Receiverships Under Attack !

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I. INTRODUCTION

In the past year or two, some debtor's counsel have been filing pleadings saying that money in the judgment debtor's bank account from the deposit of a paycheck are the proceeds of exempt property (wages), which remain exempt from seizure by a receiver under subsection (f) of the turnover statute. CPRC 31.002 (f).

Also in the past year or so, some debtor's counsel have been defending against the appointment of a receiver by arguing that the turnover receivership is a harsh or drastic remedy, to be used only sparingly. You may recall reading cases in law school to that effect.

This paper debunks these incorrect claims, as well as some other miscellaneous arguments being brought to defend against the use of a turnover receivership.

This paper is intended to be a reference if any of this comes up in one of your hearings for turnover relief.

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II. DEBUNKING THE HARSH / DRASTIC REMEDY ARGUMENT

It is claimed that the turnover receivership is a harsh, drastic remedy, to be used only sparingly, which makes it especially horrible to obtain a receivership *ex parte*.

The "harsh remedy" case law does not apply to a turnover receivership. The harsh / drastic remedy case law either dates from before the turnover statute (enacted in 1979) or they are about any of the several other kinds of Texas receiverships.

The case law actually goes the other way. The turnover receivership is meant to be an available remedy, "for even the smallest of judgments". *Childre v. Great Sw. Life Ins. Co.*, 700 S.W. 2d 284 (Tex. App.—Dallas 1985, no writ.). Discussing whether a bond is required for a turnover receivership, *Childre* shows that unless the judgment debtor shows extraordinary circumstances,

> "… any bond required should not be in an amount that would act as a prohibitive cost or make it economically impossible for the judgment creditor to use the remedies provided in [the turnover statute] for even the smallest of judgments."

Childre at 289, quoting David Hittner, Texas Post-Judgment Turnover & Receivership Statutes, 45 Tex. Bar J. 417, 420 (1982)); *Shultz v. Cadle Co.*, 825 S.W.2d 151, 154-155 (Tex.App.—Dallas 1992, writ denied); *Estate of Herring*, 983 S.W.2d 61 (Tex. App.—Corpus Christi, 1999, no pet.)

The statute's purpose is to put a reasonable remedy in the hands of a diligent judgment creditor, subject to court supervision. *CRE8 International LLC v Elexis Rice*, 05-14-00377-CV (Tex.App--Dallas June 3, 2015, no pet.).

The turnover receivership is simply a procedural device to help the Court enforce its judgments. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, at 223 (Tex. 1991). The defendant has already lost. Compare it to a pre-judgment situation where someone is trying to throw a business into receivership before they've even won the lawsuit. That is the harsh / drastic remedy that the case law is talking about.

The idea that receivership is a harsh remedy comes from non-turnover case law. In October 2017, a search at Casemaker for receivership opinions mentioning "harsh remedy" or "drastic remedy" brought up 80 opinions. They are not turnover receivership cases. Some of these are opinions from before there was a turnover statute. The rest are talking about the many other kinds of receiverships. (There was one opinion out of 80 in a turnover context, but the opinion mentioned "harsh remedy" without any analysis, only referring back to an earlier opinion. That earlier opinion was about a receivership under the Texas Securities Act.)

My view is that a turnover receivership is usually no more harsh than a writ of execution or a garnishment. A receiver can have a bank account released within a few days of it being frozen. In a garnishment, it would take much longer to release the bank account.

The legislature amended the turnover statute in June 2017, making it much easier to prove up a receivership. Surely, they would not have done that if the turnover receivership was viewed as a harsh or drastic remedy.

If the court is concerned about the receivership being harsh / drastic, the solution is to appoint a prudent, experienced receiver. The key is the receiver, not the remedy.

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III. Ex Parte Relief Is Available & Constitutional

A recent petition in circulation uses "harsh remedy" to bolster a misplaced complaint that the defendant did not have notice of the turnover proceeding.

If the legislature and the courts thought that the turnover receivership is that harsh or drastic a remedy, the statute and case law would require notice to the defendant at the very least, which they don't. The cases discussing proceeding ex parte relief do not mention harsh or drastic remedy. They point out that the judgment debtor has had its day in court and should expect that collection actions will occur.

Notice to the defendant and opportunity to be heard are not required by the turnover statute. *Ross v. 3D Tower Ltd.*, 824 S.W.2d 270 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *Cantu v. Seeman*, No. 01-09-00545-CV (Tex.App.—Houston [1st Dist.] May 3, 2012, pet. denied).

An ex parte turnover order does not unfairly surprise a judgment debtor because the judgment puts the debtor on notice that post-judgment collection proceedings will follow. *Ex parte Johnson*, 654 S.W.2d 415, 418 n.1 (Tex. 1983); *Thomas v. Thomas*, 917 S.W.2d 425, 433-34 (Tex. App.—Waco, 1996, no writ); *Scheel v. Alfaro*, 406 S.W.3d 216 (Tex. App.--San Antonio 2013, pet. denied).

A good review of the constitutional issues is found in *Sivley v. Sivley and Sivley*, 972 S.W.2d 850 (Tex.App.—Tyler, 1998, no pet.):

> "The question before us, however, is whether the trial court's failure to provide prior notice and a hearing before the issuance of the turnover order under Section 31.002 violated Don, Jr.'s constitutional rights to due process and trial by jury even though the turnover statute does not require it. Due process of law requires that an individual is entitled to notice and hearing before he is deprived of a property right. U.S. CONST. amend. XIV; TEX.CONST. art. I, § 19. The issue of whether post-judgment collection proceedings compromised constitutional due process principles was addressed by the Supreme Court of the United States in Endicott--Johnson Corporation v. Encyclopedia Press, 266 U.S. 285, 288--290, 45 S.Ct. 61, 69 L.Ed. 288 (1924). In Endicott--Johnson, the judgment debtor contended that a New York statute was in conflict with the constitutional due process clause because it authorized the issuance of a garnishment execution without giving notice to the judgment debtor or affording him a hearing. In holding that due process was not violated, the court reasoned as follows:
>
> ... the established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment. Thus, in the absence of a statutory requirement, it is not essential that he be given notice before the issuance of an execution against his tangible property; after the rendition of the judgment he must take "notice of what will follow," no further notice being "necessary to advance justice."

Endicott-Johnson Corporation, 45 S.Ct. at 62—63; Sively, 972 S.W.2d at 860.

In 1968, the United States Supreme Court turned down the opportunity to revisit *Endicott-Johnson Corporation*, in *Hanner v. DeMarcus*, 390 U.S. 736 (1968).

We do not give a judgment debtor notice of a writ of garnishment, a writ of execution, or sequestration, so it is no surprise that notice is not required for turnover.

IV. WAGES IN THE BANK ARE NOT PROCEEDS OF EXEMPT PROPERTY

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Money in the bank is not exempt proceeds of exempt property under §31.002 (f), even if the deposit was a judgment-debtor's paycheck.

THERE ARE NO CASES saying that wages in the debtor's bank account remain exempt as proceeds of exempt property. The case law is actually to the contrary as shown below. As of this writing, there are no CPRC §31.002 (f) cases where the issue was money in the bank.

A. Money in The Bank

1. *Marrs v. Marrs*, 401 S.W.3d 122 (Tex.App.--Houston[14 Dist.] 2011, no pet.)

Marrs v. Marrs is the case that is most on point. It is the case used by opponents, saying that §31.002 (f) is "implicitly overruling the line of cases holding that wages were no longer 'current' once paid to and received by debtor." This is used to support the proceeds of wages argument, but the opinion does not go there. *Marrs* actually distinguishes itself from a 'money in the bank' situation.

Marrs is a divorce case. Charlita Marrs was to pay $90,367.12 attorney fees to Michael Marrs' attorney and costs to Michael.

Charlita files a Chapter 13 bankruptcy. The bankruptcy court issued a wage order directing her employer to pay a portion of her wages directly to the Ch 13 trustee. The bankruptcy is eventually dismissed, leaving at least $23,536.82 in the trustee's hands. Michael seeks turnover of the money from the trustee. Charlita says the money is exempt wages.

Michael & his attorney argue that once wages are received by the debtor, they cease to be current wages and are no longer exempt, relying *Sloan v. Douglass*, 713 S.W.2d 436 (Tex.App.-Ft. Worth 1986, writ ref'd n.r.e.). Under *Sloan*, the exemption only continues until the wages are due and in the debtor's possession and 2) upon debtor's demand could be in his possession. *Sloan,* at 440. *Sloan* precedes sub (f).

In my view, "paid to & received by" is not the same as saying the money was put into a bank account. If they meant "deposited into a bank account", they would have said that.

For both sides, the key was that someone had voluntarily placed the wages with another and retained control over them, based on *Sloan*. The debtor in *Sloan* was a professional baseball player. His employment contract deferred wages for several years out, but he did not control the wages-- he could not take his money out earlier.

Once Charlita's bankruptcy was dismissed, the remaining funds were ordered to be paid to her. The Court held that at that point the money became proceeds or disbursements of exempt property. The key is that Charlita never had control of the money. It went from her employer, who was under a wage order, directly to the trustee.

Marrs cites to *Goebel v. Brandly*, 174 S.W.3d 359 (Tex.App.-- Houston [14st Dist.] 2005, pet. denied). In *Goebel*, the debtor purchased savings bonds for her children through a payroll deduction. The savings bonds remained exempt because she never deposited the money into a bank account. *Goebel*, at 366. Neither *Sloan* nor *Goebel* are about a paycheck deposited into a bank account.

The *Marrs* opinion actually distinguishes itself from "money in the bank" cases, saying,

> "Moreover, the Goebel court noted it was undisputed that the debtor, like Charlita [Marrs], did not receive the subject wages and did not deposit them into her bank account."

Marrs, at 125-126 (citing Goebel at 365-66).

Marrs v. Marrs is the closest case on point for this discussion because it clearly distinguishes itself from a 'money in the bank' case. Yet, proponents of the exempt money in the bank claim rely on that one sentence from *Marrs* for support.

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2. *Schultz v. Cadle Co.*, 825 S.W.2d 151 (Tex. App—Dallas 1992, writ denied)

Schultz v. Cadle Co. is important because it is a case under subsection (f) that keeps alive the long established rule that money in the bank is not exempt.

Schultz received a salary from a clinic that he had a 50% interest in. He directed the clinic to deposit his salary into another entity that he owned. Schultz claimed the money as exempt wages. The Dallas Court of Appeals held that the debtor lost his exemption when he put the money into his other entity. The money changed its character from wages to simple income to that entity.

The key is that *Shultz* relies on the 1927 case *Sutherland v. Young* in its analysis:

> "We have reached the conclusion that, when wages are paid to and received by the wage-earner, they thereby cease to be current wages, and the exemption statute does not apply thereto. Appellant, having taken his wages and voluntarily placed them in the bank and thereby created the relation of debtor and creditor between himself and the bank, caused the funds to be subject to garnishment, **the same as if he had invested the same in property that was not exempt to him under the statutes.**" (my emphasis).

Schultz, quoting *Sutherland v. Young*, 292 S.W.581 (Tex.Civ.App. 1927, no writ).

So, we have *Schultz v. Cadle Co*. out of Dallas keeping the rule from *Sutherland v. Young* alive and *Marrs v. Marrs* out of Houston distinguishing itself from 'money in the bank' cases.

B. The Proceeds of Wages Argument.

Proponents of the theory that money in the bank is "proceeds" of the debtor's paycheck look to *Caulley v. Caulley* and to *Burns v. Miller, Hiersche, Martens & Hayward*.

3. *Caulley v. Caulley*, 806 S.W.2d 795 (Tex. 1991)

You may see a quote from *Caulley*:

> "Referring to (f), the Texas Supreme Court said, "The new section was intended to specifically exempt paychecks, retirement checks, individual retirement accounts and other such property exempted under the bankruptcy code."

Caulley, 798.

That's "paychecks", not money in the bank. *Caulley* had been ordered to turn over $2,500 of his $2,700 net monthly wages. The Texas Supreme Court does not discuss money in the bank in *Caulley*, much less whether money in the bank would be proceeds.

4. *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317, 324 (Civ. App.—Dallas, 1997, writ denied)

Burns does not discuss money in the bank. The issue in *Burns* relevant to this discussion was trust checks paid to the debtor.

> "In the context of receiving a paycheck, the amendment's drafter said that "proceeds" was intended to include the cash someone received from cashing a paycheck, but that such money would cease being proceeds once it was spent."

(*Burns*, at 325).

Even at that point, the opinion is not discussing money in the bank. Cashing a paycheck is not the same as depositing it into a bank account.

5. *American Express Travel Related Services v. O.L. Harris*, 831 S.W.2d 531 (Tex.App.-- Houston [14th Dist.] 1992, no writ)

This is a garnishment case that mentions sub (f) in passing. The debtor argued that wages in the bank are exempt.

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> "In construing the above provisions, Texas courts have held that when wages are paid to and received by the wage-earner, they cease to be "current" for the purposes of the exemption laws. Applying this rule to the present case, when appellee received his paychecks from his employer and deposited them into his checking account with garnishee bank, such wages were no longer exempt and were properly subject to garnishment by appellant." (citations omitted).

The opinion next recites subsection (f), and states that it doesn't apply in a garnishment case. The opinion does not say that sub (f) would have applied had it been a turnover case, only that it does not apply in a garnishment.

6) The stated purpose of §31.002 (f):
> "The purpose of this Act is to give persons subject to a judgment the same protection to certain properties as under the bankruptcy code, Section 42.0021, Property Code."

HB 1029 Bill Analysis 71st Legislature, Regular Session 1989.

Section 42.0021 of the Property Code exempts money in IRAs and other protected retirement accounts. §41.002 is not about wages. The reference to the bankruptcy code is vague, because a debtor might or might not choose the federal "wildcard" exemption option (protecting money in the bank up to a certain limit).

C. Current Wages in the bank.

It has been established as far back as 1927 that wages deposited into the debtor's bank account lose their exemption. *Sutherland v. Young*, 292 S.W. 581 (Tex.Civ.App.--Waco 1927, no writ) (explained above). Also, in 1992, the Texas Supreme Court says that money in the bank is a debt owed by the bank to the depositor. *Bandy v. First State Bank, Overton, Tex*., 835 S.W.2d 609, 620 (1992). *Bandy* is a probate case talking about the bank's right to setoff. Once money is deposited, the debtor's interest becomes subject to bank fees, garnishment, automatic bill pays, and such.

D. What are "proceeds" anyway?

The statute uses "proceeds of exempt property." *Caulley v. Caulley* speaks of "proceeds of current wages". But, what are proceeds?

When possible, we discern legislative intent from the plain meaning of the words chosen. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006), citing *Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 402 (Tex. 2000).

Black's Law Dictionary defines "proceeds" as

> "1. The value of land, goods or investments when converted into money; the amount of money received from a sale <the proceeds are subject to attachment>. 2. Something received upon selling, exchanging, collecting or otherwise disposing of collateral. UCC 9-102(a)(67)".
>
> Black's Law Dictionary, Ninth Edition, 2009.

The Twelfth District used Black's definition in a recent opinion discussing proceeds from the sale of a homestead, *Fitzgerald v. The Cadle Company*, No. 12-16-00338-CV (Tex.App.--Tyler October 18, 2017, no pet.).

One way of determining the meaning of a word is to look at how it is used. In the Texas Property Code, "proceeds" is used as follows:

> As the proceeds of a sale:
> Sections 5.066, 41.001, 51.0075, 51.016, 53.122, 54.045, 59.0445, 59.046, 70.003, 70.005, 70.006, 70.007, 70.304, 70.305, 70.402, 70.4045, 71.201, 76.504, 76.601, 82.068, 209.011;
> As the proceeds of a sale, lease or mortgage of commercial property: 62.101, 62.104, 62.106;

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As the proceeds of sale or other disposition of an asset: 116.176;
As the proceeds of sale or rental of real property: 301.041;
As the proceeds from the sale of advertising space: 76.201;
As insurance proceeds: 5.077, 5.078, 55.003, 61.003, 81.206, 81.207, 82.055, 82.070, 82.111, 82.113, 92.054, 94.155, 116.164, 121.051;
As the proceeds of a loan: 28.008, 53.255, 53.258;
As the proceeds of an appeal bond: 24.00512;
As the proceeds of a settlement or cause of action: 55.003, 61.003,
As the proceeds of an obligation to pay rent: Chapter 64 generally;
As the proceeds of disposition of a large animal: 70.010;
As the proceeds of unclaimed property: 71.201, Chapter 74 generally;
As mineral proceeds: Chapter 75 generally, 113.013;
As proceeds of property in a museum: 80.006;
As proceeds of trust property: 114.008;
As proceeds of a condominium owner's interest: 82.101;
As proceeds of property taken by eminent domain: 116.161;
As proceeds of a financial asset: 116.179; and
As proceeds of an interest in property: 141.002.

But, nowhere does the property code mention proceeds of wages.

There is no such thing as *proceeds* of wages. Proceeds come from a res, per Black's and based on how it is used in the Property Code.

As there is no such thing as proceeds of wages, §31.002 (f) simply does not apply.

V. MISCELLANEOUS ARGUMENTS MADE AGAINST THE TURNOVER RECEIVERSHIP

A. No bond is required, no matter what Rule 695a says.

Rule 695a was adopted in the 1940s, 30 years before there would be a turnover statute. They could not have had the turnover statute in mind.

The bond requirements of Rule 695a do not apply to a turnover receiver. *In re Estate of Herring*, 983 S.W.2d 61, 64 (Tex. App.—Corpus Christi 1998, no pet.)

The turnover statute does not require a bond. §31.002; *Schultz v. Cadle Co.*, 825 S.W.2d 151 (Tex. App.—-Dallas 1992), writ denied per curiam, 852 S.W.2d 499 (Tex. 1993) (bond requirements of rule 695a do not apply to postjudgment receiver appointed under turnover statute, and decision whether to require bond is in court's discretion); *In re Estate of Herring*, 983 S.W.2d 61, 64 (Tex. App.—Corpus Christi 1998, no pet.); *Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284, 285 (Tex. App.—Dallas 1985, no writ).

> "Any bond which may be required should be carefully framed so as not to indemnify the judgment debtor in the traditional sense, as the righteousness of the appointment should have been fully litigated in any hearing pursuant to the new statutes."

Childre, 700 S.W.2d at 289.

The judgment debtor bears the burden of showing any extraordinary circumstances requiring the bond to be increased. *Childre*, 700 S.W.2d at 289. If the application for turnover seeks both a receiver and an injunction, one bond may serve both purposes. *Childre*, at 288–89.

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Tex. R. Civ. P. 695a provides for a receiver's bond to protect the defendant in the case of a wrongfully appointed receiver. The idea of a wrongfully appointed turnover receiver is out of context, because by the time of the turnover hearing, the creditor has already won its judgment. The elements required for turnover relief will have been proved up at the hearing.

B. No Evidence That The Money is Non-Exempt.

An assertion that there is no evidence at the turnover hearing that the funds in the debtor's bank account was non-exempt, and therefore, that the money in the account is exempt, has it backwards under *Roosth v. Roosth* and *Cauley v. Caulley*:

1. *Roosth v Roosth*, 899 S.W.2d 445 (Tex.App.-- Houston [14 Dist.] 1994, no writ.)

Mr. Roosth claimed the property to be turned over was exempt. His position was that property not proved as non-exempt is exempt, relying on *Caulley v. Caulley*. But *Caulley* only goes so far as to say that once the debtor has claimed a homestead, it is on the creditor to prove that the homestead has been abandoned. *Caulley*, at 797; *Roosth*, at 459. *Roosth* explains that not all exemptions require proof:

> "We believe Rucker states the general rule that a party asserting an exemption bears the burden of establishing entitlement to the exemption. However, not all exemptions require proof."

Roosth points to the property described in §42.001 and §42.002 for examples of property that do not require proof to be exempt. *Roosth*, at 459.

So, an argument that there was no evidence at the turnover hearing that money in the bank was non-exempt has it backwards. Exemptions stem from the constitution and the statutes. Property is available to creditors unless covered by the constitution or a statute. The burden is on the debtor. Money in the bank is not necessarily current wages or even wages at all.

Case law since the 1927 teaches that money in the bank is available to creditors, unless specifically exempted by some statute such as Texas Property Code §42.00021 or 42 U.S.C.S. § 407 (a).

VI. *Ex Parte Prado*, 911 S.W.2d 849, 850 (Tex. App.—Austin 1995, no writ)

Ex Parte Prado was mentioned in a recent CLE article cautioning against the "overuse" of turnover.

Prado says that an order compelling the turnover of money must make it clear that the money comes from a non-exempt source.

Prado, a ticket scalper, was ordered to turn over $500 a month. When he got behind by $2,000, the creditor filed a contempt action. Prado was put in jail until he got caught up on his payments.

The opinion calls Prado the classic judgment proof debtor. Both sides spent a lot of time discussing whether Prado's future earning potential made him more like an attorney expecting income from his practice (*Jacobs v. Adams* / non-exempt) or like an employee with deferred earnings to be paid later (*Sloan v. Douglas*), such as an annual bonus paid at the end of the year.

However, neither was important for the Austin Court of Appeals. The Court's concern was that the turnover order compelled turnover of money without regard for whether that money came from an exempt source or a non-exempt source.

The order failed for the Court because it compelled the turnover of future assets which may or may not ever be owned by the debtor (he could stop scalping tickets at any time) and because the order resulted in unconstitutional imprisonment for a debt.

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Unless the order in your case compels the debtor to turnover money from an unspecified source, Prado does not apply.

VII. The Exemption Should Not Be Construed To Last Forever.

It has been argued that wages in the bank are forever exempt. Besides the authorities saying that money in the bank loses its exemption, this argument flies in the face of the stated exemption, which is for current wages. It is also counter to how other exemptions work. Proceeds from the sale of the homestead remain exempt for six months. Tex. Property Code §41.001 (c). Qualified amounts distributed from a retirement plan are exempt for 60 days. Tex. Prop. Code § 42.0021 (c).

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