



## NEW JERSEY LAW REVISION COMMISSION

### Draft Tentative Report

#### Relating to

### JUDGMENTS AND THEIR ENFORCEMENT

**July 8, 2013**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S.* 1:12A-8.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **September 23, 2013**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## JUDGMENTS AND THEIR ENFORCEMENT

### Introduction

The Commission's review of statutes concerning judgments continues an effort begun in 1989 to revise Title 2A provisions concerning the courts and the administration of civil justice. Many of the current 32 sections are outdated, unclear and superseded in practice. Moreover, even taken together the statutes and rules do not reflect the totality of current practice. The Commission proposal replaces those with provisions reflecting current practice.

The Commission proposal articulates the processes by which a judgment or order is recorded and the process by which information concerning subsequent events that affect the judgment are added to the record. First, a copy of the whole text of the judgment or order is kept by the court. See Section 1. That assures that the detail of a judgment or order will always be available. Entry is made in the Case Docket each time a judgment or order is entered. See Section 2. The docket entry serves as notice to all parties of the existence of the judgment or order and makes the decree effective against them. A judgment or order that is for a sum of money or that affects title to real estate is recorded on the Judgment Docket. See Section 3. That docket provides notice to all persons and makes a judgment a lien against real property. See Sections 7 and 8. "While the decretal provisions of a judgment take effect ... when the judgment is entered on the civil docket, the judgment would not constitute a lien until entered on the civil judgment and order docket ...." Pressler and Verniero, *Current N.J. Court Rules*, Comment R. 4:101. Documents constituting the subsequent history of a judgment such as executions or assignments are also indicated on the docket with the judgment. See Sections 5 and 6.

The current law concerning the collection of judgments also includes many sections that are outdated, unclear or superseded in practice by newer more detailed court rules. As a whole, they fail to reflect current practice. The current law does not give proper guidance or assistance to a party trying to collect a judgment. The proposed law is a comprehensive statement of the law relating to collection of judgments.

In addition to clarifications brought about by revisions in terminology, the Commission proposes substantive changes. The Commission proposes that the collection procedure be driven by written collection instructions from the judgment creditor to the collection officer. This is an innovation in law but not in practice. It conforms the statutes to recent case law and practice. Today's collection officer is in a situation different from that which existed when the present statutes were enacted. At one time, a sheriff armed with a writ of execution might be presumed to know the nature and location of the debtor's assets within the county. This obviously is no longer the case; the collection officer normally relies on the creditor for instructions, and the courts have held that the officer must follow the reasonable instructions of the creditor in satisfying a judgment. The Commission proposal formalizes transmission of these instructions to the officer and establishes the guidelines for determining priorities among claimants and the time when the collection order must be returned.

The Commission takes no position concerning modification of the current \$1,000 personal property exemption. Change in the level of exemption involves policy-laden decisions

that are best left to the Legislature. However, the Commission proposal revises the unworkable system of appraisal that accompanies present exemption procedures. The Commission proposes that when neither party objects, the collection officer's informal evaluation of items of personal property be accepted as the basis for claiming exemptions.

## Draft

## JUDGMENTS

### J-1. Records

The Clerk of the Superior Court shall keep indexed copies of every judgment and order, and any other instrument in a civil action which the Administrative Director with the approval of the Chief Justice, shall require, in a form acceptable to them.

Source: 2A:16-12.

#### COMMENT

This section clarifies the meaning of the source provision which requires the recording of judgments and orders. The difficulty is that judgment practice, case law, statutes and rules present confusing terminology, and the term "recording" is used inconsistently. The section avoids old terminology and focuses on the process required to keep records of the full text of judgments and orders. "It must be borne in mind that there are not only distinctions between signing and entering judgments, but also between filing, recording and docketing. Such distinctions must be kept clearly in focus when considering the laws of conveyancing and real property so that there will be no improper impairment of titles." *Brescher v. Gern, Dunetz, Davison Etc.*, 245 N.J. Super. 365, 371 (App. Div. 1991).

This proposal deletes description of the methods of recording documents specified in the source provision. The mode of recording chosen may vary with technological advances so long as copies are kept and indexed.

### J-2. Case docket

a. The Clerk of the Superior Court shall keep a Case Docket and shall make a dated entry in it of every civil action in the Superior Court, other than in the Special Civil Part of the Law Division, and every judgment, order and execution of process, and of any other instrument which the Administrative Director with the approval of the Chief Justice shall require. The entry shall state where a copy of the full judgment or order is kept.

b. The dated entry shall constitute the record of the judgment or order.

c. A judgment or order takes effect only upon entry in the Case Docket, unless the court directs otherwise in the judgment or order.

Source: New

#### COMMENT

This new section fills a statutory void. Law 1991, c.119, sec.4, repealed 2A:2-12 which required the Clerk of the Superior Court to "keep a book known as the civil docket..." Judgments take effect only upon entry in the civil docket, but there is no statute or rule requiring its existence. Because the "entry required by this rule [R. 4:101-3.] shall constitute the record of the judgment or order..." and because the civil docket is referred to in statutes providing for the civil judgment and order docket, a statute mandating it is desirable. The proposal changes the name from "civil docket" to "case docket."

### **J-3. Judgment docket**

The Clerk of the Superior Court shall keep a Judgment Docket and upon request and receipt of any required fee shall make a dated entry in it of the parties and their addresses and amount of the following judgments and orders:

a. Any judgment or order for payment of a fixed total amount of money entered from any part or division of the Superior Court except from the Special Civil Part, including

(1) a judgment or order to pay a fixed total amount of money for counsel fees and other fees or costs; and

(2) a judgment or order to pay a fixed total amount of money as arrearages resulting from failure to make periodic payments;

b. Any judgment or order affecting title to or a lien upon real or personal property or for conveyance or release of real property;

c. Upon filing of a statement required by NJS 2A:18-32 et seq., any judgment of the Special Civil Part of the Law Division;

d. Upon written request pursuant to NJS 2B:12-26, any municipal court judgment assessing a penalty;

e. Any certificate or lien filed by a State or county officer or agency required by law to be docketed; and

f. A certificate of debt issued by the Department of the Treasury evidencing a debt to a State Department or Agency not paid 30 days after notice to a debtor. The certificate shall refer to the legal authority under which the debt arises.

Source: 2A:16-11, 2A:16-11.1; R. 4:101-4.

#### COMMENT

This section brings together the vital functions of the civil judgment and order docket in current practice without repeating the details listed in the relevant court rules. The proposal changes the name of the docket from "civil judgment and order docket" to "judgment docket." Subsection a. retains the additions of the 1981, 1982 and 1983 amendments concerning counsel fees, periodic payments and arrearages. As a result, the subsection covers any kind of judgment for a sum certain. The fact that a judgment accrues interest does not mean that it is not for a sum certain. It does not include a judgment ordering future periodic payments, but it does include a judgment for a specific amount due immediately even if the amount is the result of overdue periodic payments. Subsections c. and d. add judgments of the Special Civil Part and the municipal court in accordance with their respective statutes. Subsection e. reflects the requirement that certain agencies file statutory liens with the Superior Court. Examples of statutes encompassed by the subsection are 30:4C-29.2 (Division of Youth and Family Services lien) and 2A:158A-17 (Public Defender lien). See also *R.* 4:101-4. Subsection f. continues the essential parts of 2A:16-11.1.

### **J-4. Address of judgment holder**

The Clerk shall enter the address of the holder of a judgment with each judgment entered in the Judgment Docket. A judgment holder shall file a new address with the Clerk promptly after each change in address.

Source: New

#### COMMENT

While this section is new, with section 8(b) below, it enacts the substance of Section 13 of the Fair Foreclosure Act, L. 1995 c.244.

#### **J-5. Attachments and execution of process**

The Clerk shall enter in the Judgment Docket, if the judgment is entered there, and otherwise in the Case Docket:

- a. Any attachments, giving the names of plaintiff and defendant; and the time when, and amount for which, writ of attachment issued; and
- b. Notation of any return showing execution of process resulting in full or partial satisfaction of the judgment.

Source: 2A:16-11.

#### COMMENT

R. 4:101-2(b) contains the same requirements as those in subsection a. The Commission adds this provision because docketing of attachments as searchable records should be statutorily required.

#### **J-6. Assignment, subordination or release of the lien, warrant to satisfy, satisfaction**

The Clerk shall enter in the Judgment Docket, if the judgment is entered there, and otherwise in the Case Docket, notation of any assignment of, subordination or release of the lien of, warrant to satisfy, and satisfaction of, any judgment.

a. An assignment of a judgment shall be in writing, and acknowledged or proved as required for conveyance of real estate.

b. A subordination or release of the lien of judgment shall contain a description of the property as to which the judgment lien is to be subordinated and shall be acknowledged or proved as required for conveyance of real estate.

c. Satisfaction shall be: (1) by order of the court on motion after receipt of money paid into court; (2) upon receipt from the satisfied party of an acknowledged satisfaction or warrant directing entry of satisfaction; (3) upon the filing of a warrant or the satisfied return by the sheriff or other officer of an execution issued on a judgment; or (4) upon order of the court on motion of the party making satisfaction. A creditor that receives full satisfaction of a judgment shall enter satisfaction on the record or deliver a warrant to satisfy judgment to the debtor. A creditor that fails to enter satisfaction or deliver the warrant within 30 days after written request by the debtor shall be liable to the debtor for \$100 and, in addition, for any loss caused to the debtor by the failure.

Source: 2A:16-15, 2A:16-41, 2A:16-44, 2A:16-45, 2A:16-46, 2A:16-47, 2A:16-48.

#### COMMENT

In subsection b. subordination of the lien of judgment more accurately describes the practice whereby a judgment creditor agrees that the lien against the debtor's real property will be inferior to a loan taken by the debtor and secured by a mortgage covering the same property than does the current term "postponement of lien of judgment."

In subsection c. the proposal streamlines the four source provisions. The procedural details are in R. 4:48-3 and 4:48-2. The subsection makes clear the duty of a creditor that receives full satisfaction to act to assure that the docket shows that the judgment has been satisfied. The penalty for failing to act is based on 12A:9-404 which penalizes failure to remove security interests under the Uniform Commercial Code.

### **J-7. Judgment lien; judgment as conveyance**

a. A Superior Court judgment or order for the payment of a fixed total amount of money shall be a lien on real estate from the time it is entered in the Judgment Docket.

b. When the party against whom a Superior Court judgment is entered for conveyance or release of real estate or an interest in it, does not comply by the time specified in the judgment, or within 15 days after entry of judgment if no time is specified, the judgment shall act as the conveyance or release without further order of the Court.

Source: 2A:16-1, 2A:16-7.

#### **COMMENT**

Subsection a. is based upon 2A:16-1.: "No judgment of the superior court shall affect or bind any real estate, but from the time of the actual entry of such judgment on the minutes or records of the court." The proposal, written in the affirmative, reflects contemporary practice by substituting "Judgment docket" for "minutes or records of the court." Liens resulting from "judgments and orders for the payment of money" take effect only when the judgment or order is entered upon the civil judgment and order docket in Trenton. "While the decretal provisions of a judgment take effect pursuant to R. 4:47 when the judgment is entered on the civil docket, the judgment would not constitute a lien until entered on the civil judgment and order docket pursuant to this rule." Pressler and Verniero, *Current N.J. Court Rules*, Comment R. 4:101.

Subsection b. streamlines the language of its source provision.

### **J-8. Judgment Docket as notice**

a. Entry of an instrument in the Judgment Docket serves as notice to all persons of that instrument.

b. Entry of the address of a judgment holder in the Judgment Docket serves as notice to all persons of the proper address for notification of matters concerning the judgment.

Source: New

#### **COMMENT**

While subsection a. is new, the current provisions present this crucial function of the Judgment Docket in a generalized manner. Section 2A:16-42 states that "The record of an assignment of a judgment shall, from the time the assignment is left for record, be notice to all persons concerned that such a record is so assigned...." This subsection explicitly states that the notice applies to all instruments entered in the Judgment Docket. This subsection, like its source, makes docketing alone a prerequisite to notice. While the next section requires that a docketed judgment be indexed, a mistake in indexing does not affect the power of a docketed judgment. Cf. *Howard Sav. Bank v. Brunson*, 244 N.J. Super. 571 (Ch.Div. 1990).

Subsection b., with Section 4 above, enacts the substance of Section 13 of the Fair Foreclosure Act, L. 1995 c.244.

### **J-9. Indexes**

The Clerk shall maintain an alphabetical debtor index of the Judgment Docket and other suitable alphabetical indexes of judgments, assignments of judgments, subordinations or releases of the liens of judgments, or warrants to satisfy judgments, in accordance with the Rules of Court.

Source: 2A:16-16.

#### **COMMENT**

The proposal streamlines the source provision.

## **J-10. Security for payment of judgment; order discharging real estate from lien**

a. If a person appealing a Superior Court judgment deposits with the Clerk of the Court an amount which the Court deems sufficient as security for payment of the amount finally to be determined to be due, the Court, by order, may discharge appellant's real estate from the lien of the appealed judgment.

b. The deposited amount shall be subject to the lien of the appealed judgment and of any later judgment recovered. The Clerk shall retain the deposit until final determination of the action.

c. When the order has been entered in the Case Docket and the deposit made, the Clerk shall enter the order following the judgment entry in the Judgment Docket.

Source: 2A:16-3.

### COMMENT

Subsection c. changes the entry in the docket from a phrase and a date to the order of discharge itself.

## **J-11. Offset against judgment of taxes, etc., due municipality**

When a person recovers a judgment against a municipality to which the person is or becomes personally indebted before satisfaction of the judgment, the municipality may apply for an order to offset the personal indebtedness against the judgment.

Source: 2A:16-8.

### COMMENT

*N.J.S.* 2A:16-8. became effective on January 1, 1952. Through 1980, courts did not deal with the statute, but had construed the predecessor statute, *R.S.* 2:27-255, authorizing an offset only when the taxpayer "is indebted to the municipality for taxes." "A tax against real estate is not a debt of the owner; it is not founded on a contract express or implied but is an imposition against the property and no personal liability attaches." *Francis Realty Co. v. Newark*, 16 N.J. Misc. 328, 330 (Essex Co. Cir. Ct. 1938). "The current statute may be regarded as having adopted the holding of *Francis Realty Co. v. Newark, supra.*" *Garden State Racing Ass'n v. Tp. of Cherry Hill*, 1 N.J. Tax 569, 578 (Tax Ct. 1980). In 1982, the Tax Court concluded that as the "Legislature has provided the municipality with the procedure whereby it can collect unpaid property taxes ... it would be improper to expand such procedures to include the right of offset." *Seatrains Lines v. Edgewater*, 4 N.J. Tax 378, 385 (Tax Ct. 1982), *aff'd* 192 N.J. Super. 535 (App. Div. 1983). The appellate judgment in *Seatrains* was summarily reversed, 94 N.J. 548 (1983), following passage of Senate Bill No. 3037, L.1983, c.137, which authorized a municipality to offset a refund of real property taxes against delinquent taxes owed on the same property. The Committee Statement emphasized that the "bill is intended to apply solely to property taxes, and does not include other local assessments or charges which may also be recovered through civil action against a property owner personally." A new section was added to Title 54 stating that real property taxes generally do not constitute "a personal debt of the owner of the property against which the taxes are assessed and levied." 54:4-135.

The proposal applies only to personal indebtedness, thereby excluding property taxes. Examples of "municipal charges or assessments for which the owner of the lands assumes a personal liability" include sewerage service charges and water and sewage disposal charges. "The basis for such liability is that the municipal service rendered is founded on contract." *Garden State Racing Ass'n, supra* at 576-577.

## **J-12. Ex parte entry of judgment on written settlement agreement**

a. A judgment may be entered on a written agreement that consents to the entry of judgment only as provided in this section. Notice of the application for entry of judgment shall

be given to the defendant in the form required by the court rules for notice of application for entry of default judgment.

b. The written agreement consenting to entry of judgment may be executed only after the acts or omissions of defendant have created a cause of action against the defendant for the amount of the judgment.

c. The application for entry of judgment shall be supported by an affidavit of the facts on which the judgment is based.

d. The agreement shall authorize entry of judgment for a specific sum or for a sum to be calculated in a manner provided in the agreement.

e. The agreement may authorize immediate entry of judgment or it may impose new obligations on the defendant and condition entry of judgment upon failure to comply with its terms.

Source: New.

#### COMMENT

Judgment by confession has existed in New Jersey practice for 175 years. It occurs when a debtor permits a creditor to enter judgment against the debtor by a written statement without institution of legal proceedings. Historically, statutes regulated confession of judgment practice. Judge Brennan stated that judgments "by bond and warrant of attorney, without institution of suit, derive all their efficacy from statutory law and strict compliance with statutory requirements is necessary." *Hickory Grill, Inc. v. Admiral Trading Corp.*, 14 N.J. Super. 1, 5 (App. Div. 1951). However, the concept of confession of judgment was not created by statute, and over the years, many of the statutes regulating confessions of judgment were not re-enacted. Vestiges remain in Title 2A (2A:16-6, -9, -13); most statutes outside Title 2A which mention confession of judgment prohibit or restrict their use. 39:6-72 (Settlement of actions against motorist); 12A:3-112 (Terms and omissions not affecting negotiability of an instrument); 2A:50-6 (Bonds or notes where a mortgage on real estate may be given for the same debt; notice of proposed judgment by confession or action); 38:23C-16 (Sale of property during period of military service); 42:1-9 (Uniform Partnership Law).

Since 1969, the most important regulation of confessions of judgment has been by court rule. The Rule requires that before judgment is entered, the debtor must receive notice of the date that the confession will be entered and the creditor must produce proof of the amount due. "While the 1969 rule did not wholly eliminate judgments by confession, it did eliminate their most objectionable feature by requiring notice to be given to the defendant before entry of the judgment." Comment, *R. 4:45-2*. The confession of judgment no longer operates as a waiver to the debtor's defenses; that was its original appeal to creditors. There is scant case law since the 1969 rule revision, but the cases show a continued reluctance to allow confessions of judgment to be used to foreclose defenses to a claim. *First Mutual Corp. v. Gramercy & Maine, Inc.*, 176 N.J. Super. 428, 441 (Law Div. 1980), *United Pacific Ins. Co. v. Lamanna's Estate*, 181 N.J. Super. 149, 160 (Law Div. 1981).

The classic confession of judgment situation is one in which the debtor executes a confession of judgment along with a promissory note. This "cognovit note" allows the creditor to have judgment entered against the debtor if he misses a payment without notice to the debtor or any defense by him. This kind of confession of judgment rarely occurs now because of the 1969 revision of *R. 4:45-2*; further, it may be invalid as aviolation of the "due process" clause of the Fourteenth Amendment to the Constitution. See, *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 178 (1972). The Commission found that use of confession of judgment is legitimate in the limited context of settlements of litigation. In such a situation, a person settles a claim with an agreement in which the defendant admits liability and provides that if the defendant does not fulfill his obligations under the settlement, the plaintiff may use the confession to have judgment entered without proof of the claim. This kind of confession of judgment was found constitutional in *D. H. Overmyer Co. v. Frick Co.*, *supra*. This section allows the use of judgment by consent on settlement agreement but regulates it strictly. It permits execution of an agreement only after there has been a default or other action by the debtor that would form the basis for a judgment. It eliminates the use of a warrant of attorney by requiring that the defendant make a written agreement supported by an affidavit of the facts on which the

judgment consented to is based. However, the Commission proposal allows the most common and appropriate current use of confessions of judgment. It permits a person to settle a claim by reaching an agreement that confesses liability and allows a judgment to be entered if the debtor does not make certain future payments. Such an agreement complies with subsection (b) since it is executed after the acts that formed the basis of the claim have occurred. There may be disputes as to whether the debtor has failed to comply with the agreement and therefore whether the creditor may seek judgment on the confession. Those disputes do not involve the basis of the claim but are relevant in determining whether the application for judgment on the confession should be granted. The debtor will have a fair opportunity to raise these issues; the section requires that notice be given to the debtor of the application for entry of the judgment.

The approach taken by this section differs from that taken by court rules. Court rules distinguish between confessions of judgment controlled by R. 4:45-2 and consent judgments controlled by R. 4:42-1. The Rules place severe restrictions on the entry of a judgment based on a confession of judgment. While these restrictions are not identical to those in Section 13, they serve the same purposes. However, where a complaint has been filed, there are no restrictions on the use of a signed consent judgment. *State v. Cruse*, 275 N.J. Super. 324 (App.Div. 1994). Notice need not be given to the defendant by service of the complaint or otherwise. R. 4:42-1(d). While both R. 4:42-1 and *Cruse* seem to contemplate that the consent judgment be executed after the accrual of the cause of action, neither requires it. The same document that would involve notice, hearing, and affidavits if used as a confession of judgment under R. 4:45-2 would suffice alone as a basis for judgment as a consent judgment under R. 4:42-1. The Commission decided that whether a document was used alone, as a confession of judgment, or coupled with a complaint, as a consent judgment, the same issues were involved, and the same restrictions should apply. Section 13 reflects that unitary approach.

## **COLLECTION OF JUDGMENTS**

### **Part 1. GENERAL PROVISIONS**

#### **C-1. Definitions**

As used in this act:

"Earnings" means payment for personal services performed, whether described as wages, salary, commission, fees, bonus, tips, pension and retirement benefits or otherwise.

"Writ of execution" means a court order directing the collection officer to satisfy a money judgment from the property of a judgment debtor.

"Property of the judgment debtor" means all interests in real property and all forms of personal property, including rights and credits, and all earnings.

Source: New

#### **COMMENT**

The purpose of these definitions is to make clear at the outset the categories that are used in later proposed subsections concerning the issuance of specific kinds of writs of execution. The phrase "property of the judgment debtor" is defined to include all kinds of property. As defined, it includes anything of value that can be taken for the benefit of the creditor.

## **C-2. Issuance of writs of execution**

a. At the request of a judgment creditor and upon receipt of any required fee, the Court shall issue a writ of execution directing the satisfaction of a money judgment from the property of the judgment debtor.

b. A writ of execution may be issued only within 20 years after entry of the judgment to be collected, or if the judgment has been revived, a collection order may be issued only within 20 years after the date of the revival of the judgment.

Source: 2A:17-3.

### **COMMENT**

Subsection a. of this proposed section states a general rule that is implied but not stated in the source sections, and is expressed in *R. 4:59-1(a)*. The fees for issuing writs of execution are established in 22A:2-7. Subsection b. continues the rule of source section 2A:17-3 that places a 20-year limit on the issuance of a writ of execution, unless the judgment is revived. Note that there are no current statutory provisions concerning revival of a judgment.

## **C-3. By whom issued**

a. A writ of execution against personal property of the judgment debtor may be issued by the Clerk of the Superior Court if the judgment is recorded in the judgment docket of the Superior Court.

b. A writ of execution against personal property or earnings may be issued by the Clerk of the Special Civil Part if the judgment is recorded in the case records of the Superior Court, Law Division, Special Civil Part but not in the judgment docket of the Superior Court.

c. As many writs of execution with respect to a particular judgment may be issued as the judgment creditor requests, and may issue a writ of execution to more than one county at the same time.

Source: 2A:17-4; 2A:17-17.

### **COMMENT**

Subsection a. of this proposed section continues the rule in current law that if a judgment is docketed in the Superior Court, the clerk of that court issues the writ of execution, even if the judgment originally was obtained in the Special Civil Part. In addition, subsection b. continues the rule under current law that the clerk of the Special Civil Part issues a writ on judgments that have been obtained in that Part but not docketed in the Superior Court. Subsection c. restates 2A:17-4. It also makes it clear that successive writs may issue after the return of the writ or its expiration. See *Vitale v. Hotel California, Inc.*, 184 N.J. Super. 512, 520-21 (Law. Div. 1982), *aff'd* 187 N.J. Super. 464.

Note that the Clerk of the Superior Court may issue a writ of execution against any kind of property, including real property, while writs of execution issuing from the Special Civil Part are limited to personal property and earnings. This distinction is consistent with the current statutes; see 2A:17-17.

## **C-3 1/2. Writ of execution against real property; perfected lien**

a. A writ of execution against real property of the judgment debtor may be issued by a judge of the Superior Court if the judgment is recorded in the judgment docket of the Superior Court.

b. A writ of execution against real property may be issued only if the judge finds after notice to the debtor and a hearing that the debtor has no remaining personal property from which the judgment can be satisfied.

c. A writ of execution against real property shall be treated as a final judgment of the Superior Court, and a sale of property in compliance with the terms of the writ shall vest good title in the purchaser.

d. A writ of execution against real property of the judgment debtor that is filed with a collection officer shall perfect the lien against the real property described in the writ or in the instructions to the collection officer from the time it is filed with the collection officer.

Source: 2A:17-1; 2A:17-17.

#### COMMENT

Subsection a. limits executions against real property to judgments recorded in the judgment docket of the Superior Court. This limitation is a continuation of 2A:17-17. The words of that section prevent real property executions for judgments of the Special Civil Part, but the limitation has been held not to apply if the Special Civil Part Judgment has been docketed in the judgment docket of the Superior Court. *City of Philadelphia v. Bauer*, 97 N.J. 372, 379 (1984). The provision in 2A:17-17 barring executions for judgments based on employment wage taxes has been deleted because it was held unconstitutional in *Philadelphia v. Bauer*, 97 N.J. at 380-384.

Subsection b. continues the rule of 2A:17-1 that personal property must be exhausted before the creditor has recourse to real property. However, this section provides an enforcement mechanism for the rule. A writ against real property is separate from one against personal property, and before one can be entered, a judge must make a finding that personal property has been exhausted. Current law has a single writ, and a sheriff must enforce the priority. If it appears later that there was additional personal property, the sale of real property may be held void. That approach has made title to real estate based on an execution sale uninsurable. To make title based on an execution sale more secure, subsection c. makes the judicial determination that personal property has been exhausted a final judgment subject to appeal and binding on the issue of whether other property existed.

Subsection d. clarifies that the lien established by a judgment is perfected against a parcel of real property by filing a writ of execution with the collection officer.

### **C-4. To whom issued**

a. Writs of execution for judgments recorded in the judgment docket of the Superior Court may be directed to the sheriff of any county.

b. Writs of execution for judgments recorded in the case records of the Superior Court, Law Division, Special Civil Part but not in the judgment docket of the Superior Court shall be directed to the officer responsible for enforcing judgments of the Law Division, Special Civil Part in any county.

Source: 2A:17-4.

#### COMMENT

Subsection a. continues the provision in 2A:17-4 permitting simultaneous collections in more than one county.

### **C-5. Form and contents of collection orders**

a. A writ of execution shall specify in its title whether it is directed at the personal property, real property, or the earnings, of the judgment debtor.

b. A writ of execution shall include such information concerning the judgment, the judgment creditor and the judgment debtor as Court Rules require.

Source: New

COMMENT

Proposed subsection a. provides that a writ of execution must specify on its face the kind of property at which it is directed. This specificity is required because of the different treatment provided each of the two kinds of writ of execution, one against property, whether real or personal, and one against earnings.

Proposed subsection b. is consistent with R. 4:59-1 in specifying the information required to be contained in a writ of execution. Errors in this information that do not prejudice a party should not be a ground for attacking a collection order.

## C-6. Exemptions

a. The following property of a judgment debtor, who is either a natural person resident in the State of New Jersey or the estate of a decedent who was resident in the State of New Jersey, shall be exempt from a writ of execution pursuant to this chapter:

- (1) property that a federal or state statute forbids taking to satisfy a state judgment;
- (2) wearing apparel of the judgment debtor other than furs and jewelry; and
- (3) *additional property whose aggregate value does not exceed either \$1000.*

b. The exemptions provided in this section shall not apply if the judgment being enforced:

- (1) arises from the purchase of the same property against which collection is sought; or
- (2) is for child support; or
- (3) is for the collection of taxes or assessments.

Source: 2A:17-19.

COMMENT

The purpose of this section is to simplify the provisions of the source statute which specifies the property of a judgment debtor that is exempt from collection and levy. Proposed subsection a.(1) is a reference to the fact that numerous statutes exempt various kinds of property, often of public and quasi-public entities, from collection and levy. See, *e.g.*, 5:12-168 (property of Casino Reinvestment Development Authority exempt from levy and collection); 27:19-33 (property of bridge commissions); 33:1-25 (alcoholic beverage licenses). With respect to individuals, there are numerous statutory provisions which exempt pensions from collection and levy. See generally Title 43 Pensions and Retirement and Unemployment Compensation.

The current personal property exemption has not been changed. Wearing apparel of the judgment debtor, other than furs and jewelry, is exempt, and there is a general exemption for \$1,000 worth of personal property. The \$1000 amount has not been revised since 1973 and covers far less property than it did when written. The \$100 amount may no longer meet the standard announced by the 1993 "Report of the Supreme Court Committee on Post-Judgment Collection Procedures in the Special Civil Part." The Committee judged that the amount of the exemption should be adjusted so that it will be sufficient "to ensure that debtors are not deprived of bare necessities to exist for one month and maintain a minimal household." Post-Judgment Collection Procedures Report at 47. The Commission takes no position on the proper amount for the exemption. The Commission considers setting the amount to be the kind of policy decision best left to the Legislative process.

Proposed subsection b.(1) continues the provision in the current statute which removes the exemption from collection and levy from property which was purchased with funds which gave rise to the debt underlying the collection action, *i.e.* a "purchase money debt." See *Stoutenburgh v. Konkle*, 15 N.J. Eq. 33 (1862).

Subsection b.(2) is new; it codifies the principle enunciated in *Redick v. O'Brien*, 191 N.J. Super. 614 (Ch. Div. 1983), which held that the policy behind the exemption provision, *i.e.*, the protection of the debtor and his family from destitution, precluded the judgment debtor's use of the exemption in cases where the judgment being enforced was for support of the debtor's dependents.

Subsection b.(3) continues the exception in the source section for the collection of taxes and assessments.

## **C-7. Selection of exempt personal property**

a. In consultation with the collection officer, the judgment debtor may select any item or items of personal property whose aggregate value is not greater than the values allowed under section C-6(a)(3). The selected item or items shall be exempt from levy.

b. The collection officer shall prepare an inventory of the items of personal property selected for exemption by the judgment debtor and shall include an impartial and honest evaluation of each item inventoried. The value of an item shall be the price judged to be that for which the item would be sold at public sale. Copies of the inventory shall be given to the debtor, creditor and their counsel.

c. Within 10 days after receipt of the inventory, either the debtor or the creditor may dispute the value of any item in the inventory by notice to the other party by submitting a written statement under oath concerning the value and applying to the court to make a determination of the value of the items in dispute. The court may receive or require testimony or evidence, including expert appraisals as necessary to make its determination.

d. If neither party disputes the values in the inventory, the judgment debtor, on the basis of the inventory values, shall select items whose aggregate value is not greater than the values allowed under section C-6(a)(3). These items shall be exempt from levy. If either party disputes the values in the inventory, the judgment debtor, on the basis of the values determined by the court, shall select items whose aggregate value is not greater than the values allowed under section C-6(a)(3). These items shall be exempt from levy.

Source: 2A:17-20 through -28.

### **COMMENT**

The section provides for the selection of exempt personal property in a process of informal consultation with the collection officer. The source statutes required appointment of three expert appraisers to assess the value of all personal property, but N.J.S. 22A:2-41 allows a fee of only \$1.00 for each appraiser. In practice, appraisals have been carried out rarely. The proposed section requires the collection officer to prepare an inventory only of the items of the judgment debtor's personal property to be levied against.

## **C-8. Receipt of writs of execution**

The collection officer shall record on a writ of execution the date and time it was received.

Source: 2A:17-11.

### **COMMENT**

This provision continues the requirement to record the date and time a writ of execution is received, which affects priority of claims to debtor's property. But it abandons the earlier requirement that the officer

levy against property in the order that writs of execution were received, because the officer has no way of knowing whether or not orders have been filed elsewhere and is obligated to proceed to levy immediately rather than to make a probably unproductive inquiry.

Note that the provision in source section 2A:17-12 which gives priority to support orders over other orders received on the same day has been eliminated as having only minor remedial effect.

### **C-9. Judgment creditor's collection instructions**

a. A judgment creditor who obtains a writ of execution shall submit written instructions to the collection officer with the writ.

b. The collection instructions shall contain a description of property to be levied against, by item, type or location sufficient to identify it for levy. If all property at particular premises occupied by the debtor is to be levied against, instructions stating that shall be sufficient. The instructions shall state whether the property is located in a dwelling. The collection instructions shall contain a description of real property to be levied against sufficient to identify it.

c. The officer shall record on the collection instructions the date they were received.

d. The officer shall comply with the lawful written collection instructions of the judgment creditor, except that the officer shall not levy against more items of property than necessary, in the judgment of the officer, to satisfy the judgment and pay costs.

e. The officer may levy against personal property of the judgment debtor subject to the writ of execution but not identified in the collection instructions of the judgment creditor, unless the instructions of the judgment creditor state otherwise.

Source: New

#### **COMMENT**

There is no current statutory provision that authorizes or requires the judgment creditor to provide the enforcing officer with instructions for collecting the judgment, although it is common practice for the judgment creditor to do so, and enforcing officers generally will not proceed without instructions. This proposed provision conforms with the principles enunciated in *Vitale v. Hotel California, Inc.*, 184 N.J. Super. 512, (Law Div. 1982), aff'd, 187 N.J. Super. 464, in which the court stated that the collection officer must follow the judgment creditor's lawful instructions regarding the time and manner of making a levy. Subsection (d) requires the officer to comply with the lawful written instructions of the judgment creditor. It limits the levy to items sufficient to satisfy the judgment, protecting the judgment debtor from creditor's instructions that might bind more items of property than necessary.

Subsection () provides that the judgment creditor's written instructions must be transmitted to the levying officer along with the writ of execution. This subsection must be read in conjunction with the proposed section on returns, C-24(a)(1), which provides that the levying officer is required to make a return of the writ of execution if no written instructions are received. Taken together, these proposed provisions make the collection officer's obligation to act dependent upon the receipt of reasonable written instructions from the judgment creditor. If no instructions are received, the writ of execution may be returned. This provision gives the levying officer a clear rule.

### **C-10. Levy against personal property in possession of judgment debtor**

a. A collection officer may levy against personal property in the possession of the judgment debtor in any of the following ways:

(1) by removing the property to a place of safekeeping;

(2) by installing a custodian in the place where the property is located to maintain custody over the property; or

(3) by any other reasonable means of obtaining possession or control of the property.

b. If the creditor agrees, the collection officer, in place of making a levy, may leave the property in the custody of the debtor until the sale. The officer shall list each item of property left in the custody of the debtor and give a copy of the list to the debtor and to the creditor. The debtor shall not intentionally damage or dispose of property left by the collection officer. This action by the collection officer shall be considered equivalent to a levy for the purpose of establishing the rights of the creditor as against other judgment creditors, but it shall not affect the rights of a person who, not knowing that the property is held pending public sale, purchases the property or acquires a lien for fair value.

Source: New; 2A:17-14.

#### COMMENT

This section provides for collection against personal property by taking it into custody, or by other means of obtaining possession or control of the property. Under current law, some of these means are regarded as effectuating a "constructive levy." It is very uncertain, however, what constitutes a constructive levy under current law, and for what purposes a constructive levy is equivalent to a true levy. There are cases which state that property may be left in the hands of a judgment debtor until the day of sale, upon the judgment debtor's voluntary acceptance of the obligation to keep them as bailee. *See, e.g., Nelson v. Van Gazelle Valve Mfg.*, 45 N.J. Eq. 594 (1889). *But see Cumberland Bank v. Hann*, 19 N.J.L. 166 (1842) which stipulated that goods left with the defendant as bailee were at the risk of the sheriff who was liable to the judgment creditor for waste, loss or destruction. If however, the goods were left with the judgment debtor at the direction of the judgment creditor or with the judgment creditor's consent, the risk of loss was shifted from the sheriff to the judgment creditor. The judgment debtor's consent is a necessary condition to the creation of a bailment in such cases, and consent is unlikely. Hence, this section does not adopt a bailment approach; it imposes on the judgment debtor only the obligation of not intentionally damaging or destroying items of personal property left in the judgment debtor's possession under this provision for a limited equivalent of levy.

### **C-11. Levy against personal property in a dwelling**

a. If the judgment creditor instructs the officer to levy against personal property located in the judgment debtor's dwelling place, the officer shall demand access to the property at the dwelling place where the property is located. At the time the demand is made the officer shall inform the judgment debtor that the judgment debtor may be liable for costs incurred in any further proceedings to obtain access to the property. If the judgment debtor does not allow access to the property upon demand of the collection officer, the officer shall promptly notify the judgment creditor of the failure to obtain custody of the property.

b. Whether or not a demand has been made pursuant to subsection (a), the judgment creditor may apply to the court which issued the writ of execution for an order directing the officer to levy against a judgment debtor's property located in a dwelling place. An application for an order to seize property shall describe with particularity sufficient to identify them, both the property sought to be levied against, and the place where it is to be found, according to the best knowledge and belief of the judgment creditor. The court may not issue the order unless the judgment creditor establishes that there is probable cause to believe that the property to be levied against is located in the place described. At the time delivery of the property is demanded, the officer shall make known his or her purpose and authority, and shall announce that persons interfering with officers enforcing the order are subject to arrest for obstructing an officer.

Source: New

#### COMMENT

Subsections a. and b. of this proposed provision specify the measures a collection officer is required to take in obtaining access to property of a judgment debtor which is in a dwelling place if the judgment debtor or other person refuses to allow access to the dwelling. These subsections are based upon current judicial precedents. *Spiegel, Inc. v. Taylor*, 148 N.J. Super. 79 (Bergen Cty Ct. 1977) requires the judgment creditor to identify non-exempt personal property of the judgment debtor by supplementary proceedings, and then to instruct the levying officer to levy against the discovered assets. It forbids entering the judgment debtor's dwelling place on "fishing expeditions."

Subsection (a) of the proposed section permits the enforcing officer to make an attempt to gain access to a dwelling place, but if access is not voluntarily allowed, the officer must notify the judgment creditor of the attempt. The judgment creditor may then proceed under subsection (b) to obtain an order authorizing access to the dwelling to levy against the property. Subsection (b) requires the judgment creditor to establish "probable cause" to believe that the identified property is at the location specified. In contrast to the provisions for levying against property in an inaccessible place given in the following section (C-12), the officer is not authorized to enter a dwelling place by force. Forcible entry of a dwelling in aid of collection of a judgment has generally been considered a violation of the constitutional rights of the property owner; see *Silverman v. Stein*, 217 N.W. 785 (Mich. 1928), *Trainer v. Saunders*, 113 Atl. 681 (Pa. 1921), *Hillman v. Edwards*, 745 S.W. 787 (Tex. Civ. App. 1902) and other cases collected at 57 ALR 209. Note that the judgment creditor need not make an initial demand under subsection (a), but may choose to proceed under subsection (b) in the first instance.

### **C-12. Levy against property in an inaccessible place**

a. If the judgment creditor instructs the officer to levy against personal property located in a place inaccessible to the collection officer, that is other than a dwelling place, the officer shall demand access to the property at the place where the property is located. At the time access to the property is demanded, the officer shall make known his or her identity, purpose, and authority, and shall announce that persons interfering with officers enforcing the order shall be subject to arrest for obstructing an officer.

b. If access to the property is not given, the officer may use force to obtain access to the property and may cause the place where the property is believed to be located to be opened in the manner that the collection officer reasonably believes will cause the least damage.

Source: New

#### COMMENT

This proposed section applies to those situations in which property is located in a place that is inaccessible to the collection officer, and makes it clear that the collection officer may use force to enter and may risk violence in doing so. A "place inaccessible to the collection officer" is a place from which the officer in a manner similar to the public in general is or may be excluded by means of locks, security personnel or other devices, as, for example, a locked or inner room, closet or storage facility, etc. *Vitale v. Hotel California, Inc.*, 184 N.J. Super. 512 (Law Div. 1982) establishes that under current law a levying officer risks amercement for failure to use the full powers of the levying officer's powers, including physical force, to carry out the judgment creditor's particularized instructions to levy. The *Vitale* case makes it clear that common sense and prudence dictate obtaining police assistance in such situations.

### **C-13. Levy against personal property in the custody of a third party**

a. If the judgment creditor instructs the collection officer to levy against personal property in the possession of a person other than the judgment debtor, the officer shall serve a copy of the writ of execution personally on the person who has possession of the property.

b. The service of the writ of execution shall be effective against:

(1) any personal property of the judgment debtor in the custody of the third party at the time of service; and

(2) any additional personal property which the judgment debtor becomes entitled to receive from the time of the levy to the time of the order directing that the property be turned over to the collection officer.

c. Service of the collection order on any office of a business shall be effective against any personal property of the judgment debtor in the custody of the business.

d. During the time the levy is in effect, the third party holding custody of personal property subject to the collection order shall hold the property pending order of the court and shall not honor any other demand for the property.

e. Any time within 30 days after levy, the creditor may make a motion pursuant to the court rules for an order directing that the property be turned over to the collection officer.

f. Banks and financial institutions may assess a fee of no more than \$25 per levy against the judgment debtor.

Source: 2A:17-58; 2A:17-63.

#### COMMENT

This proposed provision is intended to generalize the current law concerning collection against rights and credits.

### **C-14. Service and mailing of notice of levy**

a. At the time the collection officer levies against property of a judgment debtor, the officer shall serve a copy of the writ of execution on the person who has custody of the property levied against; and

b. The collection officer shall mail a copy of the writ of execution and notice of levy on the same day:

(1) to the judgment debtor, if the order and notice have not been served upon the judgment debtor;

(2) to any person whom the officer actually knows may have an interest in the property described in the notice; and

(3) to the attorneys for the judgment debtor and creditor.

c. A notice that specific property has been levied against shall contain a description of the specific property levied against, a statement of the debtor's right to exempt property from collection, and any other information required by the Rules of Court.

Source: New

#### COMMENT

This draft provision is consistent with the current court rules providing for notice to the judgment debtor of levy and collection. Subsection b.(2) requires the officer to serve notice on persons the officer actually knows to have made a claim to the property, knowledge that may have been obtained, for example, in the course of making the levy.

### **C-15. Collection orders against earnings; earnings subject to writs of execution**

a. At the request of a judgment creditor, the Superior Court shall issue either a writ of execution directing an employer to withhold a portion of a debtor's earnings, or a writ of execution to the debtor to make periodic payments to the creditor from earnings.

b. A writ of execution, other than one enforcing a support order, against the earnings of a judgment debtor shall provide that 10% of gross earnings be taken unless the court finds that the needs of the debtor require that a lesser percentage be taken or allow a greater percentage to be taken. The amount to be withheld shall not exceed the amount allowed under section 303 of the Federal Consumer Credit Protection Act (15 U.S.C. sec. 1673).

Source: 2A:17-50; 2A:17-56.

#### **COMMENT**

Subsection a. restates the source statute; 2A:17-50 was interpreted in *Great Bay Hotel & Casino v. Guido*, 249 N.J.Super. 301 (App. Div. 1991), which held that issuance of a writ of execution against earnings was not a matter of discretion even if the judgment debtor's earnings precluded setting an amount at the time the writ was issued. As writs of execution are satisfied one at a time, and sequentially in the order issued, *Great Bay Hotel* held it critical for the first applicant to gain priority over creditors who might subsequently apply; upon a showing of changed circumstances, the creditor who had applied first would seek a modification of the order. *Id.* at 304. Subsection a. also allows the issuance of a writ to a debtor ordering payments from earnings. This provision is new, but its substance is in accord with current practice. It distinguishes collection orders directed to the employer from those directed to the debtor. Orders that direct the debtor to pay are used when the debtor works for an employer outside of the state, beyond the jurisdiction of a writ of execution. It restates the inherent power of the courts to fashion orders to enforce judgments.

Current section 2A:17-50 specifies that wage collections may be ordered only if the debtor has income exceeding \$48 week; 2A:17-56 allows orders for more than 10% if annual earnings exceed \$7500. These amounts have not been changed for more than twenty years to reflect inflation. This section adopts the basic wage percentage subject to collection at the 10% level as found in current statutes but avoids specific dollar amounts. In place of specific amounts, the section allows a court flexibility to determine the collection percentage that balances the legitimate needs of the debtor against the claim of the creditor. Thus, if the family expenses of the debtor could not be met if 10% of wages were deducted, a lesser percentage can be specified. On the other hand, if the debtor can afford more, more can be ordered. The percent that can be taken from a debtor's earnings without interfering with family necessities is not determined solely by the amount of earnings.

The source statutes for this section apply to collections against "wages, debts, earnings, salary, income from trust funds, or profits due and owing to the debtor." This section applies only to "earnings," but "earnings" are defined as "compensation payable by an employer for personal services performed by an employee, whether defined as wages, salary, commission, bonus or otherwise." See Section 1, Definitions. To the extent that this section is narrower than its source, Section C-15(b)(2) fills the gap. It allows collection against any personal property in the custody of a third party including debts, income from trust funds and profits.

### **C-16. Priorities among collection orders against earnings**

a. If more than one writ of execution against the earnings of a judgment debtor is served on an employer,

- (1) only one collection order against earnings shall be satisfied at one time;
- (2) support orders shall be satisfied before writs of execution; and
- (3) writs, shall be satisfied in the order in which they were served on the employer.

b. If a judgment debtor is subject to more than one writ of execution against earnings other than a support order, upon application by the debtor the court shall modify the amount of the later writ so that the amount to be collected at any time on both writs other than support orders is not greater than 10% of gross earnings.

c. For purposes of sections C-14 through 16:

(1) a writ of execution against the earnings of a judgment debtor includes any court order that requires that payments be made from the earnings of the judgment debtor whether the payments are to be made by the employer or by the judgment debtor;

(2) a support order is any order for the support of a child, spouse or former spouse or any order based on a claim for unpaid support for a child, spouse or former spouse.

Source: 2A:17-52.

#### COMMENT

Subsection a. restates the source statute. Subsection b. incorporates the holding of *In Re Household Finance Corporation v. Clevenger*, 141 N.J. Super 53 (App. Div. 1976) that one manner of reaching wages has no priority over another. So long as payments are to be made from the same stream of earnings, a collection order to pay in installments under 2A:17-64 is governed by the same priorities as a collection order against wages under 2A:17-52. The court held that the legislative intent was to limit collections from earnings; subsection b. codifies this intent. Subsection a.(2) provides that collection orders for support take precedence regardless of the time they were served on an employer. This precedence is now provided by 2A:17-56.7.

### **C-17. Payments under writs of execution against earnings**

a. Any employer to whom a writ of execution against earnings is presented shall deduct from earnings owed the judgment debtor the amount prescribed in the order and pay the amount prescribed to the officer presenting the order. The employer may deduct a fee of no more than 5% or \$5, whichever is less, from each payment, to compensate the employer for expenses. The judgment debtor shall bear the expense of the fee.

b. Any employer who fails to make payments required by a writ of execution against earnings shall be liable to the judgment creditor for the payments.

Source: 2A:17-53; 2A:17-54.

#### COMMENT

This section continues the substance of its sources.

### **C-18. Collection order, lien on personal property**

a. A judgment creditor who files a writ of execution with a collection officer shall have a lien on any property of the debtor levied against by that officer from the time of levy.

b. A judgment creditor who has caused a levy to be made against the proceeds of the collection or sale of debtor's property levied against for another creditor shall have a lien on that property from the time of levy on the proceeds.

c. If more than one lien established by this section is applicable to an item of property, priority among the liens shall be governed by the same rules as those governing distribution of the proceeds of property that has been levied against to enforce a judgment.

d. A lien established by this section shall prevail over any subsequent transfer of an interest in the property.

Source: 2A:17-10

COMMENT

This section updates the source section and the case law arising from it by specifying the conditions under which a creditor's collection prevails against other claimants to property levied against. Whereas the source section placed a lien on property and goods from the time the collection order was delivered to the sheriff, subsections a. and b. place the lien from the time of levy. This follows the rule that the lien was not perfected until a levy was made, *Regan v. Metropolitan Haulage Co.*, 127 N.J.Eq. 487 (1940), as well as the intent of the new chapter which places primary importance on the creditor's written collection instructions. Subsection c. provides that where more than one lien has been established, priority among them is determined by the same rules as govern distribution of proceeds in section C-22. Subsection (d) establishes the priority of these liens in the event of subsequent transfers.

**C-19. Sale or other disposition of property**

a. Cash shall be collected and applied to the satisfaction of the judgment as so much money collected, unless it has a value exceeding its face value, in which case it shall be sold.

b. The following property of a judgment debtor shall be collected and reduced to cash and applied to the satisfaction of the judgment in accordance with the instructions of the judgment creditor:

- (1) instruments payable within the term of the collection order;
- (2) any other rights to the payment of money.

c. Other property of a judgment debtor that has been levied against pursuant to a writ of execution shall be sold as provided in this chapter and the proceeds applied to the payment of the judgment.

Source: 2A:17-15; 2A:17-16; 2A:17-17; 2A:17-19; 2A:17-61.

COMMENT

Proposed subsection a. continues the rule of the source statute, which provides that cash is not sold but is merely collected and applied to the satisfaction of the judgment. Under current law, this means that a sheriff who seizes cash receives no fee, because there is no sale held, while a Special Civil Part officer, whose fee is calculated on the amount applied toward the judgment regardless of whether there is a sale or not, receives a fee for the seizure of cash. See *International Brotherhood of Electrical Workers, Local No. 1470 v. Gillen*, 174 N.J. Super. 326 (App. Div. 1980).

Note that the general language of this proposed provision includes the separate categories of property identified in the source provisions, i.e., 2A:17-16 (shares of stock).

The Commission has not dealt with the issue of fees due sheriffs and officers in the Special Civil Part, matters covered in Title 22A. While Special Civil Part officers receive a commission on the total receipts collected, including cash collected, sheriffs receive no commission on cash collected.

**C-20. Property sold, manner**

a. Property that has been levied against may be sold by any method specified in a court order or agreed upon by the judgment creditor, the judgment debtor and any other party having an interest in the property.

b. In the absence of an order or agreement, that property shall be sold as follows:

(1) Personal property that has a readily ascertainable current value and that is normally sold in an established public market shall be sold in that market.

(2) All other property shall be sold by auction, pursuant to provisions governing public sales.

Source: New

#### COMMENT

Proposed subsection a. is new; it permits the sale of property in a manner agreed upon by the judgment creditor and the judgment debtor. This would permit property to be sold in the manner that will obtain the best price in those situations in which an auction sale would not accomplish that purpose, provided that the judgment creditor and judgment debtor agree.

Proposed subsection b. covers those situations in which the judgment creditor and judgment debtor do not agree on a method of sale. Proposed subsection b.(1) is new. It requires that property which has a ready market shall be sold in that market, the purpose being to obtain the highest price. Subsection b.(2) states the principle of existing law that property shall be sold by public auction. In this proposed section, an auction sale is the last resort.

This report does not deal with the implications of these changes on the manner in which the sheriff's fees are calculated. The language in Title 22A concerning sheriff's fees for sale is broad enough to include any form of sale subsequent to collection by the sheriff. It is our view that it might be wise to propose modifications in the language in Title 22A to make it clear that the intent is that once the sheriff has executed against particular property, he receives his percentage fee for the ultimate sale, even if the sale is not by sheriff's auction but by agreement between the parties or by negotiation in some other market.

### **C-21. Objections to sale or disposition of property**

a. Any person who claims an interest in property which has been levied against or who objects to the sale or other disposition of property which has been levied against may file a written objection to the sale or disposition with the Clerk of the Court which issued the collection order and deliver a copy of the objection to the collection officer.

b. The Clerk shall notify the collection officer, the judgment creditor, and the attorney for the judgment creditor of any objections that have been received to the sale or other disposition. Upon receipt of notification of the objections, the collection officer shall not sell or dispose of the property until further order of the court.

Source: 2A:17-29, 2A:17-31.

#### COMMENT

This proposed provision modifies and simplifies the source provisions by providing that notice of objections to sale or disposition shall be given to the clerk of the court, with the clerk obliged to notify the collection officer of the objections. Once objections are received, the collection officer shall not act until further order of the court.

### **C-22. Priorities in Distribution of proceeds**

The proceeds of property which has been levied against to collect a judgment shall be distributed in the following order:

a. to the judgment creditor for whom the property was levied against and sold;

b. if the sale is of personal property, to other judgment creditors who have levied against the proceeds of the sale;

- c. to junior lienholders whose liens are extinguished by the sale;
- d. to the debtor.

Source: New.

COMMENT

While there is no current statute dealing with this subject, the proposed section is in accord with case law and practice.

**C-23. Disputes over distribution of proceeds**

If a dispute arises concerning the application of either money collected or proceeds of a sale to the satisfaction of a judgment, the officer or any party with a right to the property to be distributed may apply to the court, on notice to the other parties whose property rights will be affected by resolution of the dispute, for an order directing the distribution of the money or proceeds.

Source: 2A:17-6.

COMMENT

While much of this section is new, it continues the current practice.

**C-24. Return of writ of execution**

a. The collection officer shall file a return with the court that issued the writ of execution at the earliest of the following times:

- (1) Immediately after receipt of the collection order, if no written instructions have been received from the judgment creditor.
- (2) 30 days after notice to the judgment creditor unless directed otherwise.
- (3) Immediately after a request in writing for a return by the judgment creditor.
- (4) 12 months after the date of the issuance of the writ of execution against property; and
- (5) Immediately after a writ of execution is satisfied.

b. The return filed by the levying officer shall include:

- (1) A statement of the amount collected, if any, and the time when it was collected and remitted to the judgment creditor; and
- (2) An itemized bill of costs and fees.

Source:

COMMENT

Subsections a.(1) and a.(2) provide for situations in which a creditor instructs the levying officer to make further collection efforts after a seizure and sale of personal property. This obviates the necessity to obtain the issuance of a new writ of execution if the judgment has not yet been fully satisfied. N.J.S. 2A:18-23, governing county district courts, now repealed, required that the levying officer report to the party or the party's attorney and request further instructions before returning the writ of execution marked "no levy" or "unsatisfied". *Vitale v. Hotel California, Inc.*, 184 N.J. Super. 512, 520-21 (Law. Div. 1982), aff'd 187 N.J. Super. 464, held that statutory authority for successive levies under one order before the return date, is

universally recognized. The court referred to 2A:17-23 as evidence for the rule that more than one levy may be requested; the court also held that if property levied against is insufficient to satisfy a collection order, a return should not be made without a showing that another levy would be fruitless. The rule recognized in Vitale, that the sheriff must follow the judgment creditor's reasonable instructions regarding the time and manner of making a levy and must abide by any special instructions of the judgment creditor, is reflected in subsections a.(1), a.(2), and a.(3), each of which gives priority to written instructions from the judgment creditor.