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Opinion No. 01-094

Authority of court clerks to issue immediate, pre-trial writs of possession

QUESTION

Does Tenn. Code Ann. § 18-4-203 authorize clerks of Tennessee's general sessions and circuit courts to issue immediate, pre-trial writs of possession?

OPINION

Tenn. Code Ann. § 18-4-203 does not authorize clerks of general sessions and circuit courts to issue immediate, pre-trial writs of possession.

ANALYSIS

This opinion requires interpretation of the statutes providing an action for recovery of personal property, Tenn. Code Ann. §§ 29-30-101, *et seq.*, together with Tenn. Code Ann. § 18-4-203, which sets out powers and duties of circuit and general sessions court clerks. Subsection (a) of that statute provides: "The clerk of such court has concurrent authority with the judge to issue warrants and other process and writs, *other than those which the law requires to be issued by a judicial officer . . .*." (Emphasis added).

Those "warrants, other process and writs" which the law mandates that only a judicial officer may issue are not clearly identified. But frequent references to "the court" and "the judge" in statutes and case law addressing recovery of personal property strongly imply that only a judge, not a clerk, may issue a pre-trial writ of possession and, in effect, deprive a defendant of property, even if that deprivation may only be temporary until the action is tried.

Tenn. Code Ann. §§ 29-30-101, *et. seq.*, provide a detailed procedure by which one entitled to possession of personal property, held by another, may recover it. An action to recover personal property may be commenced in chancery, circuit or general sessions court. Venue lies in the county in which the property is located, in the county in which an underlying contract was executed, or in the county in which any defendant resides or in which his address is stated to be in any writing on which the plaintiff's claim is grounded. *See* Tenn. Code Ann. § 29-30-102.

Although Tenn. Code Ann. § 29-30-104 provides for a possessory hearing *before the judge or chancellor,* to be set not less than five (5) days nor more than twenty (20) days after service of process on the defendant, Tenn. Code Ann. § 29-30-106 provides a means for expediting the proceeding.

That procedure permits a requesting party to apply for a writ of possession by filing with the appropriate court a verified complaint, containing a copy of any writing on which the alleged claim to possession is based. The complaint may be filed prior to or simultaneously with the making of the application for the writ. Upon the application being made, *the court* hears the parties and orders the writ of possession in the plaintiff's favor when *the court* finds either:

> (A) That at least five (5) days prior to such application plaintiff mailed by certified mail or delivered to defendant a notice of the time and place of such application and that:
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> (i) Such notice had either been received by the defendant, or was directed to the defendant at the address stated in any writing, signed by the defendant, and on which the plaintiff's claim to possession is founded;
>
> (ii) Such notice was accompanied by a copy of plaintiff's complaint, including a copy of any writing on which the plaintiff's claim to possession was founded; and
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> (iii) The plaintiff is entitled to possession of the property, or that there is no substantial controversy as to the plaintiff's right to such possession; or
>
> (B) (i) That the property was obtained by fraud, misrepresentation or theft, or
>
> (ii) The defendant is:
>
> (a) Concealing the property;
>
> (b) Likely to remove it from the jurisdiction of the court;
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> (c) Likely to dispose of the property;
>
> (d) Endangering the property by unusually hazardous use; or
>
> (e) Seriously impairing the plaintiff's security interest in the property, such as by use in a manner other than that contemplated by the parties, or by failing to maintain hazard insurance on the property where the written instrument or agreement on which the plaintiff's claim is founded requires such insurance.

A writ of possession issued pursuant to § 29-30-106(1)(B) is conditioned on the plaintiff's posting a bond in an amount fixed by *the court*, which amount shall be no less than the value of the property.

If, under the procedure provided for in § 29-30-106(1)(A), the defendant appears and admits *in open court* the plaintiff's right to possession, *the court* shall issue the requested writ to the plaintiff. If the defendant fails to appear, there is an inference that he does not dispute the plaintiff's right to possession. In such case, if the verified complaint demonstrates the plaintiff's right to possession, the writ shall be issued. The writ directs the officer to take possession of the property, deliver it to the plaintiff, and summon the defendant to appear and answer within 10 days if the action is in the general sessions court and within 30 days if it is in circuit or chancery court. The same action by the officer is required when a writ is issued under the provisions of §29-30-106 (1)(B).

When the defendant appears and resists the plaintiff's application, as provided for in subdivision (1)(A), *the court* shall either try the action at that time or:

> (i) Fix a time within which the defendant must answer;
> (ii) Fix a time for the trial; and
> (iii) Determine which party shall have possession of the property pending a final determination *by the court* and condition such possession upon the posting of such bond as *the court* may deem advisable. Where such party fails or refuses to post such bond, the officer shall take possession of the property and retain it either until the bond is posted or until *the court* enters its final judgment.

In 1974, the constitutionality of § 29-30-106 (then codified as § 23-2346) was challenged in *Woods v. State of Tennessee*, 378 F.Supp 1364 (W.D. Tenn. 1974). In that case, the United States District Court for the Western District of Tennessee upheld the statute's constitutionality on, among other grounds, the fact that *the court* hears the plaintiff, and *the court* orders the writ of possession. "*The court* to which the application is made will . . . hear the plaintiff and order a writ of possession if *the court* finds [that sufficient grounds exist]." (Emphasis added); 378 F.Supp. at 1365. Comparing the facts of the case before it with those in *Mitchell v. W. T. Grant Company*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), the Court in *Woods* stated:

> There, as here, the plaintiff must swear to facts that support his claim. There, as here, the party seeking repossession must give adequate bond to protect the defendant. And there, as here, pre-hearing repossession can only be awarded *by a judge.*

378 F.Supp. at 1366 (emphasis added); *see also Marsh v. State*, 185 Tenn. 103, 203 S.W.2d 372 (Tenn. 1947) (private act giving court clerk "concurrent authority with the Judge to issue warrants and other processes and writs, other than those which the law required shall be issued only by a Judicial officer" did not authorize clerk to issue a search warrant as such is a judicial function).

Accordingly, it is the opinion of this Office that Tenn. Code Ann. § 18-4-203 does not authorize clerks of the general sessions court or circuit court to issue pre-trial, immediate writs of possession.

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