

No. 1-13-3855

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re Marriage of)	Appeal from the
)	Circuit Court of
IRENE WACHOWSKI,)	Cook County
)	
Petitioner-Appellant,)	
)	95 D 7023
and)	
)	
DANIEL WACHOWSKI,)	The Honorable
)	Patrick W. O'Brien,
Respondent-Appellee.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

- ¶ 1 *Held:* The judgment creditor was not entitled to funds that the judgment debtor withdrew from and then returned to a deferred compensation account; the funds retained their exempt status and thus were outside the scope of the citation to discover assets served on the judgment debtor. The trial court's denial of the judgment creditor's turnover motion and grant of an exemption to the judgment debtor for such amounts are affirmed. The judgment creditor's request for attorney fees is denied.
- ¶ 2 This appeal addresses whether a judgment creditor is entitled to the turnover of funds that the judgment debtor withdrew from, and then deposited back into, a deferred compensation account after the judgment debtor's receipt of a citation to discover assets from the judgment creditor. Appellant Irene Wachowski seeks reversal of the judgment of the circuit court of

Cook County (a) denying her request for an order compelling turnover of the \$25,000 withdrawn and returned by appellee Daniel Wachowski and (b) granting Daniel an exemption for that amount. We conclude that the withdrawal and return of the funds did not change their exempt status and thus affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 Daniel and Irene divorced in 1996, and Daniel retired from the Chicago Fire Department in 2002. The former spouses have engaged in extensive litigation regarding the division of Daniel's pension from the Municipal Employees' Annuity and Benefit Fund of Chicago (MEABF). In a decision filed contemporaneously herewith, we affirm the circuit court's entry of a qualified Illinois domestic relations order (QILDRO) dividing the MEABF pension between Daniel and Irene. *In re Marriage of Wachowski*, 2014 IL App (1st) 130814-U (unpublished order under Supreme Court Rule 23). As part of that pension-related litigation, the circuit court entered a judgment in favor of Irene for \$189,342.94 on February 4, 2013, representing back payments owed by Daniel. This appeal arises from the supplementary proceedings to collect the unpaid amount, which Irene alleges is \$180,463.01.

¶ 5 Irene served Daniel with a citation to discover assets dated February 27, 2013.¹ During the citation examination of Daniel on April 3, 2013, Irene's counsel asked Daniel, "Would the most recent amounts of the IRA 457 B and the deferred compensation plans be contained in the documents you're presenting to us?" Daniel answered affirmatively, adding, "The only thing is I did remove 25,000 that I needed to pay some bills." Daniel stated, in part, that the \$25,000 distribution was "within the last couple of weeks," and that "[i]t's going to pay back my [current

¹ Although a copy is included in the appendix filed by Irene with this Court, neither the citation to discover assets nor a copy thereof is included in the record on appeal. However, the parties do not appear to dispute its existence or content.

wife Susan] what I had to borrow when I had to pay the bills." He indicated that he had not yet cashed the check—later stating, "I don't have any place to deposit it"—and clarified that the check itself was for \$20,000 because "[t]hey took out 5,000 in cash for taxes." Although a copy of the check apparently was not included in the documents Daniel had previously provided, Daniel offered to email a copy to Irene's counsel.

¶ 6 A copy of the check is included in the record on appeal. The check amount is \$20,000, and the issuance date was March 28, 2013. The first line of the account holder information reads, "NATIONWIDE TRUST CO FSB A DIV OF NW BANK." The second line reads, "FBO NRS PLAN PARTICIPANTS." The check is made payable to Daniel J. Wachowski.

¶ 7 On August 16, 2013, Daniel filed "Objections to Motion for Turnover of Funds and Declaration of Exempt Assets," in which Daniel claimed statutory exemptions and objected to Irene's requested turnover of various amounts. Daniel claimed one of the exemptions pursuant to section 2-1402(b)(5) of the Illinois Code of Civil Procedure (the Code) with respect to the \$20,000 received from, and then "almost immediately" deposited back into, his "457(B) retirement account through Nationwide."² See 735 ILCS 5/2-1402(b)(5) (West 2012). He apparently did not cash the check and returned the funds on the advice of his counsel. Daniel argued in his objection that "Irene cannot attach these funds" and that he "cannot be ordered to remove \$20,000 from an exempt retirement account for purposes of paying the Judgment."

¶ 8 In an objection and reply, Irene argued that "the instant that the funds were withdrawn, said funds became subject to the Citation lien, expressly stated in the Citation itself (a court order) and expressly prohibiting Daniel from any transfer or other disposition of property until further order of the court." Irene contended that Daniel "had possession and control of the

² A 457(b) plan allows employees of sponsoring organizations, such as state and local governments, to defer income taxation on retirement savings. See 26 U.S.C. § 457 (2012).

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\$25,000" upon receipt of the check, and "[h]e decided to transfer the money not in satisfaction of the Judgment, in violation of the Citation lien." She sought immediate turnover of the full \$25,000, asserting that the "taxes on Daniel's withdrawal are Daniel's responsibility," not hers.

¶ 9 On October 2, 2013, after a hearing, the circuit court entered an order providing, in part: "As it relates to the \$25,000 amount removed & returned to the Nationwide account, for the reasons stated on the record and the finding of the court incorporated herein by reference, the \$25,000 amount is hereby exempt and the request to turnover the \$25,000 is denied."

¶ 10 In response to a motion for reconsideration filed by Irene,³ Daniel asserted that he "did not take any action that would cause the funds to lose their exempt status." On November 7, 2013, the circuit court denied the motion for reconsideration and included a Rule 304(a) finding that "there is no just reason for delaying either enforcement or appeal or both." See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Irene filed this appeal, seeking reversal of the circuit court's decision and the award of "reasonable attorney's fees."

¶ 11 ANALYSIS

¶ 12 Section 2-1402 of the Code "provides a mechanism by which a judgment creditor may initiate supplementary proceedings against a judgment debtor or a third party to discover the assets of the judgment debtor and apply those assets to satisfy an underlying judgment."

Stonecrafters, Inc. v. Wholesale Life Insurance Brokerage, Inc., 393 Ill. App. 3d 951 (2009); 735 ILCS 5/2-1402 (West 2012). Service of a citation imposes a lien on certain assets of the judgment debtor, as set forth in section 1402(m) of the Code, which provides in part:

"(m) The judgment or balance due on the judgment becomes a lien when a citation is served in accordance with subsection (a) of this Section. The lien binds

³ Although a copy is included in Irene's appendix, her motion for reconsideration is not included in the record on appeal.

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nonexempt personal property, including money, choses in action, and effects of the judgment debtor as follows:

(1) When the citation is directed against the judgment debtor, upon all personal property belonging to the judgment debtor in the possession or control of the judgment debtor or which may thereafter be acquired or come due to the judgment debtor to the time of the disposition of the citation." 735 ILCS 5/2-1402(m)(1) (West 2012).

¶ 13 As noted on the standard citation form, a judgment debtor has the right to assert statutory exemptions, declaring that certain income or assets may not be used to satisfy the underlying judgment. See 735 ILCS 5/2-1402(b) (West 2012). Section 1402(b)(5) provides that "[p]ension and retirement benefits and refunds may be claimed as exempt under Illinois law," (735 ILCS 5/2-1402(b)(5) (West 2012)), and section 12-1006 of the Code sets forth the Illinois exemption for retirement plans, providing in part:

"(a) A debtor's interest in *** the assets held in or to receive pensions, annuities, benefits, distributions, *** or other payments under a retirement plan is exempt from judgment, attachment, execution, *** and seizure for the satisfaction of debts if the plan (i) is intended in good faith to qualify as a retirement plan under applicable provisions of the Internal Revenue Code of 1986 *** or (ii) is a public employee pension plan created under the Illinois Pension Code ***." 735 ILCS 5/2-1006 (West 2012).

Section 12-1006(b) of the Code further provides that a "retirement plan" includes "a government *** retirement plan" and "a public employee pension plan created under the Illinois Pension Code." 735 ILCS 5/12-1006(b)(2), (4) (West 2012). "[T]he purposes of the exemption and

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pension statutes *** are to provide support for the debtor and his family and to prevent them from becoming public charges." *Auto Owners Insurance v. Berkshire*, 225 Ill. App. 3d 695, 699 (1992).

¶ 14 Irene contends that the applicable standard of review is *de novo*, asserting that the "question of whether a citation lien pursuant to 735 ILCS 5/2-1402(m)(1) should be enforced is a question of statutory interpretation," as is the "question of whether or not a lump sum payout from a public retirement plan qualifies as an exempt asset under 735 ILCS 5/12-1006." Citing *In re Marriage of Gowdy*, 352 Ill. App. 3d 301 (2004), Daniel asserts that the "decision whether to grant or deny a motion for reconsideration is reviewed for abuse of discretion." We agree with Irene. As stated by the court in *Shulte v. Flowers*, 2013 IL App (4th) 120132, ¶ 24, if the underlying issue being considered in a motion for reconsideration is factual, then "we will give due deference to the finding of the trial court, which was 'in a position superior to a court of review to observe the conduct of witnesses while testifying, to determine their credibility, and to weigh the evidence and determine the preponderance thereof.' [Citation]. If the underlying issue is legal, we will proceed *de novo*." See also *O'Shield v. Lakeside Bank*, 335 Ill. App. 3d 834, 838 (2002) (noting that a "party cannot convert the *de novo* standard applicable to the original motion into an abuse of discretion standard simply by asking the court to reconsider its previous ruling"). Given that the underlying issues here involve questions of law, not of fact, we apply a *de novo* standard of review.

¶ 15 The first issue presented by Irene is "whether or not a citation lien pursuant to 735 ILCS 5/2-1402(m)(1) should be enforced." Section 2-1402(m) of the Code expressly provides, in part, that the citation lien "binds *nonexempt* personal property, including money, choses in action, and

effects of the judgment debtor." 735 ILCS 5/21-1402(m) (West 2012) (Emphasis added). If the \$25,000 is *exempt* personal property, then it would not be subject to the citation lien. See *id.*

¶ 16 Our focus thus turns to the next issue presented by Irene: whether a "lump sum payout from a public retirement plan" qualifies as an exempt asset under section 12-1006 of the Code. As a threshold matter, we are uncertain whether the amount at issue was actually deducted from the Nationwide account, *i.e.*, whether there was, in fact, a "payout." Although Irene, Daniel and the trial court each have used terminology that suggests that the contested funds were deducted from the account—*e.g.*, referring to the funds as "removed" or "withdrawn" or "taken out"—our understanding of the usual check payment process indicates otherwise. For example, one treatise describes the "life of a typical bank check" as follows:

"(1) The check is filled out and signed by the drawer; (2) it is delivered to the payee; (3) the payee might negotiate it to another person***; (4) the payee or other holder will eventually deposit the check in that person's bank account; (5) the depository bank will send the check to the payor bank either directly or through one or more intermediary banks and receive some form of settlement therefor; (6) the check is received by the payor bank, is charged against the drawer's account, and is canceled; and (7) the canceled check is eventually returned to the drawer when the bank sends the drawer its next bank statement."

1 Richard B. Hagedorn, *Brady on Bank Checks and Funds Transfers*, ¶ 15.01 (Rev. ed. 2013).

In this case, the parties appear to agree that Daniel, the "payee," did not deposit the check in his bank account. Without such action, the payor bank would never have received the check from a depository bank and charged the check against Nationwide's account. While the quarterly

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statements issued by Nationwide apparently reflect the removal and return of the funds, we believe, as a technical matter, the funds may never have been deducted from the 457(b) account, which would make this entire issue moot. However, even assuming there was a "withdrawal" of the contested funds—as we do for the remainder of our analysis—such withdrawal does not affect the exempt status of the funds, as discussed below.

¶ 17 Irene's arguments implicitly and explicitly recognize the funds in the Nationwide account, prior to Daniel's withdrawal, as exempt. For example, in her appellate briefs, Irene refers to the 457(b) plan at issue as a "public retirement plan," which would be included in the section 12-1006 definition of a "retirement plan." See 735 ILCS 5/12-1006 (West 2012). Irene also conceded in the circuit court that the "funds that remain in the retirement plan, and were not removed or paid out[,] are exempt from satisfying a judgment." Irene's contention appears to be that it was the *withdrawal* of the funds that triggered the imposition of the citation lien on the *withdrawn* amount. Indeed, during the October 2, 2013 hearing, responding to the Daniel's counsel's assertion that the law would not require his client to withdraw the funds a second time and give them to Irene, Irene's counsel stated, in part: "Your honor, I believe the law would, because a citation was in effect, so the minute that money was -- he had access to it, that the [lien] had attached."

¶ 18 While Irene asserts that the "length of time that the \$25,000 was held outside any plan or account by Daniel in his physical possession and control is irrelevant," Daniel counters that the "temporary withdrawal and prompt replacement" of the funds did not cause them to lose their exempt status. We note that the exact length of time before Daniel returned the funds is unclear from the record; the \$25,000 withdrawal apparently was reflected in the first quarter 2013 account statement, and the return was reflected in the second quarter 2013 statement.

¶ 19 Citing *Auto Owners Insurance v. Berkshire*, 225 Ill. App. 3d 695 (1992), the circuit court in this case focused primarily on the nature and use of the withdrawn funds rather than the length of time they were outside of the account. We agree with this approach. The judgment creditor in *Auto Owners* served a citation to discover assets on a bank; the judgment debtor claimed an exemption of the \$696.32 in his checking account at the bank, alleging that the funds were his interest in retirement benefits paid to him by his former employer. *Id.* at 696. The creditor argued that the funds lost their exempt character as retirement funds when the debtor deposited them into his checking account. *Id.* The circuit court found that because the debtor deposited the funds into a personal account and the funds were being used for his individual use, the funds were "no longer" exempt. *Id.* at 696-97. The appellate court noted that section 12-1006 of the Code protects a debtor's interest "in the assets" and the debtor's right "to receive" benefits, distributions, refunds of distributions and other payments under a retirement plan. *Id.* at 698. The section applies to the "proceeds traceable to the pension plan payments," and "[b]y its very terms, it protects the principal as well as the income or the right to receive payments." *Id.* However, the appellate court observed that the record did not explain the "nature of the 'pay-out' of defendant's pension plan." *Id.* The court stated:

"[E]ven if the funds were originally exempt, they may still lose their exemption depending on the original character of the payment. The record does not clearly demonstrate the nature of the 'pay-out' of the pension plan. If the funds represent a payment of defendant's total accrued benefits as a lump-sum distribution, then the funds could be held for future use and investment rather than support. It was incumbent upon defendant to ensure the continuing qualification of the asset under ERISA, the Internal Revenue Code or the exemption statute by depositing

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the pension funds into a spendthrift trust, IRA or other protected plan.

[Citations.] On the other hand, if the payment was a periodic pension benefit intended for current support, the funds were exempt and stayed exempt because defendant deposited them into an account retaining the 'quality of moneys.'" *Id.* at 701.

The court reversed and remanded the case for the trial court to make an additional finding. *Id.* "If the funds were a lump-sum distribution of defendant's interest in his pension plan, the funds were no longer exempt because he failed to roll the funds over into another qualified plan." *Id.* "Conversely, if the funds were a pension distribution intended for support, the funds remained exempt as they retained the quality of moneys in the checking account." *Id.*

¶ 20 Although somewhat factually dissimilar, we find *Auto Owners* to be instructive. Irene accurately observes that, in *Auto Owners*, "the \$696.32 was already in defendant's bank account" when the citation was issued. However, also unlike in the instant case, the *Auto Owners* judgment debtor had deposited the funds in his checking account. Noting that "defendant's funds retained their character when he deposited them into his checking account," the *Auto Owners* court concluded that, depending on the "character of the funds," they may continue to be exempt. *Id.* at 700-01.

¶ 21 The *Auto Owners* court discussed whether the pay-out at issue was a "lump sum distribution of defendant's accrued benefits paid on termination," or, in other words, "a payment of defendant's total accrued benefits as a lump-sum distribution." *Id.* at 698, 701. Although Irene consistently refers to the withdrawal as a "lump sum payout," we are uncertain, based on our review of the record, whether the \$25,000 at issue constituted distribution of Daniel's "accrued benefits paid on termination" of the Nationwide account, *i.e.*, whether the \$25,000

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represented Daniel's "total accrued benefits."⁴ Even assuming *arguendo* that the \$25,000 constituted, as Irene asserts, a "lump-sum distribution" of Daniel's interest in the deferred compensation plan, the funds would retain their exempt status under *Auto Owners* if deposited into a protected plan. Daniel's return of the funds to Nationwide, without the check being cashed, resulted in the return of the funds to an exempt account. In other words, if the funds were exempt in the Nationwide account, their removal and subsequent return under the circumstances herein would not change their status. The circuit court in this case observed, and we agree, that:

"****Auto Owners Insurance* did make a distinction between whether it's a lump sum or whether it's paid out over the course of time. However, in that distinction, what they indicated was that it would lose its exempt status because the funds could be held for personal use and events rather than support. In this instance, the funds were put back in. So, despite the fact that for a brief period of time they might have been taken out, they were not used at this point, nor are they available for use for investment. So, in the sense that the reason why they were exempt in the first instance, which was because their status is deferred, and it's part of a, if you will, State-allowed retirement plan, that status, even if it was gone for the moment, for that short period of time that it was out, having been returned and not

⁴ During the citation examination of Daniel on April 3, 2013, Irene's counsel addressed Daniel, "You disclosed on the disclosure an IRA 457B rollover *** for \$40,397.18. What is that, sir?" Daniel responded, "I have deferred compensation. I was putting money in while I was working. Then I was going to use it when it became necessary at a lower tax rate *** [o]r when it was needed for retirement." Based on our review of the record, we are not certain whether Daniel had an IRA *and* a 457(b) account or whether the \$40,397.18 amount represents the total amount in his 457(b) account. Under either circumstance, our analysis herein remains the same.

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having been held for future use in investment, I find that it doesn't at this point in that, for that brief moment it was out, have lost its status as being exempt."

We conclude that the withdrawal and subsequent return of the funds into a deferred compensation account did not strip those amounts of their exempt status. Furthermore, particularly given that "[t]he personal property exemption statutes are to be construed liberally to protect debtors" (*Auto Owners*, 225 Ill. App. 3d at 699), we are unmoved by Irene's arguments on appeal regarding rollover contributions. Regardless of the accuracy of Irene's contention that "[r]eturning a sum to the plan is not a rollover," the return of the check to Nationwide resulted in the continued exempt status of those funds.

¶ 22 Furthermore, the mere withdrawal of funds under these circumstances would not necessarily transform the withdrawn amounts into nonexempt assets even if the funds were not returned to the Nationwide account. For example, if the check had been deposited by Daniel into a personal checking account, the funds may have maintained their exempt status, depending on the purpose and use of the funds. Discussing the \$25,000 during the citation hearing, Daniel stated that he "had to borrow some money from [his current wife, Susan,] when the Harris account was stopped to make the mortgage payments, to make all the other payments that I had in there." He continued: "The only thing I didn't pay were the legal fees or anything that I couldn't get put on a credit card, so it's going to be used to pay all of that off. I borrowed from my sister and wife." As the *Auto Owners* court noted, "[w]here the purpose of an exemption is to protect income necessary for the support of a debtor and his family, it makes no sense to allow the funds to be exempt so long as the debtor cannot use them." *Auto Owners*, 225 Ill. App. 3d at 698. "So long as the debtor continues to hold and to use the funds for the support of the debtor and his family, the exemption statutes require the exemption of funds traceable from exempt

payments." *Id.* at 698-99. Although "the concept of tracing is not limitless" (*id.* at 698), we observe that funds withdrawn from the Nationwide account and used for the support of Daniel and his family potentially would remain exempt from the reach of a citation lien. Daniel's return of the uncashed check on the advice of counsel, however, renders this speculation unnecessary.

¶ 23 On a final note, we observe that even Irene's initial position in the circuit court appeared to be that the *cashing* of the check resulted in the availability of the funds. In a memorandum and reply filed on April 9, 2013, six days after Daniel's citation examination, Irene stated, in part, in connection with a pending fee application:

"In his Citation examination ("Examination"), DANIEL stated that he withdrew \$25,000 from one of his IRA's that, as of April 3, 2013, remained an uncashed check. ****Once it is cashed, it is no longer retirement money, but an asset available to him to pay his obligations.*" (Emphasis added.)

To the extent the check to Daniel was never cashed, then we are hard-pressed to see how the funds would be available to pay Daniel's obligation to Irene.

¶ 24 As discussed above, the lien created by section 2-1402(m) of the Code "binds nonexempt personal property." 735 ILCS 5/2-1402(m) (West 2012). Because we conclude that the \$25,000 did not lose its exempt status, such funds were not subject to Irene's citation lien.

¶ 25 **CONCLUSION**

¶ 26 We conclude that the withdrawal and deposit of the \$25,000 from deferred compensation account did not change the exempt status of such funds. We thus affirm the judgment of the circuit court denying reconsideration of its order (a) denying Irene's turnover motion and (b) granting Daniel an exemption for such amount. To the extent that Irene's request for attorney fees is appropriate in the context of this appeal, such request is hereby denied.

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¶ 27 Order affirmed.