

2004

Kitches and Zorn v. Yong Woo Kim : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KITCHES & ZORN, L.L.C., a limited
liability company and ERIKA E. ZORN
and RANDY L. ZORN, dba ERZ
PARTNERSHIP

Plaintiffs/Appellants,

Vs.

YONG WOO KIM; YONG HWAN
KIM aka KIM YONG HWAN; and SAK
KWI SUK aka KWI SUK KIM,

Defendants/Appellee.

Appellate Case No. 20040526 - CA

BRIEF OF APPELLEE

**Appeal from the Final Order of the Second Judicial District Court
of Davis County, State of Utah
The Honorable Rodney S. Page, District Court Judge**

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LIST OF PARTIES

The parties to this appeal proceeding are:

Plaintiff/Appellant: Kitches & Zorn, L.L.C., and Erika E. Zorn and Randy L. Zorn dba ERZ Partnership. Collectively these parties are referred to as “Kitches & Zorn, L.L.C.” or “Plaintiffs.”

Defendant/Appellee: Yong Woo Kim referred to as “Defendant”. The remaining defendants Yong Hwan Kim aka Kim Yong Hwan and Sak Kwi Suk aka Kwi Suk Kim are not parties to this proceeding.

TABLE OF CONTENTS

LIST OF PARTIES	i
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
ISSUES	1
CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
CONCLUSION	15
ADDENDUM	

TABLE OF AUTHORITIES

CASES

<u>Anglin v. Contracting Fabrication Machining, Inc.</u> , 2001 UT App 341, P4, 37 P.3d 267.	2
<u>Blackner v. State Dep’t of Transp.</u> , 2002 UT 44, P12, 48 P.3d 949	13
<u>Dick Simon Trucking, Inc. v. Utah St. Tax Comm.</u> , 2004 UT 11, 84 P3d 1197	14
<u>Hercules, Inc. v. Utah State Tax Comm’n</u> , 2000 UT App 372, P9, 21 P.3d 231.	2
<u>Lorenzo v. Workforce Appeals Bd.</u> , 2002 UT App 371, P11, 58 P.3d 873.	14
<u>Lyon v. Burton</u> , 2000 UT 19, P17, 5 P.3d 616.	13
<u>Morton Int’l, Inc., v. Auditing Div.</u> , 814 P.2d 581, 590 (Utah 1991).	14
<u>O’Keefe v. Retirement Bd.</u> , 956 P.2d 279, 281 (Utah 1998)	2, 14
<u>Osuala v. Aetna Life & Cas.</u> , 608 P.2d 242, 243 (Utah 1980)	14
<u>Roberts v. Erickson</u> , 851 P.2d 643, 644 (Utah 1993)	13
<u>Silver v. Auditing Div.</u> , 820 P.2d 912, 914 (Utah 1991)	13
<u>State v. Burns</u> , 2000 UT 56, P15, 4 P.3d 795.	1
<u>State v. Larsen</u> , 865 P.2d 1355, 1357 (Utah 1993).	1, 2, 14
<u>State v. Lusk</u> , 2001 UT 102, P11, 37 P.3d 1103.	1
<u>State v. Petersen</u> , 810 P.2d 421, 424 (Utah 1991).	1
<u>State v. Pixton</u> , 2004 UT App 275, P5, 506 Utah Adv. Rep. 31.	14
<u>State v. Schofield</u> , 2002 UT 132, P5, 63 P.3d 667	13

<u>State v. Tooele County</u> , 2002 UT 8, P10, 44 P.3d 680.	14
<u>State Dep’t of Natural Res. V. Huntington-Cleveland Irrigation Co.</u> , 2002 UT 75, 13, 52 P.3d 1257	13
<u>Wilson Supply, Inc., v. Fradan Mfg. Corp.</u> , 2002 UT 94, P14, 54 P.3d 1177	13
<u>Zoll & Branch, P.C. v. Asay</u> , 932 P.2d 592, 594 (Utah 1997)	14

STATUTES and RULES

Utah Rules of Civil Procedure 69	2, 11, 12, 15
Utah Code Ann. § 78-2a-3(2)(j)	1, 2
Utah Code Ann. § 78-22-1	2, 9, 12, 13, 15
Utah Code Ann. § 78-22-1.5	1, 2, 5, 6, 7, 8, 9, 10, 12, 13, 15

JURISDICTIONAL STATEMENT

This court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

ISSUES

1. Whether or not Utah Code Ann. § 78-22-1.5 requires a judgment creditor to file both its abstract of judgment in the Registry of Judgments in the county where the defendant's real property is located and record the abstract of judgment at the office of the County Recorder in order to perfect a judgment lien against a defendant's real property. *(Issue preserved in Record ("R.") at 54-106 and Transcript of 2/17/2004 hearing ("Tr.") at pgs. 7-11.)*

Standard of Review: At issue is statutory interpretation that is a question of law reviewed on appeal for correctness. State v. Lusk, 2001 UT 102, P11, 37 P.3d 1103; State v. Burns, 2000 UT 56, P15, 4 P.3d 795; State v. Larsen, 865 P.2d 1355, 1357 (Utah 1993); State v. Petersen, 810 P.2d 421, 424 (Utah 1991).

2. Whether or not the requirements of Utah Code Ann. § 78-22-1.5 are unambiguous thus negating the need to look to legislative history and intent for interpretation of the statutory language. *(Issue preserved in Record ("R.") at 54-106 and Transcript of 2/17/2004 hearing ("Tr.") at pgs. 7-11.)*

Standard of Review: The rule of statutory construction is that unambiguous statutory language is construed according to the statute's plain language and resort to other methods of statutory interpretation is only necessary if the language is ambiguous. Anglin v. Contracting Fabrication Machining, Inc., 2001 UT App 341, P4, 37 P.3d 267; Hercules, Inc. v. Utah State Tax Comm'n, 2000 UT App 372, P9, 21 P.3d 231; O'Keefe v. Retirement Bd., 956 P.2d 279, 281 (Utah 1998); State v. Larsen 865 P.2d 1355, 1357 (Utah 1993).

**CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES AND REGULATIONS**

Utah Rules of Civil Procedure 69 – full text set forth in Appellee's Brief Addendum

Utah Code Ann. § 78-2a-3(2)(j)

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(j) cases transferred to the Court of Appeals from the Supreme Court.

Utah Code Ann. § 78-22-1 – full text set forth in Appellants' Brief Addendum

Utah Code Ann. § 78-22-1.5 – full text set forth in Appellants' Brief Addendum

STATEMENT OF THE CASE

This dispute arose when plaintiffs, after obtaining a judgment against defendant in Third District Court on March 17, 2003, attempted to execute upon real property previously owned by defendant in Bountiful, Davis County. Utah Code Ann. § 78-22-1.5 requires a judgment to be recorded in both the Judgment Registry in the district court in the county in which the property is located and in the office of the County Recorder in the county in which the property is located. Both steps are required in order to perfect a judgment lien. By the time plaintiff completed both steps on July 29, 2003, defendant no longer had any interest in the Bountiful real property. Upon defendant's challenge to plaintiffs' Writ of Execution served upon him on December 5, 2003, the trial court determined that plaintiff's failure to perfect its judgment lien by complying with both steps of Utah Code Ann. § 78-22-1.5 precluded execution upon the real property and thereby granted defendant's Motion to Quash plaintiffs' Writ of Execution. Plaintiff has appealed from the trial court's decision to grant defendant's Motion to Quash.

STATEMENT OF FACTS

1. Plaintiffs obtained a judgment against defendant, Yong Woo Kim, (hereinafter "defendant") in the Third District Court, Salt Lake County, State of Utah, on March 17, 2003. (*R. at 1-2 and 109*)

2. During this time, the defendant was having marital problems and had agreed to refinance his family residence at 1106 East 400 North, Bountiful, Utah using his creditworthiness only. Mr. Kim agreed his interest in the home would be quitclaimed to his wife, Hye Ok Kim so that if necessary the home could be used by her and their children in the event of a divorce. To that extent Mrs. Kim obtained a loan that was used to pay the current mortgage obligation on the property. *(R. at 109)*

3. The home was refinanced and a new Deed of Trust recorded in the name of Yong Woo Kim on April 16, 2003. *(R. at 110)*

4. On May 9, 2003, the plaintiff recorded their judgment against the defendant in the office of the Davis County Recorder. *(R. at 110)*

5. On May 12, 2003, Yong Woo Kim executed a Quit Claim Deed quitclaiming his interest in the property to that of his wife, Hye Ok Kim. The deed was recorded on May 19, 2003, and then recorded again on June 13, 2003. *(R. at 110)*

6. On July 29, 2003, the plaintiff filed a copy of the judgment obtained in Third District Court and an abstract of the judgment along with the debtor information sheet with the clerk of the Second District Court in Davis County. *(R. at 110)*

7. On December 5, 2003, defendant was served with a Writ of Execution filed by plaintiff seeking to execute on the real property located at 1106 East 400 North, Bountiful, Utah. *(R. at 26)*

8. On February 17, 2004, in the Second District Court, the Honorable Rodney S. Page heard defendant's Motion to Quash the Writ of Execution. At the conclusion of the hearing, the Court specifically found that the statutory language of Utah Code Ann. § 78-22-1.5 was not ambiguous and required a two-step process in order to perfect a judgment lien. The Court further concluded that plaintiffs' judgment against defendant recorded in the Davis County Recorder's Office on May 9, 2003, did not create a judgment lien upon the property that had been quitclaimed to Mrs. Hye Ok Kim because plaintiffs had failed to comply with both statutory requirements for attachment of a judgment in that plaintiffs failed to record the judgment in the Judgment Registry in the Second District Court until July 29, 2003. Based upon its decision the Court refused to consider affidavits and other evidence submitted by plaintiffs regarding the legislative history. *(R. at 117-121) and (Tr. at pg. 6 lines 14-25 and pg. 7 lines 1 through 21 and pg. 8 lines 6 through 10 and pg. 10 lines 17 through 22)*

SUMMARY OF ARGUMENT

The issue on appeal is whether or not the trial court correctly interpreted the requirements of Utah Code Ann. § 78-22-1.5. The statute is clear and unambiguous in its requirement that in order to maintain a judgment lien upon the real property of a judgment debtor in a county other than that in which the judgment was rendered, Utah law requires a two-step procedure. The judgment must be filed and docketed with the

clerk of the district court in the county in which the defendant has real property and the judgment or an abstract thereof must be recorded with the office of the County Recorder in the county in which the real property is located. Until both of these steps have taken place, a judgment creditor is unable to execute upon the real property of a judgment debtor.

Pursuant to the facts of this case, plaintiff completed one step, recording the judgment in the office of the County Recorder, prior to the time defendant quitclaimed his property interest to his wife. By the time plaintiff completed the second step, that of docketing the judgment in the office of the clerk of the district court, defendant possessed no interest in the real property in question. Thus, plaintiffs' Writ of Execution was properly quashed by the district court for plaintiffs' failure to perfect its judgment lien.

ARGUMENT

The district court specifically held that Utah Code Ann. § 78-22-1.5, requires a two-step procedure in order to create a judgment lien. The court came to this conclusion based upon a reading of the statute and application of the plain meaning of the statute. The district court's interpretation was correct and when applied to the facts of this case precluded plaintiffs' from executing on defendant's real property pursuant to its Writ of Execution.

The relevant portions of Utah Code Ann. § 78-22-1.5 are as follows:

- (2) On or after July 1, 1997, a judgment entered in a district court **does not create a lien upon or effect the title to real property unless the judgment is filed in the Registry of Judgments** in the office of the clerk of the district court **of the county in which the property is located.**
- (3) (a) On or after July 1, 2002, except as provided in Subsection (3)(b), **a judgment entered in a district court does not create a lien upon or affect the title to real property unless the judgment or an abstract of judgment is recorded in the office of the county recorder in which the real property of the judgment debtor is located.**
 - (b) State agencies are exempt from the recording requirement of Subsection (3)(a).

(Emphasis added.)

The statute's requirements are clear and unambiguous. A valid judgment lien cannot be created until the judgment or abstract is recorded in the Judgment Registry and the office of the County Recorder in the county in which the real property is located. The statute clearly sets forth the requirement that for judgments entered on or after July 1, 1997, the judgment must be filed in the Judgment Registry. Further a judgment entered on or after July 1, 2002, must also be recorded in the office of the County Recorder. There is no ambiguity in the statute, nor any exclusionary language that would indicate that a judgment creditor has the option to choose one requirement or the other. A plain reading of the statute does not indicate that judgments entered after July 1, 2002, are

required only to be recorded with the County Recorder. When the Legislature amended this section in 2001, if it had intended this interpretation, it could have stated so very easily. For example, subsection (2) could have been amended to state, “On or after July 1, 1997 and before July 1, 2002 . . .” or subsection (3) could have been amended to state that the only requirement to create a judgment lien for judgments entered after July 1, 2002, is to record the judgment in the County Recorder’s office in the county in which the real property is located.

In addition, an examination of the Amendment Notes to this statute states,

“The 2001 amendment by ch. 370, effective July 1, 2002, rewrote the section to require recording the judgment or abstract of judgment with the county recorder and to further specify the requirements for the separate information statement.”¹

There is nothing in the statute or the amendment notes to indicate that the requirement that the judgment be entered in the Judgment Registry is no longer necessary. It is also interesting to note that the Legislature found that if abstracts were no longer filed with the court there could be a potential loss of revenue to the General Fund in the amount of \$103,800. See Fiscal Notes for HB0305s3 and HB0305, Gen. Sess., (Utah 2001).²

Thus without any ambiguity in the requirements of Utah Code Ann. § 78-22-1.5

¹ See Utah Code Ann. § 78-22-1.5 as set forth in Addendum to Appellant’s Brief.

² See R. at 98-99.

and no exclusionary language to indicate that the Legislature had any other meaning in mind than what is plainly expressed, the trial court correctly concluded that the statute requires a two-step process for the creation of a valid judgment lien.

The plaintiffs have argued that the controlling statute in this matter is Utah Code Ann. § 78-22-1. This is a general statute regarding judgments and does not make the distinction as to how to perfect a judgment lien upon real property located in a county other than that located in the county in which the judgment was entered. Subsection (7) (a) (i) and (ii), that plaintiffs are basing their argument upon, could be and should be read to apply only to judgments entered in the same county as that of the judgment debtor's real property. Whereas Utah Code Ann. § 78-22-1.5 is very specific and unambiguous as to the requirements to perfect a judgment lien upon a judgment debtor's real property located in a county other than where the judgment was entered. In the case before this Court, the plaintiffs' obtained a judgment in Salt Lake County. If defendant had owned real property in Salt Lake County, the only other requirement for the plaintiffs would be to record the judgment in the Salt Lake County Recorder's Office. This is true because the judgment would have already been entered into the Judgment Registry for the district court in Salt Lake County. However, defendant's real property was located in Davis County. Recording the judgment only with the Davis County Recorder would not have

resulted in notice of the judgment in the Judgment Registry for the district court in Davis County.

Therefore, until both subsections (2) and (3)(a) of Utah Code Ann. § 78-22-1.5 are complied with, a judgment creditor cannot create a lien upon or affect the title to real property. It is also interesting to note that the first line of Utah Code Ann. § 78-22-1.5 Subsection (4) indicates that both subsections (2) and (3)(a) are necessary for the creation of a judgment lien when it states, “In addition to the requirements of Subsections (2) and (3)(a) . . .”

Applying the facts of this matter, there is no dispute that plaintiffs recorded their judgment in the Davis County Recorder’s Office on May 9, 2003 pursuant to subsection (3) and docketed the judgment in Davis County until July 29, 2003, pursuant to subsection (2). Also there is no dispute that the defendant had no interest in the property after June 13, 2003. The plaintiffs complied with both requirements of the statute on July 29, 2003, when the abstract of judgment was filed in the Registry of Judgments in the Second District Court. At that time plaintiffs had a statutorily valid lien except that defendant did not own any property in Davis County and had no interest in the property at 1106 East 400 North, Bountiful, Utah, that plaintiffs could execute upon.

Further support for defendant’s position is found in the nature and effectiveness of judgment liens upon a debtor’s real property. This type of lien is only effective in

enforcing a judgment creditor's claim upon real property in two instances. First, when a judgment debtor attempts to sell the real property encumbered by a valid judgment lien, he must pay the judgment lien creditor, as well as other obligations on the property, in order to transfer a clear title to the buyer. Second when the judgment creditor attempts to execute upon its lien through a writ of execution. However, it is possible that a judgment debtor may decide never to sell his real property. He may continue to utilize the property and pay any superior liens and obligations on that property. In such a case the only option for a judgment creditor to obtain the property and/or satisfy its judgment is to execute upon the property with a writ of execution. Thus, at some point, a judgment creditor will most likely have to resort to a writ of execution to satisfy its judgment. The requirements for a writ of execution are found at Utah Rules of Civil Procedure, Rule 69. This Rule provides the procedures for issuance of a writ of execution and states in relevant part:

(A) Issuance of a writ of execution. Unless otherwise ordered by the Court, a writ of execution may be issued at any time within eight years following the entry of a judgment or order . . . either in the county in which such judgment was rendered, or in any county in which a transcript thereof has been **filed and docketed in the office of the clerk of the district court**

...

(B) Contents of writ and to whom it may be directed . . . It shall be issued to the sheriff of the county where the real property or some part thereof is situated . . . It must intelligibly refer to the judgment, stating the court, **the docket number, the county where the same is entered or docketed**, the names of the parties, the judgment, and if it is for the

payment of money, the amount thereof, and the amount actually due thereon.

(Emphasis added).

It is clear from Rule 69 that before a writ of execution can be issued, a copy of the judgment or abstract must be filed and docketed in the office of the clerk of the district court in the county where the property is located because the contents of the writ must refer to the docketing information in the district court. If the judgment is never docketed in the county in which the real property is located, then the writ of execution cannot contain the required information for issuance.

Plaintiffs' position is that the general requirements of Utah Code Ann. § 78-22-1 are all that is required for a valid judgment lien. Yet this position fails to account for the specific requirements of Utah Code Ann. § 78-22-1.5 and Rule 69. Plaintiffs have made no attempt to coordinate the plain meaning of these interrelated statutes and rules. On the other hand, defendant's position is that the statutes discussed require both steps to be completed in order to create a lien on a judgment debtor's real property. Until both steps are completed there is no enforceable judgment lien that can attach to real property. By the time plaintiff completed the second step, defendant owned no property in Davis County. Thus, defendant's position is that the specific requirements of Utah Code Ann. § 78-22-1.5 and Rule 69 of the Utah Rules of Civil Procedure is the position supported by the district court and should be upheld by this Court.

Plaintiffs have offered no reasonable explanation as to why they are not required to comply with the clear requirements of this statute. Rather plaintiffs have proposed that because Utah Code Ann. § 78-22-1 does not include such a requirement that is all that needs to be considered. Yet they have offered no explanation as to why the requirements of § 78-22-1.5 do not apply to them. Plaintiffs' position appears to be that a general statute supersedes a more specific related statute and rule specifically directed to the facts at issue herein.

This Court has often been asked to interpret statutory meaning and has set forth several guidelines for doing so.

“When interpreting statutes, we determine the statute’s meaning by first looking to the statute’s plain language, and give effect to the plain language unless the language is ambiguous.” State v. Schofield, 2002 UT 132, P5, 63 P.3d 667; Wilson Supply, Inc., v. Fradan Mfg. Corp., 2002 UT 94, P14, 54 P.3d 1177 (quoting Blackner v. State Dep’t of Transp., 2002 UT 44, P12, 48 P.3d 949); see also State Dep’t of Natural Res. V. Huntington-Cleveland Irrigation Co., 2002 UT 75, 13, 52 P.3d 1257. Furthermore, the “plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and ‘with other statutes under the same and related chapters.’” Lyon v. Burton, 2000 UT 19, P17, 5 P.3d 616 (quoting Roberts v. Erickson, 851 P.2d 643, 644 (Utah 1993) (per curiam) see also Silver v. Auditing Div.,

820 P.2d 912, 914 (Utah 1991); Osuala v. Aetna Life & Cas., 608 P.2d 242, 243 (Utah 1980.)

“A fundamental rule of statutory construction is that statutes are to be construed according to their plain language.” State v. Pixton, 2004 UT App 275, P5, 506 Utah Adv. Rep. 31 quoting O’Keefe, 956 P.2d at 281; Larsen, 865 P.2d at 1357; see also Dick Simon Trucking, Inc. v. Utah St. Tax Comm., 2004 UT 11, 84 P3d 1197.

“Only if the language of a statute is ambiguous do we resort to other modes of construction.” O’Keefe 956 P.2d at 281. “Further ‘unambiguous language . . . may not be interpreted to contradict its plain meaning.’” Lorenzo v. Workforce Appeals Bd., 2002 UT App 371, P11, 58 P.3d 873 (quoting Zoll & Branch, P.C. v. Asay, 932 P.2d 592, 594 (Utah 1997)) “A corollary of this rule is that ‘a statutory term should be interpreted and applied according to its usually accepted meaning, where the ordinary meaning of the term results in an application that is neither unreasonable confused, inoperable, nor in blatant contradiction of the express purpose of the statute.’” O’Keefe, 956 P.2d at 281 (quoting Morton Int’l, Inc., v. Auditing Div., 814 P.2d 581, 590 (Utah 1991); see also State v. Tooele County, 2002 UT 8, P10, 44 P.3d 680.


From the foregoing case law it is clear that this Court has addressed this issue on a number of occasions and has stated the status of Utah law on this subject in numerous ways. There is no question that in Utah an unambiguous statute is to be interpreted

according to its plain meaning and in such a way so as not to contradict or render inoperable other related statutes. Both plaintiffs and defendant agree that the terms of the governing statutes are not ambiguous thus there is no need to look to other modes of construction or legislative intent. The district court found that the provisions of Utah Code Ann. § 78-22-1.5 were not ambiguous, but clearly required a two-step procedure to perfect a judgment lien. Accordingly, based upon the foregoing, defendant would urge this Court to apply the specific and unambiguous requirements of the relevant statutes, Utah Code Ann. §§ 78-22-1.5 and 78-22-1 as well as Rule 69 of the Utah Rules of Civil Procedure to the issue before it and uphold the district court's determination that plaintiffs did not possess a valid judgment lien until July 29, 2003.

CONCLUSION

Based upon the foregoing, defendant requests that this Court uphold the trial court's interpretation of Utah Code Ann. § 78-22-1.5 and its decision to quash plaintiffs' Writ of Execution for failure to comply with the judgment lien requirements therein.


DATED this 30th day of September, 2004.


SUSAN C. NOYCE
Attorney for Appellee/Defendant

CERTIFICATE OF SERVICE

I SUSAN C. NOYCE, certify that on October 1, 2004, I served a copy of the **attached BRIEF OF THE APPELLEE** upon Robert Stevens, the counsel for the appellant in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

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**SUSAN C. NOYCE
Attorney for Appellee/Defendant**

ADDENDUM

Rule 69. Execution and proceedings supplemental thereto.

(a) **Availability of writ of execution.** A writ of execution is available to a judgment creditor to satisfy a judgment or other order requiring the delivery of property or the payment of money by a judgment debtor.

(b) **Property subject to execution.** A writ of execution may be used to levy upon all of the judgment debtor's personal property and real property which is not exempt from execution under state or federal law.

(c) **Issuance of writ of execution.** Unless otherwise ordered by the court, a writ of execution may be issued at any time within eight years following the entry of a judgment or order (except an execution may be stayed pursuant to Rule 62), either in the county in which such judgment was rendered, or in any county in which a transcript thereof has been filed and docketed in the office of the clerk of the district court. **Notwithstanding the death of a party after judgment,** execution thereon may be issued, or such judgment may be enforced, as follows:

(1) In case of the death of the judgment creditor, upon the application of an authorized executor or administrator, or successor in interest.

(2) In case of the death of the judgment debtor, if the judgment is for the recovery of real or personal property or the enforcement of a lien thereon.

(d) **Contents of writ and to whom it may be directed.** The writ of execution shall be issued in the name of the State of Utah, and subscribed by the clerk of the court. It shall be issued to the sheriff or constable of any county in the state (and may be issued at the same time to different counties) but where it requires the delivery of possession or sale of real property, it shall be issued to the sheriff of the county where the real property or some part thereof is situated. If it requires delivery of possession or sale of personal property, it may be issued to a constable. It must intelligibly refer to the judgment, stating the court, the docket number, the county where the same is entered or docketed, the names of the parties, the judgment, and, if it is for the payment of money, the amount thereof, and the amount actually due thereon. The writ may be accompanied by a praecipe executed by the judgment creditor or the judgment creditor's counsel generally or specifically describing the real or personal property to be levied upon. It shall be directed to the sheriff of the county in which it is to be executed in cases involving real property, and shall require the officer to proceed in accordance with the terms of the writ; provided that if such writ is against the property of the judgment debtor generally it may direct the sheriff or constable to satisfy the judgment, with interest, out of the non-exempt personal property of the debtor, and if sufficient non-exempt personal property cannot be found, then the sheriff shall satisfy the judgment, with interest, out of the judgment debtor's non-exempt real property.

(e) **When writ to be returned.** The writ of execution shall be served at any time within sixty days after its receipt by the officer. It shall then be returned to the court from which it issued, and when it is returned the clerk must attach it to the record.

(f) **Service of the writ.** Unless the execution otherwise directs, the officer must execute the writ against the non-exempt property of the judgment debtor by levying on a sufficient amount of property, if there is sufficient property; collecting or selling the choses in action and selling the other property in the manner set forth herein. Levy includes the seizure of the property and holding the property in person or through one or more agents, including the judgment debtor, appointed by the officer. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within view of the officer, the officer must levy only on such part of the property as the judgment debtor may indicate, if the property indicated is amply sufficient to satisfy the judgment and costs.

When an officer has served an execution issued out of any court the officer may complete the return thereof after such date of service.

(g) **Notice to judgment debtor of sale and of exempt property and right to a hearing.** At the time the writ of execution is issued, the clerk shall attach to the writ a notice of execution and exemptions and right to a hearing and two copies of an application by which the judgment debtor may request a hearing.

Upon service of the writ, the sheriff or constable shall serve upon the judgment debtor, in the same manner as service of a summons in a civil action, or cause to be transmitted by both regular and certified mail, returned receipt requested, to the judgment debtor's last known address as provided by the judgment creditor, (i) the notice of execution and exemptions and right to a hearing, and (ii) the application by which the judgment debtor may request a hearing. Upon service of the writ, the sheriff or constable may also set the date of sale or delivery and serve upon the judgment debtor notice of the date and time of sale or delivery in the same manner as service of the notice of execution and exemptions and right to a hearing.

The notice of execution and exemptions that is to be served upon the judgment debtor shall indicate in substance that certain property is or may be exempt from execution including but not limited to a homestead; tools of the trade; a motor vehicle used for the judgment debtor's business or profession; social security benefits; supplemental security income benefits; veterans' benefits; unemployment benefits; workers' compensation benefits; public assistance (welfare); alimony; child support; certain pensions; part or all of wages or other earnings from personal services; certain furnishings and appliances; musical instruments; and heirlooms (each not to exceed the amount allowed by law). The notice shall also indicate that the list is a partial list and other various property exemptions may be available under federal law or the Utah exemptions statute, and that the judgment debtor must request a hearing within ten (10) days from the date of service of the notice upon the judgment debtor. For purposes of this provision, the date of service shall be the date of mailing, if mailed, or date of delivery, if hand-delivered, and no period for mailing under Rule 6(e) shall be used in computing the time period.

If the writ, the notice of execution and exemptions and right to a hearing cannot be served upon the judgment debtor in the same manner as service of a summons in a civil action, and the judgment creditor does not have available the judgment debtor's last known address, only the following notice need be published under the caption of the case in a newspaper of general circulation in each county in which the property levied upon, or some part thereof, is situated:

TO _____, Judgment Debtor:

A writ of execution has been issued in the above-captioned case, directed to the sheriff or constable of _____ County, commanding the sheriff or constable as follows:

"WHEREAS, _____ [Quoting body of writ of execution]."

YOU MAY HAVE A RIGHT TO EXEMPT PROPERTY from the sale under statutes of the United States or this state, including Utah Code Annotated, Title 78, Chapter 23, in the manner described in those statutes.

The date of publication shall be deemed the date of service and the date of publication shall be not less than ten (10) days prior to the date of sale or delivery.

This paragraph (g) shall not be applicable to judicial mortgage foreclosure proceedings commenced under Utah Code Annotated, Title 78, Chapter 37.

(h) Request for hearing.

(1) Time for request. The judgment debtor or any other person who owns or claims an interest in the property subject to execution may request a hearing to claim any exemption to the execution, or to challenge the issuance of the writ. Such request must be filed or served upon the judgment creditor or the attorney for the judgment creditor within ten (10) days of the service upon the judgment debtor of the materials required to be served by paragraph (g) upon the judgment debtor. The request for a hearing, which shall be provided to the judgment debtor shall be in a form to enable the judgment debtor to specify the grounds upon which the judgment debtor challenges the issuance of the writ or claims the property executed upon to be exempt, in whole or in part.

(2) If a request for hearing is filed. If a request for hearing is filed by or on behalf of the judgment debtor, the court shall set the matter for hearing within ten (10) days from the filing of the request and serve notice of that hearing upon all parties by first class mail. If the court determines at the hearing that the writ was issued improperly, or that any property seized is exempt from or is not subject to execution, the court shall immediately issue an order to the officer releasing such property or portion thereof from the writ of execution. If the court finds that the property or a portion thereof is subject to execution and not exempt, it shall issue an order directing the officer to proceed with the sale of the non-exempt property subject to execution. If the originally scheduled date of sale for which notice has been given has passed, notice of the new date and time of sale shall be provided as required herein. No sale may be held until the Court has decided upon the issues presented at the hearing. At the hearing, the court may award costs as it deems appropriate.

(3) If no request for hearing is filed. If a request for hearing is not filed as provided for in this Rule and the time for doing so has expired, then the officer shall proceed to sell or deliver the property subject to execution in accordance with the writ and this Rule 69.

(4) This paragraph (h) shall not be applicable to judicial mortgage foreclosure proceedings commenced under Utah Code Annotated, Title 78, Chapter 37.

(i) Proceedings on sale of property.

(1) Notice of sale. Before the sale of the property on execution notice thereof must be given as follows: (A) in case of perishable property or animals, by posting written notice of the time and place of sale, and generally describing the property to be sold, in the district courthouse and in at least three other public places of the county or city where the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property; (B) in case of other personal property, by posting written notice of the time and place of sale, and generally describing the property to be sold, in the district courthouse and in at least three public places of the county or city where the sale is to take place, for not less than seven nor more than 14 days, and by publishing a copy thereof at least one time not less than one day preceding the sale in some newspaper of general circulation published or circulated in the county where the sale is to take place, if there is one; (C) in case of real property, by posting written notice of the time and place of sale, and particularly describing the property, for 21 days, on the property to be sold, at the place of sale, at the district courthouse of the county where the real property to be sold is situated, and in at least three public places of the county or city where the sale is to take place, and by publishing a copy thereof at least 3 times, once a week for 3 successive weeks immediately preceding the sale, in some newspaper of general circulation published or circulated in the county, if there is one. In addition, except for the sale of perishable property or animals, if notice of the date and time of sale has not been served upon the judgment debtor previously, notice of the date and time of sale shall be served upon the judgment debtor personally or by causing the same to be transmitted by regular or certified mail to the judgment debtor's last known address.

(2) Postponement. If at the time and place appointed for the sale of any real or personal property on execution the officer shall deem it expedient and for the interest of all persons concerned to postpone the sale for want of purchasers, or other sufficient cause, the officer may postpone the same from time to time, until the same shall be completed; and in every such case the officer shall make public declaration thereof at the time and place previously appointed for the sale, and if such postponement is for a longer time than 72 hours, notice thereof shall be given in the same manner as the original notice of such sale is required to be given.

(3) Conduct of sale. All sales of property under execution must be made at auction to the highest bidder, Monday through Saturday, legal holidays excluded, between the hours of 9 o'clock a.m. and 8 o'clock p.m. After sufficient property has been sold to satisfy the execution no more shall be sold. Neither the officer holding the execution nor such officer's deputy shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery it must be within view of those who attend the sale. The sale must be held in a place reasonably accessible to the general public. The property must be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and the third person requires it to be sold separately, such portion must be thus sold. All sales of real property must be made at the courthouse of the county in which the property, or some part thereof, is situated. The judgment debtor, if present at the sale, may also direct the order in which the property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the officer must follow such directions. The officer shall pay to the judgment creditor or the attorney for the judgment creditor so much of the sales proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and reasonable accrued costs must be returned to the judgment debtor, unless otherwise directed by the judgment or the court.

(4) Accounting of sale. Upon request of the judgment debtor or the judgment debtor's attorney, the plaintiff shall deliver an accounting of any execution sale, including the amount due on the judgment, accrued costs, and the amount realized at the sale.

(5) Purchaser refusing to pay. Every bid shall be deemed an irrevocable offer; and if the purchaser refuses to pay the amount bid for the property struck off to such purchaser at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss is occasioned thereby, the party refusing to pay, in addition to being liable on such bid, is guilty of a contempt of court and may be punished accordingly. When a purchaser refuses to pay, the officer may also, in such officer's discretion, thereafter reject any other bid of such person.

(6) Personal property. When the purchaser of any personal property pays the purchase money, the officer making the sale shall deliver the property to the purchaser (if such property is capable of manual delivery) and shall execute and deliver to the purchaser a certificate of sale and payment. Such certificate shall state that all right, title and interest which the debtor had in and to such property on the day the execution or attachment was levied, and any right, title and interest since acquired, is transferred to the purchaser.

(7) Real property. Upon a sale of real property the officer shall give to the purchaser a certificate of sale, containing: (A) a particular description of the real property sold; (B) the price paid by the purchaser for each lot or parcel if sold separately; (C) the whole price paid; (D) a statement to the effect that all right, title, interest and claim of the judgment debtor in and to the property is conveyed to the purchaser; provided that where such sale is subject to redemption that

fact shall be stated also. A duplicate of such certificate shall be filed for record by the officer in the office of the recorder of the county. The real property sold shall be subject to redemption, except where the estate sold is less than a leasehold of a two-years' unexpired term, in which event said sale is absolute.

(j) Redemption of real property from sale

(1) Who may redeem. Real property sold subject to redemption, or any part sold separately, may be redeemed by the following persons or their successors in interest: (A) the judgment debtor, (B) a creditor having a lien by judgment, mortgage, or other lien on the property sold, or on some share or part thereof subsequent to that on which the property was sold.

(2) Redemption, how made. The person seeking redemption may make payment of the amount required to the person from whom the property is being redeemed or for such person to the officer who made the sale, or such officer's successor in office. At the same time the redemptioner must produce to the officer or person from whom the redemptioner seeks to redeem, and serve with the notice to the officer, (A) a certified copy of the judgment under which the redemptioner claims the right to redeem, or, if the redemptioner redeems upon a mortgage or other lien, a copy certified by the recorder, (B) an assignment, properly acknowledged or proved where the same is necessary to establish the claim, (C) an affidavit by the redemptioner or an authorized agent showing the amount then actually due on the judgment, mortgage or other lien.

(3) Time for redemption, amount to be paid. The property may be redeemed within six months after the sale by paying the amount of the purchase with a surcharge of 6 percent thereon in addition, together with the amount of any assessment or taxes and any reasonable sum for fire insurance and necessary maintenance, upkeep, or repair of any improvements upon the property, which the purchaser may have paid thereon after the purchase, with interest at the lawful rate on such other amounts, and if the purchaser is also a creditor having a lien prior to that of the person seeking redemption, other than the judgment under which said purchase was made, the amount of such other lien, with interest.

In the event there is a disagreement as to whether any sum demanded for redemption is reasonable or proper, the person seeking redemption may pay the amount necessary for redemption less the amount in dispute, to the court out of which execution or order authorizing the sale was issued, and at the same time file with the court and serve upon the purchaser a petition setting forth the item or items demanded to which the redemptioner objects, together with the grounds of objection, and thereupon the court shall enter an order fixing a time for hearing of such objections. A copy of the order fixing time for hearing shall be served on the purchaser not less than five days before the day of hearing. Upon the hearing of the petition the court shall enter an order determining the amount required for redemption. In the event an additional amount to that theretofore paid to the clerk is required, the person seeking redemption shall pay to the clerk such additional amount within 7 days. The purchaser shall forthwith execute and deliver a proper certificate of redemption upon being paid the amount required by the court for redemption.

(4) Subsequent redemptions. If the property is redeemed by a creditor, any other creditor having a right of redemption may, within 60 days after the last redemption and within six months after the sale, redeem the property from such last redemption in the same manner as provided in the preceding paragraph, upon paying the sum of such last redemption with a surcharge of three percent thereon in addition, and the amount of any assessment or tax, and any reasonable sum for fire insurance and necessary maintenance, upkeep or repair of any improvements upon the property which the last redemptioner may have paid thereon, with interest on such amount, and in addition, the amount of any lien held by such last redemptioner prior to the redemptioner's own, with interest.

(5) Notice of redemption. Written notice of any redemption shall be given to the officer and a duplicate filed with the recorder of the county. Similar notice shall be given of any taxes or assessments or any sums for fire insurance, and necessary maintenance, upkeep or repair of any improvements upon the property, paid by the person redeeming, or the amount of any lien acquired, other than upon which the redemption was made. Failure to file such notice shall relieve any subsequent redemptioner of the obligation to pay such taxes, assessments or other liens.

(6) Certificate of redemption or conveyance. If no redemption is made within six months after the sale, the purchaser or the purchaser's assignee is entitled to a conveyance, or if so redeemed, whenever 60 days have elapsed and no other redemption by a creditor has been made and notice thereof has been given, the last redemptioner, or assignee is entitled to a sheriff's deed at the expiration of six months after the sale. If the judgment debtor redeems, the judgment debtor must make the same payments as are required to effect a redemption by a creditor. If the debtor redeems, the effect of the sale is terminated and the debtor is restored to the debtor's estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to the debtor a certificate of redemption, duly acknowledged. Such certificate must be filed and recorded in the office of the county recorder where the property is situated.

(7) Rents during period of redemption. The purchaser from the time of sale until a redemption, and a redemptioner

from the time of redemption until another redemption, is entitled to receive from any tenant in possession the rents of the property sold or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or their assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or such purchaser's assigns to such redemptioner or debtor. If such purchaser or such purchaser's assigns shall for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may, within 60 days after such demand, bring an action to compel an accounting and disclosure of such rents and profits, and until 15 days from and after the final determination of such action the right of redemption is extended to such redemptioner or debtor.

(k) Remedies of purchaser.

(1) For waste. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, upon motion, with or without notice, of the purchaser, or such purchaser's successor in interest. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs or buildings thereon or to use wood or timber on the property therefor, or for the repair of fences, or for fuel for a family while such person occupies the property. After the estate has become absolute, the purchaser or a successor in interest may maintain an action to recover damages for injury to the property by the tenant or other person in possession after sale and before possession is delivered under the conveyance.

(2) Where purchaser fails to obtain possession of property or is dispossessed thereof or evicted therefrom. Where, because of irregularities in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, or because of the reversal or discharge of the judgment, a purchaser of property sold on execution, or a successor in interest, fails to obtain the property or is dispossessed thereof or evicted therefrom, the court having jurisdiction thereof shall, on motion of such party and after such notice to the judgment creditor as the court may prescribe, enter judgment against such judgment creditor for the price paid by the purchaser, together with interest. In the alternative, if such purchaser or a successor in interest, fails to recover possession of any property or is dispossessed thereof or evicted therefrom in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on motion of such party and after such notice to the judgment debtor as the court may prescribe, revive the original judgment in the name of the petitioner for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and the judgment so revived shall have the same force and effect as would an original judgment of the date of the revival.

(l) Contribution and reimbursement; how enforced. When upon an execution against several persons more than a pro rata part of the judgment is satisfied out of the proceeds of the sale of the property of one, or one of them pays, without a sale, more than such person's proportion, and the right of contribution exists, such person may compel such contribution from the others; and where a judgment against several is upon an obligation of one or more as security for the others, and the surety has paid the amount or any part thereof, by sale of property or otherwise, the surety may require reimbursement from the principal. The person entitled to contribution or reimbursement shall, within one month after payment, or sale of the property in the event there is a sale, file in the court where the judgment was rendered a notice of such payment and the claim for contribution or reimbursement. Upon the filing of such notice the clerk must make an entry thereof in the margin of the docket which shall have the effect of a judgment against the other judgment debtors to the extent of their liability for contribution or reimbursement.

(m) Payment of judgment by person indebted to judgment debtor. After the issuance of an execution and before its return, any person indebted to the judgment debtor may pay to the officer the amount of the debt, or so much thereof as may be necessary to satisfy the execution, and the officer's receipt is a sufficient discharge for the amount paid.

(n) Where property is claimed by third person. If an officer shall proceed to levy any execution on any goods or chattels claimed by any person other than the defendant, or should the officer be requested by the judgment creditor so to do, such officer may require the judgment creditor to give an undertaking, with good and sufficient sureties, to pay all costs and damages that the officer may sustain by reason of the detention or sale of such property; and until such undertaking is given, the officer may refuse to proceed against such property.

(o) Order for appearance of judgment debtor; arrest. At any time when execution may issue on a judgment, the court from which an execution might issue shall, upon written motion of the judgment creditor, with or without notice as the court may determine, issue an order requiring the judgment debtor, or if a corporation, any officer thereof, to appear before the court, a master, or other person appointed by the court, at a specified time and place to answer concerning the judgment debtor's property. A judgment debtor, or if a corporation, any officer thereof, may be required to attend

outside the county in which such person resides, but the court may make such order as to mileage and expenses as is just. The order may also restrain the judgment debtor from disposing of any nonexempt property pending the hearing. Upon the hearing such proceedings may be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as on execution against such property.

(p) Examination of debtor of judgment debtor. At any time when execution may issue on a judgment, upon proof by affidavit or otherwise to the satisfaction of the court that any person or corporation has property of such judgment debtor or is indebted to the judgment debtor in an amount exceeding two hundred fifty dollars, not exempt from execution, the court may order such person or corporation or any officer or agent thereof, to appear before the court or a master at a specified time and place to answer concerning the same. Witness fees and mileage, if any, may be awarded by the court.

(q) Order prohibiting transfer of property. If it appears that a person or corporation, alleged to have property of the judgment debtor or to be indebted to the judgment debtor in an amount exceeding fifty dollars, not exempt from execution, claims an interest in the property adverse to such judgment debtor or denies such indebtedness, the court may order such person or corporation to refrain from transferring or otherwise disposing of such interest or debt until such time as may reasonably be necessary for the judgment creditor to bring an action to determine such interest or claim and prosecute the same to judgment. Such order may be modified or vacated by the court at any time upon such terms as may be just.

(r) Witnesses. Witnesses may be required to appear and testify in any proceedings brought under this rule in the same manner as upon the trial of an issue.

(s) Order for property to be applied on judgment. The court or master may order any property of the judgment debtor, not exempt from execution, in the possession of the judgment debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

(t) Appointment of receiver. The court may appoint a receiver of the property of the judgment debtor, not exempt from execution, and may forbid any transfer or other disposition thereof or interference therewith until its further order therein; provided that before any receiver shall be vested with the real property of the judgment debtor a certified copy of the appointment shall be recorded in the office of the recorder of the county in which any real estate sought to be affected thereby is situated.

ADVISORY COMMITTEE NOTE

The 1994 amendments constitute a substantial reorganization and revision of the rule applicable to executions. While not an exhaustive list, the Advisory Committee notes the following significant changes:

The Rule has been restructured to eliminate references to gender.

Paragraph (a) specifies that a writ of execution is available only post judgment and Paragraph (b) now states that a writ of execution may only be used to reach the judgment debtor's non-exempt real or personal property. The availability of writs of execution to reach non-exempt property, and the requirement that the judgment creditor now notify the judgment debtor of a right to exemptions, are described in several provisions of the revised rule. This change incorporates similar notice procedures now utilized in Rule 64D, and alleviates constitutional due process problems in the previous rule. These constitutional issues were addressed by the United States Court of Appeals in *Aacen v. San Juan County Sheriff's Department*, 944 F.2d 691 (10th Cir. 1991), involving a similar New Mexico Rule.

Paragraph (d) retains the requirement that writs of execution be issued to and served by a sheriff or constable. A sheriff must make service in the case of real property. Paragraph (d) also allows the use of a praecipe, which is commonly executed by the judgment creditor or the judgment creditor's counsel directing the officer to specific property to be levied upon. In practice, some officers will not execute a writ of execution without an accompanying praecipe.

Paragraph (e) has been amended to allow the officer to serve the writ within sixty (60) days, although the return of the writ may be made thereafter.

Paragraph (f) now defines "levy" as the seizure of the non-exempt property and authorizes the officer to hold the property in person or through one or more agents. It is common practice for the officer to appoint a "keeper" to hold the property pending sale as it is not always practical for the officer to take physical possession of the property. Language in this paragraph on payment of the sales proceeds has now been relocated to new Paragraph (i) on conducting the sale. Provisions in paragraph (f) regarding detailed procedures in event of death of the officer were deemed unnecessary and have been eliminated.

Paragraph (g) is new and provides that the clerk shall attach to the writ of execution a notice of execution and exemptions and right to a hearing, and two copies of an application by which the judgment debtor may request a hearing. A similar procedure is contained in Rule 64D. It is expected in practice that the plaintiff will provide to the clerk the materials to be attached to the writ. Official forms for the notice of execution, exemptions and right to a hearing, and the application for a hearing have been prepared by the Committee. Service of these forms may be made personally in the same manner as service of a summons in a civil action or may be transmitted by mail to the judgment debtor's last known address as provided by the judgment creditor. Notice of the time and date of sale may also be served at the same time. Paragraph (g) also contains a publication form of service if the judgment creditor's last known address is not available. This paragraph also sets forth the language to be included in the notice and application to be served upon or mailed to the judgment debtor. Paragraph (g) is not applicable to judicial mortgage foreclosure proceedings since the real property in such an action has already been ordered sold by the court.

Paragraph (h) is new. This paragraph contains a hearing procedure similar to current hearing practice under Rule 64D and contains the time limits applicable to requests for a hearing to contest the writ of execution. This paragraph is not applicable to mortgage foreclosure proceedings.

Paragraph (i)(1) substantially revises the previous provision on notice of sale. In the case of non-perishable personal property, the notice must generally describe the property to be sold, the notice must be posted at the district courthouse and in at least three public places in the county or city where the sale is to take place, and it must be published in a newspaper of general circulation at least one day preceding the sale. In addition, in the event notice of the time and place of sale has not been previously served upon or mailed to the judgment debtor, or if the original sale date was canceled, this Paragraph requires that a copy of the notice of sale be served upon or mailed to the judgment debtor. The former rule simply required posting in three public places. The Committee determined that such notice would not reasonably apprise the judgment debtor or interested third parties of the time and place of sale. Those interested in the sale will also be able to review all notices at a central location, i.e., the district courthouse. Similar changes have been made with respect to notice of sale of real property. The Committee believes that the revisions to this paragraph rectify several constitutional issues raised by the former Rule.

Paragraph (i)(2) expands the time in which the officer may postpone the sale from one day to 72 hours. This coincides with a similar postponement procedure in the Utah Trust Deed Foreclosure statute.

Paragraph (i)(3) clarifies the authorized days for a sale and expands the time allowed from 9:00 o'clock a.m. to 8:00 o'clock p.m., rather than 5:00 o'clock p.m. This was intended by the Committee to expand the time during which the judgment debtor and third parties would be able to attend the sale.

Paragraph (j) clarifies that redemption only pertains to real property and clarifies the procedure and documents required for redemption.

Paragraph (o) pertains to orders in supplemental proceedings and authorizes the court to order the judgment debtor to appear before the court, a master or other person appointed by the court. It is intended by the Committee that this could include the judgment creditor's attorney. The former rule authorizing the judgment debtor to be arrested based upon an affidavit has been eliminated.