

*Richmond Wholesale Meat Co. v. Ngiraklsong*, 2 ROP Intrm. 292 (1991)  
**RICHMOND WHOLESALE MEAT CO.,**  
**Petitioner,**

v.

**HONORABLE ARTHUR NGIRAKLSONG, ET AL.,**  
**Respondent.**

**A.J.J. ENTERPRISES,**  
**Petitioner,**

v.

**HONORABLE ARTHUR NGIRAKLSONG, ASSOCIATE JUSTICE, TRIAL DIVISION,**  
**Respondent.**

SPECIAL PROCEEDING NO. 2-90  
Civil Action No. 531-89; 533-89 & 540-89  
(Consolidated)

Supreme Court, Appellate Division  
Republic of Palau

Memorandum of decision entered March 14, 1990  
Decided: May 10, 1991

Counsel for Petitioner: David F. Shadel

BEFORE: MAMORU NAKAMURA, Chief Justice; LOREN A. SUTTON, Associate Justice;  
FREDERICK J. O'BRIEN, Associate Justice.

SUTTON, Associate Justice:

On March 14, 1990, this Court issued DECISION RE PETITION FOR WRIT OF MANDAMUS directing Respondent, the Honorable Associate Justice Arthur Ngiraklsong, to issue writs of execution forthwith and to promptly hear and determine Petitioner's request **1293** for writs of attachment.

In each of the cases before the Court a money judgment had been entered for a sum certain and writs of execution and attachment had been applied for. The lower court had set hearing dates in each case at times more than thirty (30) days hence and delayed issuance of any writ pending such hearings. In Civil Cases numbered 531-89, 533-89 and 540-89 notices of appeal had been filed by the judgment debtor and the lower court set hearing to hear argument on whether the court had jurisdiction to issue the writs after notice of appeal was filed and absent a specific order for stay.

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In Civil Action No. 146-89 hearing was set by the lower court to afford the judgment debtor opportunity to show cause why a writ of execution should not issue.

The issues raised by these rulings of the lower court are:

1. Whether the filing of a notice of appeal deprives the trial court of jurisdiction to enforce its money judgment by way of a writ of execution where no stay has been specifically granted.
2. Whether a court has discretion to issue or not issue writs of execution where judgment has been entered for a sum certain and such writs are petitioned for by the judgment creditor.
3. Whether the statutes which regulate the issuance of such writs comport with constitutional requirements of due process and if so, what specific process is required.
4. The distinction between writs of attachment and of **1294** execution. When is each appropriately filed?

#### JURISDICTION

Section 605 of Title 14, Palau National Code, establishes jurisdiction in a trial court to execute its judgments, orders or sentences absent a stay. *Secty. of State, Ngaraard State, et al., v. Gibson Kanai, et al., and Mamoru Nakamura, Chief Justice*, Civ. App. No. 5-86, Order of April 3, 1986; *ROP v. M/V Aesarea*, 1 ROP Intrm. 429 (App. Div. Jan 1988); 4 Am. Jur. 2d 837, *APPEAL AND ERROR*, Sec. 360 & 361.

Where land is the subject of a judgment, 14 PNC § 2002 provides that there shall be an automatic stay upon the filing of a notice of appeal unless there is a specific order to the contrary. *Reab and Jeltan Lanki v. Helkena Lanikieo*, 7 TTR 533, 536 (H.C.T.T. App. Div. June 1977).

It is clear that in the case of a money judgment and in the absence of a stay, a lower court does not lose jurisdiction to enforce its judgment even though notice of appeal has been filed.

We so hold and find that absent other impediments to the issuance of the writs in Civil Cases Nos. 531, 533 & 540-89 (Spec. Proc. No. 2-90), it was unnecessary and improper for the trial court to delay execution on that ground.

#### EXECUTION AND ATTACHMENT IS THERE A DIFFERENCE?

A writ of execution and one of attachment each seek satisfaction of a money judgment but are distinguishable on several grounds.

A writ of execution is a general writ which reaches for any **1295** and all non-exempt

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personal property of a judgment debtor. It shall be issued upon application of the judgment creditor, by the court which issued the judgment, absent a specific order of stay of execution from that or a higher court. 14 PNC § 2103.

A writ of attachment seeks specific personal property and may only be issued by the Trial Division of the Supreme Court supported by a statement of the Court for special cause shown supported by a statement under oath. 14 PNC § 2101(a).

In most jurisdictions the writ of attachment is utilized pre-judgment in order to protect assets of a potential judgment debtor and prevent dispersal or diminishment of such assets where it may be shown that there is a likelihood that the Movant shall prevail in the suit. In Palau, some confusion exists re the nature of these writs and counsel often file post-judgment petitions for “writs of execution and attachment”.

Upon application to the court which has entered a money judgment, a writ of execution must be issued promptly. The issuance of such a writ is a purely ministerial duty of the court. 14 PNC § 2103.

The issuance of a writ of attachment, on the other hand, is a discretionary act dependent upon the court’s finding of special cause shown and allowing for the specification of certain exemptions over and above those required by 14 PNC § 2110; 14 PNC § 2101(a) & (b).

We find, therefore, that upon the petition of a judgment creditor to the court which has entered the judgment for a sum of money certain, such court shall promptly issue a writ of 1296 execution when applied for in the manner and form prescribed by 14 PNC § 2103 *et. seq.*, and this decision, absent a specific stay order from that or a higher court.

We find, contrarywise, that upon the pre-judgment petition of a potential judgment creditor to the Trial Division of the Supreme Court for a writ of attachment, the issuance of said writ is a discretionary act and the court may determine whether special cause exists and whether the appropriate exemptions are withheld.

### DUE PROCESS REQUIREMENTS

The seminal U.S. case on the issue of due process required upon execution of a money judgment is *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 45 S.Ct. 61 (1924). It was held there that the underlying judgment itself was sufficient notice to the judgment debtor of potential execution and that therefore due process did not require notice and further opportunity to be heard prior to a garnishment of the Appellant/Judgment Debtor’s wages.

*Endicott* has, however, been considerably undermined by repeated challenges to post judgment remedies and the majority rule in the U.S. today is that due process requirements are satisfied if they provide:

1. Notice to the judgment debtor that property has been seized;

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2. Notice of exemptions to which the judgment debtor may be entitled; and,
3. Prompt opportunity to be heard and to assert exemptions **1297** and/or challenge the seizure.

*McCahey v. L.P. Investors*, 774 F.2d 543, 549 (2d Cir. 1985) citing *Mathews v. Eldridge*, 96 S.Ct. 893, 902 (1976).

The rationale in *McCahey, supra*, adopts the balancing test established in *Mathews, supra*.

This test takes into consideration the governmental and private interests involved and considers three primary factors:

First, the private interest that will be effected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *McCahey, supra*, at 548 quoting *Mathews, supra*, at 902.

Given the similarities between U.S. Constitutional requirements of due process and those of Palau and between the statutory schemes of execution and attachment of each, we see no compelling reason to depart from the standard set out above in *McCahey* and *Mathews*. See also *Reigh v. Schleigh*, 748 F.2d 1191 (4th Cir. 1986).

We turn now to the statutes on attachment and execution of Palau and find no constitutional infirmity attached thereto.

We hold, however, that the notice of execution presented to a judgment debtor by the person levying must contain a listing of exemptions to which the judgment debtor is entitled (14 PNC § 2110) and that opportunity must be afforded the judgment debtor to assert such exemptions and to challenge the seizure, *post facto*, if application be made therefor. We hold further that upon **1298** such application the court must act promptly and set hearing at a time prior to the final disposition or sale of the applicant's property and where exemptions are claimed from property already seized, within no more than a few days. Section 2103 of Title 14, PNC, requires that the opportunity to be heard be available, by its reference to Sec. 2110 of that title, and basic due process (Art IV, Sec. 6 ROP Const.), we find, requires that an opportunity be afforded to the judgment debtor whose property has been seized to challenge the seizure. *McCahey v. L.P. Investors, supra*, at 549.

Likewise, we do not read these sections to require that pre-attachment notice or opportunity to be heard be afforded. The Court is required by 14 PNC § 2101(a) to base issuance

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of a writ of attachment upon its finding of special cause shown and may do so *ex parte* upon the sworn statement of the petitioner. The Court may, however, exercise its discretion in the case of a pre-judgment petition for writ of attachment and hold a pre-attachment hearing if the sworn statement of the petitioner is deemed insufficient and other facts and circumstances known to the Court commend such a procedure. Such hearing, however, must be set and held promptly (i.e. within a few days).

We find that the same procedural due process protections as we have held must be accorded when property of a judgment debtor is seized by way of a writ of execution must likewise be afforded a judgment debtor whose property is attached by way of a writ of attachment without pre-attachment notice and opportunity to be heard.

**1299** These due process rights are:

1. Notice that the property has been attached, which includes a listing of exempted property and that the recipient may request a prompt hearing on exemptions and/or to challenge the seizure itself on good cause shown.
2. A prompt hearing, if applied for and good cause is shown.

#### SUMMARY

We hold that in the case of a writ of execution where there is a judgment for a sum certain the Court is compelled, pursuant to 14 PNC § 2103, to promptly issue said Writ. Due process requires that the writ must contain a list of exemptions to which the judgment debtor is entitled pursuant to 14 PNC § 2110 and notice that upon good cause shown the person levied upon shall be granted the opportunity to be heard, post-levy, and challenge the seizure.

In the case of a writ of attachment we hold that the Court may, upon special cause shown, grant and issue such writ *ex parte*, absent a stay order and without a pre-levy hearing. 14 PNC § 2101(a).

We hold further, that, similarly to the process required in the case of a writ of execution, a post-levy hearing on a writ of attachment must be granted upon application of the judgment debtor. Since the issuance of a writ of attachment is a discretionary act by the Court, the Court may set a pre-levy hearing if such is deemed appropriate. If a pre-levy hearing is set by the Court such hearing must be promptly held (i.e. within a few days). The Writ of Attachment shall contain the same **1300** information regarding exemptions and notice of right to a post-seizure hearing as has been indicated in the case of a writ of execution.

In post-judgment cases where a judgment exists for a sum of money certain a writ of execution should be sought, not a writ of attachment. The Writ of Execution may, of course, designate certain property, if known to the judgment creditor.

We hold further that, in the absence of a specific stay order, the fact of the filing of a

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notice of appeal does not deprive the lower court of jurisdiction to enforce its money judgment.

We have not considered herein the execution of judgments involving land since those issues are not raised in this appeal.