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# SETTING ASIDE EXEMPTIONS

## TABLE OF CONTENTS

---

I. Introduction	
A. Definitions .....	37.1
B. Nature of clerk’s role in setting aside exemptions and issuing executions .....	37.1
C. General description of exemptions.....	37.1
D. Two kinds of exemptions .....	37.1
E. G.S. Chapter 1C sets out procedure to claim exemptions .....	37.1
F. Summary of exemption process .....	37.2
G. Debtor’s waiver of exemptions .....	37.3
H. Statute of limitations suspended.....	37.5
II. Statutory Exemptions Allowed	
A. Residence and burial plot exemption .....	37.5
B. Catch-all exemption .....	37.7
C. Motor vehicle exemption.....	37.8
D. Household belongings exemption .....	37.8
E. Tools of trade exemption.....	37.9
F. Life insurance exemption .....	37.9
G. Professionally prescribed health aids .....	37.9
H. Personal injury or wrongful death proceeds.....	37.9
I. Individual retirement plans.....	37.10
J. Qualified college savings plan .....	37.10
K. Retirement benefits from other states and local governments.....	37.10
L. Alimony, support, separate maintenance and child support.....	37.10
M. Limitation on statutory exemptions.....	37.10
N. Additional exempt property.....	37.10
III. Pre-Notice Steps	
A. Clerk must determine whether debtor entitled to statutory exemptions .....	37.10
B. When judgment debtor not entitled to statutory exemptions.....	37.10
C. Clerk must hold hearing to determine whether exemptions apply .....	37.13
D. Clerk must determine if exemptions already designated.....	37.13

---

**SETTING ASIDE EXEMPTIONS**  
**TABLE OF CONTENTS**

---

E. Clerk must determine if debtor has waived exemptions by written waiver ..... 37.16

IV. Issuing Notice of Rights

A. Serve notice of rights and motion to claim exemptions to judgment debtor..... 37.16

B. Motion must be served on both husband and wife codebtors ..... 37.17

C. When notice of rights may be issued ..... 37.17

D. How judgment creditor must serve a notice of rights and motion ..... 37.17

E. Recovery of costs of service of notice on debtor ..... 37.17

V. Waiver By Failing to Assert Exemptions

A. When waiver occurs..... 37.18

B. No extension of time to claim exemptions..... 37.18

C. Proof of service to show waiver..... 37.18

D. Clerk issues execution on all property when debtor waives exemptions..... 37.19

E. Setting aside waiver ..... 37.19

VI. Claiming Statutory Exemptions

A. Burden is on judgment debtor to claim exemptions ..... 37.19

B. Who is eligible judgment debtor ..... 37.19

C. How debtor claims exemptions..... 37.20

D. Procedure when judgment debtor claims exemptions..... 37.20

E. Procedure when debtor files request for hearing to claim exemptions ..... 37.21

VII. Hearing Before District Court Judge

A. Clerk sets hearing..... 37.22

B. Clerk must give notice of time and place of hearing ..... 37.22

C. Clerk appoints appraiser if ordered by judge ..... 37.22

D. Judge determines value of property and enters order designating exemptions.... 37.22

VIII. Post-Order Procedures

A. Notation in judgment docket..... 37.23

B. Notification when exempt real property located in another county ..... 37.23

C. Issuing execution ..... 37.23

D. Reaching exempt property with excess equity..... 37.23

E. Appeal from an order of the clerk designating exemptions is to district court .... 37.24

F. Appeal from order of district court judge is to Court of Appeals ..... 37.24

G. Modification of exemptions ..... 37.24

---

**SETTING ASIDE EXEMPTIONS**  
**TABLE OF CONTENTS**

---

IX. Claiming Constitutional Exemptions

- A. History .....37.25
- B. What are the constitutional exemptions .....37.26
- C. Who is entitled to constitutional exemptions .....37.26
- D. Exceptions from constitutional exemptions .....37.26
- E. When constitutional exemptions may be claimed .....37.27
- F. Procedure for claiming constitutional exemptions .....37.27

Appendix I Flow Chart for Setting Aside Exemptions.....37.29

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**SETTING ASIDE EXEMPTIONS**  
**TABLE OF CONTENTS**

---

---

# SETTING ASIDE EXEMPTIONS

---

## I. Introduction

### A. Definitions.

1. “Judgment creditor.” As used in this outline, **judgment creditor** or **creditor** means the party to whom monetary damages or possession of personal property is awarded. The judgment creditor is not necessarily the plaintiff in the lawsuit.
2. “Judgment debtor.” As used in this outline, **judgment debtor** or **debtor** means the party ordered to pay monetary damages or to turn over possession of personal property. The judgment debtor is not necessarily the defendant in the lawsuit.

B. Nature of clerk’s role in setting aside exemptions and issuing executions. In the past, the clerk’s role in issuing executions has been held to be ministerial. [*Gooch v. Gregory*, 65 N.C. 142 (1871).] With the 1981 adoption of the current procedure requiring clerks to determine exemptions, the determination of exemptions and issuance of an order designating exemptions is a judicial act, which must be performed by the clerk or an assistant clerk and for which the clerk has judicial immunity. However, the issuance of the execution itself after the determination of exemptions probably remains a ministerial act that can be performed by a deputy clerk.

C. General description of exemptions. A judgment debtor may claim certain property he or she owns as exempt (or free) from the enforcement of a monetary judgment or a judgment for possession of household goods. This procedure is called setting aside exemptions and precedes the issuance of a writ of execution or in some cases the issuance of a writ of possession for personal property.

D. Two kinds of exemptions. There are two kinds of exemptions—statutory exemptions and constitutional exemptions. The constitutional exemptions of \$1,000 in real property and \$500 in personal property were the only exemptions available to a judgment debtor until 1981 when the General Assembly adopted statutory exemptions that include specific types of property with much higher values that a judgment debtor can protect from judgment creditors. While statutory exemptions can be waived by failing to claim them after notice, constitutional exemptions cannot be waived in that manner. Therefore, usually constitutional exemptions are claimed, if at all, only when a judgment debtor has waived his or her statutory exemptions.

E. G.S. Chapter 1C sets out the procedure for a debtor to claim exemptions.

1. Property that may be claimed under the statutory exemptions is described in section II at page 37.5.

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## SETTING ASIDE EXEMPTIONS

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2. The procedure for claiming statutory exemptions is described in sections III through VI at pages 37.10 to 37.19.
  3. Situations when exemptions are inapplicable are described in section III.B at page 37.10.
  4. The procedure after entering an order designating statutory exemptions is described in section VIII at page 37.23.
  5. Property that may be claimed under the constitutional exemptions and the procedure for claiming constitutional exemptions is described in section IX at page 37.25.
  6. For the general procedure in issuing a writ of execution, see Writs of Execution, Civil Procedures, Chapter 38.
  7. The spouse and dependents of a deceased debtor may claim the decedent's constitutional real property exemption. N.C. CONST. art. X, § 2, provides that the homestead, after death of owner, is exempt so long as there are minor children or the surviving spouse does not remarry. Pre-G.S. Ch. 1C cases indicated that it is not necessary for the debtor to claim and set off constitutional exemptions before death in order for his or her spouse or dependents to claim those exemptions. [See *Watts v. Leggett*, 66 N.C. 197 (1872); *Allen v. Shields*, 72 N.C. 504 (1875).] The same principles appear to apply to Chapter 1C exemptions if the property passes to a dependent spouse or child. [See G.S. § 1C-1604(b)]
- F. Summary of exemption process. Before issuing an execution, clerk must:
1. Determine whether debtor is entitled to claim exemptions.
  2. Determine whether exemptions have already been claimed in this judgment in response to an earlier notice of rights before issuance of an earlier execution. [This will be necessary only in counties where the clerk does not require a new notice of rights once exemptions have been designated. See section III.D at page 37.13.]
  3. Determine that creditor has served a notice of rights and motion to claim exemptions form on debtor, if debtor is entitled to claim exemptions. The forms are NOTICE OF RIGHT TO HAVE EXEMPTIONS DESIGNATED (AOC-CV-406) and MOTION TO CLAIM EXEMPT PROPERTY (STATUTORY EXEMPTIONS) (AOC-CV-415).
    - a) If debtor claims exemptions by motion or hearing and creditor does not object, enter order designating exemptions.
    - b) If debtor claims exemptions and creditor objects, set case for hearing before district court judge.
    - c) If debtor does not respond to notice, the exemptions are waived.
  4. After exemptions have been designated, upon request by the judgment creditor, the clerk issues a writ of execution ordering the

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## SETTING ASIDE EXEMPTIONS

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sheriff to levy on non-exempt property. If exemptions are waived, upon request by the judgment creditor, the clerk issues a writ of execution ordering the sheriff to levy on any property of the judgment debtor.

- G. Debtor's waiver of exemptions.
1. Statutory exemptions. Statutory exemptions provided in G.S. § 1C-1601(a) can be waived in the following manner:
    - a) Failure to assert exemption after proper notice to do so pursuant to G.S. § 1C-1603.
      - (1) This type of waiver applies only to the first execution issued after the notice of rights is served on the debtor. A new notice of rights must precede any subsequent execution when waiver was by failure to assert exemptions. [*Household Finance Corp. v. Ellis*, 107 N.C.App. 262, 419 S.E.2d 592 (1992), *aff'd per curiam*, 333 N.C. 785, 429 S.E.2d 716 (1993).]
      - (2) In *Household Finance*, the creditor had the clerk issue an execution as soon as the time for responding to the notice of rights expired, and the court in that case assumed that all creditors followed that practice. However, in some cases a creditor will serve the notice of rights and then wait a long period of time after the debtor waived the right to exemptions to come to the clerk and ask to have an execution issued. That practice raises an issue for the clerks: Should the clerk issue the execution based on the waiver since this is the first execution issued after the waiver or should the clerk require a new notice of rights because of the long period between waiver and issuance of the execution? The underlying reasoning in *Household Finance* would indicate that at some point a new notice of rights would be required, but it gives no answer as to what the time limit might be. The clerk might want to set a time period after which a new notice of rights must be served and consistently follow that policy in the county.
      - (3) Clerk or district court judge may relieve waiver due to mistake, surprise or excusable neglect to the extent that rights of innocent third parties are not affected. [G.S. § 1C-1601(c)(3)] (See section V at page 37.18 regarding waiver).
    - b) Written waiver by debtor. A written waiver must be made after judgment is entered, and the clerk must approve the waiver upon finding that debtor made the waiver freely,

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## SETTING ASIDE EXEMPTIONS

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voluntarily, and with full knowledge of his or her rights to exemptions and that he or she is not required to waive them. [G.S. § 1C-1601(c)(2)] This waiver could last for the life of the judgment depending on the language of the written waiver.

(1) **Caution:** Any waiver included in a consent judgment or confession of judgment is invalid because it is not entered into after judgment. The clerk should ignore such a provision and require judgment creditor to serve a notice of rights on the judgment debtor before an execution can be issued.

c) Transfer of property allocated as exempt. [G.S. § 1C-1601(c)(1)]

(1) When exempt property is conveyed to another, the exemption ceases as to liens attaching before the conveyance. [G.S. § 1C-1604(a)] This applies to real property claimed as exempt because the judgment became a lien against any real property when docketed. The lien is not released when the judgment debtor claims his or her exemption in the property and it remains against the property when the property is transferred.

**Example.** Judgment debtor claims Blackacre as exempt and clerk signs order designating Blackacre as exempt. A year after the order is entered debtor sells Blackacre to his neighbor. Judgment creditor can proceed to have execution issued and sheriff can sell Blackacre.

(2) As mentioned, generally this provision applies only to real property because that is only kind of property to which a judgment lien attaches before seizure. However, the court held that when judgment debtor deposited a cash bond in lieu of a surety bond to stay execution of a money judgment against him, he waived his right to claim exemptions in that cash and judge was authorized to apply bond to underlying judgment. [*Barrett v. Barrett*, 122 N.C.App. 185, 468 S.E.2d 264 (1996).]

2. Constitutional exemptions found in Sec. 1 & 2, Art. X, N.C. Constitution and G.S. § 1C-1602.

a) Constitutional exemptions are not waived by failure to claim exemptions after notice to do so. [*Household Finance Corp. v. Ellis*, 107 N.C.App. 262, 419 S.E.2d 592 (1992), *aff'd per curiam*, 333 N.C. 785, 429 S.E.2d 716 (1993) (holding G.S. § 1C-1603 unconstitutional as applied to constitutional exemptions).] The debtor may claim constitutional

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## SETTING ASIDE EXEMPTIONS

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exemptions up until the clerk disburses any proceeds from an execution sale.

- b) Constitutional exemptions can be waived by written waiver, after judgment, approved by the clerk (or district court judge) who must find that the debtor made the waiver freely, voluntarily, and with full knowledge of his or her rights to exemptions and that the debtor is not required to waive them. [G.S. § 1C-1601(c)(2)]
- c) A constitutional provision may be waived by express consent, by failure to assert it, or by estoppel. [*Cameron v. McDonald*, 216 N.C. 712, 715, 6 S.E.2d 497, 499 (1940).]
  - (1) A waiver by failing to assert would occur only when the debtor has not asserted a claim for exemptions before the clerk disburses any proceeds from an execution sale. [*Household Finance*, above.]
  - (2) Judgment debtor waived right to homestead exemption by giving sheriff written request to sell the land and by signing the deed to the land sold by the sheriff. [*N.C. Joint Stock Land Bank v. Bland*, 231 N.C. 26, 56 S.E.2d 30 (1949).]
  - (3) Debtor waived right to homestead exemption by being present at sale but making no objection until 5 months after sale. [*N.C. Nat'l Bank v. Sharpe*, 49 N.C.App. 693, 272 S.E.2d 368 (1980).]

H. Statute of limitations suspended. The statute of limitations on judgments is suspended for the period of exemption as to property that is exempt. [G.S. § 1C-1604(a)]

- 1. Statute of limitations on enforcing judgment is 10 years.
- 2. Statute is suspended only if the judgment creditor records, before the expiration of the statute of limitations, a copy of the order designating exempt property in the office of the register of deeds in the county where the real property is located. [G.S. § 1C-1604(a1)]
- 3. The purpose of this section is to continue the judgment lien on real property that has been claimed as exempt so that the creditor might sell the property to satisfy the judgment at some later time. As a practical matter, this provision is never used by judgment creditors.

### II. Statutory Exemptions Allowed [G.S. § 1C-1601(a)]

NOTE: The exemptions set out below apply to judgments filed on or after Jan. 1, 2006. (See AOC-CV-415.) For judgments entered before Jan. 1, 2006, see AOC-CV-407 for the exemptions and their amounts.

- A. Judgment debtor is entitled to claim his or her interest not to exceed \$35,000 in value in real property or personal property (e.g., mobile home) used as a residence or in a burial plot for debtor or his or her dependent. An unmarried debtor who is 65 years of age or older and whose property was previously

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## SETTING ASIDE EXEMPTIONS

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owned as tenancy-by-the entirety with a former spouse who is deceased may claim a \$60,000 exemption. [G.S. § 1C-1601(a)(1)]

1. The \$35,000 or \$60,000 residence/burial plot exemption is unique because it applies regardless of when the judgment was entered. More importantly, it automatically applies to any execution issued after December 1, 2009, if the real estate exemption was designated before that date on the statutory amount in effect before the increase to \$35,000.

**Example.** Debtor claims his \$18,500 in his residence on November 20, 2009. The clerk designates the exemptions on that date. On January 10, 2010, the clerk issues an execution on the judgment. The clerk should modify the exempt property to reflect the statutory increase from \$18,500 to \$35,000 in the residence exemption.

2. “Value” is defined as the fair market value of debtor’s interest in property, less valid liens superior to the judgment lien sought to be enforced. [G.S. § 1C-1601(b)]

- a) All perfected security interests in personal property would be superior to the judgment sought to be enforced because the judgment lien does not attach until the sheriff levies on the personal property. With real property, however, the judgment lien attaches on the date the judgment was docketed in the county in which the property is located; any lien created before that date is superior; any after that date is junior to the judgment.

- b) **Example:** Debtor owns a house worth \$150,000 with \$75,000 deed of trust. He has two judgments against him—Judgment A for \$5,000 is docketed June 15, 2006, and Judgment B is for \$2,000, docketed July 25, 2008. When the debtor claims exemptions for Judgment B, the fair market value of the residence is \$70,000 [\$150,000 - (\$75,000 + \$5,000)].

3. Property held as tenancy-by-the-entirety cannot be reached under a writ of execution if the judgment is against only one spouse. [*Johnson v. Leavitt*, 188 N.C. 682 (1924); *Union Grove Milling & Manufacturing Co. v. Faw*, 103 N.C.App. 166, 404 S.E.2d 508 (1991).]

4. When both husband and wife are co-debtors, each is entitled to a full set of exemptions.

- a) Husband and wife must fill out separate exemption forms. The clerk should require the judgment creditor to serve a notice of rights on each one.

- b) If each claims interest in a residence owned as tenants-by-entirety, each is entitled to \$35,000 for a total of \$70,000 value in the residence. [*In re Mahaffey*, 91 F.3d 131 (4<sup>th</sup> Cir. 1996) (unpublished opinion); *In re Hollar*, 184 B.R. 25

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## SETTING ASIDE EXEMPTIONS

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(Bankr. M.D.N.C. 1995), *aff'd*, 188 B.R. 539 (M.D.N.C. 1995), *aff'd*, 92 F.3d 1179 (4<sup>th</sup> Cir. 1996) (unpublished opinion).]

- c) Each debtor may exempt his or her aggregate interest, which is one-half of the equity in the residence. In other words, if the total equity in the residence is \$35,000 one spouse cannot claim \$35,000 and the other take a “wild card” exemption; each spouse must take \$17,500 in residence.
5. The property must be used as the debtor’s residence. [*In re Hollar*, 184 B.R. 25 (Bankr. M.D.N.C. 1995), *aff'd*, 188 B.R. 539 (M.D.N.C. 1995), *aff'd*, 92 F.3d 1179 (4<sup>th</sup> Cir. 1996) (unpublished opinion).]
  6. A fee simple remainder interest in real property is a sufficient interest to claim residence exemption. [*In re Cain*, 235 B.R. 812 (Bankr. M.D.N.C. 1998) (debtor, who had remainder interest in home, resided in home with his mother, who held the life tenancy).]
- B. Judgment debtor is entitled to the aggregate interest in any real or personal property of his or her choosing not to exceed \$5,000 in value of any unused amount of the exemption used under the residence or burial plot exemption discussed in subsection A, immediately above. [G.S. § 1C-1601(a)(2)]
1. This is sometimes referred to as the “wild card” or “catch-all” exemption and may be used to exempt property not otherwise qualifying for an exemption.
  2. This exemption may be taken only when the debtor has not taken the full amount in the residence or burial plot exemption discussed in subsection A.
    - a) **Example 1.** Debtor claims \$35,000 exemption in residence he owns. Debtor can claim no exemption under the “wild card” exemption.
    - b) **Example 2.** Debtor only has \$32,000 equity in residence claimed under subsection A. Debtor can claim \$3,000 in any other property under the “wild card” exemption.
    - c) **Example 3.** Debtor only has \$25,000 equity in his residence taken under subsection A. Debtor can claim \$5,000 in any property under the “wild card” exemption.
  3. Judgment debtor must own the property in which he or she claims this exemption. [*In re Hollar*, 184 B.R. 25 (Bankr.M.D.N.C.1995), *aff'd*, 188 B.R. 539 (M.D.N.C. 1995), *aff'd*, 92 F.3d 1179 (4<sup>th</sup> Cir. 1996) (unpublished opinion).]
  4. This exemption may be taken in any of debtor’s real or personal property and may be taken in any manner debtor chooses. [*Avco Financial Services v. Isbell*, 67 N.C.App. 341, 312 S.E.2d 707 (1984).]

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## SETTING ASIDE EXEMPTIONS

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5. The full \$5,000 may be used when judgment debtor does not own a home and therefore claims no exemption in a residence or burial plot under section II.A at page 37.5.
  6. If judgment is against one spouse and the residence is owned as tenants by entirety (and therefore cannot be reached to satisfy that judgment), the judgment debtor does not need to claim the residence exemption and could use the full \$5,000 in other property owned by him or her.
- C. Judgment debtor is entitled to exempt his or her interest not to exceed \$3,500 in value in one motor vehicle under this specific exemption. [G.S. § 1C-1601(a)(3)]
1. A horse trailer without a motor does not qualify as a motor vehicle under this exemption. [*In re Trevino*, 96 B.R. 608 (Bankr.E.D.N.C. 1989).]
  2. A judgment debtor who owns two motor vehicles may claim one motor vehicle under this exemption and the other under the “wild card” exemption discussed in section II.B at page 37.7 if he or she has any “wild card” exemption.
  3. A judgment debtor who owns one motor vehicle in which the equity interest is \$5,000 and who has exemption value available under the “wild card” exemption may claim a \$3,500 interest in motor vehicle under this exemption and an additional \$1,500 under the “wild card” exemption.
  4. A judgment debtor who owns two cars with an equity interest of only \$500 in each may claim only one vehicle under this exemption. The motor vehicle exemption applies to one motor vehicle **only** no matter what the equity in that vehicle.
  5. If husband and wife are both judgment debtors, each is entitled to a \$3,500 interest in a motor vehicle registered in both of their names. If the motor vehicle is registered in only one of their names, only that person can claim a \$3,500 exemption in that vehicle.
  6. If the car is titled jointly in the names of husband and wife, but only one is the judgment debtor, that spouse can claim a \$3,500 exemption in that spouse’s ½ interest in the car.
- D. Judgment debtor is entitled to \$5,000 plus \$1,000 for each dependent (not to exceed \$4,000 total for dependents) in household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments used primarily for personal or family purposes. [G.S. § 1C-1601(a)(4)]
1. The maximum exemption is \$9,000, even if the debtor has more than four dependents.
  2. “Dependent” is not defined in the exemption law, but the best definition would probably be that of a dependent for income tax

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## SETTING ASIDE EXEMPTIONS

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purposes: A person for whom the debtor provides more than 50 per cent of the support.

3. Although “wearing apparel” is not defined in the exemption law, jewelry probably qualifies as wearing apparel and may be claimed under this exemption. [*In re Mims*, 49 B.R. 283 (Bankr.E.D.N.C. 1985).]
4. The term “household goods” as used in G.S. § 1C-1601(a)(4) and 1C-1601(e)(7) is not defined by North Carolina’s exemption law, and there are no North Carolina appellate cases on point.
  - a) Lawn mowers, garden tractors, chain saws, and other personal property normally used by debtors in or around the house probably are household goods subject to exemption. [*In re Jones*, 5 B.R. 655 (Bankr.M.D.N.C. 1980); *In re Coleman*, 5 B.R. 76 (Bankr.M.D. Tenn. 1980).]
  - b) After North Carolina’s exemption law was enacted, the Federal Trade Commission enacted a rule making it an unfair trade practice for lenders to take a nonpossessory, nonpurchase money security interest in household goods. That federal regulation (16 C.F.R. 444.1 and following) defines “household goods” for purposes of that rule as “clothing, furniture, appliances, one radio, one television, linens, china, crockery, kitchenware, and personal effects (including wedding rings).”
  - c) In interpreting the term “household goods” under state law, North Carolina courts are not bound by the narrower definition of household goods in the federal regulation that was adopted after North Carolina’s exemption law was enacted. [*Ken-Mar Finance v. Harvey*, 90 N.C.App. 362, 368 S.E.2d 646, review denied, 323 N.C. 365, 373 S.E.2d 545 (1988); *In re Smith*, 57 B.R. 330 (Bankr.N.D.Ga. 1986).]
- E. Judgment debtor is entitled to claim his or her interest, not to exceed \$2,000, in any tools of trade. [G.S. § 1C-1601(a)(5)] Truck used by debtor in boat hauling business does not qualify as a “tool of trade” under this provision. [*In re Trevino*, 96 B.R. 608 (Bankr.E.D.N.C. 1989).]
- F. Judgment debtor may exempt any life insurance on his or her own life if the spouse or children are sole beneficiaries. [G.S. § 1C-1601(a)(6)] There is no value limit on this exemption.
- G. Judgment debtor may exempt any professionally prescribed health aids. [G.S. § 1C-1601(a)(7)] There is no value limit on this exemption.
- H. Judgment debtor may exempt all compensation for personal injury or wrongful death of a person on whom the debtor was dependent. [G.S. § 1C-1601(a)(8)] Does not apply to claims for funeral, legal, medical, dental, hospital, and health care charges related to the accident or injury giving rise to the compensation.

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## SETTING ASIDE EXEMPTIONS

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- I. Judgment debtor may exempt individual retirement plans under the Internal Revenue Code (IRAs, Roth IRAs etc.) [G.S. § 1C-1601(a)(9)]
- J. Up to \$25,000 in a qualified college savings plan. [G.S. § 1C-1601(a)(10)]
- K. Retirement benefits from other states and local governments to the extent that those benefits are exempt under the laws of the state under which the benefit plan is established. [G.S. § 1C-1601(a)(11)]
- L. Alimony, support, separate maintenance, and child support that has been received or to which debtor is entitled to extent reasonably necessary for the support of the debtor or the debtor's dependents. [G.S. § 1C-1601(a)(12)]
- M. Limitation on statutory exemptions. The judgment debtor may not claim exemptions under the "wild card" provision, the motor vehicle exemption, the household goods exemption, or the tools of the trade exemption in any property acquired by the debtor within 90 days of the serving of the notice of rights on him. [G.S. § 1C-1601(d)]
  - 1. This provision only applies where the intent is to hinder, delay or defraud enforcement. [*In re Hallman*, 26 B.R. 34 (Bankr.W.D.N.C. 1982).]
- N. Additional exempt property. There are other state and federal statutes that specifically exempt certain property from execution. The debtor need not claim this property because it is exempt whether or not claimed.
  - 1. Some of the state statutes are: G.S. § 108A-36 (payments made for Work First); G.S. § 96-17(c) (unemployment benefits); G.S. § 97-21 (worker's compensation); G.S. § 135-9 (state employee's retirement); G.S. § 128-31 (local government employee's retirement); G.S. § 111-18 (aid to the blind); and G.S. § 58-58-165 (group life insurance policy or proceeds).
  - 2. Federal statutes include: 10 U.S.C. § 1440 (annuities for retired military); 38 U.S.C. § 5301 (veteran's benefits); 5 U.S.C. § 8346 (civil service retirement and disability benefits); 42 U.S.C. § 407 (social security old age, survivors, and disability benefits).

### III. Pre-Notice Steps

- A. Clerk must determine whether debtor entitled to exemptions. When the judgment creditor asks to have an execution or writ of possession for personal property issued, the clerk must determine if the judgment debtor is entitled to any exemptions. If the judgment debtor is not entitled to exemptions, the clerk must issue an execution or writ of possession on all property. If the debtor is entitled to exemptions, see section III.D at page 37.13.
- B. When judgment debtor not entitled to statutory exemptions.
  - 1. Debtor is not a resident of North Carolina. [G.S. § 1C-1601(a)]

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## SETTING ASIDE EXEMPTIONS

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- a) Residence is determined at the time of the request to issue the notice of rights to claim exemptions.
  - b) Nonresidency means actual cessation of dwelling in state without a definite time of return although a general intention to return may exist. [*First Union Nat'l Bank v. Rolfe (II)*, 90 N.C.App. 85, 367 S.E.2d 367 (1988).]
  - c) If there is any doubt about residence, the clerk must hold a hearing to determine whether the judgment debtor is entitled to receive a notice of rights. [*First Union Nat'l Bank v. Rolfe (I)*, 83 N.C.App. 625, 351 S.E.2d 117 (1986) (judgment debtor who was resident of N.C. at time of filing of complaint entitled to notice of hearing to determine whether no longer resident at time of enforcement of judgment).]
2. Debtor is not an individual. [G.S. § 1C-1601(a)]
    - a) Corporations and limited liability companies are not entitled to any exemptions.
    - b) Partnerships are not entitled to any exemptions (in property titled in the name of the partnership); individual partners are liable for debts of partnership and are generally sued along with the partnership. The individual partners are entitled to claim exemptions.
    - c) Persons doing business as or trading as another name (e.g., John Jones d/b/a 24-hour Cleaners) are individuals and are entitled to their exemptions.
    - d) The burden is on the judgment creditor to convince the clerk that the judgment debtor is not an individual if there is any doubt. The clerk should issue the notice of rights unless the creditor convinces him or her that the debtor falls under this exception.
  3. Judgment is for child support, alimony, or an equitable distribution distributive award order pursuant to Chapter 50. [G.S. § 1C-1601(e)(9)]
    - a) Although there are child support provisions found in G.S. Chapters 50B, 52C, and 110, those chapters are procedural and proceedings under those chapters determine child support under Chapter 50. Therefore, all child support awards are covered by this exception and are not entitled to exemptions.
  4. Judgment is for state or local taxes. [G.S. § 1C-1601(e)(2)]
  5. Judgment is to recover possession of personal property other than household goods, or judgment is to recover possession of household goods and the creditor has a purchase money security interest in the goods.

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## SETTING ASIDE EXEMPTIONS

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- a) For definition of “household goods,” see section II.D.4 at page 37.9.
- b) The only time that a notice of rights must be served before the clerk issues a writ of possession for personal property is when the writ is to recover household goods and the judgment creditor has a nonpossessory, nonpurchase money security interest in the household goods.
  - (1) A nonpossessory security interest is one where the creditor does not take possession of the security when the security agreement is created. Most security agreements are nonpossessory. An example of a possessory security agreement is a pawnshop that takes possession of the debtor’s ring as security for the extension of credit to the debtor.
  - (2) A nonpurchase money security interest is one where the judgment creditor did not lend the judgment debtor the money for the purpose of buying the household goods.
  - (3) In practice, the only time a notice of rights must be given when the judgment is to recover possession of personal property is when the judgment creditor is a finance company and the goods to be recovered are household goods. In that case the clerk may not issue a writ of possession until notice of rights and other Chapter 1C procedures have been followed.
  - (4) However, in some cases the finance company may have loaned the judgment debtor the money to buy the household goods, which would give the finance company a purchase money interest, or the finance company may have purchased the account from a merchant or taken an assignment, which would allow the finance company to have a purchase money interest. If judgment or complaint indicates that the finance company has a purchase money security agreement in household goods, the clerk may issue a writ of possession without having a notice of rights served.
  - (5) For further discussion, see Writs of Possession for Personal Property, Civil Procedure, Chapter 40.
- c) In all other cases where the judgment is to recover possession of personal property, the clerk should issue a writ of possession upon request of the judgment creditor without requiring a notice of rights to be served or following other Chapter 1C procedures.

**Example 1.** Creditor finance co. gets judgment against debtor to recover possession of a motor vehicle. The clerk

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## SETTING ASIDE EXEMPTIONS

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should issue a writ of possession without requiring a notice of rights.

**Example 2.** Creditor Sears gets a judgment against debtor to recover a television set upon default of a security agreement signed when the debtor bought the television from Sears. The clerk should issue a writ of possession without requiring a notice of rights because Sears is a purchase money creditor.

6. Judgment is for forfeiture of an appearance bond. [G.S. § 1C-1601(e)(2)]
  7. Judgment is for forfeiture on a fiduciary bond to the State or its subdivisions. [G.S. § 1C-1601(e)(2)]
  8. Judgment is to enforce a laborer's or mechanic's lien with regard to the specific property affected. [G.S. § 1C-1601(e)(3),(4)] This section applies to liens under G.S. § 44A-8.
  9. Judgment is for the payment of obligations contracted for the purchase of the specific real property affected. [G.S. § 1C-1601(e)(5)]
  10. Judgment is to enforce a statutory lien other than a judicial lien. [G.S. § 1C-1601(e)(8)] This section applies to actions to enforce liens under G.S. Chapter 44 and G.S. § 44A-2.
  11. Criminal restitution orders docketed as civil judgments under G.S. § 15A-1340.38. [G.S. § 1C-1601(e)(10)]
  12. The creditor is an agency of the United States government and there is a provision of federal law or regulation that specifically provides that state exemptions do not apply to the particular claim.
    - a) **Example:** 38 U.S.C. § 5301 provides that veteran's benefits are not subject to execution except that a federal agency can reach those benefits to recover an overpayment or illegal payments. That provision has been interpreted to mean that state exemptions would not apply to that action. [*Higgins v. Beyer*, 293 F.3d 683 (3<sup>rd</sup> Cir. 2002).]
- C. If there is any question about whether exemptions apply, the clerk must hold a hearing to make that determination.
1. A hearing may be triggered by either party raising a question about whether exemptions apply. Upon a request for a hearing by one party, the other parties must have notice and opportunity to be heard. [*First Nat'l Bank v. Rolfe (I)*, 83 N.C.App. 625, 351 S.E.2d 117 (1986) (since debtor was resident at time judgment entered, must be given notice and hearing before clerk determined not entitled to notice of rights because became nonresident later).]
- D. The clerk must determine if exemptions already have been designated in the judgment involved.

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## SETTING ASIDE EXEMPTIONS

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1. If exemptions already set aside against debtor in this judgment in response to a notice of rights sent for an earlier issued execution, the law is not clear whether a new notice of rights needs to be sent before a subsequent execution is issued. The clerk must have a policy of whether to interpret the case law as requiring a new notice of rights or not requiring one to be served by the judgment creditor and should make sure that the policy is followed consistently in the office.
  - a) In *Household Finance*, the court used broad language when it said: “We therefore hold that the statute requires that no execution be issued until a Notice to Designate Exemptions has been served and any waiver applies only to the particular execution issued.” [*Household Finance v. Ellis*, 107 N.C. 262, 266, 419 S.E.2d 592, 595 (1992), *aff’d per curiam*, 333 N.C. 785, 429 S.E.2d 716 (1993).]
  - b) If the clerk interprets *Household Finance* literally, the clerk would require the issuance of a new notice of rights before each execution even if for an earlier execution in the same judgment the defendant claimed exemptions. Under that reading, an order designating exemptions would be good only for the first execution issued after the order.
    - (1) This reading of *Household Finance* has been followed by the Bankruptcy Court of the Eastern District of North Carolina. [*In re Pinner*, 146 B.R. 659 (Bankr.E.D.N.C.1992).]
    - (2) The clerk would ignore any earlier exemptions claimed when a new execution is requested. Essentially, the order designating exemptions would be good only for the next ensuing execution.

**Example.** Judgment is entered against debtor; debtor responds to the notice of rights and claims the following property as exempt: \$5,000 in his 1998 Honda Accord, with a fair market value of \$5,000 (\$3,500 claimed under the motor vehicle exemption and \$1,500 claimed under the catch-all); all of his household belongings valued at \$3,500; and his carpenter’s tools (he is a carpenter) valued at \$1,000. An execution is issued but is returned unsatisfied by the sheriff because the debtor had no non-exempt property on which to levy. One year later the creditor seeks to have a second execution issued. The clerk would issue a new notice of rights and if the debtor failed to respond to this notice of rights, the debtor would waive exemptions for the second execution.
  - c) Another reading of the language in *Household Finance* is to look at it in the context of the facts of the case and the

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## SETTING ASIDE EXEMPTIONS

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court's analysis. The second phrase of the sentence quoted above places the statement in the context of a waiver. The factual situation with which *Household Finance* dealt was a waiver, and the court was interpreting the statutes to determine whether a waiver is permanent. If the court had intended to deal with the issue of issuing subsequent executions after an order designating exemptions has been entered, it would have had to deal with the clear language in G.S. § 1C-1603(a)(4), which excepts from the general requirement of issuance of a notice of rights before execution is issued cases in which exemptions have already been designated, and G.S. § 1C-1603(g), which sets out a procedure for modifying exemptions. G.S. § 1C-1603(g) would be meaningless if the court's decision in *Household Finance* is read to apply to cases in which the exemptions are designated. Also the court has consistently held that exemptions are to be read liberally in favor of the debtor; giving the earlier claimed exemptions to the debtor along with the right to come in and modify the exemptions at the time of a later execution would be the most favorable to the debtor. [See section VIII.G at page 37.24 for the procedure to modify exemptions.] Under this reading a clerk would not require a new notice of rights to be issued before issuing a subsequent execution when an order designating exemptions has been entered with regard to the judgment.

**Example.** Judgment is entered against debtor; debtor responds to the notice of rights and claims the following property as exempt: \$5,000 in his 1998 Honda Accord, with a fair market value of \$5,000 (\$3,500 claimed under the motor vehicle exemption and \$1,500 claimed under the catch-all); all of his household belongings valued at \$3,500; and his carpenter's tools (he is a carpenter) valued at \$1,000. An execution is issued but is returned unsatisfied by the sheriff because the debtor had no non-exempt property on which to levy. One year later the creditor seeks to have a second execution issued. The clerk would issue the execution ordering the sheriff to levy on non-exempt property attaching the previous order designating exemptions. If the debtor had sold the 1998 Honda and purchased a 2009 Ford Focus the debtor could come to the clerk and file a motion to modify the exemptions, substituting the Ford for the Honda. The clerk should consider the motion to modify even if the sheriff has already levied on the Focus because the exemption law must be read liberally in favor of the debtor.

- d) A third option in interpreting the statutes and *Household Finance* is to issue a notice of rights before every execution even if debtor previously claimed exemptions. However,

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## SETTING ASIDE EXEMPTIONS

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rather than treating a subsequent failure to respond to a notice of rights as a waiver, the clerk would issue an execution subject to the previously designated exemptions. This interpretation is consistent with the provision that property allocated as exempt remains exempt so long as the debtor owns it. [G.S. § 1C-1604(a)]

2. If exemptions have already been set aside for a judgment debtor in another judgment, exemptions must still be set aside in this judgment.
  - a) The debtor has a right to set aside exemptions with regard to each judgment entered against him or her so exemptions claimed in one judgment do not apply to or affect another judgment.
  - b) The judgment debtor must claim exemptions as to each judgment entered against him or her.
  - c) The judgment debtor could claim different property as exempt with regard to different judgments, but that would not be to the debtor's benefit because each judgment creditor could then levy on the property not claimed as exempt from his or her judgment.
  - d) A judgment "renewing" an earlier judgment is a new and separate judgment. Therefore, exemptions set aside under the earlier judgment would not apply to the later judgment.
- E. The clerk must determine if the judgment debtor has waived exemptions in this judgment by a written waiver. [See section I.G at page 37.3.] If there is a written waiver, the debtor is not entitled to a notice of rights. However, if the waiver was by failing to claim exemptions in response to a notice of rights preceding the issuance of an earlier execution, the waiver does not carry over to a later execution. In that case a new notice of rights must be issued before a subsequent execution may be issued. [*Household Finance*]

### IV. Issuing Notice of Rights [G.S. § 1C-1603(a)(4)]

- A. If the clerk determines that the debtor is entitled to claim exemptions, the clerk should give the judgment creditor an original and a copy of the notice of rights and an original and two copies of the motion to claim exempt property. In practice the creditor usually brings copies to the clerk with the heading completed. The forms are NOTICE OF RIGHT TO HAVE EXEMPTIONS DESIGNATED (AOC-CV-406) and MOTION TO CLAIM EXEMPT PROPERTY (STATUTORY EXEMPTIONS) (AOC-CV-415 for judgments filed on or after January 1, 2006) or (AOC-CV-407 for judgments filed before January 1, 2006).
  1. The original of the notice of rights is for the judgment creditor or the sheriff to indicate service and return to the clerk; the copy is to be served on the judgment debtor.

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## SETTING ASIDE EXEMPTIONS

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2. The original and two copies of the motion to claim exempt property are to be served on the judgment debtor. (A debtor who completes the motion files the original with the clerk, sends one copy to the judgment creditor, and keeps the other copy.)
- B. When husband and wife are codebtors, a notice of rights and motion to claim exempt property must be sent to each of them since each is entitled to claim exemptions.
- C. When notice of rights may be issued. One issue is whether the notice of rights may be issued during the time of the automatic stay of the judgment.
1. G.S. § 1A-1, Rule 62 provides that “no execution shall issue upon a judgment nor shall proceedings be taken for enforcement until the expiration of the time provided for in the ... statute or rule.” [10 days for appealing small claims judgment to district court; 30 days for district or superior court judgments.]
  2. It is possible to read Rule 62 to allow the notice of rights to be issued before the time for appeal has passed so long as the execution is not issued until the period expires. However, the better practice is to wait until the time for appeal has passed before issuing a notice of rights because of the problems that are created if the notice is issued and then the debtor appeals.
- D. How judgment creditor must serve a notice of rights and motion to claim exempt property on judgment debtor.
1. Judgment creditor may serve the notice and motion by registered or certified mail, return receipt requested, addressed to debtor, by depositing with a designated delivery service, addressed to the debtor, delivering to the addressee and obtaining a delivery receipt or by mailing by signature confirmation, addressed to the debtor, and delivering to the addressee and obtaining a delivery receipt as provided in Rule 4(j)(1), or
  2. Judgment creditor may have sheriff serve notice and motion as provided in Rule 4(j).
  3. If certified mail, delivery service, or service by sheriff is attempted and is unsuccessful, the judgment creditor may serve the debtor by first class mail to last known address of debtor.
    - a) The judgment creditor is only required to attempt one of the forms of service before using first class mail.
    - b) The judgment creditor is not required to serve the debtor by publication when Rule 4(j) service is not successful.
- E. Recovery of costs of service of notice on debtor. A judgment creditor who wishes to recover the costs of service from the judgment debtor must also prove costs by receipt or voucher. Upon proof, the clerk may tax as costs.

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## SETTING ASIDE EXEMPTIONS

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- V. **Waiver By Failing to Assert Exemptions [G.S. §§ 1C-1601(c) and 1C-1603(e)(2)]**
- A. When waiver occurs. If the judgment debtor does not file with the clerk a motion to claim exempt property or a written request for a hearing within the appropriate time after the notice of rights and motion were served, the judgment debtor waives the right to claim statutory exemptions.
1. If the notice of rights is served by the sheriff, the judgment debtor has 20 days from the date served to file the motion.
  2. If the notice of rights is served by certified or registered mail, the judgment debtor has 20 days after the notice is delivered to file the motion. [*Williams v. Moore*, 95 N.C.App. 601, 383 S.E.2d 416 (1989).]
  3. If the notice of rights is served by an authorized delivery service or by signature confirmation, the judgment debtor has 20 days after receipt of the notice to file the motion.
  4. If the notice of rights is served by first class mail, the judgment debtor has 23 days after the notice is mailed to file the motion. [G.S. § 1A-1, Rule 6(e)]
- B. No extension of time to claim exemptions. Rule 6(b) does not allow the clerk to extend the time to file a motion to claim exempt property, since the time limit is specified in a statute other than the rules. [See *Riverview Mobile Home Park v. Bradshaw*, 119 N.C.App. 585, 459 S.E.2d 283 (1995).] When a debtor files a motion to extend time to file a motion claiming exemptions, the clerk might suggest that the debtor ask for a hearing to claim exemptions. Then the clerk can accomplish the same result as extending time by scheduling the hearing in 30 days at which time the debtor may bring the completed motion to the hearing.
- C. Proof of service to show waiver. A judgment creditor seeking to have execution issued must prove that the notice and motion were served on the judgment debtor and that the time for the judgment debtor to claim exemptions has elapsed without a claim being asserted. [G.S. § 1C-1603(a)(4)]
1. Proof of service by sheriff is by sheriff's return.
  2. Proof of service by certified or registered mail is by affidavit showing proof of service accompanied by signed returned post office receipt (green card).
  3. Proof of service by delivery service is by affidavit showing proof of service accompanied by delivery service receipt.
  4. Proof of service by signature confirmation is by affidavit showing proof of service accompanied by copy of signature confirmation.
  5. Proof of service by first class mail is by certificate indicating that service by either certified or registered mail or by the sheriff was

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## SETTING ASIDE EXEMPTIONS

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tried and was unsuccessful and giving the date the notice was mailed by first class mail and the address to which it was mailed.

- D. Clerk issues execution on all property when debtor waives exemptions. Upon proof of service of notice and no response by the judgment debtor, the clerk issues an execution for all property owned by the judgment debtor.
1. Statute does not require the clerk to make a finding of waiver; waiver is automatic on proof of service.
  2. Some clerks have a practice of making a finding of waiver so the file will indicate waiver. For example, "On 7/10/90, the judgment creditor served a notice of rights and motion to claim exempt property on judgment debtor. The judgment debtor did not file a motion to claim exemptions or a request for a hearing within the appropriate time. Therefore, I find that the judgment debtor has waived his right to exemptions as provided by 1C-1601(c)(3)."
- E. Setting aside waiver. The clerk (or district court judge) may relieve a waiver because of mistake, surprise, or excusable neglect at any time before property is sold at execution sale. If the waiver is set aside, the judgment debtor may then claim statutory exemptions. [G.S. § 1C-1601(c)(3)]
1. The standard of excusable neglect to relieve a waiver is less strict than for setting aside judgments under Rule 60. [*In re Laughinghouse*, 44 B.R. 789 (Bankr.E.D.N.C. 1984).]
  2. One situation in which relief from a waiver might be sought is when the debtor did not get actual notice of the right to set off exemptions. Another situation might be when the motion to claim exemptions was filed late.
  3. Although the statute does not specify, the clerk should give notice to both parties of a hearing to determine whether to relieve the judgment debtor of the waiver if the creditor raised objection to the late filing.

NOTE: Because G.S. § 1C-1601(c)(3) allows relief from waiver any time until the property is sold, the clerk has the power to stop the sheriff from selling the property until a determination is made on the waiver.

4. If there is a hearing, the clerk should enter an order either relieving judgment debtor from waiver or not.

### VI. Claiming Statutory Exemptions [G.S. § 1C-1603(e)]

- A. The burden is on judgment debtor to claim exemptions. They are not granted automatically.
- B. Who is eligible judgment debtor.
1. Judgment debtor must be an individual to qualify for any exemptions. [See section III.B.2 at page 37.11.]
  2. Judgment debtor must be a resident of North Carolina. Even if a resident at the time of judgment, if debtor is not a resident at the time

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## SETTING ASIDE EXEMPTIONS

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the notice of rights is served, then debtor cannot claim the exemptions. [See section III.B.1 at page 37.10.]

- C. How debtor claims exemptions. Debtor may claim exemptions by filing a motion to designate exemptions or by filing a written request for a hearing before the clerk to claim exemptions.
1. Motion to designate exemptions must be filed with the clerk of superior court in the county where the judgment was rendered.
  2. Motion must be filed within 20 days after service of the notice of rights except if the notice is served on judgment debtor by first class mail, the debtor has 23 days to answer. [G.S. § 1A-1, Rule 6(e)]
  3. If 20 days have elapsed before the judgment debtor files motion to claim exempt property with the clerk, the debtor has waived the exemptions even if he or she files the motion before an execution is issued. [G.S. § 1C-1603(e)(2)] However, the clerk may set aside a waiver made by reason of mistake, surprise, or excusable neglect. [See section V.E at page 37.19.]
- D. Procedure when judgment debtor claims exemptions. If judgment debtor files motion to designate exemptions, the following procedure must be used:
1. Judgment debtor must serve a copy of the motion on the judgment creditor under G.S. § 1A-1, Rule 5.
    - a) If judgment debtor serves a copy of the motion to claim exemptions on the judgment creditor but fails to file it with the clerk, this technically would constitute a waiver. However, it would be a situation where the clerk on his or her own motion might want to set aside the waiver and file the motion. The clerk could not extend time to file the motion. [See section V.B at page 37.18.]
  2. Judgment creditor has 10 days from the date served with the debtor's motion to file an objection to property claimed by the judgment debtor.
    - a) If the judgment debtor files a motion with the clerk within proper time but fails to serve a copy on the judgment creditor, when judgment creditor requests to have an execution issued on the grounds that judgment debtor waived exemptions, the clerk should give the creditor the debtor's motion claiming exemptions and give the creditor 10 days from that date to file objections.
    - b) Judgment creditor may notify clerk before the 10 days expires that he or she has no objection and wants to have an execution for nonexempt property issued.
  3. If the judgment creditor does not file an objection to the property claimed, the clerk issues an order designating property claimed and allowed by law as exempt. The form is ORDER DESIGNATING EXEMPT PROPERTY (AOC-CV-409).

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## SETTING ASIDE EXEMPTIONS

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- a) Generally, the clerk does not have responsibility to determine whether the judgment debtor has completed the form correctly, and the clerk awards whatever claimed. The burden is on judgment creditor to object.
  - b) However, an exemption should not be allowed when it is claimed in property clearly not allowed by law to be exempted. [G.S. § 1C-1603(e)(6)]
  - c) In practice, many clerks do not enter the order designating exempt property 10 days after the motion is filed but rather wait until the creditor requests issuance of the execution.
4. If the judgment creditor files an objection to property claimed, the matter must be heard by district court judge. [See section VII at page 37.22.]
- E. Procedure when debtor files request for hearing to claim exemptions. If the judgment debtor makes a written request for a hearing before the clerk to claim exemptions (rather than filing motion to claim exempt property), the following procedure must be used:
1. The clerk must set date for hearing and notify the judgment creditor and judgment debtor of date, time, and place of hearing. Check block 1 on the form NOTICE OF HEARING ON EXEMPT PROPERTY (AOC-CV-408).
  2. If the judgment debtor does not appear at the hearing, the clerk should make a written finding that the judgment debtor requested a hearing to claim exemptions; that the judgment debtor was given notice of the hearing; that the judgment debtor did not appear at the hearing; and conclude that “therefore the judgment debtor waived his or her right to statutory exemptions.” The debtor could move to set aside the waiver if he or she can show excusable neglect for not appearing at the hearing. However, if the hearing was set before the 20 days to file a motion claiming exemptions, the clerk should not treat the failure to appear at the hearing as a waiver of exemptions until 20 days from service of the notice of rights have passed without debtor filing a motion.
  3. If the judgment debtor appears, the clerk assists the debtor in claiming exemptions by going through motion form with him or her. The judgment debtor should sign the exemption motion and file it with the clerk.
  4. Judgment creditor is not required to appear at the hearing and has no formal role in the proceeding. Frequently the creditor does appear at the hearing and wants to ask questions to determine what assets the debtor owns or to try to settle the case. It is the clerk’s decision how much involvement to allow the creditor. However, the statute is clear that the creditor cannot contest, at this hearing, the valuation of the property given by the debtor. A creditor who wants to contest the

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## SETTING ASIDE EXEMPTIONS

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valuation claimed at the hearing must file an objection as stated below.

5. Judgment creditor has 10 days after the date of the hearing to object to the exemptions claimed by the judgment debtor at the hearing.
  - a) There is no requirement to serve a copy of the motion filled out at the hearing on the judgment creditor. Judgment creditor is notified that the hearing will take place and has duty of either coming to the hearing or getting a copy of the motion from the clerk's office to determine what was claimed.
6. If the judgment creditor does not file an objection, the clerk issues order designating property claimed and allowed by law as exempt.
  - a) The form is ORDER DESIGNATING EXEMPT PROPERTY (AOC-CV-409).
  - b) Judgment creditor may notify the clerk before the 10 days expires that he or she has no objection and wants to have an execution for nonexempt property issued. In that case the clerk may enter the order designating exempt property before the 10 days have elapsed.
7. If the judgment creditor objects to the property claimed, the matter must be set before a district court judge. [See section VII immediately below.]

### **VII. Hearing Before District Court Judge [G.S. § 1C-1603(e)(7) through (9)]**

- A. Clerk sets hearing. If the judgment creditor objects to the exemptions claimed by the judgment debtor, the clerk must set the motion before a district court judge at the next nonjury civil session.
- B. The clerk must give notice of time and place of the hearing to the judgment creditor and judgment debtor. Check block 2 on the form NOTICE OF HEARING ON EXEMPT PROPERTY (AOC-CV-408).
- C. The clerk, if ordered by the district court judge, appoints a qualified person to examine the property and report its value to judge.
  1. Because the person requesting the valuation (judgment creditor) must advance expenses of hiring the appraiser, the clerk must require the judgment creditor to advance the costs before hiring the appraiser. [G.S. § 1C-1603(e)(8)]
  2. The costs of hiring an appraiser are court costs that may be taxed against judgment debtor. (Costs have priority over the claim.)
  3. If the judgment creditor does not advance the costs of the appraiser, the clerk should notify the judge, who must determine how to proceed.
- D. At the hearing, the judge determines the value of property and enters an order designating exempt property.

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## SETTING ASIDE EXEMPTIONS

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### VIII. Post-Order Procedures [G.S. § 1C-1603(e)(10) through (12), (f), (g)]

- A. Notation in judgment docket. After an order designating exemptions is issued, the clerk must enter a notation in the judgment docket that “exemptions designated.” [G.S. § 1C-1603(f)]
- B. Notification when real property designated as exempt is located in another county. If real property located in another county is designated as exempt and a transcript of judgment has already been sent to the county where the real property is located, the clerk in the county where the judgment was rendered (entered) must send a notice of the designation of exempt property to the clerk in the county where the property is located. [G.S. § 1C-1603(f)] This provision was enacted before electronic transcripts and applies only to transcripts sent manually.
- C. Issuing execution. Upon request of judgment creditor and payment of fees, the clerk issues an execution for all non-exempt property. The clerk must attach a copy of the order designating exemptions, and the motion claiming exempt property if the order merely incorporates the motion, to the execution so sheriff will know what property is exempt.
- D. Reaching exempt property with excess equity.
  1. Where the order designating exemptions indicates excess value in exempt property, the clerk, in an execution, may order the sale of property having excess value and appropriate distribution of the proceeds. [G.S. § 1C-1603(e)(10)]
  2. The sheriff cannot sell exempt property that has excess value in it without an order from the clerk because the general order in the execution directs the sheriff not to sell any exempt property. However, some sheriffs may sell property based on excess equity in the order without a specific order from the clerk, and in those counties the creditor will not seek to have the clerk order the sale for excess equity.
  3. If a creditor wishes to have the sheriff sell property for excess value, the creditor must ask the clerk to indicate on the execution in the block entitled “Additional Order For Satisfying Judgment” the particular piece of property to be sold. The clerk should direct the sheriff to sell the particular piece of property, beginning the sale at \$1 over the exemption amount, and apply the proceeds by giving the judgment debtor the exemption amount and applying the remainder to the judgment as if that were the amount of the bid. Some clerks enter the order authorizing the sale of property with excess equity on ORDER DESIGNATING EXEMPT PROPERTY (AOC-CV-409) in the blank marked “It is further ordered.”

**Example.** The order designating exempt property gave debtor a \$35,000 exemption in a residence with a fair market value of \$100,000 and no liens. The debtor has \$65,000 excess equity in the property. In order to sell the house for excess equity, the creditor

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## SETTING ASIDE EXEMPTIONS

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asks that the clerk order the sale of the house in the execution. The clerk would add as an additional order: “You are ordered to sell the residence at 506 Jones St., Handly, NC, beginning the sale at \$35,001. Give the first \$35,001 to the judgment debtor and apply the remainder of the proceeds as you would in any execution.”

- E. Appeal from an order of the clerk designating exemptions is to a district court judge. The appealing party must give notice of appeal within 10 days after entry of order.
- F. Appeal from an order of a district court judge designating exemptions is to the Court of Appeals.
- G. Modification of exemptions. Either judgment creditor or judgment debtor may move to modify original exemptions upon a change of circumstances. [G.S. § 1C-1603(g)]
  - 1. Substantial change in value may constitute changed circumstances.
  - 2. Creditor’s assertion that the real property claimed by the debtor had a fair market value substantially higher at the time it was claimed than that which the debtor claimed does not constitute a change of circumstances. The remedy is for creditor to object to valuation when motion to claim exempt property is served on creditor or to appeal designation of exemptions. [*Brock & Scott Holdings, Inc. v. Stone*, 203 N.C.App. 135, 691 S.E.2d 37 (2010).]
  - 3. If the clerk follows the policy of not issuing a new notice of rights when the debtor has claimed exempt property pursuant to an earlier execution on the judgment, the most common reason for the debtor to move to modify would be that the debtor no longer owns the property listed as exempt but has purchased new property that he or she wishes to exempt.
  - 4. The statute does not specify when the right to file a motion to modify is cut off. Some clerks would not allow the motion after execution is issued and others would entertain the motion any time until the property is sold. Since exemptions are to be interpreted liberally on behalf of the debtor, the latter reading might be the better one.
  - 5. Procedure for modification.
    - a) The statute requires a motion in the original proceeding. Generally, a motion would require a notice of the motion and the setting of the motion for a hearing, but the procedure for claiming exemptions is different from the normal procedure and the statute is not clear what procedure should be followed.
    - b) Several rules should be followed in whatever procedure the clerk adopts:
      - (1) All parties should be given notice and an opportunity to be heard at some point.

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## SETTING ASIDE EXEMPTIONS

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- (2) Both parties should be treated fairly.
  - (3) The clerk should consider whether the party seeking the modification is entitled to modification under the law and should not merely treat the request for modification like a default.
- c) There is no form for filing the motion so the party or the party's attorney must prepare a motion. In many cases if the debtor is the moving party, the debtor might file an amended MOTION TO CLAIM EXEMPT PROPERTY (AOC-CV-415 or -407) as the request for modification.
- d) Below are two possible procedures that clerks could follow.
- (1) The party moving for modification sets a hearing for the motion and serves notice on the other parties. At the hearing the clerk would determine whether the moving party is entitled to modify the exemptions, and if so, the clerk would, after evidence is presented, enter an order designating the new exemptions.
  - (2) The moving party files with the clerk a motion for modification that includes a modified list of exempt property that the party wishes to claim. Based on the motion the clerk determines whether to allow the modification and makes sure that the moving party serves a copy of the proposed modified exemptions on the other party and notifies the other party that if the party does not object to the newly claimed exemptions within 10 days after notice, the clerk will enter an order granting the new exemptions. Essentially, this procedure follows the procedure used for originally claiming exemptions in modifying exemptions.

### IX. Claiming Constitutional Exemptions

- A. History. The North Carolina Constitution provides that every homestead, to a value fixed by the General Assembly, but not less than \$1,000, and personal property of a resident to a value fixed by the General Assembly but not less than \$500, is exempt from sale under execution. [N.C. CONST. art. X, §§ 1, 2]
1. For over 100 years, the constitutional provision was implemented by statutes that provided for \$1,000 homestead exemption and \$500 personal property exemption. The debtor was entitled to the homestead exemption without claiming it; and the exemption was set off in the real property itself. The debtor was entitled to the personal property exemption if the debtor requested it.
  2. In 1981 General Assembly enacted Art. 16 of G.S. Chapter 1C totally rewriting the exemption law. The new law sets out larger

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## SETTING ASIDE EXEMPTIONS

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statutory exemptions but authorizes a debtor who does not claim the statutory exemptions to claim the constitutional exemptions. However, the constitutional exemptions are in value, not in the specific property.

3. G.S. § 1C-1603(a)(4), which provides that debtor waives his or her right to all exemptions (both statutory and constitutional) if not asserted after served with a notice of rights, was held unconstitutional as it applies to constitutional exemptions. [*Household Finance Corp. v. Ellis*, 107 N.C.App. 262, 419 S.E.2d 592 (1992), *aff'd per curiam*, 333 N.C. 785, 429 S.E.2d 716 (1993) (limiting the claiming of constitutional exemptions to 20 days after notice to designate is served is unconstitutional).]
- B. What are the constitutional exemptions. [G.S. § 1C-1602]
1. The debtor is allowed to claim \$1,000 in value in real property owned and occupied by the debtor.
  2. The debtor is allowed to claim \$500 in value in personal property owned by the debtor.
- C. Who is entitled to constitutional exemptions.
1. Any resident of North Carolina is entitled to the constitutional exemptions.
  2. **A debtor may not claim both statutory and constitutional exemptions.** [G.S. § 1C-1602]
  3. Debtors are likely to claim constitutional exemptions in two situations:
    - a) The debtor waived statutory exemptions and the sheriff is about to or has sold property under an execution.
    - b) The law does not entitle the debtor to claim statutory exemptions but does allow a claim of constitutional exemptions (e.g., **judgment** for forfeiture of an appearance bond or a fiduciary bond or judgment is for criminal restitution.)
- D. Exceptions from constitutional exemptions. Certain judgments are not entitled to constitutional exemptions.
1. Debt is for taxes. [N.C. CONST. art. X, § 2; *City of Wilmington v. Sprunt*, 114 N.C. 310, 19 S.E. 348 (1894).]
  2. Child support. [*Walker v. Walker*, 204 N.C. 210, 167 S.E. 818 (1933).]
  3. Spousal support. [*Anderson v. Anderson*, 183 N.C. 139, 110 S.E. 863 (1922).]
  4. Purchase-money mortgages on land. [N.C. CONST. art. X, § 2; *Jarrett v. Holland*, 213 N.C. 428, 196 S.E. 314 (1938).]

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## SETTING ASIDE EXEMPTIONS

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5. Enforcement of security agreement against personal property. [*Montford v. Grohman*, 36 N.C.App. 733, 245 S.E.2d 219 (1978).]
- E. When constitutional exemptions may be claimed.
1. Constitutional exemptions may be claimed any time “until the moment the money from the sale is applied to the debt to be paid.” [*Household Finance Corp. v. Ellis*, 107 N.C.App. 262, 419 S.E.2d 592 (1992), *aff’d per curiam*, 333 N.C. 785, 429 S.E.2d 716 (1993).]
  2. Therefore, exemptions may be claimed in the proceeds of an execution sale that have been received by the clerk but not yet paid to the judgment creditor.
- F. Procedure for claiming constitutional exemptions. [G.S. § 1C-1602]
1. In designating constitutional exemptions, the clerk follows the procedure set out in G.S. § 1C-1603, which is the procedure for designating statutory exemptions.
  2. Debtor who has claimed statutory exemptions is not entitled to claim constitutional exemptions.
  3. Debtor seeking constitutional exemptions may claim exemptions by:
    - a) Filing a motion with the clerk to designate the exemptions. The form is MOTION TO CLAIM EXEMPT PROPERTY (CONSTITUTIONAL EXEMPTIONS) (AOC-CV-411).
    - b) Filing a motion that the debtor requests a hearing before the clerk to designate exemptions.
  4. Creditor may object to exemptions claimed within 10 days after the motion is served on creditor or within 10 days after the hearing to designate exemptions is held.
  5. If the creditor does not object within the proper time, the clerk must designate the property to be exempt. The form is ORDER DESIGNATING EXEMPT PROPERTY (AOC-CV-409).
  6. If the creditor does object, the clerk places the motion for hearing by the district court judge at the next civil session.
  7. If the debtor comes to the clerk to claim exemptions after an execution has been issued or the sheriff has levied on property but before the sale, the clerk might consider notifying sheriff to postpone levying on property or to postpone the sale until the clerk determines what property is exempt.
    - a) The clerk should not recall the execution because the debtor would then be entitled to a new notice of rights and might exempt property that is subject to the outstanding execution.
    - b) The clerk must notify sheriff when exemptions have been set aside that the sheriff can proceed with the sale, but the notice must indicate what property is now exempt and cannot be sold.

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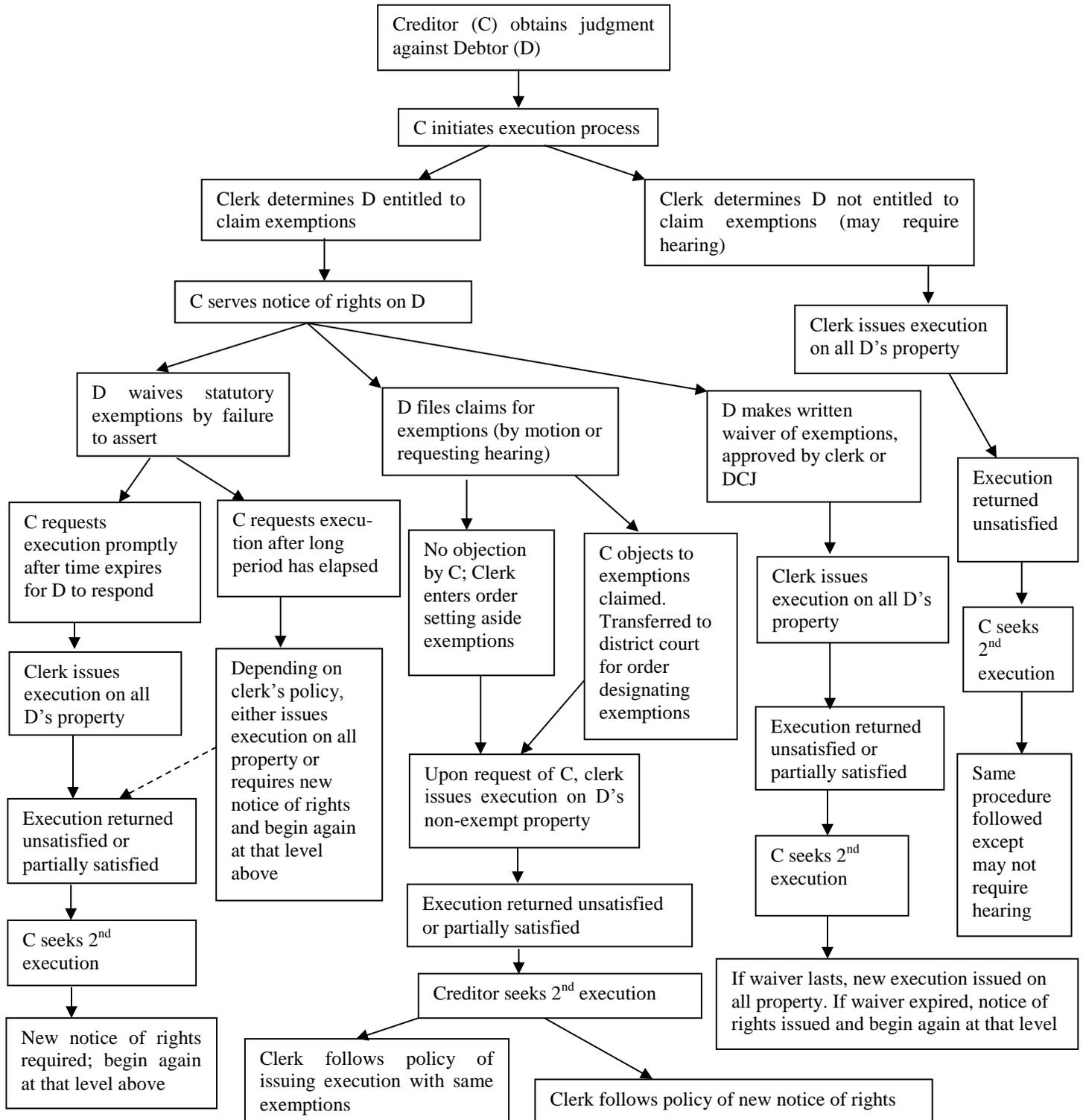
## SETTING ASIDE EXEMPTIONS

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8. If exemptions are claimed after the sheriff has sold the property, the clerk pays the exemption out of the proceeds of the sale before paying the remainder to the judgment creditor.
9. If exemptions are taken in property that has excess equity, the creditor may request the clerk to order the property sold for excess equity. In that case the clerk must indicate in the block marked “additional order” on the execution that the sheriff is to sell the property for the excess equity beginning the sale at \$1 over the exemption amount.
10. Debtor is not entitled to take a partial allotment in several items of personal property each worth more than \$500. For example, debtor cannot claim \$250 in a motor vehicle with a value of \$5,000 and \$250 in a boat with a value of \$2,000.

# SETTING ASIDE EXEMPTIONS

## Appendix I Flow Chart for Setting Aside Exemptions



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## SETTING ASIDE EXEMPTIONS

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