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*CPLR 5231: Personal Property Law Section 49-b limits income execution.*

Under CPLR 5231, virtually any income over thirty dollars per week may be made subject to continuing execution up to ten per cent thereof.<sup>165</sup> Section 49-b of the Personal Property Law, however, provides that an assignment or court order for the support of the employee's minor children or spouse "takes priority over any other assignment or garnishment of wages, salary and/or commissions. . . ." <sup>166</sup> The amount of this support payment is not limited to any percentile deduction as is execution under CPLR 5231. The extent to which this priority of support-order deductions affects income execution pursuant to CPLR 5231 has been the subject of judicial consideration.

In the case of *Loan Serv. Corp. v. Bridgeport Lumber Co.*,<sup>167</sup> the court, in consonance with the New York Attorney General,<sup>168</sup> held that the "priority" provision of section 49-b could not have been intended by the legislature to exclude all other garnishments while the support order was in effect. The court emphasized that to so construe the section would render the employee's wages immune from garnishment for an indeterminate period, and thereby create an opportunity for collusion between spouses to feign separation and defeat judgment creditors. It therefore concluded that the priority of support-order deductions did not prevent a simultaneous garnishment (income execution) or wage assignment of an employee's salary.

In *Feder v. Skyway Container Corp.*,<sup>169</sup> the court, after considerable analysis of the interaction of the sections involved, held the legislative intent behind section 49-b to be that "an order for the support of children shall always come first, and the payment of other debts second."<sup>170</sup>

The recent case of *Beahm v. Beahm*<sup>171</sup> adopted the *Feder* position and, in fact, amplified it by holding that the priority of support orders under section 49-b required that even prior income executions, already in effect on the employee's salary, be suspended prima facie until the support deduction had been eliminated.<sup>172</sup> The *Beahm* court explained that this prima facie suspension did not

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<sup>165</sup> See CPLR 5231(b).

<sup>166</sup> N.Y. PERS. PROP. LAW § 49-b(2).

<sup>167</sup> 27 Misc. 2d 938, 939, 215 N.Y.S.2d 185, 186 (Sup. Ct. Onondaga County), *aff'd without opinion*, 14 App. Div. 2d 827, 218 N.Y.S.2d 535 (4th Dep't 1961).

<sup>168</sup> See 1959 OPS. N.Y. ATT'Y GEN. 103, 104.

<sup>169</sup> 218 N.Y.S.2d 362 (App. T. 2d Dep't 1961).

<sup>170</sup> *Id.* at 368.

<sup>171</sup> 47 Misc. 2d 900, 263 N.Y.S.2d 533 (N.Y.C. Fam. Ct. 1965).

<sup>172</sup> *Id.* at 902-03, 263 N.Y.S.2d at 536.

render the employee's income immune from any further continuing levy, but rather put the burden upon the judgment creditor to take affirmative steps under the CPLR's several provisions allowing the continuing levy on income not necessary for the reasonable requirements of the employee and his dependents.<sup>173</sup> The court in *Beahm* justified placing the burden upon the judgment creditor by the fact that the economic situation of typical garnished judgment debtors puts such formal legal remedies beyond their means.<sup>174</sup> The opinion indicated that, whatever tightening of credit would result, its holding was sanctioned by the overriding intent of the legislature to insure dependent support and to relieve the welfare rolls of this significant burden.<sup>175</sup>

*Beahm's* interpretation of the language of section 49-b appears to have merit. The word "priority" when used elsewhere in the CPLR results in the prior deduction from the employee's income pre-empting any subsequent garnishment.<sup>176</sup> Furthermore, *Beahm's* holding is consistent with the implicit policy of the legislature to limit compulsory deductions from a judgment debtor's income to ten per cent unless a court of competent jurisdiction determines that he is receiving additional sums which are unnecessary for the reasonable requirements of the judgment debtor and his dependents.<sup>177</sup> If income execution and support-order deductions were allowed to operate simultaneously, the employee's income would be subject to total deductions greatly in excess of ten per cent without judicial determination. For example, a judgment debtor earning ninety dollars per week might ordinarily be required to pay thirty-five dollars for support of his wife and children. An additional nine dollar garnishment might destroy his incentive to continue working and thereby place the entire burden of support upon the welfare department. It would also seem that the legislative intent to minimize welfare costs supports an extension of the priority of these support-order deductions even to the suspension of prior (in time) income executions.<sup>178</sup>

Judgment creditors who rely upon income execution to satisfy their judgments must be forewarned that this source of recovery may be denied them when a support-order deduction takes effect

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<sup>173</sup> See CPLR 5226, 5231(g), 5240. See also CPLR 5205(e). In addition, note the court's discussion of how, on its own motion, it could stay the operation of Personal Property Law Section 49-b and permit simultaneous income execution and support order deductions. See *Beahm v. Beahm*, 47 Misc. 2d 900, 911, 263 N.Y.S.2d 533, 543 (N.Y.C. Fam. Ct. 1965).

<sup>174</sup> *Beahm v. Beahm*, *supra* note 173, at 907, 263 N.Y.S.2d at 540.

<sup>175</sup> *Id.* at 902, 909, 263 N.Y.S.2d at 535, 541-42.

<sup>176</sup> CPLR 5231(h). See also N.Y. PERS. PROP. LAW § 48-a.

<sup>177</sup> See CPLR sections cited in note 173 *supra*.

<sup>178</sup> See Wylegala, *Memorandum of Committee on Legislation of New York State Association of Children's Court Judges*, 1958 N.Y. LEGIS. ANNUAL 6.

on a judgment debtor's income source. In addition, those who deal with persons having few assets aside from their earning power are advised to evaluate their credit policies in view of the *Beahn* decision.

*CPLR 5231(b): Drawing accounts subject to income execution.*

Judgment debtors, who work on commission or percentage bases and are paid principally by means of a drawing account charged against future commissions, provide considerable difficulties whenever their earnings are subjected to income execution. A drawing account is an arrangement whereby the employer agrees to advance to his employee a certain sum, usually weekly, against commissions to be earned. The employee agrees to repay that part of the sums advanced which is in excess of his commissions subsequently earned.<sup>179</sup> The cause of the difficulty is that the employer, by advancing sums sufficient to exceed the employee's accrued commissions, can consistently avoid being the holder of any money due the employee.<sup>180</sup> The income execution sections of both the CPLR and the CPA were designed to reach only moneys due the judgment debtor from the garnishee (employer).<sup>181</sup> Therefore, the judgment debtor, under such a drawing account arrangement and with the cooperation of his employer, could substantially immunize himself from income execution under CPLR 5231.

In *Larry Goldwater, Inc. v. C. B. Snyder Nat'l Realty Co.*,<sup>182</sup> the Civil Court of New York City was faced with the possibility of a salesman on commission avoiding income execution under CPLR 5231(b). Defendant employer made the orthodox argument that deduction need only be made from sums due and owing the judgment debtor and, that the advances always exceeded the earnings. The *Goldwater* court passed unhindered through the

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<sup>179</sup> We do not concern ourselves here with agreements by which the employer advances moneys without any obligation on the employee's part to repay, which are merely advance wage payments and clearly subject to execution under CPLR 5231. See *Laird v. Carton*, 196 N.Y. 169, 175, 89 N.E. 822, 824 (1909).

<sup>180</sup> See *Franklin Simon & Co. v. Pease Elliman, Inc.*, 238 App. Div. 614, 616, 255 N.Y. Supp. 199, 201 (1st Dep't), *motion for leave to appeal denied*, 262 N.Y. 693, 188 N.E. 124 (1933).

<sup>181</sup> CPA § 684(7) provided that compensation through such a drawing account should be treated as wages. And under CPA § 684(1) any wages "due and owing to the judgment debtor" were subject, to the extent of ten per cent, to garnishment for the benefit of the judgment creditor. CPLR 5231 (b) & (e) provide that "where a judgment debtor is receiving or will receive" more than thirty dollars from a person, such person upon his service with an income execution shall withhold, under CPLR 5231(e), "from money then or thereafter due to the judgment debtor" installments of ten per cent.

<sup>182</sup> 48 Misc. 2d 669, 265 N.Y.S.2d 542 (N.Y.C. Civ. Ct. 1965).