



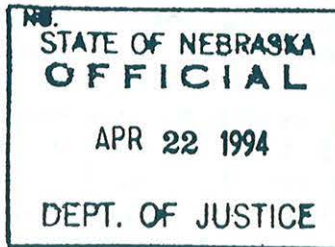
STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#94030



DATE: April 21, 1994

SUBJECT: Limitations on felony non-support cases; § 28-706;
§ 29-110.

REQUESTED BY: John E. Samson, Washington County Attorney

WRITTEN BY: Don Stenberg, Attorney General
Joseph P. Loudon, Assistant Attorney General

As we understand the facts presented to us, a child-support order was in existence on December 9, 1988. The father-obligor was in arrears on that date, and the arrearage continues to the present. We assume that the obligor was ordered to pay child support for each child up until the child reached 19 years of age. The obligor's youngest child reached the age of 19 years on December 9, 1988.

You have informed us that you are contemplating bringing a criminal prosecution against the obligor for non-support and have concerns with the statute of limitations. Your query is whether the statute of limitations' time period commenced on December 8, 1988, the date on which the obligor's child-support obligation was to have been terminated, or whether the offense is continuing, in which case the time period has yet begun to run. It appears that this is the first time that this office has been asked this question.

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Laurie Smith Camp
Delores N. Coe-Barbee
Dale A. Comer

James A. Elworth
Lynne R. Fritz
Royce N. Harper
Mary L. Hewitt
Lauren Lee Hill
Amy Hollenbeck
William L. Howland

Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Joseph P. Loudon
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson

Harold I. Mosher
Fredrick F. Neid
Marie C. Pawol
Kenneth W. Payne
Paul N. Potadle
Jan E. Rempe
James H. Spears

Mark D. Starr
John R. Thompson
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

John E. Samson
April 21, 1994
Page -2-

"Any person who intentionally fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obliged to provide to a . . . minor child . . . commits criminal nonsupport." Neb. Rev. Stat. § 28-706 (1989). Nothing in § 28-706 limits the time in which a criminal non-support action may be brought. It appears that Neb. Rev. Stat. § 29-110 (Supp. 1993) is the applicable statute of limitations. With certain exceptions not here applicable, "no person or persons shall be prosecuted for any felony . . . unless a complaint for the same shall be filed before the magistrate within three years next after the offense shall have been done or committed and a warrant for the arrest of the defendant shall have been issued." § 29-110(1). Considering the holding in *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994), that the Legislature may not constitutionally revive a barred prosecution by extending a statute of limitations by later amendment, it is worth noting that although § 29-110 has been amended several times since 1988, the language at issue has remained unchanged. See Laws 1989, LB 211, § 1; Laws 1990, LB 1246, § 10; Laws 1993, LB 216, § 10.

There are two other matters which must be briefly addressed before turning to the merits of your question. Section 29-110 provides that it "does not extend to any person fleeing from justice." We assume from the facts presented to us that this is not the case here. You should also be aware that the defense of the statute of limitations is raised by a defendant's not guilty plea. *State v. Nuss*, 235 Neb. 107, 454 N.W.2d 482 (1990).

Only a single Nebraska case could be found directly addressing the issue at hand. In *State v. Journey*, 186 Neb. 556, 184 N.W.2d 616 (1971), the complaint, filed on June 27, 1969, charged the defendant under the predecessor to § 28-706 with a failure to pay a child support payment accruing in May 1966. The court declared, "It is consequently obvious that the statute of limitations had run" *Id.* at 557, 184 N.W.2d at 617.

The criminal non-support statute at issue in *Journey* defined the offense as occurring "[w]henver any husband, against whom a decree for divorce and alimony for the support of his children shall have been rendered by any court in this state, shall, without good cause, refuse or neglect to pay the person noted the amounts and manner provided by such decree for the support of such child or children." See Neb. Rev. Stat. § 28-450 (1964). The statute further provided that each failure to pay a separate installment of support money as ordered in the divorce decree was a separate offense. *Id.* At the time *Journey* was decided, the relevant terms of § 29-110 read as they do today.

John E. Samson
April 21, 1994
Page -3-

We cannot conceive of any reason why *Journey* would not apply to the facts presented by you. For purposes of your question, the only substantive distinction between § 28-450 and § 28-706 is the language in § 28-450 providing that each failure to pay a separate installment constituted a separate offense. We do not believe this distinction to be a principled one. Under the facts of *Journey*, the payment was due on a certain date, and the offense arguably continued, with the obligor remaining in arrears on the date the action was filed. The same would be true in this case.

The Supreme Court examined the subject of "continuing offenses" most recently in *Nuss*, 235 Neb. 107, 454 N.W.2d 482. In *Nuss*, the defendant was charged with retaining property stolen from his employer. The defendant contended that because he quit his employment with the particular employer over three years before charges were filed, the statute of limitations barred his prosecution. The State claimed that the statute of limitations did not bar prosecution because the offenses with which the defendant was charged were continuing offenses and that the statute did not begin to run until the prohibited conduct terminated.

The *Nuss* court declared, "The conclusion that a crime is a continuing offense should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that the Legislature intended that it be treated as a continuing one." *Id.* at 107, 454 N.W.2d at 482 (syllabus of the court). Significantly, the court in *Nuss* quoted with approval *Duncan v. State*, 384 A.2d 456, 460 (Md. 1978), wherein it was asserted that "the criminal withholding of money or property [is] not a continuing offense." *Id.* at 116, 454 N.W.2d at 487. The court held that retention of stolen property was not a continuing offense and that the prosecution therefor was barred by § 29-110.

In applying the rule cited in *Nuss*, nothing in the explicit language of § 28-706 indicates that criminal non-support is a continuing offense. It might be argued that the Legislature evinced its intent that a violation of § 28-706 be considered a continuing offense by its deletion of the language contained in § 28-450 regarding each failure to pay as constituting a separate offense. This argument does not seem particularly persuasive in view of legislative intent manifested in § 29-110. Only certain crimes, criminal non-support not being among them, have been excepted from the three-year statute of limitations. *See* § 29-110.

From our reading of *Journey* and *Nuss*, we conclude that § 29-110 bars a prosecution for criminal non-support under the facts presented to us by you. Furthermore, the opposite conclusion would prevent the statute of limitations from ever commencing, assuming

John E. Samson
April 21, 1994
Page -4-

that the obligor remained in arrears. A statute of limitations is to be liberally construed in favor of the defendant in a criminal case. *Hirsch*, 245 Neb. 31, 511 N.W.2d 69; *Nuss*, 235 Neb. 107, 454 N.W.2d 482. Construing § 29-110 in such a way as to allow a criminal non-support prosecution in this instance would run counter to this principle of statutory construction.

We would point out that the state may file a complaint for criminal non-support anytime within the three-year period following a failure to provide support. For example, assume a father was ordered to pay monthly child support commencing January 1, 1990, and continuing to January 1, 2000. He never makes a payment and on April 1, 1994, the county attorney wants to prosecute. While the father could not be criminally prosecuted for failure to pay prior to April 1991, he could be prosecuted for any failure to pay child support from April 1991 to April 1, 1994.

Respectfully submitted,

DON STENBERG
Attorney General

Joseph P. Loudon
Joseph P. Loudon
Assistant Attorney General

APPROVED BY:


Attorney General

14-011-10.rev