

Scott Walker  
Governor

Jon E. Litscher  
Secretary



Mailing Address

3099 E. Washington Ave.  
Post Office Box 7925  
Madison, WI 53707-7925

Telephone (608) 240-5000  
Fax (608) 240-3300

## State of Wisconsin Department of Corrections

---

July 28, 2017

Attorney General Brad D. Schimel  
Wisconsin Department of Justice  
17 West Main Street  
P.O. Box 7857  
Madison, WI 53703-7857

Re: Request for an Opinion of the Attorney General

Dear Attorney General Schimel:

The Department of Corrections ("Department") and I, as its Secretary, seek an opinion as to whether the Department has the authority or duty under Wisconsin law to pursue a judgment for unpaid restitution when an inmate in prison or person on probation, extended supervision, or parole dies before satisfying restitution ordered by a circuit court. *See* Wis. Stat. § 165.015(1) (opinion to head of state government department); 77 Wis. Op. Att'y Gen. Preface (1988) (criteria to request formal opinion).

I make this request fully committed to the Wisconsin Constitution providing crime victims with the right to restitution:

This state shall ensure that crime victims have all of the following privileges and protections as provided by law: timely disposition of the case; the opportunity to attend court proceedings unless the trial court finds sequestration is necessary to a fair trial for the defendant; reasonable protection from the accused throughout the criminal justice process; notification of court proceedings; the opportunity to confer with the prosecution; the opportunity to make a statement to the court at disposition; *restitution*; compensation; and information about the outcome of the case and the release of the accused.

Wis. Cons. art. I, § 9m (emphasis added); *see* Wis. Stat. § 950.04(q) (codifying right to restitution).

Crime victims have a right to a judgment for unpaid restitution. Wis. Stat. § 950.04(r). The right to a judgment exists to instances when a person has not satisfied his or her restitution obligation prior to the expiration of probation. *Id.* (citing *id.* § 973.09(3)(b)). It also pertains to parental liability for acts of a minor child. *Id.* (citing *id.* § 895.035(2m)). But no such right is identified when a person has not satisfied his or her restitution obligation prior to the expiration of parole or a bifurcated sentence of imprisonment and extended supervision. *See id.*

Wisconsin law does not provide guidance when the individual responsible for making the restitution payments dies prior to satisfying his or her restitution obligation. The obligation to pay restitution transfers to a federal offender's estate in the event of a death. 18 U.S.C. § 3613(b) (estate responsible for unpaid balance of restitution). But no equivalent statutory provision exists under Wisconsin law.

The death of a criminal defendant does not deprive a court of its ability to preside over a case in limited circumstances. *See, e.g., State v. McDonald*, 144 Wis. 2d 531, 424 N.W.2d 411 (1988) (appeal may continue irrespective of death); *State v. Witkowski*, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991) (appeal not mooted by death).

The Department has a duty to collect and disburse money from a person sentenced to prison or placed on probation. *Id.* § 973.20(11)(a)–(b). And it has the authority to participate in the process to obtain a judgment for unpaid restitution before the probation expiration date. *See id.* § 973.09(3)(b). The Department, through its officials and employees, also must properly disposed of property of deceased inmates, parolees, probationers, and persons on extended supervision. *Id.* § 302.14 (property of estates of \$150 or less); *see also* Wis. Admin. Code § DOC 309.20(4)(c).

I request an opinion to ensure that the Department acts under its authority and fulfills its duty to collect and disburse restitution when an inmate in prison or person on probation, extended supervision, or parole dies before satisfying restitution ordered by a circuit court. A satisfactory legal answer cannot be reached from the relevant statutory provisions, case law, and other authorities after having given the matter careful consideration.

A tentative conclusion is that a judgment is unnecessary because “[a]fter the termination of probation, extended supervision, or parole . . . , restitution

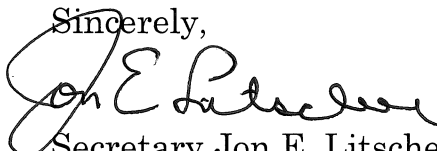
ordered under [the restitution statute] is enforceable in the same manner as a judgment in a civil action by the victim named in the order to receive restitution.” Wis. Stat. § 973.20(1r). But such a conclusion may render the probation statutes’ imposition of a judgment as surplusage. *Compare id.* § 973.20(1r) (restitution), *with id.* § 973.09(3)(b) (judgment) *and State v. Matasek*, 2014 WI 27, ¶ 18, 353 Wis. 2d 601, 846 N.W.2d 811 (surplusage). And it does not resolve when the death occurs in prison prior to release on extended supervision or parole. *See id.* § 973.20(1r).

To ensure that the Department fulfills its responsibilities and duties in accordance with the laws of Wisconsin, I present the following questions:

1. Does a criminal sentence terminate immediately upon the death of a person in prison or on probation, extended supervision, or parole?
2. May a circuit court preside over a criminal case and enter judgment for unpaid restitution after a defendant died?
3. May a circuit court only enter a judgment for unpaid restitution as provided under Wis. Stat. §§ 895.035 (2m) and 973.09 (3)(b)?
4. Does the Department have the authority or any duty to pursue a judgment for unpaid restitution when an inmate in prison or person on probation, extended supervision, or parole dies before satisfying restitution?

The Department is fully committed to protecting the rights of crime victims. Please provide your opinion on this matter of importance.

Sincerely,

  
Secretary Jon E. Litscher,  
Department of Corrections  
State of Wisconsin