

CIVIL PROCESS

- ## Objectives
- Identify and discuss Missouri Supreme Court Rules affecting the civil process duties of the Office of Sheriff.
 - Identify and discuss Missouri statutes and federal statutes affecting the civil process duties of the Office of Sheriff.
 - Identify and discuss recently enacted laws that will modify Missouri Supreme Court Rules and Missouri statutes affecting the civil process duties of the Office of Sheriff.
 - Discuss the different types of legal process a Sheriff or a Sheriff's process unit may serve.
 - Identify resources available to civil process servers.

DISCLAIMER

This presentation is presented for informational and educational purposes only and is not intended nor should be construed as legal advice. No attorney-client relationship is created between the presenter and any observer or recipient of this material either through the presentation of information or the answering of specific questions or through any other means. Individuals seeking legal advice regarding the topics discussed should consult their or their entity's legal counsel.

Rules for the Road

- Requirements related to civil process are found in
 - Supreme Court Rules
 - Statutes
 - Case law
- Generally, when a statute conflicts with or is inconsistent with a Supreme Court Rule the Rule controls (Mo. Const. Art. V. Sec. 5)

Rules for the Road

- If there is no rule but there are statutes then the statutes and related case decisions govern
- In probate proceedings summons and notices may be served according to the probate rules and statutes unless judge orders that other rules apply
- Rules apply to service of summons and other process in associate circuit cases unless otherwise specified by law

Summons, Subpoenas and Returns

Summons

- ⦿ Summons is an order from the court to appear at a certain date and time to answer a petition or to file a written answer to a petition by a certain date and time
 - Issued at the beginning of a law suit after the Plaintiff/Petitioner has filed a petition with the court
 - Rule 54.01 directs the court clerk to deliver the summons to the Sheriff for service unless a special process server has been appointed
 - Special process servers should be specifically named by the court in an order

Contents of a Summons

- ⦿ Rule 54.02 – Summons shall:
 - Be signed by the clerk
 - Be dated the day it was issued
 - Be under the seal of the court
 - Contain the name of the court
 - Contain the names of the parties
 - Contain the name and address of Plaintiff's Attorney (if there is one, otherwise it's the Plaintiff's info)
 - Be directed to the Defendant
 - State the date and time Defendant is required to appear and defend
 - Notify defendant that failure to comply may result in a default judgment against them

Summons

- ⦿ The summons must have a copy of the petition with it when it is delivered to the Sheriff's Office
 - If it doesn't return it to the clerk and notify them that the petition is missing
- ⦿ The summons and the petition must be served together
 - Don't get too hung up on title and format as these may change

Summons

- ⦿ If you observe a defect in a summons, notify the clerk and return it for corrections
 - Defects may invalidate the service of the summons
 - This may create more work on the backside because you'll probably end up having to reserve the paper.

Types of Service

- ⦿ There is a difference between in-state service (inside the State of Missouri) and out of state service (outside the State of Missouri)
- ⦿ For in-state service, process may be served by
 - a sheriff (or his/her deputies)
 - Remember generally deputies have the same powers as the Sheriff
 - Any person 18 years of age or older who is not a party to the suit
- ⦿ For out of state service, process may be served by
 - Anyone authorized under the laws of the state where service is to be made
 - Anyone appointed by the court to make the service

Types of Service

- ⦿ Defined in Rule 54.13 (In State)
- ⦿ What are the three general categories of service?
 - Individual or Conservator Service
 - Abode Service
 - Representative Service
- ⦿ All of these constitute personal service under rule 54.13

Individual/Conservator

- ◉ Individual service is personally serving the individual
 - This includes an infant (person under 18) or an incompetent (disabled or incapacitated) person if they don't have a legal guardian
- ◉ Conservator service applies when the individual to be served is an infant or incompetent **AND** they have a legal guardian or a conservator
 - Guardians and conservators must be served personally instead of the infant or incompetent person

13

Abode

- ◉ Unless otherwise provided by either a rule or a statute a person may be served by:
 - Leaving a copy of the summons and petition at the individual's dwelling or usual place of abode
 - Process must be left with someone in the person's family who is over the age of 15

14

Abode

- ◉ What constitutes "family"?
 - Related by blood
 - Related by marriage
 - Other persons
- ◉ Missouri courts have defined family (for purposes of serving process) as:
 - [a] collective body of persons who live in one house, under one head or manager, including parents, children, and servants and as the case may be lodgers or boarders....
 - *Colter v. Luke*, 108 S.W. 608, 609 (Mo. Ct. App. 1908)

15

Abode – other family

- ◉ **Colter Test:**
 - ◉ "If the relation between him [person to be served] and the other persons of the household is of a permanent and domestic character and not intended to be merely temporary, he is regarded as a person of the family on whom constructive service of process against another may be made."
 - ◉ Long term room mate ok – *Midwest Acceptance Corp. v. Blount*, 777 S.W.2d 645 (Mo. Ct. App. 1989)
 - ◉ Soon to be ex-wife not ok – *Sykes v. Sykes*, 940 S.W.2d 35 (Mo. Ct. App. 1997)

Representative

- ◉ Corporations, partnerships and unincorporated associations must be served by:
 - delivering a copy of the summons and petition to an officer, partner, managing or general agent
 - leaving the copies at any business office of the defendant with the person having charge of that location
 - Delivering copies to the registered agent or any other agent authorized by appointment or required by law to receive process
- ◉ Can you use Abode service on a Representative?
 - No

Representative

- ◉ **Serving the government**
 - Service on a County must be made to the County Clerk
 - Service on a City must be made to the mayor, city clerk or city attorney
 - All other public and quasi-governmental entities must be served by delivering summons and petition to the chief executive officer of the entity
 - ◉ Can also be served on anyone lawfully designated. The court can make this designation

Return of Service

- Serving official must make a written return of service which must include
 - The date served
 - The time served
 - The place of service
 - The manner of service
 - Signature of the serving official
- Failure to make a return of service may invalidate the service.

19

20

Returns

- Return is essentially an affidavit
 - It is considered prima facie evidence of the facts contained in the return
 - There are criminal penalties for fraudulent returns
- Rule 54.22 provides that the court may allow the serving official to amend the return unless it appears that material prejudice would result to the substantial rights of the party served
- The party served, the sheriff, sheriff's deputies, sureties or anyone making service is permitted to show the true facts of service and impeach the return when the return does not comport with the facts as found by the court

21

Tampering with a Public Record

- 1. A person commits the crime of tampering with a public record if with the purpose to impair the verity, legibility or availability of a public record:
 - (1) He knowingly makes a false entry in or falsely alters any public record; or
 - (2) Knowing he lacks authority to do so, he destroys, suppresses or conceals any public record.

Timeliness

- Rule 54.21 states that service and the return of service shall be made "promptly"
- If process can't be served within 30 days it shall be returned to the court with a statement of why service couldn't be made
 - Commonly referred to as "non-est"
 - Court may extend time for service up to 90 days from the date of original issuance

Timeliness

- There are some situations where different timelines apply
- Unless extended by the court or one of the special circumstances applies service made after 30 days from date of issuance is invalid.

Special Timelines & Circumstances

- Rule 114.01 – Juvenile Court Summons
 - Must be personally served within 24 hours of hearing.
 - Must be served personally on the juvenile if they are at least 12 years old, otherwise it must be on the guardian/parent or guardian ad litem (if appointed by court to receive service)
 - If summons directs juvenile to be taken into custody then juvenile should be taken into custody upon service of summons

Special Timelines & Circumstances

- Rule 86.05 – Condemnation Proceedings
 - Process must be served at least ten days prior to the hearing
 - If personal service can't be made within the state then notice is served by publication or posting
 - Notice of hearing (date and time) published for three consecutive weeks prior to hearing in a newspaper published in the county where the hearing will be held
 - If no such newspaper exists or if the publisher refuses to publish the notice then notice is provided by posting the notice of hearing for three consecutive weeks at the door of the courthouse of the county where the land or any portion of them lie.

Special Timelines & Circumstances

- RSMO 473.083.6 – Probate Summons
 - Served like any normal civil summons unless its on a contested will
 - Summons and petition on a contested will shall be served no later than 90 days after the petition is filed.
- RSMO 517.041 – Associate Circuit Court Summons
 - Must be served not less than 10 days prior to hearing and not more than 60 days prior to hearing or date specified for return

Special Timelines & Circumstances

- RSMO 535.030 – Rent and Possession
 - Must be served at least four days before the hearing. Hearing date must be no more than 21 days from the date the summons was issued unless plaintiff filed an affidavit consenting to a later date.
 - Court may order posting at residence and a copy mailed to the defendant at last known address
 - Mail is both ordinary and certified mail, return receipt requested, restricted delivery
 - Posting and mailing must be made at least 10 days before specified return date or hearing date
 - If defendant can't be found, has absconded or absented themselves then serving official must file an affidavit with the court that posting and mailing was performed as provided by law.

Special Timelines & Circumstances

- RSMO 535.030 – Rent and Possession (Continued)
- If posting/mailling is not ordered by court and the summons is returned as a non-est then Plaintiff may request issuance of an alias summons to be posted and mailed as described above
 - Serving official should complete an affidavit that posting and mailing procedures were performed as specified by law and file the affidavit with the court

Special Timelines & Circumstances

- RSMO 534.090 - Forcible Entry and Unlawful Detainer Actions
 - Must be served at least four days prior to hearing
 - If defendant can't be found or has absconded or absented himself from his normal abode Plaintiff may request alternative service (done on order of court)
 - Posting for ten days at premises in question and posting in a public place in the county where the defendant is believed to dwell for ten days. Order should also direct service by ordinary mail
 - file affidavit

Notices

- ⦿ A notice is similar to a summons but it usually does not require the appearance of the person being served or require them to file a written response.
- ⦿ Most notices don't require service by the Sheriff or a Sheriff's Deputy but there are some exceptions to that rule.
 - Involuntary commitments
 - Guardianship and Conservatorship

Notices

- ⦿ Involuntary Commitment Notices
 - Related to mental health, drug and alcohol treatment/evaluation.
 - Notice may come in different forms (notice, summons or court order)
 - The notice, petition and list of prospective witnesses must be served on the respondent and his/her attorney (usually appointed)
 - Not uncommon that the attorney is served via mail with a certificate of service

Subpoena

- ⦿ Compels a person to appear at court or for deposition for the purpose of testimony or producing documents or things
- ⦿ Essentially there are three types of subpoenas (may not always use the formal name)
 - Subpoena Ad Testificandum – compels a witness to appear and testify
 - Issued by judge or clerk
 - Many courts have these filled out so attorneys can add the details and send out
 - Subpoena Duces Tecum – compels a witness to bring documents or things
 - Issued by judge or clerk
 - Must state what documents, books, things, etc. the person is to produce
 - Notary Subpoena – usually issued by a court reporter. Generally used for purposes of deposition but may be used for trial testimony or production.
- ⦿ Must contain the name of the court; caption (name of suit); the attorneys' name, address and phone number and identify the party requesting the subpoena; date and time for appearance/production or who they can call for that information
 - Deposition subpoena or Duces Tecum need not contain attorney information
 - If depo subpoena is to a non-party must be served at least 10 days prior to appearance

Subpoena

- RSMO 491.110 - Sheriffs and Sheriff's Deputies may serve subpoenas issued by any court of record in the county may be served anywhere in their county or adjoining counties
 - Can be served where the person resides or anywhere they may be found
- RSMO 491.120 – subpoenas to testify may be served by delivering a copy to the person summoned or by reading the subpoena to the person
 - If the witness resides more than 40 miles from the place they are to appear the return shall state that fact and state whether the witness fees have been tendered or paid
 - If served by a private person the return is verified by affidavit which **may** be made before the Sheriff of the county where service was made

Subpoena

- Does that mean I can serve them by telephone?
 - The law doesn't say and there is no case law on point
 - This is not advisable
 - Difficult, if not impossible, to truly verify that you are speaking to the right person
 - Do you want to be the test case to determine if you can?

Witness Fees

- If a person lives more than 40 miles from place of appearance they are entitled to fees, if they demand them.
 - Fees are not required if witness lives less than 40 miles from place of appearance or they are not compelled to appear
- Fees should be tendered at the time of summoning
- Person/attorney requesting the appearance is responsible to provide the clerk or sheriff with appropriate fees
 - Can't be compelled to attend if fees are demanded and not tendered
 - If they don't demand fees when served they cannot refuse to attend
- RSMO 491.130 - Fees consist of mileage to and from appearance location and one day's attendance
 - \$25 per day (RSMO 491.280) and \$0.10 per mile (RSMO 33.095)

Subpoena Enforcement

- ⦿ Those who do not comply with a subpoena, including depo subpoenas are subject to contempt of court
 - A writ of body attachment may be ordered by the court (We'll come back to this)
 - Person may be required to post a bond to secure appearance
 - Person may be jailed for contempt (both civil and criminal contempt)

37

Sheriff's Fees

- ⦿ RSMO 57.280
 - Outlines the fees sheriffs "shall receive" for service of process
 - \$20 for any summons, writ or other order of the court, in connection with any civil case
 - \$10 for service and return of subpoena
 - An additional \$10 on all civil papers including subpoenas
 - Goes to Deputy Sheriff Salary Supplementation Fund
 - No fees can be collected in a case where court costs are paid by the state, county or a municipality

38

Sheriff's Fees

- ⦿ Sheriff is entitled to receive the IRS allowable rate for motor vehicle use as an amount per mile for each mile actually traveled
 - Can't charge mileage for more than one item of process served in the same cause on the same trip
- ⦿ Fees are received by the sheriff who is requested to perform the service
- ⦿ Unless otherwise provided by law all of the fees "shall" be charged as court costs and collected by the court clerk
 - Fees are payable prior to the time service is rendered
 - If fee can't be readily determined then the Sheriff shall receive a deposit based upon the likely amount of the charge and the balance is payable immediately upon determination of the proper amount
 - Sheriff may refuse to perform any service in any action or proceeding until the fees are paid
 - Except when court costs are waived as provided by law
 - Failure to receive the fee does not affect the validity of the service

39

Sheriff's Fees

- ◉ Commission on Sheriff's Sales - where lands or goods have been levied and advertised and sold
 - 5% on sales up to five hundred dollars
 - 4% on sales above five hundred dollars
 - Only get 1/2 of the amounts listed above if sold without being levied on **OR** property is levied on but not sold and the money is paid to the Sheriff

Refusal of Service

- ◉ Rule 54.20(f)
 - If the person to be served or an authorized agent (in or out of state) refuses service the attempt of the server to deliver and the fact of refusal constitute valid service if the facts of the service attempt and refusal are documented in the return
 - RSMO 491.120 – same for subpoenas including reading
 - If service is made by mail, a notation made pursuant to USPS regulations that certified or registered mail has been refused constitutes proof of service.

Things to Remember

- ◉ Generally the person/entity bringing the suit has the responsibility of providing the Circuit Clerk's Office with the names and addresses of persons to be served and to insure that those listed are appropriate for service
- ◉ Be sure you're serving the right person. Under Missouri law personal service on the right party by the wrong name is generally good service.
 - When in doubt, verify the person's identity
 - Service upon a corporation by the wrong name has been held to be a basis for quashing service

Things to Remember

- If the court orders additional paperwork to be served or orders a particular method of service, comply with the order.
- DON'T GIVE LEGAL ADVICE!!! – you are allowed to read the summons verbatim if needed, i.e. an illiterate person. Don't try to explain what the papers mean or the significance of the document.

43

Writs

44

Extraordinary Original Writs

- The sheriff may receive extraordinary original writs to serve or execute
 - Writ of Mandamus (commands an official to perform an action they are legally required to perform)
 - Writ of Quo Warranto (challenge to an official on forfeiture of office usually due to abuse of authority or neglect of their duties)
 - Writ of Prohibition (prohibits action by an official or seeks review of judicial decision where appeal is not a viable option)
 - Writ of Habeas Corpus
- As a general rule serve/execute the writ as directed in the order
- Seek guidance from the issuing court on uncommon writs

45

Attachment

- ◉ Writ directing the Sheriff to seize property owned by a defendant/respondent or to seize an amount of property necessary to satisfy a prospective award amount (including interests and costs)
 - Court can't order an attachment before the defendant has been served with summons for the underlying suit
 - Generally a court can't order attachment unless a surety (bond) has been filed.
 - Amount of surety is set by the court and it can't exceed twice the amount sought in the underlying suit
 - Surety is not required if the County or the State is the party asking for the attachment of property

Attachment

- ◉ Served with a notice of rights
 - Has to advise the person/entity of the right to post a surety equal to the value of the property or the amount of claims and costs (whichever is the least) to get the property back
 - Has to advise defendant/owner's right to a hearing to determine if attachment should be dissolved
- ◉ Served like a summons to the defendant, owner of property or anyone who has possession of property to be seized.
 - Can be served before, during or immediately after the seizure as long as the defendant is given an opportunity for an immediate hearing

Attachment

- ◉ Rule 85.21 – property must be seized in the same manner as property seized under a general execution (more to come)
 - Personal property - must be actually seized or if too large to seize through posting and immobilization
 - Real property – may be done by endorsing the property description (must be the legal description) and filing a notice of levy with the Recorder of Deed's Office
 - May be directed to any Sheriff in the State but the Sheriff of the county where property may be found is who can seize the property. Rule 85.06
 - Improperly seizing property can result in personal liability on the Sheriff's bond.

Attachment

- Court may order a prejudgment garnishment to aid in attachment
- Court may order a prejudgment sale of the seized property if the court finds the property is likely to perish or significantly depreciate in value
 - Prejudgment sale should be handled in the same manner as other sales and the notice requirements for the sale of personal property used under a general execution should be used unless modified by the court

Garnishments

Garnishment

- A garnishment is a writ which directs a third party (the garnishee) who holds money or other property of a judgment debtor to turn the property over to satisfy an execution or an attachment
 - Garnishments are ancillary to an execution or an attachment and a garnishment cannot occur without one or the other
 - In order for a garnishment to be valid there must be strict compliance with the procedures outlined in the Rules and Statutes
 - Rule 90 et seq. contains the rules for Garnishments and Sequestration (special form of garnishment)

Garnishment

- ⦿ Persons who may be garnished must be listed in the writ.
 - If a person has property subject to garnishment then they may be summoned as a garnishee
 - Garnishor (judgment creditor) must know or have good reason to believe that a garnishee is: (any of the following)
 - Indebted to the debtor
 - Obligated to make periodic payments to the debtor
 - Has control or custody of property belonging to the debtor
 - The requested return date of the writ should be stated in the writ
 - It will either be 30, 60, 90, 120, 150 or 180 days
 - Relates to the amount of time the garnishment is good for

Garnishment

- ⦿ Rule 90.01 defines what property is subject to garnishment:
 - “all goods, personal property, money, credits, bonds, bills, notes, checks, choses in action (ability to bring suit), or other effects of debtor and all debts owed to debtor”
 - This does not include funds of the debtor that are on deposit with a bank or other financial institution in an account in which **all** of the funds are:
 - Deposited electronically on a recurring basis, **and**
 - Reasonably identified as funds exempt from garnishment under RSMo 531.430.1(10)(a), (b) or (c)

Garnishment

- ⦿ The service of a notice and summons of garnishment functions to attach the property subject to garnishment that is in the garnishee’s possession (Rule 90.04)
 - This attachment exist between the date and time of service and the return date
 - Garnishee must either consent to garnishment, contest garnishment or discharge by turning all property subject to garnishment over to the Sheriff (Rule 90.05-90.13)

Garnishment

- ◉ Garnishments are served in the same manner as a general summons
 - Service may also be made on an employee of the garnishee who has been designated to receive service or by serving an officer for the garnishee who is responsible for the paying, disbursing or auditing. (Rule 90.03)
 - A corporation may designate a person to receive service of garnishments by filing a registered letter with the sheriff or other officer whose duties are collection in the corporation's county of primary residence (RSMO 525.050)
 - If no designation has been made or that person is not available then garnishment can be served on the president, secretary, treasurer, cashier or other chief or managing officer of such corporation

Garnishment

- ◉ Other service considerations under RSMO 525.050
 - Service on a railroad corporation may be had by serving notice and summons to any station or freight agent of the corporation
 - For insurance companies not incorporated by or organized under the laws of Missouri, by delivering the notice and summons, to the director of the department of insurance, financial institutions and professional registration.

Notice of Exemptions and Garnishments

- ◉ If a garnishment is in aid of an execution the serving official must follow the same notification procedures (notice of exemptions) as with any other execution
 - Notice requirements are found in RSMo 513.445
 - This notice of exemptions is not the same as a wage exemption

Garnishment

- ◉ If an exemption is claimed on a garnishment of wages notice of the exemption to the party who sought execution is not required
 - Levying official shall release from garnishment the amount claimed as exempt to the extent required by law at the time the claim for exemption is filed.
 - This is done regardless of whether a request for court review is filed

Exemptions & Garnishment

- ◉ In addition to the statutory exemptions that apply to executions there are other exemptions that apply to garnishments
- ◉ Debtor doesn't have to be apprised of these exemptions but they still apply unless the situation is one where exemptions don't apply (discussed later)
 - Unemployment Benefits (RSMo 288.380.11)
 - Fireman Pensions created pursuant to Chapter 87 (RSMo 87.090, 87.365, 87.485)
 - Police Pensions created pursuant to Chapter 86 (RSMo 86.190, 86.563)
 - State Employee and Legislator Retirement Plans (RSMo 104.540)

Exemptions & Garnishments

- CERF (RSMo 50.1175)
- Worker's Compensation Benefits RSMo 287.260.1)
- LAGERS Pension (RSMo 70.695)
- Teacher/school employee Retirement Benefits RSMo 169.090, 169.380, 169.520,169.690)
- Fraternal society benefits and life insurance that are authorized under Chapter 377 (RSMo 377.090)
- ◉ Some of these don't apply if the garnishment is due to a child support/family maintenance obligation

Garnishment of Wages

- Wages are a debt owed by the employer to the employee, therefore they are subject to garnishment
 - Pretty much the same as other garnishments but the notice, summons or writ of garnishment in these cases must also have the statutory wage exemption found in RSMo 525.030 printed/reproduced on it. (Rule 90.15)
 - Pursuant to 525.030.2 the maximum earnings limit does not apply to court orders for the payment of support, Chapter 11 bankruptcy or state/federal taxes due

Garnishment of Wages

- If a garnishment of wages is in aid of a writ of attachment Rule 90.14 contains some special rules
 - **90.14. Garnishment of Wages in Aid of Attachment**
 - (a) **Personal Service on Defendant Required-Exception.** No wages shall be garnished in aid of attachment before personal service is had or obtained upon the defendant unless the suit is brought:
 - (1) in the county where the defendant resides; or
 - (2) in the county where the debt is contracted and the cause of action arose or accrued; or
 - (3) in cities with over one hundred thousand inhabitants, in the city where the defendant resides or the debt is contracted and the cause of action arose or accrued.

Garnishment of Wages in Aid of Attachment

- (b) **Contents of Petition and Writ.** The petition or statement filed in the cause and the writ of attachment shall state the place where the defendant resides and the place where the debt is contracted and the cause of action arose or accrued.
 - (c) **Wages Earned Out of State - When Exempt.** Wages earned out of this state and payable out of this state are exempt from garnishment in aid of attachment in all cases where the cause of action arose or accrued out of this state, unless the defendant in the attachment suit is personally served with process.

Federal Exemption for Wages

- The Consumer Protection Act, 15 USC § 1673
 - Except in certain situations, maximum per work week subject to garnishment is 25% or the amount of disposable income in that work week over 30 times the federal minimum wage. Exceptions:
 - Support orders - (50% per work week if they are supporting a different spouse or child, 60% if they are not)
 - Bankruptcy (Ch. 7 or 11) orders – (60% unless they are in the twelve week harbor then 65%)
 - State or Federal taxes due – 100% of earnings may be withheld for judgments arising out of state or federal taxes due

64

Order of Delivery

- Under Rule 90.05 the court may issue an order of delivery which requires the garnishee to delivery the property subject to garnishment to the sheriff
 - Serve immediately
 - Requires personal service on garnishee unless the order specifies otherwise
 - Delivery must be made as directed by the order unless garnishee posts a bond approved by the court
 - Storage fees and other costs of sheriff may be ordered as costs

65

Things to Remember

- Rule 76.075 has the effect of requiring the sheriff to release wages exempt by law back to the judgment debtor if the debtor makes a proper request for exemption
- You are under no obligation (and shouldn't) explain garnishment procedures to the garnishee. Direct them to seek advice of counsel if they have questions.
 - It is their responsibility to comply with exemptions

66

2015 changes for Garnishments

- The new laws related to garnishments went into effect January 1, 2015
 - Most didn't effect sheriffs with the following exceptions
 - Garnishment will have effect of attaching all personal property at the time of service
 - In the case of a continuous garnishment attachment exists until debt is paid in full or the employment relationship is terminated
 - Garnishments that would otherwise have equal priority will get priority based on the date of services (RSMo 525.040)
 - Garnishee may discharge themselves by turning property over to the attorney for the garnishor (RSMo 525.070 & 525.080)

67

Executions, Levies & Sales

68

Executions & Sales

- There are a number of Rules and Statutes that apply to executions and sales
- The procedures that apply to an execution and sale vary depending on the nature of the property
 - Example personal property v. real property
- Best practice suggestions:
 - have a checklist for each type of execution and sale
 - Document all the steps and occurrences related to the execution and sale
 - seek counsel when needed.

69

Levy

- ◉ Levying on property involves either seizing of property or the interest in property
- ◉ Rule 76.06 contains the ways that a levy can be made
 - (a) Real Estate – “A levy upon real estate shall be made by the sheriff endorsing the description of the real estate upon the execution.”
 - (b) Tangible Personal Property Which Can Be Seized – “A levy upon tangible personal property shall be made by the sheriff taking possession of the property unless such seizure is impracticable.”
 - (c) Tangible Personal Property Where Seizure is Impracticable – “A levy upon tangible personal property where seizure is impracticable shall be made by the sheriff posting a notice of the levy upon the property or as near as practicable thereto.”

Levy

- ◉ (d) Property Subject to Garnishment – “A levy upon property subject to garnishment, as defined in Rule 90.01, shall be made as provided in Rule 90.”
- ◉ (e) Partnership Interest – “A levy upon an interest in a partnership shall be made as provided in Section 358.280 RSMo.”
- ◉ (f) Security or Share – “A levy upon a security or any share or other interest evidenced thereby shall be made by actual seizure thereof by the sheriff but if the security is in the possession of the issuer a levy may be made by serving a written notice of the levy upon the issuer.”
- ◉ If a judgment debtor refuses to allow the seizure of property within his dwelling or business it is advisable to obtain a search warrant.

Excessive Levy

- ◉ You may only seize as much personal property as is necessary to satisfy the judgment and associated costs.
 - There may be liability for damages if you levy on more property than is required to satisfy the judgment and costs

Election of Levy

- Rule 76.09 -The person who owns property that is to be levied upon may elect to what property, either personal or real, will be levied upon.
 - Election must be made by delivering a list of property selected to the sheriff
 - Property listed must be sufficient to satisfy the execution
 - Sheriff shall only levy upon the selected property unless the sheriff believes the selected property is insufficient to satisfy the execution

73

Retention of Property

- Under Rule 76.14 a person whose personal property has been levied upon may retain or regain possession of the property until the time of the sale, by giving a bond, in favor of the judgment creditor
 - Bond must be executed by the judgment debtor as principal and by one or more sufficient sureties, approved by the sheriff, in an amount double the value of the property
 - Must be conditioned on the delivery of the property at the time and place of sale

74

3rd Party Rights

- There may be situations where a third party has rights/interest in the property levied upon (RSMo 513.130)
 - If a third party provides the seizing officer with a verified written affidavit which sets forth their claim of right/interest the seizing officer must immediately deliver a copy of the claim to the execution creditor or that person's/business' attorney
 - If, within a reasonable time (not defined & no case law) the creditor fails to execute a bond, payable to the State of Missouri, with one or more sufficient sureties that are resident of the county (approved by the officer/sheriff), conditioned to indemnify the officer/sheriff and claimant against all damages and costs that may accrue to them by reason of the seizure and sale the levy shall be abandoned and the property released to claimant

75

3rd Party Rights

- ◉ If the creditor executes and delivers the bond as described above to the seizing officer/sheriff, the claimant may, at any time before the sale of the property, take possession of the property upon executing and delivering to the officer a bond with one or more sufficient sureties that are residents of the county (approved by the officer/sheriff) payable to the State of Missouri, and conditioned that the property shall be safely kept and preserved from damage and that when and where the court directs they shall pay all costs in the matter that are adjudged against the claimant
 - These bonds may be used as a basis for a lawsuit by any person injured, in the name of the State, for any breach of the bond conditions and the damage which the injured party sustained shall be recovered
- ◉ Third party claims along with all bonds received must be filed to the court issuing the execution on or before the first day of the next term of the court (RSMo 513.135)

76

3rd Party Claims

- ◉ Practice pointer: If you get notice of a third party claim or a potential third party claim, attempt to notify the third party of the pending execution and their rights to file a claim under RSMo 513.130
 - May avoid unnecessary work if the creditor fails to post a bond
 - May also help to reduce or eliminate exposure to a lawsuit for conversion
 - ◉ If third party fails to act after being provided notice a court may hold that they have waived their ability to bring a conversion action

77

Levies and Liens

- ◉ Executions must be served in the order they were received
- ◉ A levy serves to create a lien in favor of the judgment creditor on the property
 - This lien is superior (in most cases) to subsequently served executions
 - ◉ Determines priority of entitlement to sale proceeds
 - If liens were on the property prior to levy those liens are not affected by the levy or sale of the property
 - ◉ Purchaser of the property acquires the rights and title to the property that the debtor had at time of sale

78

Executions & Sales

- ◉ Rule 76.075
- ◉ Within 3 days after levying on property, the officer seizing the property must notify the person against whom the execution was issued that the levy has occurred and that certain property may be exempt under RSMO 513.430 and 513.440 and that the person has the right to hold the property as exempt from attachment and execution.

Exemptions

- ◉ State that there are certain exemptions under state and federal law that the judgment debtor may be able to claim with respect to the property levied upon and describe the procedure for claiming the exemption
- ◉ Notice must also tell the person whom the execution was issued against the manner in which the person may obtain a specific description of the property levied upon
 - Notice can be served in the same manner as a summons or by mailing the notice to the judgment debtor at their last known address
 - Service by regular mail is deemed complete upon mailing

Exemptions

- ◉ Judgment debtor may claim any exemption by filing a verified request with the court within 20 days after the notice of levy.
 - Any exemption allowed under federal law may be claimed at any time prior to the sale of the property or the disbursement of funds
 - This is new under Mo Sup Ct R 90.035 (changed July of 2016) previously verified request was filed with the sheriff. Talk with your circuit clerk as courts are still adjusting
- ◉ When you receive a verified request you must immediately notify the party that requested execution that the claimed exemption has been filed
 - Party requesting execution may object to the claim for exemption within 10 days of the filing of the verified request by filing a request for the court to review the exemption
 - If court review is not filed in time, the levying official shall release the items claimed as exempt
 - If court review is filed in time and doesn't involve a garnishment the claim of exemption must be reviewed and determined by the court before items claimed as exempt can be released
 - Hearing must be held within 30 days for filing of request for review and 3 days notice must be given to all parties

Exemptions

- ◉ Situations when exemptions are not allowed/applicable
 - Judgment debtor is about to leave the state (RSMo 513.425)
 - Judgments to satisfy taxes due to the State or any county, city or town within the State (RSMo 513.465)
 - RSMo 139.120 states that this only occurs if levy and sale occur after October 1st
 - Judgments for maintenance, alimony or child support (RSMo 452.140)
 - Judgments for personal services rendered as a house servant or common laborer, not exceeding \$90, if action filed timely (RSMo 513.470)
 - Action must be filed within six months of when last service was rendered (RSMo 513.060)
 - Judgments on personal property against the purchaser for the purchase price of the property (RSMo 513.140)
 - Exception for cases where property is in the hands for an innocent purchaser of the property for value who didn't have notice of the existence of a prior claim for the purchase money
 - Judgment of contributions, interest and/or penalties for unemployment taxes (RSMo 288.170)
 - Indemnity bond not required prior to levy

82

Exemptions

- ◉ If property is jointly owned by a husband and wife then the property is always exempt if the judgment is only against one of them
 - Referred to as the tenancy by the entireties exemption
 - Common law exemption recognized in Missouri case law.
 - If judgment is against both the husband and wife this exemption doesn't apply but the statutory exemptions are still applicable

83

Executions & Sales

- ◉ Sale must occur within 180 days after the return date
 - Rule 76.04
 - Don't confuse this with the date you have to file the return
- ◉ Notice of the sale must be provided prior to sale
 - For personal property, under general execution, must post at least 3 notices in public places in the township where the sale is to be held at least 10 days prior to sale
 - Notice must state the time, date and place of the sale and describe the property being sold
 - The court may shorten/remove the time frame for notice if it holds that the property is likely to considerably depreciate in value or perish

84

Executions & Sales

- Sales must be held on the day contained in the notice
 - Sales must be by public auction between 9am and 5pm and the property must be sold to the highest bidder for "ready money." (Rule 76.18)
 - Ready money is either cash or a guaranteed form of payment (cashier's check, money order, certified check)
 - Personal checks, notes, debt assignments, promise to pay, etc. do not qualify

Executions and Sales

- If the highest bidder fails to pay or refuses to pay under the terms of the sale then there is a no sale and the property is resold either immediately or a new sale date should be advertised
 - Sheriff may also seek a judgment against the defaulting bidder for the amount of the sale plus the costs of the sale
 - Sheriff can refuse the bid of a defaulting bidder at a subsequent sale of the property
 - Sheriff not liable for the amount of the bid which the purchaser fails/refuses to pay -Rule 76.19
- If there is not enough time to sell all of the property in one day
 - Announce that the sale is being adjourned and the date and time it will recommence
 - Sale is to continue "from day to day" at the same location Rule 76.18

No Sale

- The sheriff may also call a no sale if:
 - There are no bids (resell if there is sufficient time to resell based on return date)
 - Collusion or fraud (if it appears this is occurring to lower the sale price)
 - Inadequacy of bids
 - Sheriff doesn't have the right to determine a sufficient bid
 - Sheriff is considered an agent for both the debtor and the creditor
 - Can postpone or resell if the price is so inadequate as to "shock the conscience"
 - Based in case law: *Huff v. Huff*, 622 S.W.2d 731 (Mo. Ct. App. 1981) (property valued at \$25,000 sold for \$400); *Pleasant Hallow Homeowners Assoc. v. Webster*, 285 S.W.3d 421 (Mo. Ct. App. 2009) (\$110,000 house sold for \$10)

Executions & Sales

- ◉ Rule 76.20
 - The Sheriff conducting the execution and sale is prohibited from making purchases at the sale
 - Deputies of the Sheriff are also prohibited from purchase
 - Straw purchases are also prohibited by the rule
 - If this type of conduct occurs the sale is void
 - Rule is silent on other types of Sheriff's employees
 - Recommendation: Don't allow it.

Executions & Sales

- ◉ In cases of personal property, Sheriff must transfer the property to the purchaser and furnish the purchaser a duly executed bill of sale (if requested)
 - In cases of intangible personal property (stocks, bonds, etc.) the Sheriff must deliver a signed written document reciting 1) the fact a sale occurred 2) the payment of a particular sum of money by the purchaser for the property and 3) the assignment of all right, title and interest in the intangible property to the purchaser

Executions & Sales

- ◉ Real Property: Land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. *Black's Law Dictionary*
 - Includes items such as houses, barns, out-buildings, fences, improvements, crops, etc.

Executions & Sales

- ◉ Leases
 - Under RSMo 513.200, a lease upon land for any unexpired term equal to or greater than three years is subject to execution and sale
 - They are not subject to sale if the execution was issued by an associate circuit judge

Exemptions & Real Property

- ◉ The exemptions noted above and the requirements for notification of exemptions (RSMo 513.445 and Rule 76.075) have as much application in situations involving real property as they do in situations involving personal property
- ◉ Be aware of the two most likely exemptions with real property
 - Homestead (RSMo 513.475, .480, .490, .515)
 - The Catch all exemption (RSMo 513.440)

Homestead

- ◉ RSMo 513.475 provides the judgment debtor the right to claim his/her dwelling (including appurtenances and land connected to it) as exempt all of which is limited to a value not to exceed \$15,000
 - Not allowed for more than one owner of any homestead if the entire amount allowed is claimed
 - If more than one owner of a homestead claims this exemption the aggregate amount cannot exceed \$15,000

Homestead

- ◉ RSMo 513.480 – Value exceeding \$15,000
- ◉ If the homestead exceeds the limitation or the real estate upon which the homestead sits is levied upon the owner has the right to designate the part of the property the exemption applies to
- ◉ If the person refuses to designate the sheriff levying on the property shall appoint three disinterested appraisers who shall fix the location and boundaries of the homestead
 - Appraisers must be sworn to faithfully discharge their duties prior to fixing the location and boundaries
 - After boundaries are set the Sheriff shall proceed with the levy on the residue of the real proper.
 - Proceedings must be stated in the return of the execution

94

Homestead

- ◉ RSMo 513.525
 - If the homestead exceeds \$15,000 and severance would greatly depreciate the value of the residue or be of great inconvenience to the parties with interest in the residue either party may petition the circuit court for relief.
 - ◉ Court may order homestead or residue to be transferred to other parties and payment of the value to the owner of the interest
 - ◉ Court may order a sale of the whole premises and apportion the proceeds
 - ◉ Court may make other orders as it finds equitable and necessary

95

Homestead

- ◉ RSMo 513.490
- ◉ If the judgment debtor claims that personal property has been levied on is part of the homestead the sheriff shall cause appraisers to be appointed and sworn as described above and the appraisers shall decide the claim and settle the “products of such homestead” to the debtor accordingly
 - Proceedings must be stated in the return

96

Execution & Sale

- As previously stated a levy upon real property is made by endorsing the legal description of the property on the execution (Rule 76.06(a)).
 - Remember to file a notice of levy, containing the legal description of the property, with the Recorder of Deeds to create a lien on the property. (Rule 76.07)
 - Usually the attorney requesting the levy will prepare the notice of levy and record it but not always

Execution & Sales

- Debtor has the right to elect which real property is to be levied upon if its sufficient to satisfy judgment (76.09)
- Debtor has the right to elect the order of sale by delivering to the sheriff a written statement of the election at least three days before the sale (Rule 76.12)
 - Statement must specify the desired order of the sale
 - Sheriff must proceed with sale according to the election

3rd Parties and Real Property

- There are no third party claim provisions for real property in the rules or statutes
 - A third party may file a motion to intervene in the lawsuit and seek a stay or to quash the execution (Rules 76.10 and 76.25)
- Purchasers of the property at the sale, purchase the property subject to any liens or interest that may appear in the chain of title
- If you think there may be an interested third party (or that the property may be exempt) notify the party seeking execution and seek advise of counsel or the court

Notice & Sale of Real Property

- ◉ Real property must be sold within 180 days after the return is filed just like in the case of personal property (Rule 76.04)
- ◉ Notice of sale of real property must be published in each county in which any of the land to be sold is located (Rule 76.16)
 - Must state the time and place of sale, what land is to be sold and where it is situated and the methods of payment approved by the creditor
 - Must be published at least once a week for 4 successive weeks and it must appear on the same day each week
 - Last publication cannot be more than one week prior to the sale date
 - Must be published by advertisement in some newspaper printed in the county if there is a regularly published weekly or daily paper
 - ◉ If such a newspaper doesn't exist then the court shall designate a paper

Notice to Owner of Land

- ◉ At least 30 days prior to the sale of the real property **the judgment creditor** must serve a notice of sale on the person whose land is levied upon by either personal service or by mailing a copy of the notice to the person's last known address (Rule 76.17)
 - Proof of service (acknowledgment of receipt, written return of service, affidavit or certificate of service from counsel) must be filed with the court

Sale of Real Property

- ◉ The method of sale is the same as with personal property except:
 - If real property can be divided the Sheriff shall divide the property and only sell the amount necessary to satisfy the execution
 - ◉ Unless property owner desires the whole of any tract or lot to be sold together
 - Sale must be held at the courthouse door designated in the notice of sale (Rule 76.15)
 - ◉ If land is in more than one county and the tracts are contiguous the sale shall be held in any county where any part of the land is located
 - ◉ If land is in more than one county and the tracts are separate the sale or sales must be held in the county or counties in which any of the land is located which the court designates

Transfer of Title in Real Property

- ◉ After payment is received from the highest bidder the Sheriff shall execute a Sheriff's Deed
 - Must contain the names of the parties to the execution
 - Must describe the time, place and manner of the sale
 - Must describe the property (legal description)
 - Must be acknowledged before the Circuit Court of the County in which the sale was held and the clerk of the court must endorse a certificate of acknowledgment or proof of execution under seal of the court on the deed

Executions & Sales

- ◉ RSMO 514.303 -All reasonable costs of the execution, with the exception of attorney's fees, may be collected
 - Moving expenses, insurance, storage charges, etc.
 - Must certify expenses as true and accurate in an affidavit filed with the court and provide the court with copies of all receipts
 - ◉ Court may award costs as it deems reasonable and necessary

Other types of Sales

- ◉ There are special types of sales the sheriff may be called upon to perform
 - Partition
 - Mechanic's Lien Sale
 - Receivership Sales
 - Sale of Mortgaged Property
 - Sale of Unclaimed Property in Criminal Investigations

Partition

- ◉ Partition – order to sale of either a part of the property or the whole property and a division of the proceeds between the original property owners (can be real property or personal property)
 - Order of sale issued by court will contain terms and place of sale but can't set the date
 - Sold in county where property is located; if land is contiguous and in multiple county it can be sold in any county where the land is located; if land is not contiguous then court orders sale location

Partition

- ◉ Notice must be published in each county where the land is located
 - Must contain time and place of sale and what land is being sold
 - Must provide 30 days notice of sale
 - Published in a daily or weekly paper designated by the plaintiff or their attorney unless there is not such a paper in the county then the court orders which paper the notice is published in

Partition

- ◉ May be sold in separate tracts or as a whole (or both) Rule 96.23
 - Use whichever is believed to bring best price
- ◉ Distribute proceeds as ordered by court after deduction for allowable expenses and costs (Rule 96.27 and 96.30)
 - If there are adverse claims on the proceeds, maintain the proceeds until the court resolves the issue (Rule 96.28)
- ◉ Execute and deliver a Sheriff's Deed (Rule 96.24)
- ◉ File a report with the court with a description of parcels sold, the name of purchasers and the sale price
 - Report must also contain a statement of all amounts received and all costs and expenses incurred in effecting the sale (Rule 96.26)

Mechanic's Lien

- Contractors, laborers, material men, etc. can file liens on property when they do work on the property and are not paid for the work
- Lien can be reduced to a judgment
- Property may be sold upon order of the court
 - Commonly referred to as a special execution or a writ of fieri facias
- Use the same procedures as a general execution and sale of real property

109

Receivership

- Sheriff may be appointed as a receiver
 - May be in conjunction with an attachment or execution
 - Automatically becomes receiver when account books, accounts, notes, bills, bonds, certificates of deposit and other evidences of debt are seized (RSMo 513.105 & 513.110)
- Receivers protect and preserve property in their keep according to the court order
 - Seek guidance of court or legal counsel with questions
- Sale of property may be part of receivership but only if ordered by court

110

Ejectment Proceedings

111

Ejectment

- There are a few different actions that lay persons will refer to as evictions
 - Forcible Entry and Unlawful Detainer
 - Rent and Possession
 - Usually involves rental property
 - Expedited Evictions
- A writ of restitution (sometimes called a writ of possession or an execution) may be ordered by the court for the purpose of removing people and their effects
 - Generally done peaceably or by reasonable force

Forcible Entry and Unlawful Detainer

- Court may order execution to occur no earlier than 10 days after the judgment
 - these actions are appealable and the appeal time frames and procedures will govern. 10 days after judgment is the time in which an application for appeal must be filed

Forcible Entry and Unlawful Detainer

- If a trial de novo or appeal is applied for it does not stay the execution unless a sufficient bond is posted with the court (RSMo 534.350)
 - Bond must be equal to judgment and conditioned on paying all accruing rent and to stay waste of the premise
 - If this occurs the execution may not occur until the case is disposed
 - In certain cases, such as absconder, the court may order execution to be carried out even though an appeal is pending (RSMo 534.360)

Forcible Entry and Unlawful Detainer

- Court may order the sheriff to deliver possession of the property to the petitioner within 15 days of the date of the judgment at the request of the petitioner (RSMo 534.355)
- RSMO 534.590 gives the sheriff the power to expel the defendant and others who have entered the property after the commencement of the action and deliver possession to the petitioner

115

Forcible Entry and Unlawful Detainer

- If the order does not command you to levy upon the property of the defendant to satisfy amounts due under judgment then under Missouri case law you must use ordinary care in making sure the defendant's property is not damaged or broken
 - If property is to be levied on then you have to provide notice of exemptions
- Defendant's property must be moved off the property described in the order but cannot be placed on anyone else's property

116

Forcible Entry and Unlawful Detainer

- If the defendant has been provided notice of the judgment and the order of execution and fails to remove his property then the property is deemed abandoned and can't complain about what happens to the property
 - If in doubt you can put the property in storage and have the fees taxed as costs (RSMo 57.280)
 - Good idea to conspicuously post the writ if defendant isn't present and secure premise until petitioner can take possession
- Execution must occur and return made within 20 days of the issuance of the writ

117

Rent and Possession

- The procedures used in serving a writ of execution in a rent and possession action are essentially the same as those used in Forcible Entry and Unlawful Detainer actions
 - Biggest distinction is that the execution and return must occur within five days after the sheriff receives the execution

Expedited Eviction

- Contained in RSMo 441.710 et seq.
- Can be brought by a landlord or prosecuting attorney for jurisdiction where property is located
- Hearing is to be held as soon as practicable but in no case later than 15 days following service of summons
 - Continuances and stays no allowed except for "compelling and extraordinary reasons"

Expedited Evictions

- Court orders immediate eviction if it finds:
 - (Sec. 1) Emergency situation where dispossession by other means would imminently cause
 - Physical injury to other tenants or the lessor; or
 - Physical damage to lessor's property and reasonable costs of repair exceed 12 months rent
 - Drug related criminal activity has occurred on or within leased property
 - Property is being used to further, promote, aid or assist in drug related criminal activity

Expedited Eviction

- The tenant or a member of their household or guest has engaged in drug related criminal activity within or in the immediate vicinity of the leased property
- Tenant has given permission to someone who is barred from property to enter or remain on the property
- Tenant failed to notify landlord that a barred party has returned, entered or remained on the property

121

Expedited Evictions

- If court grants eviction under subsection 1 of 441.740, the tenant has 24 hours to vacate the premises after which the landlord can reenter and take possession of the premises
- If court grants eviction under subsection 2 of 441.740, those persons found to be engaging in the criminal activity are immediately removed and barred from the property but the tenancy is not terminated
- The court may order the expedited execution of an eviction or removal order by requiring the order's enforcement by the appropriate agency within a specified number of days after final judgment.
- The court may stay execution of an eviction or removal order for a reasonable length of time if the moving party establishes by clear and convincing evidence that immediate removal or eviction would pose a serious danger to the party and that this danger outweighs the safety, health and well-being of the surrounding community and of the plaintiff.

122

Other Ejectment Writs

- Under RSMo 511.290 and RSMo 524.260 courts may issue writs of possession/restitution/execution in other proceedings for ejectment
 - Usually seen when the property involved is not rental property
 - Generally the same procedures as those used with rental properties are followed
 - Execute the order and file return as directed by the court in the order

123

Immunity Laws

- ◉ RSMo 57.095 provides that "Notwithstanding the provisions of section 537.600 to the contrary, sheriffs or any other law enforcement officers shall have immunity from any liability, civil or criminal, while conducting service of process at the direction of any court to the extent that the officers' actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known."
 - Not a complete bar to suit
 - Similar to qualified immunity
- ◉ RSMo 441.870 provides that any person or organization that institutes or participates in an action brought pursuant to sections 441.710 to 441.880 shall be immune from civil liability for actions performed in good faith and in the furtherance of the cause of action.

124

Questions?

125
