

# Memorandum

**TO:** Senator Simmons

**FROM:** Barbara J. Riesberg and, Diane N. Wells

**DATE:** March 31, 2014

**RE:** Proposed amendments to §56.29

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We discussed the proposed amendments to §56.29 with members of the proceedings supplementary task force. Based upon the discussion, the December 2012, Florida Bar Journal article authored by Benjamin J. Brodsky and additional analysis, we address the proposed amendments below.

The Brodsky Article is an excellent starting point to frame the issues as it sets out the purpose of the proceedings supplementary statute. As explained by Mr. Brodsky:

The statutory procedure was designed to avoid a step required by a creditor's bill, that the judgment creditor initiate an entirely separate action. As explained by the Florida Supreme Court, "[t]hese statutes intended to empower the court to follow through with the enforcement of its judgment, so that there would be no necessity for an independent suit to reach property which legally should be applied to the satisfaction of the judgment.<sup>4</sup>

Since its inception, the proceedings supplementary statute has given circuit courts "broad discretionary powers" to subject any and all property, or property rights of any defendant in execution, however fraudulently conveyed, covered up, or concealed the same might be, whether in the name or possession of third parties or not, to the satisfaction of an execution outstanding against him.<sup>5</sup>

Brodsky Article, p.2.

Case law cited both in the Brodsky Article and elsewhere explains that a proceeding supplementary action eliminates the need for a separate proceeding, but nothing else. The action is an ancillary lawsuit connected to the original action. Accordingly, the creditor must still plead

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<sup>4</sup> / *Virginia-Carolina Chemical Corp. v. Smith*, 164 So. 717, 719 (1935) (quoting *Florida Guaranteed Sec. v. McAllister*, 47 F.2d 762, 765 (S.D. Fla. 1931)); see also *Regent Bank v. Woodcox*, 636 so. 2d 885, 886 (Fla. 4<sup>th</sup> DCA 1994).

<sup>5</sup> / *State v. Viney*, 120 Fla. 657, 663, 163 So. 57, 60 (1935).

its claims, prove its causes of action, and obtain jurisdiction over third parties consistent with due process requirements. Florida Statute 56.29 does not in and of itself create a statutory cause of action.

**A. PROPOSED AMENDMENTS TO § 56.29(1)**

We take no issue with the proposed language.

**B. PROPOSED AMENDMENTS TO §§ 56.29(5) and (6)(b)**

The proposed amendment suggests the following changes to subsections (5) and (6)(b), which concern causes of action under Florida Statute chapter 726:

(5) The ~~court judge~~ may order any property of the judgment debtor, not exempt from execution, in the hands of any person, or any property, debt, or other obligation due to the judgment debtor, to be applied toward the satisfaction of the judgment debt. The court may enter a money judgment against any initial or subsequent transferee of the property irrespective of whether the transferee has retained the property.

(6) ....

(b) When any gift, transfer, assignment or other conveyance of personal property has been made or contrived by defendant to delay, hinder or defraud creditors, the court shall order the gift, transfer, assignment or other conveyance to be void and direct the sheriff to take the property to satisfy the execution, enter a money judgment against the defendant, irrespective of whether such defendant still retains the property, and enter such other orders in accordance with this section or Chapter 726 as are just and proper in order to effectuate the purposes of this section. This does not authorize seizure of property exempted from levy and sale under execution or property which has passed to a bona fide purchaser for value and without notice. Any person aggrieved by the levy may proceed under ss. 56.16-56.20.

Protecting rights of third parties is necessary for consistency with fundamental principles of due process. *See Tomayko v. Thomas*, 143 So. 2d 227, 229 (Fla. 3d DCA 1962) (“In each case where such proceedings are followed, the rights of third parties may not be adjudicated unless such third parties have been first fully impleaded and as parties given an opportunity to adequately present their defenses, since these statutes must be enforced so as to afford due process.”) The amendment language references Chapter 726 and seems to incorporate parts, but not all provisions of that Chapter. It does not clearly require a creditor prove its claims under Chapter 726, or that a transferee has all of the rights, claims and defenses provided by Chapter 726, if the action is brought within a proceedings supplementary action. If the goal is to make this point clear, then we suggest the changes to Subsections (5) and (6) should simply state that a creditor can bring a claim under Chapter 726 in a proceeding supplementary, that the court has

the authority to enter any orders or judgment authorized under Chapter 726 in a proceeding supplementary, and that the debtor and any third party impleaded in the supplementary proceeding has all rights and defenses afforded to it by Chapter 726 and the Rules of Civil Procedure.

Florida Statute § 222.30 is an example of current legislation that incorporates Chapter 726. In this statute, “conversion” of the debtor’s property is the focus. Differently than a claim made under Florida Statute §56.29 – which is a statute in aid of execution on the debtor’s property, Florida Statute § 222.30 provides a statutory cause of action for fraudulent conversion. The point of referencing Florida Statute § 222.30 here is as an example to show how Chapter 726 was referenced, with some safeguards intact. See the highlighted language below:

222.30 Fraudulent asset conversions.—

(1) As used in this section, “conversion” means every mode, direct or indirect, absolute or conditional, of changing or disposing of an asset, such that the products or proceeds of the asset become immune or exempt by law from claims of creditors of the debtor and the products or proceeds of the asset remain property of the debtor. **The definitions of chapter 726 apply to this section unless the application of a definition would be unreasonable.**

(2) Any conversion by a debtor of an asset that results in the proceeds of the asset becoming exempt by law from the claims of a creditor of the debtor is a fraudulent asset conversion as to the creditor, whether the creditor’s claim to the asset arose before or after the conversion of the asset, if the debtor made the conversion with the intent to hinder, delay, or defraud the creditor.

(3) In an action for relief against a fraudulent asset conversion, a creditor may obtain:

(a) Avoidance of the fraudulent asset conversion to the extent necessary to satisfy the creditor’s claim.

(b) An attachment or other provisional remedy against the asset converted in accordance with applicable law.

(c) **Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:**

1. An injunction against further conversion by the debtor of the asset or of other property.

2. Any other relief the circumstances may require.

(4) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset converted or its proceeds.

(5) A cause of action with respect to a fraudulent asset conversion is extinguished unless an action is brought within 4 years after the fraudulent asset conversion was made.

(6) **If an asset is converted and the converted asset is subsequently transferred to a third party, the provisions of chapter 726 apply to the transfer to the third party.**

Furthermore, adding language to subsection (5) without addressing the due process concerns will only create more problems not less, as some parties seek to take advantage of the statute. This sounds good for creditors, but could instead cause more expense and time for the judgment creditor and may increase suits against non-judgment creditors, such as third-party lenders which entered into financial arrangements with potential debtors and will now be made proceeding supplementary defendants.

Moreover, those defendants will be defending themselves without having gone through a trial and being sued with all of the procedural due process protections of the Rules of Civil Procedure, where a plaintiff's complaint could be tested at motions to dismiss, motions for judgment on the pleadings, and summary judgment, not to mention a trial.

Finally, the proposed amendment to (6)(b) will create confusion with the addition of the language referencing Chapter 726. The issue of whether a money judgment could be entered because a "defendant" has come into possession of property, begs all of the concerns set forth above.

### **C. PROPOSED AMENDMENTS TO § 56.29(9)**

Current Proceeding Supplementary law provides for damages limited to the value of the property transferred, plus 20% of the value of the property if the transfer was made to hinder or delay creditors. (Ch. 56.18 and 56.19). The proposed modifications would need to be harmonized with existing law (or the conflicting provisions need to be repealed).

(9) The court may enter any orders, judgments, or writs required to carry out the purpose of this section, including those orders necessary or proper to subject property or property rights of any defendant to execution, and including entry of money judgments against any defendant.

Additionally, the proposed legislation creates unintended consequences by expanding the scope of claims against third parties to "any property, debt or obligation" due from the third party to the debtor to be used to satisfy the obligation. This change should include language to

avoid conflict with rights provided to debtors and third parties under garnishment, attachment and replevin statutes (Chapters 76, 77 and 78).

Harmonization can be accomplished by adding language following the end of subsection (9): “consistent with ss. 56.18 and 56.19 and Chapters 76, 77 and 78.”

**D. PROCEEDINGS SUPPLEMENTARY TASK FORCE MISSION STATEMENT AND GENERAL COMMENTS**

The Task Force mission statement is:

**To identify practical, legal and constitutional issues implicated in proceedings supplementary, levy and execution under relevant Florida Statutes, analyze any tensions between the issues and proceed with appropriate recommendations for best practices and/or statutory amendment.**

The Task Force is proceeding in a deliberate fashion to ensure consistency with existing Florida Statutes and settled interpretive decisional law while modernizing and clarifying proceedings supplementary. Fundamental due process is of significant concern as is statutory clarity. Accordingly, the group is engaging in a comprehensive in-depth analysis.

The proposed amendments conflate Chapter 726 with s. 56.29 and do not maintain the original purpose of proceedings supplementary as an ancillary proceeding to reach property that rightfully belongs to the debtor..

A proceeding supplementary is an aid to execution, to levy on property of the debtor fraudulently conveyed to a non-party or titled in a non-party’s name. In a proceeding supplementary, the court determines whether specific property of the judgment debtor in the hands of a third party is subject to execution by the judgment creditor.

In contrast, Chapter 726 provides distinct, de novo causes of action, to determine if a transferee has received a fraudulent conveyance as defined under Chapter 726. Chapter 726 is designed to focus on the actions of the transferor or the effect of the transfer on the transferor and to adjudicate those claims in a new proceeding, providing the full measure of due process rights, such as a summons, motion practice, and a trial by jury, along with the full measure of damages, including damages for the wrongful transfer, but without affording a windfall and protecting a third party’s rights as well.