

STATUTES OF LIMITATIONS  
AND EXECUTION/COLLECTION ON JUDGMENTS

Gerald K. Robbins<sup>1</sup>  
Special Deputy Attorney General

In attempting to determine when and how to apply a statute of limitations to the collection and enforcement of child support arrears one must always be mindful of when the arrears accumulated. Each of the parents of a child have a duty (legal as well as moral) to provide for the support of their children. This duty predates the child's birth and includes any birthing expenses that might arise from the birth of the child. Generally, these type of arrears (those including birthing expenses) will be seen when the custodial parent is seeking retroactive arrears. Retroactive child support arrears are arrears that are "only recoverable for child support for amounts actually expended on the child's behalf during the relevant period."<sup>2</sup> In order to recover on a claim for retroactive child support one must demonstrate then evidence of past expenditures made on behalf of the child.<sup>3</sup> The trial court may not determine the amount of retroactive child support by simply applying the Child Support Guidelines.<sup>4</sup> Additionally, the courts have made clear that an applicant for retroactive child support may not be entitled to an order for retroactive support for moneys expended for child support more than three years prior to the filing of the complaint.<sup>5</sup>

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<sup>1</sup>While a member of the North Carolina Attorney General's staff, the opinions and beliefs cited herein do not constitute the opinions of the office of the North Carolina Attorney General or any individual within the office.

<sup>2</sup>Rawls v. Rawls, 94 N.C. App. 670, 675, 381 S.E.2d 179, 182 (1989).

<sup>3</sup>Savani v. Savani, 102 N.C. App. 496, 501, 403 S.E.2d 900, 903 (1991).

<sup>4</sup>Robinson v. Robinson, \_\_\_ N.C. App. \_\_\_, 707 S.E.2d 785 (2011).

<sup>5</sup>Napowosa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, disc. rev. denied, 325 N.C. 709, 388 S.E.2d 460 (1989); N.C. Gen. Stat. § 1-51(2).

A statute of limitations does not discharge the liability incurred,<sup>6</sup> it merely bars recovery of the liability.<sup>7</sup> Moreover, the statute of limitations is an affirmative defense which must be pled . In the event that the noncustodian fails to plead the affirmative defense, he may not raise them for the first time on appeal.<sup>8</sup> Child support arrears which arise because the noncustodial parent has violated the terms of a court order have a statute of limitations different than that for retroactive support. As consistently reported by the case law, the statute of limitations for the recovery of child support arrears is ten years.<sup>9</sup>

What must be remembered here, however, is that the ten year statute “begins to run against each payment as it becomes overdue, not from the date the decree ordering support was entered.”<sup>10</sup> Because child support obligations in North Carolina are generally monthly obligations, due and owing on the first day of the month,<sup>11</sup> it is conceivable that the life of a child support order could result in 216 separate child support payments coming due (12 payments due each year multiplied by the 18 years that the noncustodian should pay child support). Accordingly, one must be mindful of

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<sup>6</sup>Williams v. Thompson, 227 N.C. 166, 41 S.E.2d 359 (1947).

<sup>7</sup>Demai v. Tart, 221 N.C. 106, 19 S.E.2d 130 (1942).

<sup>8</sup>Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986); N.C. Gen. Stat. § 1A-1, Rule 8(c).

<sup>9</sup>Stephens v. Hamrick, 86 N.C. App. 556, 358 S.E.2d 547 (1987); Arrington v. Arrington, 127 N.C. 190, 37 S.E. 212 (1900); N.C. Gen. Stat. § 1-47. See also N.C. Gen. Stat. §1-306 (a judgment which requires the payment of money cannot be enforced by execution more than ten years after the date the original judgment was rendered); N.C. Gen. Stat. § 1-234 (a judgment can act as a lien against real property for ten years).

<sup>10</sup>Belcher v. Averett, 136 N.C. App. 803, 806, 526 S.E.2d 663, 665 (2000); State of Michigan on behalf of Pruitt v. Pruitt, 94 N.C. App. 713, 380 S.E.2d 809 (1989).

<sup>11</sup>N.C. Gen. Stat. § 50-13.4(c).

the potential pitfall of the statute of limitations and attempt to reduce the number of cases where this might be a successful defense against you. I would suggest that you, in consultation and coordination with your agency client, review and/or establish arrears when or if they are due on or about the child's tenth birthday as well as graduation from high school. I believe that this would re-start the statute of limitations so that if there were any payments approaching the statute, you would get a new start.

My basis for this belief relies upon an interstate Court of Appeals decision.<sup>12</sup> The State of Florida reduced to a sum certain judgment child support arrears that had arisen pursuant to a California child support order. The noncustodian, with counsel, appeared in Florida contesting the amount of arrears. The plaintiff, within ten years, registered the Florida order here in North Carolina. The noncustodian argued that child support arrears from the California order had all occurred more than ten years previous and, therefore, the statute of limitations prevented recovery of the arrears. The North Carolina courts disagreed finding that the Florida order was entitled to full faith and credit.<sup>13</sup> At least, then, in the interstate arena it may be possible to "extend" the statute of limitations.

#### A. Reduce to a Sum Certain Judgment

Certain portions of North Carolina child support law require that in order to execute against real property, one must first reduce the child support debt to a sum certain judgment.<sup>14</sup> The Clerk, in fact, may not issue her writ of execution unless the debt is reduced to a sum certain judgment. In

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<sup>12</sup>Silvering v. Vito, 107 N.C. App. 270, 419 S.E.2d 360 (1992).

<sup>13</sup>Id.

<sup>14</sup>N.C. Gen. Stat. § 50-13.4(f)(8).

order to execute against personal property the obligee must have a judgment as well.<sup>15</sup> Now that you are ready to proceed to court on your motion in the cause to establish the arrears balance there are some statutory provisions that you must keep in mind. The court may not retroactively modify any child support arrears that previously accumulated.<sup>16</sup> Remember in determining and calculating the correct amount of child support arrears that: no arrears may accrue from and after the death of the child;<sup>17</sup> no arrears may accrue after the death of the obligor;<sup>18</sup> no arrears may accrue during the period the child is living with the obligor in accordance with either a valid court order or an oral agreement transferring custody;<sup>19</sup> or no arrears accrue during any period of time that the obligor is incarcerated.<sup>20</sup> See Exhibit A attached herein for a copy of a Motion to Reduce to a Sum Certain Judgment.

B. Sue on the Judgment

An alert agency can act for no less than 29 years of unpaid child support and should be able to escape the affirmative defense of a properly pled statute of limitations defense. As we have now seen, the statute of limitations for an unpaid child support payment is ten years.<sup>21</sup> Assuming that you

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<sup>15</sup>N.C. Gen. Stat. § 50-13.10(b).

<sup>16</sup>N.C. Gen. Stat. § 50-13.10(a); Mackins v. Mackins, 114 N.C. App. 538, 442 S.E.2d 352, disc. rev. denied, 337 N.C. 694, 448 S.E.2d 527 (1994).

<sup>17</sup>N.C. Gen. Stat. § 50-13.10(d)(1).

<sup>18</sup>N.C. Gen. Stat. § 50-13.10(d)(2).

<sup>19</sup>N.C. Gen. Stat. § 50-13.10(d)(3).

<sup>20</sup>N.C. Gen. Stat. § 50-13.10(d)(4); But see Craig v. Craig, 103 N.C. App. 615, 406 S.E.2d 656 (1991).

<sup>21</sup>Pruitt.

have now reduced this unpaid child support obligation to a sum certain judgment, you have an additional ten years upon which to enforce the child support arrearage.<sup>22</sup> Because the unpaid child support has been reduced to a sum certain judgment you may also collect arrears on the judgment in the amount as set forth by statute, 8% per annum.<sup>23</sup> Finally, you may sue on the judgment.<sup>24</sup>

Suing on the judgment is the only method under North Carolina law to “renew” a judgment.

As the Court of Appeals noted in one of its earliest cases:

there is no procedure now recognized in this State by which a judgment may be “renewed.”. . . [T]he only procedure now recognized by which the owner of a judgment may obtain a new judgment for the amount owing thereon is by an independent action on the prior judgment, which independent civil action must be commenced and prosecuted as in the case of any other civil action brought to recover judgment on a debt.<sup>25</sup>

Counsel should start the independent action with the issuance of a summons, the filing of a new complaint, service of the summons and complaint just as would be done with the beginning of any lawsuit.<sup>26</sup> The only difference is that this lawsuit is for the express purpose of recovering a judgment on a debt. The statute of limitations for bringing the judgment on a debt is ten years.<sup>27</sup> See Exhibit B attached herein for a copy of an Order Renewing Judgment.

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<sup>22</sup>Speros Construction Company, Inc. v. Musselwhite, 103 N.C. App. 510, 405 S.E.2d 785 (1991).

<sup>23</sup>N.C. Gen. Stat. § 24-5(b).

<sup>24</sup>Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955); Blevins Workshop, Inc. v. Dotson, 2010 N.C. App. LEXIS 1572 (unpublished).

<sup>25</sup>Investment Co. Toler, 32 N.C. App. 461, 462-63, 232 S.E.2d 717, 718 (1977).

<sup>26</sup>Reid.

<sup>27</sup>Id.; N.C. Gen. Stat. § 1-47.

#### D. Attachment

Attachment is an ancillary proceeding to a pending principal action.<sup>28</sup> This remedy is a preliminary form of execution which brings property belonging to the defendant into the custody of the court so that it may be subsequently applied to a debt in the event that the plaintiff should prevail.<sup>29</sup> The Court of Appeals has stated that attachment is “execution in anticipation.”<sup>30</sup> Personal service need not first be made against the defendant nor must he make an appearance before a petition for attachment be requested and granted.<sup>31</sup> An action for attachment specifically applies for the collection of alimony or child support.<sup>32</sup>

The statute establishes the following as grounds for attachment:

In those actions in which attachment may be had under the provisions of § 1-440.2, an order of attachment may be issued when the defendant is

- (1) A nonresident, or
- (2) A foreign corporation, or
- (3) A domestic corporation, whose president, vice-president, secretary or treasurer cannot be found in the State after due diligence, or
- (4) A resident of the State who, with intent to defraud his creditors or to avoid service of summons,
  - a. Has departed, or is about to depart, from the State, or
  - b. Keeps himself concealed therein, or
- (5) A person or domestic corporation which, with intent to defraud his or its creditors,
  - a. Has removed, or is about to remove, property from this State, or
  - b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or

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<sup>28</sup>Hutchison v. Bank of North Carolina, et al, 392 F. Supp. 888 (M.D.N.C. 1975); N.C. Gen. Stat. §1-440.1.

<sup>29</sup>Id.

<sup>30</sup>Vinson Realty Co., Inc. v. Honig, 88 N.C. App.113, 117, 362 S.E.2d 602, 604 (1987).

<sup>31</sup>Id.

<sup>32</sup>N.C. Gen. Stat. § 1-440.2.

secrete, property.<sup>33</sup>

In order to receive an order of attachment the plaintiff state by affidavit his intention to seek a money judgment, the nature of the action, and the amount of the claim. The affidavit must further aver the grounds for the attachment and, if any there be, the acts or grounds taken by the defendant to defraud his creditors. The allegations of fraud must be specifically pled.<sup>34</sup> The Clerk of Superior Court may issue the order of attachment.<sup>35</sup> The plaintiff will be required to establish a bond of no less than \$200.00 in order to pay costs incurred and/or damages in the event that the order of attachment is dissolved or the plaintiff does not prevail.<sup>36</sup> The defendant may, at any time, move the Clerk or trial court to dissolve the order of attachment.<sup>37</sup>

When an order of attachment is perfected by a levy, a lien of attachment is created which establishes the lienor's claim as against all other creditors and subsequent lienors. The date to which the lien relates back is the time at which the notice of the order of attachment is docketed in the record of lis pendens in the county where the property is located.<sup>38</sup> Failure to comply with the requirements of an independent civil action can prevent a creditor from receiving a portion of

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<sup>33</sup>N.C. Gen. Stat. § 1-440.3.

<sup>34</sup>N.C. Gen. Stat. § 1-440.11.

<sup>35</sup>N.C. Gen. Stat. § 1-440.5.

<sup>36</sup>N.C. Gen. Stat. § 1-440.10. But see N.C. Gen. Stat. § 1-109 (county is not required to pay bond in advance).

<sup>37</sup>N.C. Gen. Stat. § 1-440.36.

<sup>38</sup>Edwards v. Brown's Cabinets and Millwork, Inc., 63 N.C. App. 524, 305 S.E.2d 765 (1983); N.C. Gen. Stat. § 1-440.33(b)(1).

moneys otherwise available to all creditors.<sup>39</sup>

#### E. Liens for Overdue Child Support

A statutory lien arises on the real and personal property of an obligor who is delinquent in the payment of his child support.<sup>40</sup> For this lien to arise, the obligor must owe the lesser of three months of child support or \$3,000.00. The designated representative must then file a verified statement of child support delinquency. This delinquency statement provides: 1) the caption and docket number of the underlying child support case; 2) the date of the underlying child support order; 3) the amount of the child support obligation; and 4) the amount of the arrearage as of the date of the statement.<sup>41</sup>

Once the designated representative files the delinquency statement she must serve notice on the obligor that the statement has been filed. Service to the obligor and return of service must be in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. The notice must inform the obligor how he may discharge the lien. The obligor may discharge the lien by paying the full amount of the lien, by depositing the full amount of the lien with the Clerk of Superior Court and filing a petition to determine the validity of the lien, or the action on the part of the lien claimant has been dismissed, or a judgment has been rendered against the lien claimant.<sup>42</sup>

In a IV-D case the lien is perfected upon the filing of the delinquency statement. The obligor

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<sup>39</sup>State Employees' Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

<sup>40</sup>N.C. Gen. Stat. § 44-86.

<sup>41</sup>N.C. Gen. Stat. § 44-86(c).

<sup>42</sup>N.C. Gen. Stat. § 44-87.

may contest the lien by a motion in the cause. The lien attaches to personal property upon seizure by the sheriff. A lien on real property attaches when the perfected lien is docketed and indexed on the judgment docket.<sup>43</sup> The designated representative may execute on the lien after 30 days from the docketing of the perfected lien.<sup>44</sup>

#### F. Collection of Insurance Proceeds

The State or county may, upon proper notice to an insurance company, authorized to do business in the State, place a lien on the proceeds of an insurance contract.<sup>45</sup> The statutory provision requires that the obligee provide notice in writing to the insurance company that either its beneficiary or claimant “owes past-due child support.” The agency should include a certified copy of the court order requiring that support be paid along with proof that the beneficiary is past due on his obligation. The beneficiary must be receiving no less than \$3,000.00 in order for this statute to apply. Finally, this lien provision is subordinate to the lien provisions set forth in Article 9 of Chapter 44 (personal injury claims for which medical liens arise).<sup>46</sup>

#### G. Writ of Execution

Where a judgment requires the payment of money it may be enforced by the remedy of execution.<sup>47</sup> The mere request for the issuance of a writ of execution, however, does not prolong the

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<sup>43</sup>N.C. Gen. Stat. § 44-86(d).

<sup>44</sup>N.C. Gen. Stat. § 44-86(e).

<sup>45</sup>N.C. Gen. Stat. § 58-3-185.

<sup>46</sup>Id.

<sup>47</sup>N.C. Gen. Stat. § 1-302.

life of the judgment lien nor does it stop the running of the statute of limitations.<sup>48</sup> The Clerk must issue her writ upon all unsatisfied judgments upon the request of a party and upon the payment of the appropriate fees.<sup>49</sup> Judgments for child support and alimony are exceptions to the execution process in that the obligor may not declare these debts as exempt.<sup>50</sup> The writ of execution must be returned no more than 90 days after it was issued. However, no execution may issue until at least ten days following the entry of the judgment.<sup>51</sup> The judgment debtor has ten years from the entry of judgment to complete the execution sale.<sup>52</sup>

#### H. Financial Institution Data Match (FIDM)

The State has agreements with certain financial institutions to match, on a quarterly basis, the institutions' holders of accounts against the names of child support obligors.<sup>53</sup> The institution must notify child support of the account balance and the date of the account balance. Upon the collection of this information the State may attempt to "freeze and seize" moneys held in these financial institutions. In order to be eligible to attach this lien and levy against the account the obligor must owe either \$1,000.00 in unpaid child support or owe six months of unpaid support, whichever is less.<sup>54</sup> Assuming the obligor meets the threshold amount set forth in the statute, the

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<sup>48</sup>Cheshire v. Drake, 223 N.C. 577, 27 S.E.2d 627 (1943).

<sup>49</sup>N.C. Gen. Stat. § 1-305.

<sup>50</sup>N.C. Gen. Stat. § 1C-1601(e)(9); N.C. Gen. Stat. § 50-13.4(f)(10).

<sup>51</sup>N.C. Gen. Stat. § 1-310.

<sup>52</sup>N.C. Gen. Stat. § 1-306; McCullen v. Durham, 229 N.C. 418, 50 S.E.2d 511 (1948).

<sup>53</sup>N.C. Gen. Stat. § 110-139.2.

<sup>54</sup>N.C. Gen. Stat. § 110-139.2(b).

agency must serve notice on the obligor that it intends to take moneys in these specific accounts. The service must be pursuant to Rule 4 of the North Carolina Rules of Civil Procedure. At the same time, the agency must serve the financial institution, pursuant to Rule 5 of the Rules of Civil Procedure, of its intent to attach the moneys. This notice to the institution will, in effect, freeze the account. The obligor has ten days after service to give written notice that he is contesting the levy on his bank account. The hearing on the obligor's contest must be heard in the district court.<sup>55</sup>

#### I. Qualified Domestic Relations Order (QDRO)

A county may levy against a qualified pension plan for either the collection of child support arrears or the ongoing payment of child support. The county should consult with the plan administrator and review the pension plan's Summary Plan Description in order to prepare the QDRO. This is because no state court order can require the plan administrator to act contrary to the provisions of the pension plan. Accordingly, the plan administrator has more authority here than the trial court. The Employees' Retirement and Income Security Act (ERISA) controls and overrides all state law in this field, to the extent that the pension plan is covered by ERISA. Certain pension plans are not governed by ERISA, such as military pensions and federal pensions. Nonetheless, the non-ERISA plans may actually be easier to deal with because you should be able to treat each of the non-ERISA cases similarly. See Exhibit C attached for documents which allow for a QDRO to be entered by the trial court.

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<sup>55</sup>Id.