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Bill Analysis
Legislative Service Commission

S.B. 30

123rd General Assembly
(As Passed by the Senate)

Sens. Latta, Drake, McLin, Cupp, Mumper, Wachtmann

BILL SUMMARY

- Requires a judgment creditor or the judgment creditor's attorney generally to give written notice at least seven days prior to an execution sale of real property and three days prior to an execution sale of personal property to the judgment debtor and each other party to the action in which the judgment giving rise to the execution was rendered.
- Permits an execution sale of goods and chattels to be set aside under certain circumstances for a failure to comply with the bill's written notice requirements for judgment creditors or their attorneys or with existing law's public notice requirements.
- Expands the circumstances under which an execution sale of lands and tenements may be set aside to include a failure to comply with the bill's written notice requirements for judgment creditors or their attorneys.

CONTENT AND OPERATION

Notice of sale of goods and chattels on execution

Existing law

Under existing law, before an officer who levies upon goods and chattels by virtue of an execution by a court of record proceeds to sell them, the officer must give public notice of the time and place of the sale for at least ten days before the day of sale by advertisement in a newspaper published in and of general circulation in the county. The court ordering the sale may designate in the order of sale the newspaper in which this public notice must be published. (Sec. 2329.13.)

If the goods to be sold are merchandise or inventory used in connection with a trade or business and if the sale is to satisfy a judgment in favor of the state

or one of its political subdivisions for delinquent taxes, public notice of the sale must be given by advertisement in a newspaper of general circulation once a week for three weeks preceding the date of the sale. In the case of a sale of goods used in connection with a trade or business, notice of the location, date, and nature of that sale also must be conspicuously posted on the premises where the trade or business is carried on and on the premises where the goods to be sold are kept if they are located elsewhere. (Sec. 2329.13.)

Operation of the bill

Notice requirements. Under the bill, goods and chattels levied upon by virtue of an execution of a court of record are prohibited from being sold until both of the following occur (sec. 2329.13(A)(1) and (2)):

(1) Except as provided in the next sentence, the judgment creditor who seeks the sale of the goods and chattels or the judgment creditor's attorney does both of the following: (a) causes a written notice of the date, time, and place of the sale to be served in accordance with Civil Rule 5 (see **COMMENT**) upon the judgment debtor and each other party to the action in which the judgment giving rise to the execution was rendered and (b) at least three calendar days prior to the date of the sale, files with the clerk of the court that rendered that judgment a copy of the written notice with proof of service endorsed on it in the form described in Civil Rule 5. Service of the written notice *is not required to be made* upon any party who is in default for failure to appear in the action in which the judgment giving rise to the execution was rendered.

(2) Public notice of the sale is given generally as under existing law. The bill requires the public notice to include the *date* of the sale in addition to the "time and place" of the sale as required by existing law; however, under existing law, the *time* of a proposed sale probably includes the date of that sale. The bill also clarifies that the public notice related to the sale of goods that are merchandise or inventory used in connection with a trade or business must be given by advertisement in a newspaper *published in and of* general circulation *in the county* once a week for three weeks preceding the date of the sale; however, the italicized words added by the bill probably are implied from existing law's "general" public notice requirements.

Setting aside the sale for failure to comply with the notice requirements. The bill provides that all sales of goods and chattels levied upon by virtue of an execution of a court of record that are made *without* compliance with the written notice requirements proposed by the bill and the public notice requirements contained in existing law must be set aside, on motion, by the court to which the execution is returnable. Proof of service endorsed upon a copy of the

written notice is conclusive evidence of the service of the written notice in compliance with the requirements of the bill, unless, prior to the confirmation of the sale of the goods and chattels, a party files a motion to set aside the sale and establishes by a preponderance of the evidence that the proof of service is fraudulent. (Sec. 2329.13(B)(1), (2), and (3).)

If the court to which the execution is returnable enters its order confirming the sale of the goods and chattels, the order has both of the following effects (sec. 2329.13(B)(4)):

(1) The order is deemed to constitute a judicial finding as follows:

(a) That the sale of the goods and chattels complied with the written notice requirements of the bill and the public notice requirements of existing law, *or* that compliance of that nature did not occur but the failure to give a written notice to a party entitled to notice has not prejudiced that party;

(b) All parties entitled to a written notice by the bill received adequate notice of the date, time, and place of the sale of the goods and chattels.

(2) The order bars the filing of any further motions to set aside the sale of the goods and chattels.

Subsequent execution sale if goods and chattels remain unsold after the first execution sale

Under existing law, when goods and chattels levied upon by execution cannot be sold for want of bidders or for want of time, the officer who makes the return must annex to the execution a true inventory of the goods and chattels remaining unsold. The plaintiff in that execution may have another execution issued directing the sale of the remaining goods and chattels levied upon. However, those goods and chattels cannot be sold unless existing law's *public notice requirements* have been satisfied. (Sec. 2329.14.)

Under the bill, when goods and chattels remain unsold and the plaintiff wants another execution issued directing the sale of the remaining goods and chattels, the goods and chattels cannot be sold unless both the written notice requirements of the bill and existing law's public notice requirements are first satisfied. The provisions regarding setting aside an execution sale for failing to comply with the bill's written notice requirements or existing law's public notice requirements also apply to any sale of goods and chattels levied upon by virtue of a subsequent execution of a court of record. (Sec. 2329.14.)

Notice of sale of lands and tenements on execution

Existing law

Under existing law, lands and tenements taken in execution are not permitted to be sold until the officer taking the lands and tenements gives public notice of the time and place of sale, for at least 30 days before the day of sale, by advertisement in a newspaper published in and of general circulation in the county. The court ordering the sale may designate in the order of sale the newspaper in which the public notice must be published. (Sec. 2329.26.)

When the public notice described in the preceding paragraph is made in a newspaper published weekly, it is sufficient to insert it for three consecutive weeks. If both a daily and weekly edition of the paper are published and the circulation of the daily in the county exceeds that of the weekly in the county, *or* if the lands and tenements taken in execution are situated in a city, both a daily and weekly edition of the paper are published, and the circulation of the daily in that city exceeds the circulation of the weekly in that city, it is sufficient to publish the public notice in the daily once a week for three consecutive weeks before the day of sale, each insertion to be on the same day of the week. The expense of that publication in a daily must not exceed the cost of publishing it in a weekly. (Sec. 2329.27.)

All sales made without compliance with the public notice requirements must be set aside, on motion, by the court to which the execution is returnable (sec. 2329.27).

Operation of the bill

Notice requirements. Under the bill, lands and tenements taken in execution are prohibited from being sold until both of the following occur (secs. 2329.26(A)(1) and (2) and 2329.27(A)):

(1) Except as otherwise provided in the next sentence, the judgment creditor who seeks the sale of the lands and tenements or the judgment creditor's attorney does both of the following: (a) causes a written notice of the date, time, and place of the sale to be served in accordance with Civil Rule 5 upon the judgment debtor and each other party to the action in which the judgment giving rise to the execution was rendered and (b) at least seven calendar days prior to the date of the sale, files with the clerk of the court that rendered that judgment a copy of the written notice with proof of service endorsed on it in the form described in Civil Rule 5. Service of the written notice *is not required to be made* upon any

party who is in default for failure to appear in the action in which the judgment giving rise to the execution was rendered.

(2) Public notice of the sale is given generally as under existing law. The bill requires the public notice to include the *date* of the sale in addition to the "time and place" of the sale as required by existing law; however, under existing law, the *time* of a proposed sale probably includes the date of that sale.

Setting aside the sale for failure to comply with the notice requirements. The bill provides that all sales of lands and tenements taken in execution that are made without compliance with the bill's written notice requirements and existing law's public notice requirements generally must be set aside, on motion, by the court to which the execution is returnable. Proof of service endorsed upon a copy of the written notice required by the bill is conclusive evidence of the service of the written notice in compliance with the bill's requirements, unless a party files a motion to set aside the sale of the lands and tenements and establishes by a preponderance of the evidence that the proof of service is fraudulent. (Secs. 2329.26(B) and 2329.27(B)(1) and (2).)

If the court to which the execution is returnable enters its order confirming the sale of the lands and tenements, the order has both of the following effects (sec. 2329.27(B)(3)):

(1) The order is deemed to constitute a judicial finding as follows:

(a) That the sale of the lands and tenements complied with the written notice requirements of the bill and the public notice requirements of existing law, *or* that compliance of that nature did not occur but the failure to give a written notice to a party entitled to notice has not prejudiced that party;

(b) All parties entitled to a written notice received adequate notice of the date, time, and place of the sale of the lands and tenements.

(2) The order bars the filing of any further motions to set aside the sale of the lands and tenements.

Statement of legislative intent

The bill provides that, in amending sections 2329.13, 2329.14, 2329.26, and 2329.27 of the Revised Code to require that a written notice of the date, time, and place of an execution sale of real or personal property be given to certain parties to the underlying action, it is the intent of the General Assembly to respond to the holdings of the Ohio Supreme Court in *Central Trust Co., N.A. v. Jensen* (1993), 67 Ohio St.3d 140, the Court of Appeals of Clark County in *In re Foreclosure of*

Liens for Delinquent Taxes (1992), 79 Ohio App.3d 766, the Court of Appeals of Columbiana County in *Perpetual Savings Bank v. Samuelson* (1992), 1992 WL 380301, and the Court of Appeals of Hamilton County in *Central Trust Co., N.A. v. Spencer* (1987), 41 Ohio App.3d 237, that publication notice of an execution sale of property may not afford interested parties with actual notice that is reasonably calculated, under all the circumstances, to apprise them of the pendency of the sale and to afford them an opportunity to take appropriate action to protect their interests and that satisfies the due process of law requirements of the Fourteenth Amendment to the United States Constitution and of Section 16 of Article I of the Ohio Constitution. (Section 3.)

COMMENT

1. The bill refers to the giving of a specified written notice of a sale of goods and chattels or of lands and tenements in accordance with divisions (A) and (B) of Civil Rule 5 (secs. 2329.13(A)(1)(a)(i) and 2329.26(A)(1)(a)(i)). Those divisions of Civil Rule 5 read in pertinent part as follows:

(A) **Service: when required.** Except as otherwise provided in these rules, every order required by its terms to be served, . . . every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties. Service is not required on parties in default for failure to appear

(B) **Service: how made.** Whenever under these rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or party shall be made by delivering a copy to the person to be served, transmitting it to the office of the person to be served by facsimile transmission, mailing it to the last known address of the person to be served or, if no address is known, leaving it with the clerk of the court. . . . [see **COMMENT 2**] "Delivering a copy" within this rule means: handing it to the attorney or party; leaving it at the office of the person to be served with a clerk or other person in charge; if there is no

one in charge, leaving it in a conspicuous place in the office; or, if the office is closed or the person to be served has no office, leaving it at the dwelling house or usual place of abode of the person to be served with some person of suitable age and discretion then residing in the dwelling house or usual place of abode. Service by mail is complete upon mailing. Service by facsimile transmission is complete upon transmission.

2. The bill also refers to the "conclusive evidence of compliance" effect of a *proof of service* endorsed upon a copy of a written notice of a sale of goods and chattels or of a sale of lands and tenements (secs. 2329.13(B)(3) and 2329.27(B)(2)). In this regard, Civil Rule 5(B) and (D) state in relevant part as follows:

(B) **Service: how made.** . . . The served copy shall be accompanied by a completed copy of the proof of service required by division (D) of this rule. . . .

. . .

(D) **Filing.** . . . Papers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed. The proof of service shall state the date and manner of service and shall be signed in accordance with Civ. R. 11.

Civil Rule 11's signature provisions read in pertinent part as follows:

Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address and attorney registration number, if any, shall be stated. A party who is not represented by an attorney shall sign the pleading, motion, or other paper and state the party's address. . . .

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-26-99	p. 78
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