

Creditor's Rights in Non-Real Estate Matters

**Christine McAlpin Taylor, JD
Smith Debnam, Raleigh, NC**





Find an Attorney

Christina McAlpin Taylor

919.250.2131
 cmcalpin@smithdebnamlaw.com

4601 Six Forks Road
 Suite 400
 Raleigh, North Carolina 27609
 Fax 919.250.2211

Administrative Contact:
 Paulene Scott, Paralegal
 919.250.2160 Direct Phone
 pscott@smithdebnamlaw.com

Areas of Practice:

- Creditors' Rights and Collections
- Lender Liability Defense

Christina is a member of the firm's creditor's rights practice group. Christina represents a wide range of businesses through all stages of creditor representation, including pre-suit collection efforts, lawsuits, judgments, and executions.

While attending law school, Christina was a student body representative and volunteered with the trial practice team. In 2005, while a summer associate with Smith Debnam, she was assigned several creditors' rights projects. Christina gained additional legal experience while participating in North Carolina Central University School of Law's Litigation Clinic, where she worked at Chatham County's District Attorneys' Office. While working at the Chatham County District Attorneys' Office Christina assisted with several trials in both District and Superior Court, including a jury trial. Christina also assisted with many residential mortgage loan closings while clerking at a real estate firm in the summer of 2004.

Christina was selected as Leader in the Law through North Carolina Lawyer's Weekly, created to spotlight those within the legal community who are working to better the legal profession through mentoring and involvement within their community as well as going above and beyond in their everyday job.

Distinctions

show all | hide all

Admissions

- North Carolina State Bar
- U.S. District Courts for the Eastern, Middle, Western District of North Carolina

Education

- J.D., North Carolina Central University, 2006
- B.S., Family and Community Studies, East Carolina University, 2003 Minor, Business Management

Professional Affiliations

Civic Involvement

Representative Cases

Published Articles

Knowing how.

What Paralegals should know about the Execution Process
Christina McAlpin Taylor
Smith Debnam
Raleigh, NC

Obtaining a Judgment:

- A civil action is commenced by filing a lawsuit
- Creditors usually file in State District or Superior Court
- Some may file in Small Claims Court
- A majority of Creditor Cases are won by Default Judgments
- Others cases require short hearing to obtain judgments
- Very few require trials

Judgments:

- Once a judgment is obtained the first step is to send a copy of the judgment to the debtor or debtor's attorney
- A judgment acts a lien against real property of the judgment debtor in each county where the judgment is docketed
- Once the 30 day waiting period has expired, the judgment creditor can move forward with execution
- Individual judgment debtors must be served with a Motion to Claim Exempt Property
- Judgment Debtors have 20 days after service to file and serve the creditor with the Motion to Claim Exempt Property
- The Judgment Creditor will have 10 days to file an objection to the Judgment Debtor's Motion to Claim Exempt Property

Three Ways Exemptions Can Be Waived

1. Debtor transfers assets which would otherwise be exempt
2. Debtor makes a voluntary written waiver of his right to claim exemptions after judgment has been rendered
3. Debtor fails to file the Motion to Claim Exempt Property or to schedule a hearing to designate exempt property within 20 days after service (most common)

Execution:

The process by which a creditor can seize the property of a judgment debtor in an effort to satisfy the debt

- There is execution against Property
- Execution for delivery of specific real or personal property
- Execution against the person
 - A creditor obtains a writ of execution from the court, and it is delivered by the Sheriff. The writ enables the Sheriff to command the judgment debtor to turn over property to satisfy the claim

Usually deputy who handles executions will first try to write or call a debtor to get them setup on a payment plan

- An execution is valid for 90 days
- An execution can be issued to any county in which the judgment has been docketed
- During this time period when the writ of execution has been delivered to the Sheriff, he is looking for property of the judgment debtor on which to levy
- Some counties will allow the Sheriff to go directly to the bank armed only with a writ of execution and levy on funds contained in deposit accounts
- Other counties require an Order in Aid of Execution

Levies:

Counties that **WILL** permit the Sheriff to levy on a bank account without an Order in Aid of Execution:

Beaufort
Cabarrus
Catawba
Chatham
Columbus
Craven
Cumberland
Davidson
Duplin
Durham
Forsyth
Franklin
Guilford
Harnett
Haywood
Henderson
Hoke
Iredell
Lee
Lenoir

Macon
McDowell
Mecklenburg
Moore
Onslow
Orange
Pitt
Polk
Richmond
Rowan
Stanly
Stokes
Union
Vance
Wake

- If you are in a county that permits Sheriffs to levy directly on bank accounts, you may have a deputy come to the branch with a Writ of Execution, and ask for the funds from your customer's accounts.

The bank is not required to turn over customer funds pursuant to writ of execution

N.C. Gen. Stat. § 1-359

- Debtors of judgment debtors *may* satisfy execution.
- After the issuing of an execution against property, all persons indebted to the judgment debtor, or to any one of several debtors in the same judgment, may pay to the sheriff the amount of their debt, or as much thereof as is necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount paid.
- The important word in this statute is "may." Note that it does not read "shall." There is no requirement that the bank comply with the writ of execution.
- "Under N.C. Gen. Stat. § 1-359 a bank voluntarily can pay, if it chooses, to the sheriff the amount in a judgment debtor's bank account when it is notified that there is an outstanding writ of execution against its depositor." *Faught v. Branch Banking & Trust Co.*, 53 N.C. App. 132 (1981).

When do Banks have to comply with Deputy Requests?

- If the Sheriff was unable to locate any property on which to levy in order to satisfy the judgment, he will return the writ of execution "unsatisfied."
- It is at this point that creditors must use supplemental proceedings to determine what property the debtor actually has, or attempt to locate property that the debtor might be concealing.
- Not only may the debtor himself be summoned to appear at a supplemental proceeding, but debtors of the judgment debtor can be summoned as well

N.C. Gen. Stat. § 1-360 Debtors of judgment debtor may be summoned

Upon the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon affidavit that any person or corporation has property of said judgment debtor, or is indebted to him in an amount exceeding ten dollars (\$10.00), the court or judge may, by order, require such person or corporation, or any officer or members thereof, to appear at a specified time and place, and answer concerning the same; provided, however, that such inquiries may, in the discretion of the court, be answered by such person or corporation, or any officers or members thereof, by verified answers to interrogatories. The court or judge may also, in its or his discretion, require notice of the proceeding to be given to any party to the action, in such manner as seems proper

Two steps to Supplemental Proceedings:

- The Sheriff has returned the execution unsatisfied, and the disappointed creditor will then apply to the court to reach funds in the debtor’s account at the bank.

Step 1: A motion will be filed with the clerk of court asking for an order freezing the debtor’s account and directing the bank to inform the court of the amount in the account. The clerk will issue the Order instructing the bank to freeze the debtor’s account and report its contents, and the creditor will serve this Order on the bank.

At this point, the bank should immediately freeze the account, lest it find itself in violation of a court order.

- It should also submit a “verified statement” to the court indicating the amount of the funds in the debtor’s account.
- “Verified” means that it should be a sworn statement, and notarized.

Step 2:

The creditor will apply to the court for an Order directing the bank to release the funds in the debtor’s account to the creditor.

- Some clerks of court will issue an order directing the bank to turn over ALL of the funds, some clerks will order only that the bank turn over half of the available funds, and some clerks will order that all of the funds be released with the exception of some minimum amount thought to provide the debtor with some ability to meet the necessities of life.
- The creditor will serve this order on the bank, and the bank should comply by turning over the specified funds.

N.C. Gen. Stat. § 1-360.1 Execution on the property of debtors of judgment debtor.

After the clerk of superior court determines to the clerk's satisfaction that the debtor of the judgment debtor acknowledged at a proceeding conducted pursuant to G.S. 1-360 that he is in possession of unencumbered property of such judgment debtor or is indebted to him in an amount exceeding ten dollars (\$10.00), an execution shall issue against the property or debt of the judgment debtor that the debtor of the judgment debtor acknowledged he holds.

Joint Accounts:

- Under N.C. law, a joint account is presumed to be the property of the judgment debtor. The reasoning is that either of the persons that are joint on the account could withdraw all of the funds at any time. Therefore, either, and both, of the joint account holders are “full” owners of all of the funds in the account.
- The N.C. Court of Appeals stated, citing decisions from other jurisdictions, that “there is a presumption that all of the joint bank account is owned by the debtor...and that the depositors have the burden to prove that ownership of the account is otherwise.” *Jimenez v. Brown*, 131 N.C. App. 818 (1998).
- The court went on to state, however, that it believed “that equitable ownership should be the determining factor and thus hold that joint accounts are attachable to the extent of a debtor’s contribution to the account. To hold otherwise would allow seizure of money belonging to an innocent third party.” *Id.*
- The court did not specify on whom the burden rests to determine the source of the funds in the account. Arguably, if the debtor seeks to show the court that the funds in the account belong to someone else, i.e. the other person joint on the account, then the burden should rest on the debtor. The bank has performed its duty under the order by reporting to the court the contents of the account, and should thereafter comply with the orders of the court.
- The bank can provide its opinion as to the source of the funds, and their equitable ownership, when it gives its verified statement. For example, if the bank were to know that the only funds deposited in the account were monthly social security checks that would be exempt from execution by the creditor, it could certainly report that information to the court, and should.
- Clerks of court, when issuing the orders, can consider evidence as to the source of the funds in the account, and the debtor is given notice to appear at the hearing on the motion to seize the funds. It is then that the debtor should present his or her evidence as to the source of the funds.