

**Nebraska Ethics Advisory Opinion for Lawyers
No. 06-3**

[Note: This opinion was originally issued by the Committee on August 9, 2005, as Advisory Informal Opinion 2512. The Committee has now determined that this opinion should be published as a Formal Opinion. In light of the adoption of the Nebraska Rules of Professional Conduct on September 1, 2005, the opinion has been updated to include a discussion of Rule 1.5.]

ISSUE ADDRESSED

WHETHER IT WOULD BE UNETHICAL FOR AN ATTORNEY TO ASSERT A LIEN ON A FORMER CLIENT'S CHILD SUPPORT JUDGMENT AS A MEANS OF COLLECTING OUTSTANDING LEGAL FEES.

STATEMENT OF FACTS

A lawyer wishes to assert an attorney's lien against a former client's child support judgment. The attorney worked to secure a child support judgment for the former client, and the client currently has an outstanding account with the attorney's office which he has failed to pay in a timely manner. The attorney anticipates that as child support is paid to the Nebraska Child Support Payment Center by the obligor, the center will honor the lien and divert the child support to the lien holder (the attorney) until the lien has been satisfied.

RELEVANT CANONS AND DISCIPLINARY RULES

Ethical Considerations

EC 2-19. As soon as feasible after a lawyer has been employed, it is desirable that the lawyer reach a clear agreement with his or her client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him or her may have had little or no experience with fee charges of lawyers, and for this reason the lawyer should explain fully to such persons the reasons for the particular fee arrangement he or she proposes.

EC 2-20. Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. . . . Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified. . . .

EC 2-23. A lawyer should be zealous in his or her efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. The lawyer should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

EC 5-7. The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his or her client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of the client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect his or her right to collect a fee for services by the assertion of legally permissible liens, even though by doing so the lawyer may acquire an interest in the outcome of litigation. . . .

EC 9-2. Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laypersons to be unethical. . . . When explicit ethical guidance does not exist, a lawyer should determine his or her

conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

Disciplinary Rules

DR 5-103 Avoiding Acquisition of Interest in Litigation.

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that he or she may:

(1) Acquire a lien granted by law to secure the lawyer's fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

...

Nebraska Rules of Professional Conduct (Adopted September 1, 2005)

Rule 1.5(d): A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.

Ethics Opinions and Decisional Law

To date, this Committee's pertinent published opinions have primarily addressed the propriety of contingent fees in domestic relations cases, and have included discussions of the public policy considerations underlying the Committee's opinions. In Advisory Opinion No. 76-10, the Nebraska Advisory Committee concluded that it was not unethical for an attorney to represent a plaintiff in a contested paternity case under a contingent fee arrangement. "[T]he Courts which have dealt with the problem hold that contingent fee arrangements in obtaining support in a paternity case are not only proper but are supported by public policy." *Id.* However, in distinguishing paternity actions from divorce actions, the Committee noted that "courts and ethical opinions generally disapprove of fee arrangements based upon the amount of alimony or property settlements achieved in a divorce action" as such arrangements "might tend to discourage reconciliation and are, therefore, contrary to public policy." *Id.* See also *State ex rel. Nebraska State Bar Association v. Dunker*, 160 Neb. 779, 783, 71 N.W.2d 502, 505 (1955) (a contract executed before decree is rendered providing for payment of attorney's fees in a divorce action contingent upon the amount of alimony to be subsequently obtained upon the award of a divorce is void as against public policy, since, because of the lawyer's personal interest in the litigation, it tends to prevent a reconciliation between the parties and destroy the family relationship). The Committee felt that because such policy considerations were not present in a contested paternity action, a contingent fee arrangement in obtaining child support in a paternity case would not violate either professional ethics or public policy. The Committee specifically considered, and rejected, the language in EC 2-20 cautioning against contingent fee arrangements in domestic relations cases finding such language "not applicable to this situation." *Id.* Nebraska Rule of Professional Conduct 1.5(d) now specifically prohibits contingent fee arrangements in domestic relations matters where payment of the fee is contingent upon securing a divorce, or upon the amount of alimony, support or property settlement secured. However, Comment Six (6) to Rule 1.5(d) provides:

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the

same policy concerns.

The Committee has included the foregoing discussion on contingent fees because a contingent fee arrangement which is imposed upon a child support judgment is similar in effect to an attorney's lien imposed upon a child support judgment. Under a contingent fee arrangement, the attorney may have a perpetual "lien" of 33% (or some other percentage) against all future child support and will be required to file an attorney's lien with the Child Support Payment Center in order to collect the fee. Under an attorney's lien based upon an outstanding account balance, the attorney may have a lien of 100% against all future child support and will be required to file an attorney's lien with the Child Support Payment Center in order to collect the fee up to the amount of the outstanding lien. The only differences between the two arrangements are the percentage of the child support diverted to the lien holder and the length of time the lien remains in place. One issue not addressed by the Committee nearly thirty years ago in Advisory Opinion No. 76-10, however, is the ethical and public policy consideration which cuts against the imposition of attorney liens on child support judgments - namely, the issue of depriving children of the support from a noncustodial parent while an attorney's lien is being paid. This ethical and public policy consideration is present in all child support cases, regardless of whether the child support judgment arises in a divorce action or a paternity action. This issue has been addressed by ethical committees and courts across the county and will be discussed below.

In Advisory Opinion No. 78-8, the Nebraska Advisory Committee responded to an inquiry as to whether an attorney may ethically represent a divorced wife to collect back child support on a contingent fee basis. The Committee noted the same public policy concerns raised in Advisory Opinion No. 76-10 and concluded that those "policy considerations present in a prospective divorce action involving alimony and child support . . . do not exist in the situation where the award has been made but is uncollected." Based on this, the Committee ruled that an attorney may properly represent a client on a contingent fee basis to collect back alimony or support payments. To support this conclusion, the Committee cited to Drinker's work on "Legal Ethics" at Page 177, which states: "A lawyer may accept a percentage for collecting overdue alimony, but not a percentage of that to accrue subsequently." This implies disapproval with attorneys having an interest in future support payments, which is a sentiment that has been expressed by other jurisdictions that have addressed this question. E.g. Colorado Bar Association, Ethics Opinion 67 (Mar. 16, 1985; addendum issued 1995) (it is not ethical for an attorney to enter into a contingent fee arrangement to collect future child support or future spousal maintenance); Mississippi State Bar, Ethics Opinion 88 (Sept. 23, 1983) (opinion does not approve of contingent fee contracts to collect future child support and alimony).

Consistent with the foregoing, in a private opinion dated September 3, 1997 (Doc. Id. 1794), this Committee concluded that the practice of securing payment of attorney's fees in divorce litigation through assignment of money to be received in payment of future alimony, child support, or property settlement is impermissible under the Code of Professional Responsibility. In rendering this opinion, the Committee noted ethics opinions from Maine and Massachusetts, as well as decisional law from other jurisdictions. For instance, the Committee noted that in Ethics Opinion 117 the ethics committee for the Maine State Bar concluded that an attorney who handled a client's divorce action could only obtain a mortgage on the client's home to secure payment of attorney's fees if the divorce judgment was final and residual disputes regarding matters such as possession, sale, disposition, or collateral security for continuing obligations did not exist. That committee also noted that a lawyer who represents a client in a pending divorce proceeding may not take as a retainer a promissory note secured by a mortgage on the marital home if the home is or may be the subject of controversy. This would give the lawyer a personal stake in the outcome of the litigation. However, the Massachusetts opinion included the following statement: "If the divorce proceeding is complete, the lawyer may take assignment of such a promissory note as payment for services rendered, provided that it is reasonable given the client's sophistication, the client's financial ability to pay, and the availability of other methods of fee payment." Massachusetts Op. 91-1, at ABA-BNA 1001 :4601. See also *In Re May*, 96 Idaho 858, 578 P.2d 787(1975); *O'Donnell v. O'Donnell*, 5 Ill. App. 3d 870, 284 N.E.2d 682 (App. Ct. 1972). This Committee has previously determined that an attorney in a divorce action representing a party who is without cash funds to pay attorney fees may not ethically take a mortgage on the client's

home executed by the client as security for future legal services. Advisory Opinion 76-16.

In the September 3, 1997 private opinion discussed above (Doc. Id. 1794), this Committee concluded:

A lawyer's ability to obtain some form of contractual security interest on a client's property is inhibited by the rules that bar lawyers from acquiring an interest in any property that is the subject of the litigation. In the context of a divorce case, that property includes any that might be subject to division or assignment by the Court. Thus, any fee agreement which makes assignment of alimony, child support, or property settlement in a divorce context is impermissible under the Code of Professional Responsibility. The Committee expresses no opinion with respect to the appropriateness of such assignment after the divorce case is concluded.

(Emphasis supplied.) The Committee did not distinguish or otherwise explain its decision in Ethics Opinion 76-10 in which it determined that a fee arrangement assigning an interest in future child support payments in a paternity action is permissible.

Rule 1.5(d) allows contingent fee arrangements for "post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns." This is not inconsistent with the position taken by the Committee in the past on contingent fee arrangements in domestic relations matters (with the exception of opinion related to paternity cases).

In Ethics Opinion 110, the ethics committee for the Colorado Bar Association determined that a lawyer's right to assert a charging lien pursuant to the state's attorney lien statute is limited by ethical considerations. That committee specifically determined that the "Colorado courts in non-disciplinary cases have held that child support is generally exempt from imposition of an attorney's lien as a matter of public policy, see *Marriage of Etcheverry and Pratt*, 921 P.2d 82 (Colo. App. 1995), which construes C.R.S. § 13-54-102.5(1)." However, the Nebraska courts have not issued any similar decisions.

Statutes

NEB. REV. STAT. § 7-108 (Reissue 1997):

An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment, and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

DISCUSSION

I. Ethical and Public Policy Considerations as Analyzed and Applied Across the Country.

The specific question presented in this request has not been addressed by the Committee. Of the courts which have addressed this question, the majority have held or expressed the opinion that child support payments are not subject to attorney liens. See *Fuqua v. Fuqua*, 558 P.2d 801 (Wa. 1977); *Brake v. Sanchez-Lopez*, 452 So.2d 1071 (Fl. 1984); *Law Office of Tony Center v. Baker*, 366 S.E.2d 167 (Ga. 1988); *Jasper v. Smith*, 540 N.W.2d 399 (SD 1995); *Sue Davidson, P.C. v. Naranjo*, 904 P.2d 354 (Wy. 1995); *Shipman v. City of New York Support Collection Unit*, 703 N.Y.S.2d 389 (NY 2000). Conversely, a few courts have honored attorney liens asserted against monies awarded for the support of a minor child. See *Taylor v. Stull*, 79 Neb. 295, 112 N.W. 577 (1907) (judgment in bastardy proceeding is subject to attorney's lien); *State ex rel. Showen v. O'Brien*, 109 S.E. 830 (W.Va. 1921) (same); *Landry v. Roebuck*, 484 N.W.2d 402 (Mich. 1992)

(retaining lien attaches to funds representing payment of retroactive increase in child support). A thorough examination of these authorities is found in an annotation by Garrison, *Alimony or Child-Support Awards as Subject to Attorneys' Liens*, 49 A.L.R.5th 595.

The majority of courts finding that attorney liens cannot be asserted against child support payments have cited two main reasons for their holdings. The first reason is that a custodial parent acts in a trust capacity with regard to awards of child support. *Law Office of Tony Center v. Baker*, 366 S.E.2d 167, 168 (Ga. 1988). In holding that an attorney's charging lien was not enforceable against child support payments, the *Baker* court stated:

Child support...occupies a special niche in our law. 'When alimony is awarded for the support of minor children, the mother acquires no interest in the funds, and when they are paid to her she is a mere trustee charged with the duty of seeing that they are applied solely for the benefit of the children. She can not [sic] consent to a reduction or remission of the alimony, and ordinarily her conduct can not [sic] relieve the father of paying the same as directed by the court.'

Id. (quoting *Stewart v. Stewart*, 123 S.E.2d 547 (1962)). From this, the courts which have adopted the "trust" theory reason that the custodial parent does not acquire an ownership or possessory interest in the child support monies, because although the parent receives the payments, the parent is to administer them for the children's exclusive benefit. *Sue Davidson, P.C. v. Naranjo*, 904 P.2d 354, 357 (Wy. 1995); accord *Shipman v. City of New York Support Collection Unit*, 703 N.Y.S.2d 389, 394 (NY 2000). This "trust" reasoning has also carried over to child support collection units and clerks of the court. See *Baker*, 366 S.E.2d at 168 (Ga. 1988) (the clerk of the court is not "in a different category, or exempt classification from that of a trustee of the funds for support of the child"); *Shipman*, 703 N.Y.S.2d at 394 (NY 2000) (the support collection unit does not obtain an ownership interest in the funds collected by it). Because the parents are deemed not to have an ownership interest in the child support payments, attorneys' liens are not enforceable against them. See *Shipman*, 703 N.Y.S.2d at 395 (NY 2000) ("Before any creditor, including an attorney, can attach a lien to a debtor's property, the property must be owned by the judgment debtor.") (citations omitted). Nebraska has expressly rejected this line of reasoning. "Child support paid to the party having custody of the minor child shall be the property of such party except as provided in section 43-512.07 [providing for assignment of child support to HHS]." NEB. REV. STAT. § 42-364 (Reissue 2004) (emphasis supplied). See also *Taylor v. Stull*, 79 Neb. 295, 112 N.W. 577 (1907) (court rejected theory that custodial parent holds child support in trust for child).

In addition to the trust argument, other courts have held that child support payments are not subject to an attorney lien on the basis of public policy. See e.g., *Fuqua v. Fuqua*, 558 P.2d 801 (Wa. 1977); *Brake v. Sanchez-Lopez*, 452 So.2d 1071 (Fl. 1984). The court in *Brake v. Sanchez-Lopez* addressed whether an attorney's charging lien could be asserted against an award for child support in a paternity proceeding. The court examined Florida case law and noted that permanent periodic alimony payments were not subject to an attorney's charging lien when enforcing the lien would deprive the spouse of necessary support. *Brake*, 452 So.2d at 1072. "The rationale is that enforcement of a lien which defeats the essential purpose of the award and leaves the spouse unable to maintain him or herself is against public policy." *Id.* The court further noted that "[t]he reasoning applies with greater force to an award of child support payments," which are meant to maintain and support the children. *Id.* Based on this and the Florida legislature's policy of ensuring adequate support for minor children, the court held that the attorney's charging lien was not enforceable against the child support payments. *Id.*

The Washington Supreme Court also discussed public policy in its decision in *Fuqua v. Fuqua*, 558 P.2d 801 (Wa. 1977). There, a county attorney filed motions on behalf of the state to quash attorneys' liens filed against judgments entered in divorce and paternity actions. The trial court quashed the liens, relying on the trust analysis. The Supreme Court of Washington, sitting en banc, affirmed and held that "as a matter of public policy, statutory attorney's liens may not be

asserted against monies which represent payments for child support.” Id. at 805. The court reasoned:

[T]o allow an attorney’s lien to be asserted against child support would necessarily result in counsel for the custodian taking from the children involved, monies which the court has determined to be necessary to assure their adequate support. It is impractical to assume that the trial court can consider possible liability for attorney’s fees in ascertaining a support figure. . . . If the assertion of liens such as these became commonplace, the court’s function in providing for the adequate support of minor children, the innocent parties to these actions, would be wholly frustrated.

Id. This ruling was applied to all monies representing child support payments, including back support. Id. at 805-06. The court emphasized that their decision was based on public policy reasons, and not the trust argument relied upon by the trial court. The court raised concerns that the trust argument could still lead to findings that an attorney lien is enforceable against child support based on the idea “that the interest of a beneficiary in a trust for support is reachable by a creditor for necessities.” Id.

In *Jasper v. Smith*, 540 N.W.2d 399 (SD 1995) the court noted that in South Dakota “the public policy of this state is that the amount established as child support be ‘for the necessary maintenance, education and support of the child’ only, and no excess is intended to exist for such extraneous claims such as parental attorney fees.” Id. (FN 4).

Policy arguments have also been raised in favor of allowing the enforcement of attorney liens against child support monies. In *Landry v. Roebuck*, 484 N.W.2d 402 (Mich. 1992), the Michigan Court of Appeals enforced an attorney’s retaining lien on a check representing an award of a retroactive increase in child support made payable to the attorney’s former client. While the court agreed with the Fuqua court’s reasoning on the facts of that particular case, the Michigan court distinguished Fuqua, which involved a charging lien on child support payments, from the facts of the case before it. The court noted “that the purpose of child support is to ensure that the child’s immediate needs are cared for on a continuing basis.” Id. at 403. However, the court reasoned that the payment in this case could not be applied to the child’s immediate needs, and the court felt that enforcing the attorney lien would not “undermine[] Michigan’s policy regarding the support of minor children.” Id. Furthermore, the court remarked that not allowing the lien to attach in a case like this “would tend to inhibit litigation on behalf of such minors and their custodians who seek to increase child support orders already in force but thought to be inadequate.” Id. The dissent in *Sue Davidson, P.C. v. Naranjo*, 904 P.2d 354 (Wy. 1995) made a similar argument when it questioned the majority’s decision to rule that an attorney’s lien was not enforceable against child support awards. The dissent commented that “[i]t is incongruous to expect custodial parents who cannot afford to support their children to pay attorneys to collect court ordered child support payments. It is also unreasonable to expect attorneys to act pro bono in such instances, especially when they are constantly being criticized by the general public for continually promoting litigation.” Id. at 359.

II. Nebraska Law.

NEB. REV. STAT. § 7-108 (Reissue 1997) provides:

An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

The Nebraska Supreme Court held nearly a century ago that a judgment in a bastardy proceeding is subject to an attorney's lien. *Taylor v. Stull*, 79 Neb. 295, 298, 112 N.W. 577, 578 (1907). In that case, the mother was awarded a child support judgment of \$1,800 against the father. The child support was to be paid over a ten year period of time at a rate of \$45 quarterly. The father made a lump sum payment of \$1,000 and the mother's attorney who had assisted her in obtaining the child support judgment, then filed an attorney's lien in the amount of \$485 and sought to have it enforced against the \$800 in unpaid, future child support. The mother assigned the child support judgment to her brother subject to the attorney's lien which she acquiesced in. The father objected to the imposition of the attorney lien against the future child support and asserted the argument that the money did not actually belong to the mother because she was merely holding the money in trust for the child. As indicated earlier in this opinion, the Nebraska Supreme expressly rejected the "trust" argument and allowed the lien.

Taylor has never been overturned and continues to be "good" law in Nebraska. That decision is limited to paternity actions, however, and it is not known whether it would withstand public policy or ethical challenges today. The *Taylor* court did not address the public policy concerns raised by the Washington Supreme Court in *Fuqua*, supra.

Additionally, *Taylor* was decided long before the adoption of the Code of Professional Responsibility, the Nebraska Rules of Professional Conduct, the Nebraska Child Support Guidelines and the evolution of Nebraska's decisional law holding that children born out of wedlock are entitled to be supported to the same extent and in the same manner as children born in lawful wedlock. See Nebraska Child Support Guidelines, (enacted by the Nebraska Supreme Court pursuant to the authority of NEB. REV. STAT. § 42-364.16 (Reissue 1988)) "The main principle behind these guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes." *Id.* *Matchett v. Dunkle*, 244 Neb. 639, 508 N.W.2d 580 (1993) (children who are the subject of a paternity action are entitled to be supported to same extent and in same manner as children born in lawful wedlock). It is not clear, however, whether the evolution of the law in Nebraska since 1907, as well as the decisions of courts across the country which have addressed this precise issue, would cause the Nebraska Supreme Court to reach a different conclusion if the issue were to come back before the court today. It is not the Committee's function to speculate as to the outcome of any such case. For our purposes, it is sufficient to note that *Taylor* remains the law in Nebraska, and was decided based upon the attorney lien statute in effect in 1907. That statute has remained virtually unchanged to the present day. The statute contains no exception precluding liens upon child support judgments. The Legislature has taken no steps to revise 7-108 to provide for such an exception. "Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent." *Muller v. Muller*, 230 Neb. 244, 430 N.W.2d 884 (1988). Thus, as it relates to child support judgments in paternity actions, the Committee determines that the question was answered by the Nebraska Supreme Court in *Taylor*. Pursuant to *Taylor*, an attorney lien may be asserted against a child support judgment in a paternity action. This does not end the discussion, however.

As noted above, the Nebraska Supreme Court has not addressed attorney liens on child support judgments arising out of divorces or legal separations, although it has specifically disapproved of contingent fee arrangements secured by future child support payments in divorces. *State ex rel. Nebraska State Bar Association v. Dunker*, supra. As discussed earlier, the process of enforcing a contingent fee against future child support and enforcing an attorney's lien against future child support is virtually identical. Nevertheless, as long as *Taylor* and 7-108 remain the law in Nebraska it is difficult to envision why a lien asserted in a completed divorce or legal separation case would be any different from a lien asserted in a completed paternity action. See *Taylor*, supra. The court in *Taylor* specifically rejected the "trust" theory, but did not address any public policy considerations. Thus, although courts in other jurisdiction have disallowed attorneys liens on child support judgments under either the "trust" argument or public policy reasons, or both,

neither the Nebraska Supreme Court nor the Nebraska Legislature has addressed the public policy considerations implicated when an attorney files a lien against a former client's child support judgment. Section 7-108 was construed by the court in Taylor to specifically allow such a lien in paternity cases.

It is true that other courts have interpreted statutes similar to Nebraska's and reached a different result. In *Jasper v. Smith*, 540 N.W.2d 399 (SD 1995), the South Dakota court commented that "[t]he statutory scheme for attorney's fees clearly does not contemplate the attachment of a lien on child support payments based on a trust theory. SDCL 16-18-21 provides an attorney has a lien upon '[m]oney due HIS CLIENT in the hands of an ADVERSE PARTY or attorney of such party, in an action or proceeding in which the attorney claiming the lien WAS EMPLOYED....'" *Id.* at 405. (Emphasis in original.) According to the court, since the child was not a party to the proceeding, did not employ the attorney, and since the party holding the money was not an adverse party to his or her child, the statute did not apply to the child support funds. *Id.* See also *Sue Davidson, P.C. v. Naranjo*, 904 P.2d 354, 356-59 (Wy. 1995) (under Wyoming's attorney lien statute, which provides that an "attorney's lien attaches upon...[m]oney due his client and in the possession of an adverse party," the court found that a lien does not attach to child support monies because the custodial parent does not own the money). However, these decisions are not controlling or persuasive given the ruling in Taylor.

CONCLUSION

Despite the fact that a majority of courts have held to the contrary, the Committee concludes that it is lawful for an attorney to assert an attorney's lien for uncollected fees against an existing child support judgment in the state of Nebraska. More specifically, the Committee concludes the following:

1. It is no longer ethically permissible to enter into a contingent fee arrangement in a paternity action. Nebraska Rule of Professional Conduct 1.5(d) now specifically prohibits contingent fee arrangements in domestic relations matters where payment of the fee is contingent upon securing a divorce, or upon the amount of alimony, support or property settlement secured.
2. It is not permissible to enter into a contingent fee arrangement in divorce actions based upon the amount of child support obtained. See Advisory Opinion No.76-10; *State ex rel. Nebraska State Bar Association v. Dunker*, 160 Neb. 779, 783, 71 N.W.2d 502, 505 (1955). It is also not permissible to accept an assignment of future child support in divorce cases. Committee's private opinion dated September 3, 1997 (Doc. Id. 1794) and authorities cited therein.
3. It is permissible to enter into a contingent fee arrangement to collect back child support for a client. This will ultimately result in the filing of an attorney's lien on a percentage of the future payments for back child support, until all of such back child support has been paid in full. See Advisory Opinion 78-8 and supporting authority found therein.
4. An attorney's lien may be imposed upon a child support judgment obtained in a paternity case. *Taylor v. Stull*, 79 Neb. 295, --298, 112 N.W. 577, 578 (1907); NEB. REV. STAT. § 7-108 (Reissue 1997).
5. Under the current state of the law in Nebraska, an attorney's lien may be imposed upon a child support judgment obtained in a divorce or legal separation case. *Taylor v. Stull*, 79 Neb. 295, --298, 112 N.W. 577, 578 (1907); NEB. REV. STAT. § 7-108 (Reissue 1997).

The Committee feels compelled, however, to add some final comments to the conclusions reached in this advisory opinion. Ethical Consideration 9-2 provides in relevant part:

Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laypersons to be unethical. . . . When explicit ethical guidance does not exist, a lawyer should determine his or her conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

While imposition of an attorney's lien against an existing child support judgment may be legally permissible in Nebraska, the Committee concludes that this is a situation in which explicit ethical guidance did not exist in the Code of Professional Responsibility and does not exist in the Nebraska Rules of Professional Conduct. The members of this Committee are admittedly concerned about the potential, although perhaps unintended, consequences of imposing attorneys' liens against child support judgments. Allowing an attorney with an outstanding account balance to file an attorney's lien against the former client's child support judgment means allowing the attorney to divert 100% of the child support to the attorney for payment of the fee. While the fee is being paid, the custodial parent and the children are not receiving the support which the court determined was necessary for their proper support and maintenance. It is difficult, if not impossible, to turn a blind eye to the devastating impact such a lien may have on the former client and the minor children involved. If the parent cannot properly support the family without the child support that is being diverted, will the family be evicted from its home? Will the children have food, clothing, utilities, medical care and school supplies? Will the family automobile be repossessed if the custodial parent cannot make the monthly payment? The answers to these questions cannot be known by the attorney who files a lien against a former client's child support judgment. Yet, these are but a few of the questions and considerations that must be pondered by such an attorney, and which must ultimately form the basis for an attorney's determination as to whether the filing of an attorney's lien against a former client's child support judgment "promotes public confidence in the integrity and efficiency of the legal system and the legal profession." See EC 9-2.

Thus, the Committee concludes that while the imposition of an attorney's lien against a child support judgment is legally permissible under Taylor and 7-108, no explicit ethical guidance exists and an attorney considering the filing of such a lien should give consideration to the dictates of Ethical Consideration 9-2: "When explicit ethical guidance does not exist, a lawyer should determine his or her conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." In saying this, the Committee recognizes that a counterpart to Ethical Consideration 9-2 is not found in the newly adopted Nebraska Rules of Professional Conduct. Nevertheless, the Committee endorses the ethical precept of attorneys acting in a manner that promotes public confidence in the integrity of the legal profession.

**Nebraska Ethics Advisory Opinion for Lawyers
No. 06-3**