

II. Present Situation:

The procedures for the collection of debt based on a money judgment or court order (e.g., child support) and tax liens and warrants are found in a number of statutory and regulatory enforcement provisions. Debt may be collected directly from the debtor through writs of execution, replevin and bankruptcy proceedings or indirectly from third parties through writs of garnishment, creditors' bills, proceedings supplementary, and bankruptcy proceedings. There are some limitations on collections that are recognized under state and federal laws. Those include homestead exemptions (s. 222.01, F.S., and s. 4, art. X, Fla. Const.), personal property up to \$1,000 (s. 222.06, F.S., and s. 4, art. X, Fla. Const.), household wages (s. 222.11, F.S. and 15 U.S.C. 1673(a)) and other exemptions (chapter 222, F.S.).

Judgment Lien

A judgment lien generally refers to a lien based on an underlying money judgment, including costs and interests. A judgment lien on real property is created and perfected upon the recording of a certified judgment in the official county records (with the exception of foreign judgments which must be recorded according to the Florida Enforcement of Foreign Judgments Act). Under current law, a judgment lien on real property can be effective for up to 20 years from the date the judgment was entered since a judgment is only valid for 20 years. However, in order to continue to have a valid judgment lien during the 20-year period, the judgment must be re-recorded every 7 years until the end of the 20-year period. A judgment lien on personal property is created upon the delivery of a writ of execution to the sheriff in the county where the personal property is located. The judgment lien confers the right to levy (i.e., seize) on property. A person can only take title to the property upon following certain steps through a writ of execution and sale of the property.

- *Writ of Execution*

The writ of execution authorizes the enforcement of a money judgment. The writ must be obtained from the clerk of the court. Only one writ is issued on a judgment and must be dated on the day it was issued. The judgment creditor has to deliver the writ to the sheriff which creates an inchoate (i.e., unperfected) lien on the judgment debtor's property. The sheriff records the writ of execution in a docket, along with all other orders and decrees, including what, when, and from whom money was collected and to whom paid. *See* s. 30.17, F.S. A number of sheriff's fees are assessed for action taken related to the execution of a writ, including docketing the writ, levying on property, advertising property for sale, safekeeping of property and selling of property. *See* s. 30.231, F.S. Current law does not expressly provide for multiple writs to be docketed in different counties. The priority of judgment liens on personal property is determined by when the writ was docketed with the sheriff. The sheriff retains the writ until it is satisfied through a levy or until the underlying judgment expires twenty years later, whichever is later. The writ directs any sheriff of the State to levy all or specific property of the judgment debtor within that respective county and to sell the levied property to satisfy the unpaid balance of the money judgment. *See* s. 56.031, F.S.

- *Levy on Property*

The levy is the process by which the property is seized for sale to satisfy the writ of execution based on the underlying judgment. All property including lands and tenements, goods and chattels, equities of redemption in real and personal property, and corporate stock, are subject to levy under a writ of execution as are a corporation's money, goods, chattels, lands and tenements. *See* s. 56.061, F.S., and s. 56.09, F.S. A sheriff may take actual or constructive custody of personal property.¹ The sheriff must take enough property to satisfy the judgment although he or she may accept payment in full on the writ in lieu of making a levy. *See* Rodriguez v. Dicoa Corp., 318 So.2d 442 (Fla. 3d DCA 1975). If the sheriff fails to levy on the property specifically described in the writ of execution the sheriff may be compelled by a writ of mandamus to levy on the property. Until the seized personal property is sold, the sheriff is liable for its loss or destruction while it is in the sheriff's possession unless the judgment creditor designates a third party in which case liability shifts to that third party.

- *Notice of Sales of Levied Property*

A sale of levied property under a writ of execution must be noticed for four successive weeks by publication in a newspaper of the county in which the sale is to take place. *See* s. 56.21 F.S. The court may shorten the time of notice if the property is perishable and would not sell for its full value by the scheduled date of sale. Before the first published notice, a copy of the notice must be sent by certified mail to the judgment debtor's attorney of record, or to the judgment debtor at the last known address, even if a default judgment had been entered. If the levy is on real property, notice of the levy and the writ of execution sale must be made to the property owner of record in the same manner as notice is made to any judgment debtor. *Id.* The sale of real or personal property can be held no sooner than 30 days after the first date of the published notice.

- *Collection of Money Received from Sale of Levied Property*

The money collected from the sale of levied property is distributed first to the judgment creditor in whose favor the writ of execution was issued. *See* s. 56.27, F.S. The money is either paid to the judgment creditor's attorney of record or paid to the attorney who originally initiated the action or who made the original defense, if there is more than one attorney, unless the file shows a substituted attorney. Any excess money from the sale of property is paid to the defendant/judgment debtor.

- *Satisfied and Unsatisfied Writs of Execution*

Once a writ of execution is satisfied (i.e., money collected upon sale of levied property), the writ is returned to the court. *See* s. 56.041, F.S. The judgment debtor must be furnished with a satisfaction of judgment. Unsatisfied writs of execution are returned to the court 20 years after the date of the judgment's issuance.

¹The case law regarding constructive custody, however, is not very specific to how a sheriff would do that. *See* *Ex parte Fuller*, 128 So. 483 (1930).

- *Proceedings Supplementary*

A holder of an unsatisfied writ can initiate proceedings supplementary prior to the expiration of the 20 years from the date the judgment was entered. *See* s. 56.29, F.S. The proceedings supplementary allow the judgment creditor to take advantage of discovery procedures in the Rules of Civil Procedure to secure information to assist in the collection of a judgment. A defendant/judgment debtor may be required to appear for examination before the court or a court-appointed master². The order must be served on the defendant/judgment debtor or his or her attorney. The comprehensive examination is taken under an oath and covers all matters and things pertaining to the defendant/judgment debtor's business and financial interests in order to determine the existence and location of any leviable property. Any testimony aiding in satisfying the writ of execution is admissible. A corporation must attend and answer by an officer, who can be specified in the order. Any party may call witnesses.

Any property held in the hands of any person on behalf of or due to the defendant/judgment debtor that is not exempt from garnishment may be applied to satisfy the judgment amount. It is the defendant/judgment debtor's burden to prove that any transfer, gift, assignment or other conveyance of property made to his or her spouse, relative or other person on confidential terms one year prior to the service date of the examination order was not made to delay, hinder, or defraud creditors. If the court determines that the transfer, gift, assignment or other conveyance was made or contrived to delay, hinder or defraud creditors, the court can void the transaction and order that the property be taken by the sheriff to satisfy the writ of execution.

- *Conclusion*

Florida is one of 11 states that still follows the lien-on-delivery rule which as stated earlier, means that a true lien is not actually created on personal property until the property is levied and sold by the sheriff. Once the property is levied, the effective date of the lien, for purposes of establishing priority lienholder status, dates back to the date of the writ's delivery to the sheriff. Therefore all claims (whether arising from lenders who have taken a security interest or mortgage in the property, subsequent purchasers, beneficiaries, decedents, and transferees, or other creditors) that come after that date take subject to claim of the first judgment creditor.

Determining the existence of liens under Florida's existing system has proven problematic. For example, because of the decentralized system, an interested person such as a lender would have to inspect the docket of each county to determine the existence of any liens as relates to a particular person. Moreover, since a writ of execution is not necessarily docketed on the same day as it is delivered to the sheriff, there may be a time lapse in which a lien could be overlooked by a subsequent lienholder. However, the system has also been criticized for encouraging the accumulation of passive writ holders who for whatever reason have been unsuccessful or have given up in finding any leviable property belonging to the debtor. Consequently, the writ and inchoate lien could remain on a sheriff's docket for the life of the judgment, i.e., 20 years.

²The court may refer the proceeding to a master at any time who is directed to report findings of law and/or fact. The master has the power to issue subpoenas, and is to be paid fees provided by law.

Garnishment

Chapter 77, F.S., governs writs of garnishment. A number of exemptions from garnishment on a defendant/judgment debtor's salary and wages exist under chapter 222, F.S. There is also a federal restriction on wage garnishment which limits recovery to 25% of a person's net wages and prohibits the discharge of an employee due to the service of a writ of garnishment. *See* 5 U.S.C.A. §§ 1671-1677. A plaintiff commences a garnishment action by filing a motion for writ of garnishment pursuant to s. 77.01, F.S. The issued writ is served on the garnishee and it advises the garnishee to respond within 20 days and to disclose amounts owed to defendant/judgment debtor. The garnishee is then liable for all amounts due and owing to defendant during the attached time period. The answer must include the names and addresses of other persons having an ownership interest in the garnished property. If the garnishee fails to respond, a default garnishment judgment is entered. Within five days after the garnishee's answer, the plaintiff is required to give notice to all interested parties and to the defendant. *See* s. 77.055, F.S. The notice must include the right to respond, to move to dissolve the writ and to declare any exemptions within twenty days or else be subject to default. Writs of garnishment may be dissolved at any time by the court by motion of any party. *See* s. 77.07, F.S.

Homestead Exemption

In accordance with section 4 of Article 10 of the *Florida Constitution* which prohibits the forced sale of and lien against homestead property with the exception of specific liens, a person may designate his or her property as homestead prior to levy of such property by recording a statement of homestead status with the circuit court. *See* s. 222.01, F.S. Homestead property is not exempt from liens arising from tax and assessment, home purchase, improvement or repair contracts, or contracts for house, field or other labor performed on the property. There is no expedited statutory process to compel a judgment creditor to satisfy an outstanding lien on property, not otherwise homestead, which is the subject of an impending sale or pending mortgage approval other than through an action to remove a cloud from or quiet title to the property as set forth in chapter 65, F.S.

Tax liens

Generally, when any assessed tax becomes delinquent, the state agency issues a warrant for the full or estimated amount of the tax due, with interest, penalties and cost of collection. *See e.g.*, s. 197.413, F.S. (personal property taxes), s. 199.262, F.S. (intangible property taxes), s. 206.075, F.S. (motor and fuel taxes), and s. 210.14, F.S. (tax on tobacco). The warrant, which directs the sheriff of the state to execute on the warrant, is recorded with the clerk of the circuit in the county where the delinquent taxpayer's property is located. The recording of the warrant converts the warrant into a tax lien upon the delinquent taxpayer's real and personal property in the same manner as a judgment that has been docketed and recorded. The sheriff then executes on the warrant in the same way as on a judgment. Upon payment of the tax lien, the state agency must satisfy the lien record within 30 days or be compelled to satisfy the lien record.

Department of State

The Department of State is divided into seven divisions, including the Division of Corporations. *See* s. 20.10, F.S. The Division of Corporations is funded by the Corporations Trust Fund, as provided in s. 607.1901, F.S. The funds are required to be used for specified purposes. Pursuant to s. 607.1901(2), F.S., the Legislature must appropriate from the Corporations Trust Fund such

amounts as it deems necessary for the operation of the Division of Corporations. There are also other categories of specified transfer amounts required by the Division of Corporations.

Specifically the Division of Corporations is required to transfer from the Corporations Trust Fund to the Cultural Institutions Trust Fund, quarterly proration totalling \$8 million each fiscal year to be used “. . . as provided in s. 265.2861, F.S.” Administered by the Department of State, the Cultural Institutions Trust Fund³ provides funding for statewide arts grants, education and visiting arts programs, local arts agencies, state touring programs and state-owned cultural facilities.

The unencumbered balance in the Corporations Trust Fund at the close of each quarter within the fiscal year may not exceed \$300,000. Any funds in excess of this amount must be transferred unallocated to the General Revenue Fund.

III. Effect of Proposed Changes:

This bill contains three major provisions relating to debtors and creditors: 1) the creation of a centralized database of judgment liens on personal property filed with the Secretary of State, 2) the revision garnishment provisions governing notice, rights, and hearings, and 3) the notice of and expedited process for claiming homestead status against specified judgment creditors on property to be sold or mortgaged. The bill also revises related statutory provisions to conform with these amendments. In addition, the bill clarifies a number of other statutory provisions relating to debtors and creditors.

Section-by-section review

Section 1 amends s. 30.17, F.S., relating to the sheriff's maintenance of writs of execution dockets. To initiate the transition to a centralized database of judgment liens on personal property, this section provides a two-year phase-out of the sheriff's docket of writs, beginning October 1, 2001. Allows sheriffs to assess a \$20 nonrefundable fee for each request for certification of a writ delivered and docketed before October 1, 2000, which certification may be necessary for creating a valid judgment lien in the new centralized database based on the previously delivered but unsatisfied writ (s. 30.17, F.S.) For purposes of converting an unsatisfied writ delivered to the sheriffs prior to October 1, 2001, into a valid judgment lien within the centralized database, a judgment creditor may secure a written certification of the delivered writ upon payment of a \$20 non-refundable fee. Certifications requested by a state agency or political subdivision are exempt from the fee. The sheriffs' duties under this section will cease altogether on October 1, 2003.

Section 2 amends s. 30.231, F.S., relating to sheriffs' fees for service of summons, subpoenas and writs of execution. It clarifies that both listed and unlisted property in the instructions for levy may be seized by the court through actual possession, or alternatively, by constructive seizure. It also allows a levy fee to be assessed for property seized at each different location. It also clarifies that a \$20 fee will be assessed for *each* sale under process and for *each* deed, bill of sale, or satisfaction of judgment.

³This fund was last re-created effective November 4, 1996, by Chapter 96-49, Laws of Florida.

Section 3 amends s. 48.021, F.S., relating to designation and reappointment of process servers by the sheriff. It gives the sheriff the option in lieu of a mandate to make periodic updates to the process server list. This change brings the sheriff in parity with the judges who have the option to appoint process servers.

Section 4 amends s. 55.10, F.S., to revise the valid recording periods of a judgment lien on real property, from every 7 years from the date of last recording (up to 20 years or for whatever period remains on the 20-year period as measured from the date of the judgment) to every 10 years as measured from the date of last recording (up to 20 years or for whatever period remains on the 20-year period as measured from the date of the judgment). It also provides that any judgments, orders or decrees recorded prior to July 1, 1987, will be unaffected by these changes and remain as liens on real property until they expire in accordance with s. 55.081, F.S., or until the lien is satisfied.

Sections 5-13 create ss. 55.201-55.209, F.S., to establish a statutory framework for a statewide centralized filing database of judgment liens on leivable personal property. The Department of State will establish and maintain the database. These sections specifically:

- ▶ Replace the current county-by-county scheme for filing, perfecting and prioritizing judgments liens on personal property, and will include liens securing child support, tax liens and tax warrants filed directly into the database;
- ▶ Set forth the requirements for the content, filing and indexing of judgment lien certificates;
- ▶ Provide that the filing date of the certificate is the effective date of the judgment lien and establishes the priority of the judgment lien;
- ▶ Require the Department to prescribe the mandatory forms for all such instruments;
- ▶ Provide for an effective 5-year period each for the original and second judgment lien certificates;
- ▶ Clarify that liens on child support orders and tax liens lapse after 20 years in lieu of the 5-year lapse period provided in the act;
- ▶ Provide for a 90-day extension beyond the date of lapse under specified circumstances, and a 30-day toll after a stay or injunction;
- ▶ Require maintenance of judgment lien records for 1-year after the lapse;
- ▶ Permit only a judgment creditor to amend judgment lien records to reflect the termination, continuation, tolling, partial release, assignment or correction of a judgment lien;
- ▶ Allow a judgment debtor to compel a judgment debtor to confirm within 30 days a complete or partial satisfaction or release of an obligation underlying a judgment lien, subject to liability for failing to respond;
- ▶ Allow a person to file a correction statement regarding the inaccuracy of a judgment lien record or a wrongfully filed judgment lien;
- ▶ Provide that judgment liens established through writs of execution delivered and docketed with the sheriffs prior to October 1, 2001, remain effective for two years after which, if unsatisfied, they must be recorded along with written certification or attestation of the date of delivery, by October 1, 2003, through the database, or become void; and
- ▶ Establish the responsibilities of the Department to collect processing fees on all filed or copied documents, except for documents electronically filed by a state agency or a political subdivision thereof.

Section 14 amends s. 55.604, F.S., to require foreign judgments on personal property to be recorded with the Department of State by filing a certificate before they are given effect.

Sections 15-18 amends chapter 56, F.S., relating to final process, as follows:

- ▶ To allow writs of execution against a person's money in excess of \$1,000, but without authorization for a physical search and defines "money" to mean cash, checks, money orders, and the like. (s. 56.09, F.S.)
- ▶ To require the levying creditor to send, by certified mail, a notice of the levy and writ of execution sale of personal property, and an affidavit that attests to a review of the judgment lien database, to the judgment creditors established under s. 55.202 and to secured creditors as established through s. 679.401, F.S. (s. 56.21, F.S.)
- ▶ To revise the distribution scheme of money (including surplus money) collected from the writ of execution of levied property in the order prescribed: to sheriffs for costs, to the levying creditor in the amount of \$500 for liquidated expenses, to the priority judgement lienholder as established under s. 55.202, F.S. and as set forth in the levying creditor's required affidavit that attests a review of the judgment lien database, to other judgment lien holders and holders of writs of execution, and whatever remainder to the defendant/judgment debtor (s. 56.27, F.S.)
- ▶ To state that property value is not to be considered excessive unless the value of the levied property unreasonably exceeds the total debt of all satisfied liens against the defendant/judgment debtor (s. 56.27, F.S.)
- ▶ To immunize a sheriff against civil liability for damages arising from a wrongful levy if the sheriff acted in accordance with the levying creditor's affidavit (s. 56.27, F.S.)
- ▶ To clarify that it is the person, in lieu of the sheriff, who holds the unsatisfied delivered writ of execution and who may initiate proceedings supplementary (s. 56.29, F.S.)

Section 19 amends s. 61.11, F.S., to expand the liability of a person subject to a writ of bodily attachment in connection with court-ordered child support to pay costs in addition to the current purge payment, including all court costs, sheriff fees, actual costs of detention or imprisonment, transportation costs, and other related expenses.

Sections 20- 23 amend chapter 77, F.S., relating to garnishment, as follows:

- ▶ To clarify that entities have the same rights accorded to persons⁴, to recover a debt against a person or entity and that right of garnishment may be against any debt under a negotiable instrument that will become due (s. 77.01, F.S.)

⁴Under section 1.01, F.S., person is already defined to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

- ▶ To create a section providing for comprehensive procedures, notice requirements and a statutory form, relating to garnishment rights in a claim for exemption and request for hearing (s. 77.041, F.S.),
- ▶ To clarify the service of garnishee's answer and notice of right to dissolve a writ (s. 77.055, F.S.), and
- ▶ To state that service of the writ of garnishment creates a lien on the debt or property at the time of service (s. 77.06, F.S.).

Section 24 amends s. 222.01, F.S., relating to designation of homestead before the levy of property. It provides an expedited process and statutory form for designation of homestead and declaratory action regarding liens against homestead property to be sold or mortgaged. It compels a judgment creditor, upon notice received from the clerk of the court of a person's filing of a Notice of Homestead, to file a declaratory action within 45 days of notice in circuit court to determine the homestead status of the property to be sold or mortgaged or to foreclose on the lien against said property. Failure to initiate such action will free the property of the judgment lien as to the buyer or lender who executes a contract of sale or commits to the mortgage on the homestead property. However the sale or mortgage must take place within 180 days after the filing of the notice of homestead in the public records. Constitutionally recognized liens and judgment exceptions to homestead exemption are not affected by this new subsection.

Section 25 amends s. 222.12, F.S., relating to exemptions from garnishments, to allow the option to secure an oath from a notary public, in lieu of the officer who issued the process, regarding a claim of exemption against a writ of garnishment.

Section 26 amends s. 679.301, F.S., relating to priority interests and right of a lien creditor. It clarifies that it is the secured party who takes priority over the rights of a transferee or a lien creditor. Additionally, "lien creditor" is redefined to include a judgment lienholder as now provided under ss. 55.202-55.209, F.S.

Section 27 authorizes the Department of State to allocate from the Corporations Trust Fund a total of \$917,611, inclusive of salaries and benefits for 4-full-time positions, in association with the establishment and the administration of the central database, effective July 1, 2000. An additional allocation is authorized, effective January 1, 2001, from the same fund to total \$300,690, inclusive of nine full-time positions.

Section 28 amends s. 607.1901, F.S., to revise upward from a maximum of \$8 million to \$10 million the transfer of quarterly proration from the Corporations Trust Fund to the Cultural Institutions Trust Fund, to fund art grants awarded by the Division of Cultural Affairs under s. 265.2861, F.S. Additionally, the Division of Corporations is directed to transfer trust funds from the Corporations Trust Fund to the Department of State's Grants and Donations Trust Fund quarterly proration totaling no more than \$1.6 million each fiscal year to be used for services provided under s. 288.816, F.S., relating to intergovernmental relations.

Section 29 provides the act shall take effect October 1, 2000, except as otherwise provided in the act which provides for an effective date of October 1, 2001.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill may benefit debtors and creditors alike as it clarifies the rights of debtors and creditors in the collection of debts, and streamlines the procedures governing the creation of judgment liens, securing garnishment and establishing homestead status of specified property. In particular, the centralized system of filing judgment liens on personal property may facilitate the determination of existing judgment liens and other liens before commercial and private transactions occur between persons and businesses, by encouraging judgment creditors to be more diligent about perfecting and executing on a judgment lien on personal property, and judgment debtors to satisfy liens promptly or otherwise file for bankruptcy.

To the extent that the bill requires a respondent of a writ of bodily attachment in connection with a child support obligation to pay all costs including sheriff's fees, transportation and detention costs, there is a possibility that less monies will be available initially to satisfy the child support obligation.

C. Government Sector Impact:

A fiscal impact statements based on the revised committee substitute is not yet available from the Department of State. Last year, the Department of State estimated that similar processing fee provisions in the bill would generate approximately \$4.7 million in revenues.

A fiscal impact statements based on the committee substitute is not yet available from the Florida Department of Law Enforcement. Last year it was estimated the phase-out of the writs of execution docket could result in the loss of docketing fees approximating \$1.56 million in revenue. The \$20 fee charge for each written certification of a delivered writ during

the two-year phase-out period may offset nominally some of the loss although those fees are to be deposited into the fine and forfeiture fund of the county and distributed accordingly.

The sheriffs' department may benefit from the recovery of previously unrecoverable costs from the respondent associated with a writ of bodily attachment in connection with a child support order (e.g., sheriffs' fees, detention and imprisonment costs, travel expenses and other related costs).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
