

N.D.A.G. Letter to Furuseth (Feb. 19, 1991)

February 19, 1991

Mr. Peter H. Furuseth
State's Attorney
Williams County
P.O. Box 2047
Williston, ND 58802-2046

Dear Mr. Furuseth:

Thank you for your January 28, 1991, letter in which you have presented several questions concerning execution and garnishment procedures.

You first ask whether an execution on a judgment can be issued to any person other than the sheriff of the county. N.D.C.C. § 28-21-06 sets forth the requirements for the issuance and contents of an execution. This section specifically requires that the execution be directed and delivered to a sheriff. N.D.C.C. § 28-21-06 provides, in part:

The writ of execution must be issued in the name of the state of North Dakota, attested in the name of the judge of the court that entered the judgment, sealed with the seal of the court, subscribed by the clerk of that court, and directed and delivered to a sheriff as provided in section 28-21-05.

If, however, a sheriff is a party to the action which has resulted in the judgment or has an interest in any of the property against which the execution may be applied, N.D.C.C. § 28-21-05 authorizes the execution to be issued to the coroner of that county. The coroner will then have the same power and authority to enforce the judgment by execution as the sheriff. Other than this exception, the execution must be issued to the sheriff and to no other person.

You also ask whether any person, other than the sheriff, can execute a writ of execution. N.D.C.C. § 28-21-06 imposes duties upon the sheriff, upon receipt of the execution, to satisfy the judgment with interest and costs from the property of the judgment debtor or to cause the delivery of the possession of real or personal property to the person entitled to that property. In addition, N.D.C.C. § 28-21-11 requires the officer to execute the writ of execution by levying on property of the judgment debtor or take such other action as may be necessary to satisfy the execution.

N.D.C.C. ch. 28-21 does not envision enforcement of the court process or levy on the execution by a person other than the sheriff. The sheriff or other officer is required to provide a notice of levy (N.D.C.C. § 28-21-12), select property in such quantities as will be likely to bring the amount required to satisfy the execution (N.D.C.C. § 28-21-13), and

execute the execution with diligence (N.D.C.C. § 28-21-10). A failure to comply with these responsibilities may result in amercement of the sheriff or other officer. N.D.C.C. § 28-21-19. By these and other statutory provisions found in N.D.C.C. ch. 28-21, the Legislature has made the sheriff responsible to diligently comply with the statutory duties or be subject to the monetary penalty of amercement. In addition, N.D.C.C. § 28-21-12.1 provides for class B misdemeanor liability and possible civil contempt of court for failing to deliver property to a sheriff upon demand after receiving a notice of levy.

N.D.C.C. ch. 28-21 does not impose these responsibilities and duties upon persons other than the sheriff or other authorized officer. A reading of N.D.C.C. ch. 28-21 fails to disclose any legislative intention that persons other than the sheriff or other officer execute a writ of execution issued in accordance with N.D.C.C. § 28-21-06.

You also ask whether funds being held on a garnishment may be released by an employer when a copy of the execution is served on the employer by the judgment creditor and not the sheriff or whether the release of the funds requires both an execution and a sheriff's levy.

N.D.C.C. § 32-09.1-07 sets forth the form of the garnishee summons and notice and the requirements placed upon a garnishee upon receipt of the summons. Pursuant to this section, the garnishee must retain property or money in the garnishee's possession until the judgment creditor causes a writ of execution to be served upon the garnishee, until the judgment debtor authorizes release of the property or money to the judgment creditor, or upon expiration of 180 days after service of the summons or longer period of time either agreed to in writing by the judgment creditor and the judgment debtor or ordered by the court.

If the judgment debtor authorizes the release of the property or money to the judgment creditor or the time period for effectiveness of the garnishee summons has elapsed, no execution or sheriff's levy is necessary to permit payment of the property or money to the judgment creditor or return of that property or money to the judgment debtor. However, if these circumstances are not present, the garnishee is required to hold the property or money until a writ of execution is served upon that garnishee.

Since N.D.C.C. ch. 32-09.1 does not make reference to special execution procedures, the writ of execution will be issued by the court to obtain the property or money in the garnishee's possession pursuant to N.D.C.C. § 28-21-06. This writ of execution will be issued to the sheriff and the sheriff will, as previously discussed, be required to act with diligence in obtaining any property or money in satisfaction of that execution.

Garnishment under N.D.C.C. ch. 32-09.1 is a procedure to hold property or money for payment of a judgment rendered in favor of the judgment creditor. The writ of execution issued pursuant to N.D.C.C. § 28-21-06 is the court authorization to secure possession of the property or money held by the garnishee. To obtain possession of the property or money, a levy must be made upon the execution by the sheriff. The object of a levy is to bring the property or money within the custody of the law to prevent a judgment debtor

from disposing of that property to the prejudice of the judgment creditor. Winslow v. Klundt, 201 N.W. 169 (N.D. 1924).

N.D.C.C. § 28-21-08(3) requires that a levy under an execution upon money, judgments, drafts, promissory notes, or other papers of like character must be made by serving a copy of the execution and levy upon the person who has custody of such property except as may be provided for in N.D.C.C. ch. 32-09.1. This section recognizes that a levy is to be made upon property or money held by a garnishee after issuance of the execution subject to the specific requirements and limitations set forth in N.D.C.C. ch. 32-09.1. Upon compliance with the provisions pertaining to the making of a levy, a lien will attach to the personal property levied upon. N.D.C.C. §§ 28-21-08, 28-21-13. To comply with the statutory directives of N.D.C.C. ch. 28-21 and to provide the sheriff with protection from an amercement claim, a levy should be made upon an execution directed to a garnishee unless the judgment debtor has agreed to release the property or money to the judgment creditor or the time limits for the garnishee summons have expired and the property or money may then be returned to the judgment debtor.

You have also asked whether there are remedies for violation of the laws discussed in your letter to me. As I have previously noted, a person who has received notice of a levy and fails to surrender and deliver property levied on upon demand of a sheriff may be guilty of a class B misdemeanor and civil contempt. N.D.C.C. § 28-21-12.1. In addition, civil remedies may be available to the judgment creditor or judgment debtor for acts which may be contrary to the provisions of N.D.C.C. chs. 28-21 and 32-09.1. Whether criminal or civil remedies exist will be dependent upon the facts and circumstances of each case.

I hope that I have adequately responded to your inquiries.

Sincerely,

Nicholas J. Spaeth

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