

Opinion No. 71-104

August 27, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. John J. Carmody Director Administrative Office of the Courts Supreme Court Building Santa Fe, New Mexico 87501

QUESTIONS

FACTS

Several magistrate court judgments have been docketed with the District Court Following nulla bona return by the Sheriff's office, requesting that the clerk of the district court issue a transcript of judgment. In one county this request has been refused as a matter of policy.

QUESTIONS

Is the judgment creditor entitled to have a district court transcript of judgment issued upon docketing a magistrate court judgment?

CONCLUSION

Yes.

OPINION

{*156} ANALYSIS

Section 36-4-11(E), N.M.S.A., 1953 Comp. (1969 P.S.) provides that when an execution issued by a magistrate is returned nulla bona the judgment creditor may file with the district court of the county in which the magistrate issued the judgment a certified copy of the judgment along with a certified copy of the execution issued by the magistrate and of the return thereon. Upon payment of a docket fee of one dollar (\$ 1.00), the clerk of the district court shall docket the judgment and execution in the same manner in which judgments of the district court are docketed, and thereafter the clerk may issue execution on the judgment as though the judgment had been recorded in the district court.

It should be noted that the use of the word "shall" referring to docketing of the judgment and execution in the district court make this provision mandatory upon the clerk. The use of the word "may" referring to the issuance of an execution on the judgment as though the judgment had been recorded in the district court would seem to make this provision discretionary with the clerk. See Section 1-2-2(I), N.M.S.A., 1953 Comp. The

term "may" normally implies permissive, directory or discretionary rather than mandatory action or conduct on the part of an administrative agency. **Farmers Development Co. v. Rayado Land & Irrigation Co.**, 28 N.M. 357, 213 P. 202 (1923). It suggests a grant of authority to be exercised in the discretion of the agency as that agency reasonably perceives its purpose and the public interest. **Turnpike Amusement Park, Inc. v. Licensing Comm'n of Cambridge**, 179 N.E. 322 (Mass. 1962). Nevertheless, whether a statute is mandatory or permissive does not depend alone upon its form. It is a question of legislative intention to be determined from a consideration of the nature, character, subject, and purpose sought to be accomplished by the legislation as well as the language used. **Ross v. State Racing Comm'n** 64 N.M. 478, 330 P.2d 701 (1958); **Woodmansee v. Cockerill**, 185 N.E.2d 439 (Ohio Ct. App. 1961).

Accordingly, permissive language may be construed as mandatory when it plainly appears that the legislature intended to impose a ministerial duty upon a public official or agency rather than entrust the agency with a judgmental function. A mandatory construction is normally suggested when the public or an individual has a claim de jure which demands that the power conferred upon the administrative agency be exercised for the benefit of that claim. **Catron v. Marron, Treasurer**, 19 N.M. 200, 142 P. 380 (1914); **City of Wauwatosa v. County of Milwaukee**, 22 Wis. 2d 84, 125 N.W.2d 386 (1963); **John Deere Waterloo Tractor Works v. Derifield**, 110 N.E.2d 560 (Iowa 1961). See Opinion of the Attorney General No. 71-53 dated April 14, 1971. It is our opinion that the clerk of the district court should not be left {*157} with the discretion in deciding whether to execute on a judgment. Such a conclusion would leave a creditor with a valid final judgment subject to the "discretion" of a district court clerk who has no facts on which to properly exercise discretion. Thus we must conclude that upon payment of one dollar (\$ 1.00) the district court clerk must docket a judgment in execution from the magistrate court copies provided they are therein certified. We must also conclude that the district court clerks' office thereafter shall issue an execution on the magistrate judgments which would then be as though they were executions from the district court.

By: Frank N. Chavez

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