

LETTER OPINION
94-L-144

May 3, 1994

Mr. Charles Wilder
Williams County State's Attorney
PO Box 2047
Williston, ND 58802-2047

Dear Mr. Wilder:

Former State's Attorney Peter Furuseth requested an opinion on whether a county sheriff should attempt to locate personal property other than "of record assets" when executing a judgment despite the sheriff's lack of statutory authority to determine the judgment debtor's interest in such property.

Upon receipt of an execution against the property of a judgment debtor, the sheriff is required to satisfy the judgment out of the personal property of the debtor. N.D.C.C. ? 28-21-06(1). See also my letter to Peter Furuseth dated January 20, 1994, p.2. The process of levy and execution is under the control of the trial court that granted the judgment. Mees v. Ereth, 466 N.W.2d 135, 137 (N.D. 1991). An execution "is a judicial writ issued to an officer authorizing and requiring him to execute the judgment of the court." 30 Am.Jur.2d Executions ? 1 (1967). Further, "[a]n execution is a judicial writ issuing from the court where the judgment is rendered, directed to an officer thereof, and running against the body or goods of a party." 33 C.J.S. Executions ? 1(a) (1942). The word "execution" is not limited to the writ itself, "but may be used in a broad sense to embrace all of the appropriate means to execution of the judgment." 30 Am.Jur.2d Executions ? 1 (1967).

A sheriff's duties in satisfying a judgment derive from common law. The absence of an express statutory definition of a sheriff's duties when satisfying a judgment does not mean that there are no such duties. "Where there is no express constitutional or

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statutory declaration upon the subject the common law is applied." McLaughlin Oil Co. v. First State Bank of Buffalo, 57 N.W.2d 860, 864 (N.D. 1953), citing Brignall v. Hannah, 157 N.W.1042, 1045 (N.D. 1916). Therefore, the lack of a precise statement defining every aspect of a sheriff's duties upon execution of judgment in the Century Code does not imply that the sheriff has no duties other than those expressly defined by statute.

In 70 Am.Jur.2d Sheriffs ? 61 (1987), it was noted that:

When a writ is placed in the hands of a sheriff or marshal it is his duty, in the absence of any instructions to the contrary, to proceed with reasonable celerity and promptness to execute it in accordance with its mandates. It has been said that reasonable diligence is all that is required of a sheriff in making a levy, and that the question as to what constitutes such diligence depends upon the particular facts, in connection with the duty involved.

Consequently, a precise rigid answer to this question is difficult to render since the scope of a sheriff's search for assets to execute upon will vary in individual cases.

In his letter, Mr. Furuseth stated that "[i]t was the intent of the Civil Process Advisory Board to the North Dakota Sheriffs' and Deputies' Association when we drafted H.B. 1067, that due to the absence of any specific statutory authority for the sheriff to determine debtor's interest in property not filed or recorded as 'of record assets', that the responsibility of locating and determining debtor's interest in personal property resided with the judgment creditor, and not the sheriff." That intent, however, does not appear in the Century Code nor is it apparent from the language of H.B. 1067. See 1993 N.D. Sess. Laws ch. 103. The sheriff's statutory duty remains, as stated at N.D.C.C. ? 28-21-06(1), that upon receipt of an execution the sheriff shall satisfy the judgment. There are no statutory "safe harbors"

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that relieve a sheriff from searching for any assets except those which are held pursuant to a system of public recording of ownership interests. Further, while a judgment creditor may give directions on executing the writ, the creditor is not bound to do so, and "[w]hen a writ is received by an officer and no instructions are given, it is his duty to proceed with due diligence to execute it." 30 Am.Jur.2d Executions ? 211 (1967).

The amendments to N.D.C.C. ch. 11-15 allowed the sheriff the actual expenses incurred in preserving seized property, modified the sheriff's liability to the judgment creditor for failure to execute process, return the execution or pay money over, and regulated the levy when more than one execution is outstanding. 1993 N.D. Sess. Laws ch. 103. The legislative history contains some statements by interested parties addressing the sheriff's duties in regard to the amercement clause or the sheriff's liabilities for failure to execute process. See Hearing on H.1067 Before the House Pol. Subdivision Comm., 53rd N.D. Leg. (Jan 14, 1993) (Statement of Lt. Ray Gideon), Hearing on H. 1067 Before the Senate Judiciary Comm., 53rd N.D. Leg. (March 3, 1993) (Statement of Charles Neff). However, "[r]andom statements by legislative committee members, while possibly useful if they are consistent with the statutory language and other legislative history, are of little value in fixing legislative intent." Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993). "Generally, the law is what the Legislature says, not what is unsaid." Id. The statements in the legislative history do not have support in the language of the bill and, therefore, do not affect the sheriff's duty to satisfy the judgment, which is enforceable by a writ of mandamus. See my letter to Peter Furuseth dated January 20, 1994.

The court issuing an execution has complete control of its own process. Mees, 446 N.W.2d at 137. The amendments to N.D.C.C. ? 11-15-17 recognize the authority of the court by noting that the sheriff's liability for neglecting or refusing to levy upon and sell property of the judgment debtor may be modified "as otherwise provided by law or order of the court." See 1993 N.D. Sess. Laws ch. 103, ? 2. Sheriffs should consult with their legal advisors when faced with doubtful situations which may create liability should the sheriff act without a court order.

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In Mr. Furuseth's letter he also noted a concern relating to a wrongful levy and possible conversion action against the sheriff if the sheriff were to levy upon what the sheriff believes to be property in which the debtor has an interest where the debtor actually has no interest in that property. Historically, "the sheriff [had] authority to require of the levying creditor an indemnifying undertaking where a third party claim is asserted, . . . and may release the levy if the undertaking is not furnished on demand." Kelly v. Baird, 252 N.W. 70, 76 (N.D. 1934). This authority was based upon sections 7728 and 7550, Compiled Laws of 1913. Id. Section 7728 provided for a sheriff's jury to decide claims of third persons to levied property and section 7550 allowed the sheriff to demand a surety from the creditor in pre-judgment attachments if levied property is claimed by a third person. By consulting the parallel tables between the Compiled Laws of 1913 and the Century Code, it appears that section 7728 was repealed without enactment of a new law serving a similar function, but a sheriff may still require indemnity from the plaintiff for a pre-judgment attachment under N.D.C.C. ? 32-08.1-11. See 1977 N.D. Sess. Laws ch. 301 and 1985 N.D. Sess. Laws ch. 347. The Civil Process Advisory Board of the North Dakota Sheriffs' and Deputies' Association may wish to explore the possibility of legislation similar to N.D.C.C. ? 32-08.1-11 to ameliorate liabilities for wrongful levy or conversion.

Issues under present law regarding a sheriff's liability for wrongful levy for following a judgment creditor's directions to levy on particular personal property are presently the subject of litigation. See Sheriff of Cass County v. Fargo Women's Health Organization and Larson For Life, Cass County District Court No. 92-2426. In that case a judgment creditor directed a sheriff to levy on certain property which the creditor alleged belonged to the judgment debtor, but of which a third party claimed ownership. The sheriff brought an action for interpleader, and the third party counterclaimed for damages against the sheriff. It is the policy of the Office of Attorney General to decline to issue an opinion on matters which are presently pending in litigation before the courts of the state. As the question of whether a sheriff is relieved of liability to a third party for wrongful levy because the sheriff followed the

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directions of the judgment creditor is at issue in the
Cass County litigation, I decline to answer that
question.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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