

MEMORANDUM

State of Alaska Department of Law

TO: Ross Kinney
Deputy Commissioner
Department of Revenue

DATE: November 7, 1997

FILE: 663-98-0067

TEL.NO.: 465-3600

SUBJECT: Is \$25 Appeal Fee Subject to
Garnishment on Overturned
PFD Denial?

FROM: Vincent L. Usera
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You have asked whether the \$25 refundable fee an appellant must pay to have the Department of Revenue (“department”) review the denial of a Permanent Fund Dividend (“PFD”) is subject to garnishment if the denial is overturned. We conclude it is, but that the garnishor must identify the fee when seeking garnishment. Our analysis follows.

BACKGROUND

Under AS 43.23.015(g), an individual who is denied a PFD may request a review of the department’s decision. In 1996, the legislature revised that subsection to require payment of a \$25 fee for an appeal.¹ If the individual prevails, either in the administrative appeal before

¹ AS 43.23.015(g) provides:

If an individual is aggrieved by a decision of the department determining the individual's eligibility for a permanent fund dividend or the individual's authority to claim a permanent fund dividend on behalf of another, the individual may, upon payment of a \$25 appeal fee, request the department to review its decision. Within 12 months after the administrative appeal is filed, the department shall provide the individual with a final written decision. If the individual is aggrieved by the decision of the department after all administrative proceedings, the individual may appeal that decision to the superior court in accordance with AS 44.62.560. An appeal to the court under this section does not entitle the aggrieved individual to a trial de novo. The appeal shall be based on the record of the administrative proceeding from which appeal is taken and the scope of appeal is limited to matters contained in the record of the administrative proceeding. If, as a result of an administrative proceeding or a court appeal, the individual prevails, the \$25 appeal fee shall be returned to the individual by the department.

the department or in a subsequent appeal to the Superior Court, the \$25 fee is returned to the individual.

In a number of instances, under open writs of execution judgment creditors make a levy of garnishment on each year's PFD applied for by an individual until the amount of the judgment is fully paid. If on appeal, an individual is adjudged to be entitled to the PFD previously denied, and is also subject to an open writ of execution, the department will pay all or a portion of the PFD to the judgment creditor. In some situations, the amount sought by the writ is more than the amount of the PFD. In that case, where a \$25 appeal fee has been paid in a successful appeal, the question is raised whether that fee, having been earmarked for return to the applicant, constitutes funds of the debtor in the hands of a third-party garnishee, subject to the writ of execution.

DISCUSSION

Garnishment is usually defined as a legal proceeding, process or device designed to enable a judgment creditor to satisfy an underlying judgment by reaching assets, property, money, debts owing, credits and effects of a judgment debtor in the possession of, or under the control of, a third person or party, called a garnishee.

30 AM. JUR. 2D *Executions and Enforcement of Judgments* § 644 (1994) (footnotes omitted). Garnishment is strictly a creature of statute and the statutes are strictly construed in favor of the garnishee. *Id.* at § 646; *Beery v. Browning*, 717 P.2d 365, 368 (Alaska 1986) (garnishment is narrowly construed in favor of the garnishee).

In dealing with a contested garnishment of funds held by a bank, the Alaska Supreme Court, citing to AS 09.35.070 and AS 01.10.060 said:²

Construing the definitions of "property" in [the two statutes] to serve the policy of enforcing judgments, we hold that "property" liable to execution

² AS 09.35.070 provides:

All goods, chattels, money, or other property, both real and personal, or an interest in the property of the judgment debtor not exempt by law, and all property and rights of property seized and held under attachment in the action are liable to execution.

AS 01.10.060(9) provides the definition of personal property, unless otherwise superseded, to be: "personal property includes money, goods, chattels, things in action, and evidences of debt[.]"

includes not only funds within named escrow accounts, but also the rights and duties owed to judgment debtors pursuant to the terms of those accounts. . . . A valid levy subjects the judgment debtor's full interest in such accounts to execution, consistent with the priorities, exemptions and other requirements of applicable state and federal law.

Von Gemmingen v. First Nat'l Bank of Anchorage, 789 P.2d 353, 355-56 (Alaska 1990).

The *Von Gemmingen* court also cited to AS 09.40.040, which it said applies by analogy to writs of execution. That statute provides:

All persons having in their possession personal property belonging to the defendant or owing a debt to the defendant at the time of service upon them of the writ and notice shall deliver, transfer, or pay the property or debts to the peace officer, or be liable to the plaintiff for the amount of the property or debts until the attachment is discharged or a judgment recovered by plaintiff is satisfied. Debts and other personal property may be delivered, transferred, or paid to the peace officer without suit, and the receipt of the officer is a sufficient discharge.

AS 09.40.040; cited in *Von Gemmingen* at 356 n. 10.

By using garnishment proceedings, "a judgment creditor may reach any tangible or intangible property or property rights of the judgment debtor not exempt by [state] statute." 30 AM. JUR. 2D *Executions and Enforcement of Judgments* § 651 (1994) (footnotes omitted). Under AS 09.38.015(10) a PFD is exempt "to the extent allowed under

AS 43.23.065.³ None of the exemptions contained in Alaska's statutes is applicable to the \$25 appeal fee. Thus, any money held by the department on behalf of an individual is subject to a valid levy under a writ of execution, except as provided in the exemption statutes. As the \$25 appeal fee is money that, on an adjudication in favor of the applicant must be returned to the applicant, before it is actually returned it is money belonging to the debtor held under the control of the department and is subject to the levy.

That being said, however, as stated above, courts will strictly construe the execution statutes in favor of the garnishee. In *Beery v. Browning*, 717 P.2d 365 (Alaska 1986) the Court held that the requirements of Rule 89 must be adhered to and, thus, that

³ AS 43.23.065 provides, in pertinent part:

(a) Except as provided in (b) of this section, 45 percent of the annual permanent fund dividend payable to an individual is exempt from levy, execution, garnishment, attachment, or any other remedy for the collection of debt. This exemption applies to an eligible individual's permanent fund dividend both before and after payment is made to the individual. No other exemption applies to a dividend. Notwithstanding other laws, a writ of execution upon a dividend that has not been delivered to the debtor may be served on the commissioner by certified mail, return receipt requested. Upon receipt of a writ by certified mail, return receipt requested, the commissioner shall deliver that portion of the dividend executed upon to the court along with the case name and number.

(b) An exemption is not available under this section for permanent fund dividends taken to satisfy

(1) child support obligations required by court order or decision of the child support enforcement agency under AS 25.27.140 - 25.27.220;

(2) court ordered restitution under AS 12.55.045 - 12.55.051, 12.55.100, or AS 47.12.120(b)(4);

(3) claims on defaulted scholarship loans under AS 43.23.067;

(4) court ordered fines;

(5) writs of execution under AS 09.35 of a judgment that is entered

(A) against a minor in a civil action to recover damages and court costs;

(B) under AS 34.50.020 against the parent, parents, or legal guardian of an unemancipated minor;

(6) a debt owed by an eligible individual to an agency of the state, unless the debt is contested and an appeal is pending, or the time limit for filing an appeal has not expired;

(7) a debt owed to a person for a program for the rehabilitation of perpetrators of domestic violence required under AS 12.55.101, AS 18.66.100(c)(15), AS 25.20.061(3), or AS 33.16.150(f)(2).

[P]ersonal property [in the possession of a third party] shall be attached by leaving a certified copy of the writ [of execution], and a notice specifying the property to be attached, with the person having possession of same, or if it be a debt, then with the debtor.

Alaska R. Civ. P. 89(f)(3). The Court said that minimal compliance with the rule could be had by using the language contained in Civil Form 189 which stated with particularity the property that was being garnished. *Beery*, 717 P.2d at 368. That form is no longer in use by the Alaska Court System. However, the lesson of the case is that there is a requirement to recite with specificity the property the judgment creditor wishes to seize. The notice, therefore, should detail that money other than the PFD is being levied on. If the notice merely specifies the PFD, and makes no mention of other personal property, the department would be within its rights to refuse to turn over the returned appeal fee. The Alaska Supreme Court in *Beery* said:

The garnishee is merely a neutral stakeholder caught up in the underlying dispute between the judgment creditor and debtor. Until properly served, the garnishee owes primary loyalty to its own creditor, *i.e.*, the judgment debtor. The proper service of garnishment papers then immediately imposes duties and potential liabilities upon the garnishee in favor of the judgment creditor. Potentially liable to either party, the garnishee should not have to guess whether the garnishor has complied with the law.

717 P.2d at 368.

We hope this resolves your questions. If there is anything further you require in this regard, please don't hesitate to contact us.

VLU/mrj