



COMMONWEALTH of VIRGINIA

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The Honorable L. J. Ayers, III
Sheriff for Amherst County
115 Taylor Street
Amherst, Virginia 24521

Dear Sheriff Ayers:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You seek clarification regarding the executions of a Summons to Answer Interrogatories and Summons in Garnishment. You specifically ask whether the execution of the Writ of Fieri Facias requires the Sheriff to levy at the same time either summons is served. You further inquire regarding the appropriate fees to which the sheriff is entitled for his service in executing these collection methods.

Response

It is my opinion that writs of fieri facias, debtor interrogatories and garnishments are distinct, though related, proceedings, so that, although the sheriff or other executing officer may be required to levy on the tangible personal property of a judgment debtor when executing a writ of fieri facias, no such requirement is imposed when serving a Summons for Interrogatories or Garnishment Summons. It further is my opinion that the fees sheriffs may charge for these services are governed by the express terms of § 17.1-272.

Applicable Law and Discussion¹

Under Virginia law, after obtaining a judgment for the payment of money, a judgment creditor may institute collection proceedings upon the issuance of a writ of fieri facias.² Twenty-one days after judgment is entered, the creditor may request the clerk of the court in which judgment was rendered to issue the writ.³ Upon receiving the request, the clerk is required to issue the writ and deliver it to the

¹ Because you have requested a clarification of the law regarding the writ of fieri facias as it pertains only to garnishment and interrogatory proceedings, this opinion is not intended to constitute a comprehensive analysis of all aspects of the law governing post-judgment execution proceedings.

² VA. CODE ANN. 8.01-466 (2007). *See also* DOUG RENDLEMAN, ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA (2d ed. 1996).

³ *Id.*

sheriff or other proper person for execution.⁴ Upon receipt of the writ, the sheriff or other executing officer is “commanded to make the money therein mentioned out of the goods and chattels of the person against whom the judgment is.”⁵

Section 8.01-483 prescribes the protocol for the execution of a writ of fieri facias:

Upon a writ of fieri facias, the officer shall return *whether the money therein mentioned has been or cannot be made*. If there is only part thereof which is or cannot be made, he shall return the amount of such part. With every execution under which money is recovered, he shall return a statement of the amount received, including his fees and other charges, and shall pay such amount, except such fees and charges, to the person entitled. In his return upon every execution, the officer shall also state in what manner a copy of the writ was served in accordance with § 8.01-487.1, *whether or not he made a levy of the same*, the date and time of such levy, the date when he received such payment or obtained such satisfaction upon such execution and, if there is more than one defendant, from which defendant he received the same.^[6]

Other provisions govern levying,⁷ which is the process “by which [specific] property is set apart from the general property of the defendant and placed into the custody of the law until it can be sold and applied to the payment of the execution.”⁸ Virginia law clearly contemplates that levying is a distinct act⁹ and that a levy may not always occur.¹⁰

Issuance of the writ of fieri facias authorizes a lien against the personal property of the debtor. A lien attaches to the debtor’s *tangible* personal property “from the time it is actually levied by the officer to whom it has been delivered to be executed”¹¹ and the levy must occur prior to the return date of the writ.¹² Because intangible personal property, such as bonds and notes, is incapable of levy and sale, it is subject to the judgment lien once the writ of fieri facias is *delivered* to an authorized officer.¹³

⁴ *Id.* Although the twenty-one day period generally applies to collection proceedings, the court may enter an order permitting an earlier execution on the judgment if the judgment creditor demonstrates good cause. *Id.*

⁵ Section 8.01-474 (2007).

⁶ Section 8.01-483 (2007) (emphasis added).

⁷ *See, e.g.*, § 8.01-487.1 (2007) (copy of writ and any attachments to be served on debtor or other responsible person or posted at premises where levy made); § 8.01-491 (2007) (officer may break outer doors of dwelling house during daytime to execute a levy after first demanding admittance and may levy on visible property in the debtor’s personal possession); § 8.01-490 (2007) (officer may not make unreasonable levy and may not remove property from his jurisdiction unless specifically authorized).

⁸ *Walker v. Commonwealth*, 59 Va. (18 Gratt.) 13, 43 (1867).

⁹ “Several successive steps are to be taken between the issuing of the execution and the satisfaction of the judgment. The first step is, to place the execution into the hands of the sheriff. . . . The second step is, to levy the execution on specific property, . . . [t]he third step and last step is, the sale of the property.” *Id. See also Humphrey v. Hitt*, 47 Va. (6 Gratt.) 509, 526-28 (1850).

¹⁰ *See, e.g., Humphrey*, 47 Va. (6 Gratt.) at 526-28; *Rowe v. Hardy*, 97 Va. 674, 676-77, 34 S.E. 625, 625-26 (1899) (“In executing the writ, the sheriff was the agent of the plaintiff, who was entitled to its proceeds, and he and his attorneys had the right to control the execution and to say whether the officer should levy it or return it without doing so.”). *See also RENDLEMAN*, *supra* note 2, at 56-58 (noting that the creditor must decide whether or not to levy) and VA. CODE ANN. § 17.1-272 (2010) (establishing different fees for service by sheriff depending on whether levy occurs).

¹¹ Section 8.01-478 (2007).

¹² Section 8.01-479 (2007).

¹³ Section 8.01-501 (Supp. 2010). The statute provides that:

Garnishment proceedings are available to judgment creditors to collect against third parties who are believed to hold money to which the judgment debtor is or may be entitled.¹⁴ Although creditors may take advantage of this collection method “by reason of the lien of his writ of fieri facias,”¹⁵ garnishment proceedings are separate actions,¹⁶ governed by their own statutory requirements, including specified rules regarding service of process, the form of the summons and the inclusion of the debtor’s social security number.¹⁷ A garnishment proceeding “must be regarded as a civil suit, and not as a process of execution to enforce a judgment already rendered. . . . the parties have a day in court; an issue of fact may be tried by a jury; evidence adduced, judgment rendered, costs adjudged, and execution issued on the judgment.”¹⁸ Therefore, no levy is necessary when pursuing garnishment proceedings. I further conclude not only that execution of the writ of fieri facias and service of the summons in garnishment need not occur simultaneously,¹⁹ but also that where the sheriff does provide both services concurrently, no levy is required with respect to the garnishment.

“Debtor interrogatories” are a means for the creditor “to ascertain the personal estate of a judgment debtor . . . to which the debtor *named in a judgment and fieri facias* is entitled[.]”²⁰ “[U]pon the application of the execution creditor, the clerk of court *from which such fieri facias issued*, shall issue a summons against [] the execution debtor,” requiring him to “appear before the court *from which the fieri facias issued* . . . to answer such interrogatories as may be propounded to him[.]”²¹ Clearly, issuance of a summons to answer interrogatories requires as a prerequisite the *issuance* of the writ of fieri facias, but the Code does not require that a levy occur. Rather, a judgment creditor may want to discover what property is available before determining whether to proceed via levy or garnishment, or another collection means.²²

Every writ of fieri facias shall, in addition to the lien it has under §§ 8.01-478 and 8.01-479 on what is capable of being levied on under those sections, be a lien from the time it is delivered to a sheriff or other officer, or any person authorized to serve process pursuant to § 8.01-293, to be executed, on all the personal estate of or to which the judgment debtor is, or may afterwards and on or before the return day of such writ or before the return day of any wage garnishment to enforce the same, become, possessed or entitled, in which, from its nature is not capable of being levied on under such sections, except such as is exempt under the provisions of Title 34, and except that, as against an assignee of any such estate for valuable consideration, the lien by virtue of this section shall not affect him unless he had notice thereof at the time of the assignment.

See also *Knight v. Peoples Nat’l Bank of Lynchburg*, 182 Va. 380, 391, 29 S.E.2d 364, 370 (1944) (“A summons in garnishment creates no lien. It is a means of enforcing the lien of an execution placed in the hands of an officer to be levied.”).

¹⁴ Section 8.01-511 (2007).

¹⁵ *Id.* See also *In re Lamm*, 47 B.R. 364, 368 (Bankr. E.D. Va. 1984) (“The garnishment summons itself does not create a lien, but the lien is created by the fieri facias, and dates from the date of *delivery* of the fieri facias to the officer. The garnishment is notice of the lien.” (emphasis added)).

¹⁶ A “proceeding in garnishment is substantially an action at law by the judgment debtor in the name of the judgment creditor against the garnishee.” *Network Solutions, Inc. v. Umbro Int’l, Inc.*, 259 Va. 759, 768, 529 S.E.2d 80, 85 (2000) (quoting *Lynch v. Johnson*, 196 Va. 516, 521, 84 S.E.2d 419, 422 (1954)).

¹⁷ Section 8.01-513 (2007).

¹⁸ *Levine’s Loan Office, Inc. v. Starke*, 140 Va. 712, 714 125 S.E. 683, 684 (1924) (citations and internal quotation marks omitted).

¹⁹ *Cf.* § 8.01-512.3 (“Date of delivery of writ of fieri facias to sheriff if different from the date of this [garnishment] summons.”).

²⁰ Section 8.01-506 (Supp. 2010) (emphasis added).

²¹ *Id.* (emphasis added).

²² “The law authorizes the plaintiff, though execution has come to the hands of the sheriff, to sue out other and different process of execution.” *Humphrey*, 47 Va. (6 Gratt.) at 528.

The fee schedule provided in § 17.1-272 supports the above conclusions. It explicitly provides that the fee for “[m]aking a return of a writ of fieri facias where no levy is made” is \$12,²³ whereas the fee for “[l]evying an execution” or “[l]evying upon current money, bank notes, goods or chattels of a judgment debtor pursuant to § 8.01-478” is \$25.²⁴ Thus, a judgment creditor who asks the sheriff to levy upon the property of the judgment debtor upon service of debtor interrogatories or garnishment summons should be charged \$25 for the levy rather than the \$12 fee required for serving “any person, firm or corporation, an order notice summons or any other civil process[.]”²⁵ Moreover, “a judgment creditor who seeks a levy pursuant to a writ of fieri facias must pay separate fees for the levy and the service of the writ.”²⁶

“A return on a writ or process is the short official statement of the officer endorsed thereon on what he has done in obedience of the writ or, or why he has done nothing”²⁷ and “it is the duty of a sheriff or other ministerial officer to return all writs on the return day with a short account in writing endorsed by him thereon of the manner in which he has executed the same, or why he has done nothing.”²⁸ The return forms currently authorized by the Supreme Court of Virginia for the institution of debtor interrogatories and garnishment both provide for the executing officer to document the levy.²⁹ In the situations where the judgment creditor requests a levy, if the officer locates property while executing the writ, the forms instruct the officer to utilize the back of Form DC-467³⁰ to inventory the property. If no effects can be located by the officer, he can simply note that fact on the back of the summons form. In instances where no levy is required, the officer simply may insert his own notation stating that fact.

Conclusion

Accordingly, it is my opinion that writs of fieri facias, debtor interrogatories and garnishments are distinct, though related, proceedings, so that, although the sheriff or other executing officer may be required to levy on the tangible personal property of a judgment debtor when executing a writ of fieri facias, no such requirement is imposed when serving a Summons for Interrogatories or Garnishment Summons. It further is my opinion that the fees sheriffs may charge for their services is governed by the express terms of § 17.1-272.

With kindest regards, I am

Very Truly Yours,



Kenneth T. Cuccinelli, II
Attorney General

²³ VA. CODE ANN. § 17.1-272(A)(5) (2010).

²⁴ Sections 17.1-272(B)(6); 17.1-272(B)(3) (2010).

²⁵ Section 17.1-272(A)(1) (2010).

²⁶ 1987-88 Op. Va. Att’y Gen. 72, 73.

²⁷ *Rowe*, 97 Va. at 676, 34 S.E. at 625.

²⁸ *Id.* at 679, 34 S.E. at 626.

²⁹ SUMMONS TO ANSWER INTERROGATORIES, Form DC-440 (07/09) & GARNISHMENT SUMMONS, Form DC-451 (1/07), respectively. See also § 8.01-512.3 (2007).

³⁰ WRIT OF FIERI FACIAS, FORM DC-467 (10/07).