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RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 98-130

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

a. SECTION 1 of the rule purports to renumber ch. HSS 82. However, that chapter relates to certified adult family homes pursuant to ch. 50, Stats., and is within the purview of the Department of Health and Family Services. Under what authority does the Department of Workforce Development seek to renumber ch. HSS 82?

b. According to s. DWD 43.07 (3), it appears that only if a payer submits a statement of alleged error, after making a written request for a financial records review, within a specified time frame, will the child support agency provide a written determination of the correctness of the lien amount. However, s. 49.854 (3) (ag), Stats., provides that if an obligor timely requests a review, the child support agency must conduct the review and issue a determination. The statute does not require the obligor to make a “statement of alleged error” as a condition of having a financial record review. Based on the clear statutory language, it appears that the rule’s authority for requiring a statement of alleged error is questionable.

c. Generally, under current law, joint owners of property have an equal interest in the whole property for the duration of the tenancy, irrespective of unequal contributions at its creation. [See s. 700.17 (2), Stats.] Section DWD 43.08 (1) turns this maxim on its head when it requires the department and child support agencies, when seizing property subject to a child support lien, to presume that each owner of jointly owned property, has an equal pro rata share of the property. It can be argued that the Legislature was aware of the current state of the law (and s. 700.17 (2), Stats.) when it enacted 1997 Wisconsin Act 191, which allows for the seizure of property to satisfy a child support lien, and upon which the rule is based. In that Act, the

Legislature provided that joint owners of property could request a hearing to prove their contributions to the jointly held property when the department or child support agency took actions to seize the property to satisfy a child support debt. Given the existence of s. 700.17 (2), Stats., and the procedures in Act 191 to allow joint owners to protect their interests, one might argue that the Legislature intended that the department and child support agencies be able to seize the entire property of a child support obligor who is a joint owner of property, with the exception that other joint owners could take the initiative to protect their interests in the property. This would prevent a child support obligor from diluting his or her assets by simply titling all of his or her property jointly with a number of friends. Accordingly, s. DWD 43.08 (1) is arguably contrary to the Legislature's intent, which contemplated broader authority for the department and child support agencies, but balanced with a joint tenant's due process rights. In light of this comment, the provisions of sub. (1) should be reviewed.

d. Section 49.853 (2), Stats., requires the department to promulgate rules that provide for reimbursement of financial institutions for participating in the financial records matching program, in an amount not to exceed their actual costs of participation. Section DWD 43.16 (3) provides for reimbursement only for those institutions participating in a fully automated financial record matching program. The statute appears to require reimbursement of all financial institutions participating in the program. Under what authority are nonautomated financial institutions not reimbursed? Also, what is the procedure to ensure that the \$100 per quarter does not exceed the actual costs of participation, as required by the statute?

2. Form, Style and Placement in Administrative Code

a. SECTIONS 1 and 2 of the rule should be reversed so that the affected rules are in alphabetical order.

b. In s. DWD 43.03 (2) (intro.), the phrase "does any of the following" should be inserted before the colon.

c. In s. DWD 43.03 (3), pars. (a) through (f) should be physically set off from each other as paragraphs. In addition, each paragraph should end with a period rather than a semicolon and the word "and" before par. (f) should be deleted. The first letter of each paragraph should be capitalized.

d. In s. DWD 43.03 (13), (18) and (19), the bracketed references to former sections of the Administrative Code are unnecessary and should be deleted.

e. Generally, titles to subunits of rules are not part of the substantive content of a rule. Titles should not be relied on to impart any legal meaning to the substantive provisions of a rule. Accordingly, all of the paragraphs in s. DWD 43.04 (3) should be revised to make it clear in the substantive provisions what each paragraph is referring to. For example, par. (a) could be rewritten as follows: "(a) License suspension and denial. For a license suspension and denial under s. ____, Stats, to obtain and use" This comment applies also to sub. (5).

f. In s. DWD 43.06 (4), either both pars. (a) and (b) should have titles, or neither should have a title. [See s. 1.05 (1), Manual.]

g. In s. DWD 43.06 (6) (a) (intro.), the phrase “do all of the following,” or a similar phrase, should be inserted before the colon. In the alternative, par. (a) (intro.) and subs. 1. and 2. could be combined into a single sentence.

h. In s. DWD 43.09, the word “said” should be replaced by the word “the.” [See s. 1.01 (9) (c), Manual.]

i. In ss. DWD 43.07 and 43.11 (8), “shall” should replace “must.”

j. In s. DWD 43.11 (5) (b) to (d), “may not” should replace “shall not.”

k. The numbering of ch. DWD 43 skips from s. DWD 43.11 to s. DWD 43.16. Was this intentional?

4. Adequacy of References to Related Statutes, Rules and Forms

a. A reference to s. 49.854 (2), Stats., should be included in the definition of “lien” in s. DWD 43.03 (7) since that is the law under which the lien arises.

b. In s. DWD 43.06 (6) (b), the term “par.” should be inserted before the term “(a).”

c. The reference to s. 767.25 (6), Stats., in s. DWD 43.06 (6) (c) seems to be incomplete. It would appear that, at a minimum, the provision should also contain a cross-reference to s. 767.51 (5p), Stats. Also, is s. 46.10 (14) (f), Stats., applicable as well?

d. The reference to s. 49.853 (3) (ag), Stats., in s. DWD 43.07 (1), should, it appears, be a reference to s. 49.854 (3) (ag), Stats.

e. Section DWD 43.10 (1) to (5) should all contain cross-references to the statutory actions they make reference to. For example, sub. (1) could be rewritten substantially as follows: “A child support agency may initiate license suspension under s. _____, Stats., if”

f. The references in s. DWD 43.11 (2) to s. 49.854 (5) (b), Stats, should instead be a reference to s. 49.854 (5) (d), Stats.

g. Section DWD 43.16 (1) (e) refers to a “standard format” prescribed by the department. Where is this format prescribed? In another rule? In the agreement? The rule should be clarified. Also, what are the “federal specifications for automated financial record matching”? Can a federal law or regulation be cited?

h. Section DWD 43.16 (2) should contain a statutory cross-reference to the financial record matching program under s. 49.853, Stats.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. DWD 43.03 (3) (intro.), “Department” should not be capitalized.

b. In s. DWD 43.03 (4), the phrase “or a plan set by the court” is not a helpful clarification of the meaning of the term “plan.” Perhaps the word “plan” in the above phrase could be replaced by the term “order.”

c. In s. DWD 43.03 (5), is interest on arrears included in “arrearage debt”? In addition, in sub. (5) and numerous other places throughout the rule, the phrase “court case” is used. Since it appears that “court case” refers to a special type of court case, i.e., one involving a child or family support related obligation, the rule should contain a definition of the term “court case.”

d. In s. DWD 43.03 (8), “Department of Workforce Development” should not be capitalized.

e. In s. DWD 43.03 (9), the phrase “of property” should be inserted after the term “value.”

f. In s. DWD 43.03 (10), the word “equals” should be changed to “means.” In addition, the phrase “of the payer” should be inserted after the word “income” in the first sentence. Also, all of the material after the first sentence is substantive material and should not be in a definition but should be placed in a separate substantive provision. [See s. 1.01 (7) (b), Manual.] When the material in the second sentence is moved to a separate substantive provision, effort should be made to define or otherwise better identify the term “reconciliation” which, in the context of the rule, appears to be a term of art in the child support context.

g. In s. DWD 43.03 (15), (16) and (22), the word “is” after the defined terms should be replaced with “means.” Similarly, in sub. (17), the phrase “is defined as” should be changed to “means.”

h. In the second sentence of s. DWD 43.04 (2), how does an address become “verified” in order to avoid contacting the postmaster? What is to be included in the “contact” with the postmaster? Finally, the last sentence refers to “notice to the employer” being returned. It appears that the phrase should be “notice to the payer mailed to the payer’s employer” or a similar phrase that conveys the idea that the notice is still being mailed to the payer, as required by the statutes.

i. The Note to s. DWD 43.04 (2) indicates that s. 767.263 (2), Stats., requires certain information to be provided to child support agencies. However, prior to October 1, 1999, or the date stated in the notice in the Administrative Register, the information must be provided to the clerk of court. The Note should provide a complete and accurate portrayal of the statutes.

j. In s. DWD 43.04 (4), the provision should be modified to make it clear that the notice is to be sent to the payer. In addition, what are the “local locate resources and interfaces” that the department or child support agencies are supposed to use?

k. Section DWD 43.05 provides for the administrative imposition of a forfeiture. However, the rule does not specify the hearing or appeal procedure that would appear to be necessary to satisfy due process requirements. The rule should identify these procedures. If they are set forth in other rules, those rules should be cross-referenced.

l. In the second sentence of s. DWD 43.05 (2), the rule should be clarified to provide that the insulation from liability from the administrative forfeiture applies also to a subpoena respondent who fails to comply with an administrative subpoena.

m. The provisions of s. DWD 43.06 (4) (b) 1., relating to calculating the monthly amount due, seem to conflict with the definition of “monthly amount due” in s. DWD 43.03 (15) in that the definition of “monthly amount due” specifically includes the sum of “all” court-ordered provisions for periodic payments. In contrast, s. DWD 43.06 (4) (b) 1. provides that percentage-expressed orders are excluded from the calculation. This apparent contradiction should be corrected or better clarified in the rule.

n. The clarity of the rule might be enhanced if a note were added explaining when it is “appropriate” to make the credits identified in s. DWD 43.06 (6) (d).

o. In s. DWD 43.07 (1), the parenthetical information should be deleted. If a “financial records and court order review” is to be called a “financial record review,” then that fact should be made clear in a definition. In addition, sub. (1) should be revised to make it clear that the request for a review must be made in writing, as provided in s. 49.854 (3) (ag), Stats.

p. In s. DWD 43.08, “bound by” should replace “bound be.”

q. In s. DWD 43.08 (2) (b), only funds in excess of \$500 “across all of a payer’s accounts” may be seized. What does this mean? Does this mean that \$500 must be left to the payer in each account or that the payer must be left with a minimum of \$500 regardless of the number of accounts he or she maintains? The meaning of this provision should be clarified.

r. Section DWD 43.08 (3) provides that personal property cannot be seized unless the “lien exceeds \$500.” However, this appears redundant in light of the directive in s. DWD 43.06 (4) (a) that the lien-eligible amount must be at least \$500. Perhaps the rule, in s. DWD 43.08 (3), intends to set the minimum value of the personal property that can be seized at \$500. This suggestion would appear to satisfy the department’s duty in s. 49.854 (17), Stats., to prohibit a child support agency from seizing property under a certain value established by the department by rule. The rule should be clarified. Additionally, if the minimum value of the property to be seized is \$500, is that a cumulative total or a per item total? This should be clarified as well.

s. In s. DWD 43.08 (4), the parentheses should be replaced by commas. [See s. 1.02 (6), Manual.] Also, how is the “payer’s proportionate share” of the property’s equity to be determined? Finally, see comment 1. c. above.

t. Although the first sentence of s. DWD 43.08 (6) alludes to a property seizure, the sentence should be modified so that it is clear that the request for a hearing is tied to a property seizure. For example, the phrase “and is the subject of a seizure by the department or a child support agency under s. _____, Stats.,” or a similar phrase, could be added after the phrase “is jointly held.”

u. In s. DWD 43.09, the term “protective order” should be defined or better identified.

v. When the department takes administrative enforcement actions, is it not bound by the thresholds in s. DWD 43.10? As drafted, that section applies only to child support agencies.

Since other provisions of the rule apply to the department as well as child support agencies, the applicability of the thresholds to the department should be clarified.

w. In s. DWD 43.10 (2), the word “an” should be inserted after the word “initiate.”

x. In s. DWD 43.10 (5), the word “suspension” after the word “denial” should be deleted because it appears later in the sentence.

y. In s. DWD 43.11 (2), the phrase “court hearing on mistake of fact” is awkward and somewhat misleading. Act 191 provides that the payer may request a hearing and has the opportunity to establish that he or she does not owe the amount claimed to be owed. If the court finds that the payer does not owe the amount, or that the lien is not proper, because of a mistake of fact, the court may order an appropriate remedy. Perhaps, instead of trying to describe the hearing as a “mistake of fact” hearing, the rule could simply provide that the notice must inform the payer that he or she may request a hearing under the relevant statutory provisions.

Also, throughout s. DWD 43.11, the string of statutory references should be preceded by “s.” rather than “ss.” because of the use of the conjunction “or.” In addition, “49.854” does not need to be repeated before each subsection number. For example, in s. DWD 43.11 (2) (a), the statutory references should be “s. 49.854 (5) (b), (6) (a) or (7) (a) or 49.857 (3) (a) or (am), Stats.”

z. In s. DWD 43.11 (2) (c), the word “will” should be changed to “shall.” Also, the clarity of the rule would be enhanced if instead of, or in addition to, the statutory reference to s. 767.30 (1), Stats., the phrase “in the amounts and at the times that it considers expedient” were added after the word “payments” in the last sentence.

aa. In s. DWD 43.11 (3), the phrase “review of mistake of fact” is difficult to understand. Should the phrase be “review of an alleged mistake of fact”?

ab. In s. DWD 43.11 (6) (b), the word “will” should be “shall.”

ac. In s. DWD 43.11 (7), the terms “(2) (c)” and “(3)” should be preceded by the term “sub.”

ad. Section DWD 43.11 (10) (a) 1. prohibits the periodic payment plan from decreasing the payer’s gross income below a certain threshold. However, by its nature, gross income is what a payer has before support and other items like taxes are taken out. Thus, a negotiated payment plan will never reduce the payer’s gross income. A payer’s gross income will decrease if he or she is paid less. It appears that the intent of the rule is to provide that the negotiated payment plan, when subtracted from the payer’s gross income, may not leave the payer below a certain threshold. If this is the case, the rule should be modified. In any event, it should be clarified. This comment applies also to par. (b).

ae. In s. DWD 43.11 (10) (b), the phrase “is not prohibited from negotiating” should be simplified to “may negotiate.”

af. In s. DWD 43.11 (11), is the notice to the payer to be given in writing? The method of notification should be clarified.

ag. In s. DWD 43.11 (12) (intro.), the phrase “any of” should be inserted before the phrase “the following.” Also, “, but is not limited to,” is not necessary.

ah. Section DWD 43.11 (13) refers to a county initiating administrative enforcement actions. However, by definition, an administrative enforcement action is initiated by the department or child support agencies. Thus, it appears that the references to counties in sub. (13) should be a reference to child support agencies. Also, in par. (b), the phrase “property of” should be inserted after the word “against.” Finally, the phrase “is not precluded from receiving” should be simplified to “may receive.”

ai. In s. DWD 43.16 (1) (a) (intro.), what is an “automated financial institution”? The term should be defined. Also, “all of” should be inserted after “indicate.”