

**Opinion No. 65-201**

October 15, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Frank Bachicha, Jr., Assistant Attorney General

**TO:** Mr. Lowell C. Green, Court Administrator, Supreme Court Building, Santa Fe, New Mexico

**QUESTION**

QUESTION

Will a valid wage assignment of present or future earnings by an employee-defendant take priority over a subsequent writ of garnishment?

CONCLUSION

Yes.

**OPINION**

{\*328} ANALYSIS

Section 43-1-12 N.M.S.A., 1953 Compilation, relating to wage and salary assignments provides as follows:

"43-1-12. WAGE AND SALARY ASSIGNMENT -- ACKNOWLEDGMENT -- RECORDING -- SERVICE OF COPY ON EMPLOYER. -- Any and all assignments of wages or salaries due or to become due to any person in order to be valid shall be acknowledged by the party making the assignment before a notary public, or other officer authorized to take acknowledgements, and if the person making such assignment is married and living with his wife, such assignment shall be recorded in the office of the county clerk of the county in which the money is to be paid, and a copy thereof served upon the employer or person who is to make payment."

This section, by strong implication, allows such assignments. It is said generally as to assignments of future earnings:

"Except to the extent that it is forbidden by statute . . . the right of a private individual to wages or salary to be earned in the future, under a contract of employment existing at the time the assignment is made, is a property right which may be assigned, not only for the security and payment of a present indebtedness, but also for the security of future advances to be made to the assignor. This rule is based on the theory that wages or money to be earned or become due under an existing contract or employment is

regarded, not as a naked possibility coupled with an interest, a present existing right {\*329} of property in potential possession, which is assignable." 6 C.J.S. 1063 "Assignments" § 19 b.

"As between the parties, it is not essential that the fund assigned shall have been earned or be in existence at the time of the assignment; it is sufficient that it has a potential existence, that is that there is a reasonable expectancy that the fund will be earned and come into existence; in other words, a debt which has a potential existence may be assigned. It has also been held that it is not necessary that there be a binding contract under which the assignor may insist that the money shall become due; it is sufficient that there is an existing engagement out of which it is expected that money shall become due." 6 C.J.S., 1063 "Assignments" § 19 a.

It is to be noted that the validity of a wage assignment in this state is made expressly dependent upon compliance with the provisions of Section 43-1-12, supra.

Now, assuming that a valid assignment exists which is prior in time to a writ of garnishment, the question is, which of these is prior in right? We need only to refer to general law on the subject since the answer is clear. Garnishment proceedings will reach only money, credits or other property which actually belong to the defendant. Since the law permits an assignment of future earnings providing the requirements are complied with, unless specifically prohibited by statute, the following is said:

"Property and credits which have been validly transferred or assigned by defendant cannot subsequently be subjected to garnishment as belonging to him. This is a necessary consequence of the principles that garnishment will reach only such property as belongs to defendant . . . and that the garnishing creditor can acquire no greater rights than are possessed by his debtor . . . ." 38 C.J.S. 273 "Garnishment" § 77 a.

**"Future profits, earnings, or wages** under an existing contract are generally assignable except in so far as such assignments are forbidden by statute . . . and such an assignment will prevail over subsequent garnishment, provided, of course, all prerequisites of a valid assignment are complied with. This rule is referable to the doctrine that an equitable assignment will prevail over a subsequent garnishment. Mere possibilities or contingencies do not come within this rule." 38 C.J.S. 274 "Garnishment" § 77 b.

On the basis of the foregoing analysis, it is our opinion that a wage assignment of present or future earnings which is valid will take priority over a subsequently issued writ of garnishment.