

**LETTER OPINION**  
**96-L-38**

March 26, 1996

Mr. Terry W. Elhard  
McIntosh County State's Attorney  
PO Box 248  
Ashley, ND 58413

Dear Mr. Elhard:

Thank you for your letter asking whether a sheriff should release the sheriff's levy before or after the creditor has had an opportunity to claim insufficiency regarding the form of any exemptions claimed by the debtor.

There are two types of exemptions from process and levy, specifically the absolute exemptions contained in N.D.C.C. § 28-22-02 which do not need to be selected by the debtor, and the other exemptions contained in N.D.C.C. ch. 28-22 which are waived if not selected or claimed as exemptions by the debtor. Mees v. Ereth, 492 N.W.2d 72, 74 (N.D. 1992) (Mees III). Because the items listed in N.D.C.C. § 23-22-02 are "absolutely exempt from all process, levy or sale", they should not knowingly be seized by the sheriff. Exemptions which must be selected by the debtor or depend upon extraneous facts are found in N.D.C.C. §§ 28-22-03, 28-22-03.1, 28-22-04, 28-22-05, 28-22-16, 28-22-18, and 28-22-19. Other facts or circumstances may limit the availability of any claim of exemptions. See N.D.C.C. §§ 28-22-14, 28-22-15.

A sheriff who disposes of a judgment debtor's exempt property does so at peril of liability to the debtor for any property wrongfully seized and withheld. Mees v. Ereth, 466 N.W.2d 135, 136 (N.D. 1991) (Mees II). Further, a debtor claiming exemptions is entitled to have the district court which issued the execution direct the sheriff to preserve the lawful exemptions. Id. A sheriff should not immediately turn the property over to the creditor, but instead should retain possession of seized property to allow the debtor an opportunity to claim exemptions.

A creditor may challenge a debtor's claim of exemption. See N.D.C.C. § 28-22-07. A judgment creditor may also challenge a claim of absolute exemption made by a debtor. See Mees III. Once the debtor has selected the property to which the debtor claims an exemption, the value of the property must be appraised, if material, and a schedule of all money and personal property must be delivered to the sheriff. Id. It is only after any necessary appraisal has been made

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that the debtor can demand possession of the property from the sheriff. Dakota Nat. Bank of Fargo v. Salzwedel, 3 N.W.2d 468, 470 (N.D. 1942). The sheriff should retain the property until after an appraisal if an appraisal is required because generally it is only after an appraisal that it can be determined if the property, or how much of its value, can be returned to the debtor. Id. A sheriff who fails to make a proper levy is liable to the judgment creditor for any injury sustained by reason of the failure. Renner v. Gruman Steel Company, 147 N.W.2d 663, 671-672 (N.D. 1967).

A court has complete control of its own process and has inherent power to determine whether to grant relief from a levy and execution. Mees II, at 137. See N.D.C.C. § 27-05-06(3). An execution is a writ of the court that entered the judgment and is returnable by the sheriff to that court. Id. "If a levy has been made and the issue of ownership of the property or interest therein is raised by any party, or if the issue whether the property is exempt under chapter 28-22 is raised by either party, the court having jurisdiction may extend, for good cause shown, the execution for a reasonable time to accommodate due notice and hearing to determine these issues and to provide time for the publication of notice of sale and sale of the property subject to execution." N.D.C.C. § 28-21-07. "When a debtor claims exempt property, the sheriff is empowered to retain the property in his possession pending a determination of whether it qualifies for the exemption." Mees II at 136. The court which issued the execution may make orders concerning the levy and execution, therefore a sheriff should consult with legal counsel and seek a court order when faced with a doubtful situation. 1994 N.D. Op. Att'y Gen. L-144.

Upon receipt of a claim of exemptions, the sheriff may notify the creditor and determine whether the creditor will challenge the claim. If the creditor does not challenge a claimed exemption, the sheriff may return that item of property to the debtor without concern over potential liability. If the creditor challenges a claimed exemption, the sheriff should not return the property to the debtor until the court has decided the validity of the claim of exemption.

The Legislature has provided a means to resolve questions concerning the proper ownership of property which is claimed by more than one person and which is held by someone who is not claiming ownership. N.D.C.C. § 32-11-02. Anyone in possession of money or property which he or she does not claim to own and which is involved in an existing case before a court may deposit the money or property with the clerk of court of the court which issued the judgment or execution. N.D.C.C. § 32-11-02(1). This procedure is available to sheriffs who have seized property under a levy when a creditor and the debtor each claim the property. The sheriff must notify any

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person who is known to have an interest or to claim an interest in the property. Id. This relieves the sheriff of liability and allows the parties to contest the issue in court. Id.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

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