this office dated September 11, 2003 and July 25, 2002 have recognized that a clerk of court, when performing the duties of clerk, is an arm of the court itself. See also: Thornton v. Atlantic Coast Line Ry. Co., 196 S.C. 316, 13 S.E.2d 442, 446 (1941) quoting Chafee and Co. v. Rainey, 21 S.C. 11, 18 ["The clerk is an officer of the court, and any mere ministerial act he does by the order of the court is the act of the court itself."]. Another opinion of this office dated May 16, 1984 concluded that clerks of court are to be considered part of the unified judicial system "since they are officers of the circuit courts."

As to your question regarding a uniform policy for the clerks' offices, the State Supreme Court has construed Article V, Section 1 as mandating a unified and uniform judicial system in this State. See: Cort Industries v. Swirl, 264 S.C. 142, 213 S.E.2d 445 (1975; State ex rel. McLeod v. Crowe, 272 S.C. 41, 249 S.E.2d 772 (1978). In particular, in Crowe, the Court concluded that legislation requiring disparate fee schedules for magistrate courts conflicted with the uniformity requirements of Article V. An opinion of this office dated August 19, 1998 recognized that the State Constitution forbids piecemeal regulation of the court system by local governments. Several other prior opinions of this office have concluded that local enactments affecting various courts were inconsistent with the requirements of a unified and uniform court system in this State. See: Ops. Atty. Gen. dated March 31, 1988; June 19, 1984; September 15, 1986. Consistent with such mandate of uniformity, in the opinion of this office, there is a requirement for a uniform policy regarding filings and recordings to be applied to the office of clerk of court. As a result, there should be a uniform system as to the manner in which child and spousal support orders are indexed in the offices of the clerks of court in this State.

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If there are any questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General