IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
November 8, 2022 Session

RICKY L. BOREN ET AL. v. HILL BOREN PC ET AL.

Appeal from the Chancery Court for Madison County
No. 75056 Robert E. Lee Davies, Senior Judge

No. W2021-01024-COA-R3-CV

In this lawsuit between former law partners, a jury returned a verdict in favor of Appellees. The instant appeal involves Appellees' attempt to collect their judgment. The trial court held that Appellant's qualified rollover IRA is not exempt from garnishment, attachment and execution under Tennessee Code Annotated sections 26-2-105, 26-2-111(1)(D), 26-2-26, and 56-7-203. The trial court also determined that a recreational vehicle was not held as a tenancy by the entirety and was subject to attachment and execution as Appellant's individually-owned property. We reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

KENNY ARMSTRONG, J., delivered the opinion of the court, in which ARNOLD B. GOLDIN and CARMA DENNIS MCGEE, JJ., joined.

T. Robert Hill and Tamara Hill, Jackson, Tennessee, for the appellants, T. Robert Hill, and Hill Boren, PC.[1]

[1] The cover pages of the appellate briefs name Mr. Hill as counsel for Hill Boren and Ms. Hill as counsel for "Defendants." However, we observe that this appeal concerns execution on assets owned by Mr. Hill and not Hill Boren, and it appears that Mr. Hill is acting as an advocate on his own behalf and not on behalf of Hill Boren. We further observe that Ms. Hill has filed papers in this Court in the capacity of counsel for Mr. Hill, and Ms. Hill and Mr. Hill filed a notice of appeal of the trial court's February 2022 addressing the RV. In their brief, Appellants assert that Mr. Hill does not have standing to appeal the trial court's October 2021 order with respect to Ms. Hill's interest, if any, in the RV. However, construing the filings together, we are satisfied that Mr. Hill appeals the trial court's August and October 2021 orders, and that Ms. Hill, who intervened in the matter in October 2020, has appealed the court's October 2021 order with respect to her interest in the RV.

Teresa A. Luna and Lewis L. Cobb, Jackson, Tennessee, for the appellees, Jeffrey P. Boyd and Ricky Lee Boren.

OPINION

I. BACKGROUND

This is the third appeal in a dispute between former law partners involving "'fallout over an agreement . . . concerning the ownership and control of the Hill Boren, PC law firm.'" ***Boren v. Hill Boren PC***, No. W2021-00478-COA-R3-CV, 2023 WL 3375623, at *1 (Tenn. Ct. App. May 11, 2023) (quoting ***Boren v. Hill Boren PC***, No. W2019-02235-COA-R3-CV, 2021 WL 1109992, at *1 (Tenn. Ct. App. Mar. 23, 2021)). The background facts and procedural history were thoroughly recited in the prior opinions, and we revisit them only briefly here.

In 2012, the parties executed a stock-transfer agreement ("the agreement") providing for a transfer of shares of stock of Hill Boren, PC ("the firm") from Appellant T. Robert Hill ("Mr. Hill") to Ricky Boren ("Mr. Boren") and other members of the firm. ***Boren***, 2023 WL 3375623, at *2-3. In December 2016, Mr. Boren and Jeffrey P. Boyd (together with Mr. Boren, "Appellees") filed a complaint in the Madison County Chancery Court asserting several causes of action, including breach of contract, fraud in the inducement of the agreement, fraudulent misrepresentation, and breach of fiduciary duty. After contentious litigation, several claims were heard by a jury in 2019. On their claim for fraudulent inducement, the jury awarded Messrs. Boren and Boyd $600,000 and $400,000 in damages, respectively. On their claim for breach of contract, the jury awarded $713,162. On the breach of fiduciary duty claim, the jury awarded Mr. Boren $158,417 in damages on behalf of the firm. The jury also awarded Appellees $10,000,000 in punitive damages.[2] In August 2019, the trial court entered an order confirming the jury verdict, and Mr. Hill filed a premature notice of appeal. ***Boren***, 2021 WL 1109992. The trial court entered final judgment in May 2021, and this Court affirmed the judgment on appeal. ***Boren***, 2023 WL 3375623, at *20. In the meantime, protracted post-judgment discovery and litigation ensued concerning Mr. Hill's assets and execution on the judgment. This appeal involves Mr. Hill's contention that the trial court erred in finding that two assets are subject to garnishment or execution: (1) a 2004 recreational vehicle (the "RV"); and (2) Mr. Hill's qualified rollover Individual Retirement Account (the "IRA").

In May 2020, Appellees filed a garnishment on Mr. Hill's IRA with Morgan Stanley. The IRA was established with funds rolled over from the firm's profit-sharing plan—which was dissolved in the early 2000s—and holds cash and three annuities. Mr.

[2] The award of punitive damages was remitted pursuant to Tennessee Code Annotated section 29-39-104. ***Boren***, 2023 WL 3375623, at *3, n.4.

Hill filed a motion to quash the garnishment, asserting that the IRA is exempt from garnishment and execution pursuant to Tennessee Code Annotated section 26-2-105. Mr. Hill further claimed that the statute precluded Appellees' attempts to subpoena his IRA records. Following a hearing in December 2020, the trial court determined that although the IRA is qualified under section 408 of the Internal Revenue Code, under section 26-2-111(1)(D), it is not exempt. The trial court also relied on this Court's opinion in ***Massey v. Casals***, No. W2010-00284-COA-R3-JV, 2011 WL 1734066 (Tenn. Ct. App. 2011), for the proposition that the IRA is not exempt because Mr. Hill: (1) is over age 59½; (2) began taking withdrawals from the IRA in 2017; and (3) can accelerate payments to receive them over a period of 60 months or less without penalty.[3] The trial court also determined that, reading sections 26-2-105 and 26-2-111 together, "a judgment creditor is entitled to subpoena those records so the court can make the ultimate determination pursuant to § 26-2-111."

Both parties moved the court to revise its order. Following a hearing in July 2021, the trial court determined that the Employee Retirement Income Security Act ("ERISA") does not apply to Mr. Hill's IRA. Importantly, the trial court also determined that section 408(a) of the Internal Revenue Code encompasses rollover IRAs. In its August 2021 order, the court reaffirmed its determination that the IRA is not exempt under Tennessee Code Annotated section 26-2-111(1)(D). It also determined that none of the annuities held in the account are exempt under Tennessee Code Annotated section 56-7-203 or section 26-2-106.[4]

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[3] The trial court found that two of the annuities were subject to a surrender charge for a period of nine years, other than required minimum distributions, and that Mr. Hill could take final distributions from the funds as a lump sum in June 2021. The trial court was unable to determine whether the third annuity was subject to a surrender charge. In its January 2021 order, the court concluded:

> if Hill purchased annuities in which he named his wife as the beneficiary, those annuities are exempt from garnishment pursuant to Tenn. Code Ann. § 56-7-203. With regard to payments made to Hill from the annuities, those payments are exempt to the same extent that earnings are exempt pursuant to § 26-2-106 of the code. Tenn. Code Ann. § 26-2-111 (1)(D)(i). With regard to cash held by Morgan Stanley within Hill's IRA account, those funds are not exempt from garnishment.

[4] Tennessee Code Annotated section 56-7-203 provides:

> The net amount payable under any policy of life insurance or under any annuity contract upon the life of any person made for the benefit of, or assigned to, the spouse and/or children, or dependent relatives of the persons, shall be exempt from all claims of the creditors of the person arising out of or based upon any obligation created after January 1, 1932, whether or not the right to change the named beneficiary is reserved by or permitted to that person.

Tennessee Code Annotated section 26-2-106 provides:

In the meantime, in August 2020, Mr. Hill's wife, Tamara Hill, filed a motion to intervene in the matter for the sole purpose of determining her interest in the RV and a 2012 Polaris Ranger. The trial court granted her motion and heard the matter in September and October 2021. Appellees conceded that the Polaris Ranger was intended to be joint property owned by the Hills in a tenancy by the entirety. However, by order entered on October 20, 2021, the trial court found that the RV was titled in Mr. Hill's name only and that the Hills failed to establish a tenancy by the entirety in the vehicle. This appeal ensued.

II. ISSUES

We restate Appellants' issue as follows:

1) Whether the trial court erred by exercising jurisdiction over the RV.

2) Whether the trial court erred in determining the RV is not owned by the Hills in a tenancy by the entirety.[5]

3) Whether the trial court erred in permitting Appellees to subpoena his IRA plan records under Tennessee Code Annotated section 26-2-105.

4) Whether the trial court erred by determining that Mr. Hill's roll-over IRA is not exempt from garnishment and execution under Tennessee Code Annotated sections 26-2-105 and 26-2-111.

III. STANDARD OF REVIEW

> (a) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed:
> (1) Twenty-five percent (25%) of the disposable earnings for that week; or
> (2) The amount by which the disposable earnings for that week exceed thirty (30) times the federal minimum hourly wage at the time the earnings for any pay period become due and payable, whichever is less.
> (b) In the case of earnings for any pay period other than a week, an equivalent amount shall be in effect.
> (c) The debtor shall pay the costs of any and all garnishments on each debt on which suit is brought.

[5] In their brief, Appellees assert that Mr. Hill's Statement of the Issues with respect to the RV relates only to the trial court's subject-matter jurisdiction over the property and the trial court's denial of summary judgment on the issue. Accordingly, they contend that "other arguments" "should be deemed waived." However, in the context of the entire brief and the statement of the requested relief preceding the Statement of the Issues, we are satisfied that the issue of whether the trial court erred in its determination regarding the RV has been sufficiently raised.

We review the trial court's factual findings with a presumption of correctness, unless the evidence preponderates against them. ***Phillips v. Hatfield***, 624 S.W.3d 464, 473-474 (Tenn. 2021) (citations omitted); Tenn. R. App. P. 13(d). The construction of a statute is a question of law. ***Coffman v. Armstrong Int'l, Inc.***, 615 S.W.3d 888, 893 (Tenn. 2021) (citations omitted). The application of a statute to the facts of a case also presents a question of law. ***Comm'ns of Powell-Clinch v. Util. Mgmt. Review Bd.***, 427 S.W.3d 375, 381 (Tenn. Ct. App. 2013) (citation omitted). Appellate review of a trial court's conclusions on issues of law is de novo with no presumption of correctness. ***Cooper v. Mandy***, 639 S.W.3d 29, 33 (Tenn. 2022) (citation omitted).

IV. ANALYSIS

A. Subject-Matter Jurisdiction

We turn first to whether the trial court had jurisdiction to determine Ms. Hill's ownership interest in the RV. Mr. Hill asserts that because Ms. Hill filed a separate declaratory-judgment action to determine her ownership interests in a number of assets, including the RV, the trial court lacked jurisdiction to adjudicate the issue. He submits that he and Ms. Hill are in privity as a married couple and, under the doctrine of prior suit pending, "[t]he trial court had no jurisdiction over Ms. Hill, who still has a prior suit pending (Chancery #78352) wherein the RV is at issue, when the trial court assumed jurisdiction over the RV."

The doctrine of prior suit pending impacts a court's subject-matter jurisdiction. ***West v. Vought Aircraft Indus., Inc.***, 256 S.W.3d. 618, 622 (Tenn. 2008) (citation omitted). Under the doctrine, "'when courts have concurrent jurisdiction, the one that first acquires jurisdiction thereby acquires exclusive jurisdiction.'" ***Id.*** at 624 (quoting ***American Lava Corp. v. Savena***, 476 S. W.2d 639, 640 (Tenn. 1972)). Further, it is well-settled that "[s]ubject matter jurisdiction refers to a court's lawful authority to adjudicate a legal matter[,]" and parties cannot confer or expand subject-matter jurisdiction by either waiver or consent. ***New v. Dumitrache***, 604 S.W.3d 1, 14 (Tenn. 2020) (citations omitted). "Any order entered by a court lacking jurisdiction over the subject matter is void." ***Johnson v. Hopkins***, 432 S.W.3d 840, 844 (Tenn. 2013) (citation omitted). "Therefore, subject matter jurisdiction is a threshold inquiry, which may be raised at any time in any court[,]" ***Id.*** (citation omitted), by the parties or *sua sponte* by the court. ***Nandigam Neurology, PLC v. Beavers***, 639 S.W.3d 651, 667 (Tenn. Ct. App. 2021). Whether the doctrine of prior suit pending is applicable is a question of law, which we review de novo with no presumption of correctness. ***Heatley v. Gaither***, No. M2018-01792-COA-R3-CV, 2019 WL 2714378, at *2 (Tenn. Ct. App. June 28, 2019).

The doctrine of prior suit pending requires proof of four elements:

> (1) the lawsuits must involve identical subject matter; (2) the lawsuits must be between the same parties or their privies; (3) the former lawsuit must be pending in a court having subject matter jurisdiction over the dispute; and (4) the former lawsuit must be pending in a court having personal jurisdiction over the parties.

West, 256 S.W.3d at 623. As Mr. Hill asserts, he and Ms. Hill are in privity as married persons. ***See Thompson v. Hulse***, No. E1999-02474-COA-R3-CV, 2000 WL 124787, *5 (Tenn. Ct. App. Jan. 26, 2000) (declining to extend "the concept of privity in the conveyance of property . . . to degrees of kinship beyond the established relationship of spouse or parent and child."). Additionally, the issue of Ms. Hill's interest in the RV is an issue in this lawsuit and in her separately-filed declaratory judgment action. However, Appellees filed their lawsuit against Mr. Hill in 2016, and the jury rendered its verdict in June 2019. The trial court entered its order affirming the jury verdict on August 12, 2019, and it appears that proceedings to execute on the judgment were commenced shortly thereafter. In September 2019, Ms. Hill filed her separate declaratory-judgment action—No. 78352—pursuant to Tennessee Code Annotated section 45-2-703. Thus, Ms. Hill's action was not "pending" when Mr. Hill's assets were made subject to the jurisdiction of the trial court in the current action. Additionally, it appears that, in May 2020, the trial court dismissed action 78352 with respect to the RV for lack of jurisdiction under section 45-2-703. In August 2020, Ms. Hill filed a motion to intervene in the current action for the sole purpose of determining her interest in the RV and a 2012 Polaris Ranger. The trial court entered an order granting her motion in October 2020.

We agree with Appellees that the doctrine of prior suit pending is not applicable in this case. The trial court properly exercised jurisdiction over the RV and the issue of Ms. Hill's ownership interest therein. We now turn to the trial court's determination that the RV was Mr. Hill's individually owned property as opposed to the Hills' property as tenants by the entirety.

B. Ms. Hill's Ownership Interest in the RV

Following hearings in September and October 2021, by order of October 20, 2021, the trial court determined that, under the principles set-forth in ***Oliphant v. McAmis***, 273 S.W.2d 151 (Tenn. 1954), the RV is not held by the Hills as tenants by the entirety. The trial court determined that the law regarding tenancy by the entirety governs the matter, and ownership for the purposes of determining "marital property" under Tennessee Code Annotated section 36-4-121(b) is not applicable. The court found that the Hills used the RV together and that Ms. Hill "was responsible for paying for repairs, maintenance and insurance for the RV out of the part[ies'] joint bank account." The court noted that registration of a vehicle is only one factor to be considered when determining "a claim of joint ownership," but found that "there was no unity of interest, title or time" in the RV. The trial court also found that there was "no convincing evidence that [the Hills] ever

intended to own the RV jointly." The court noted that, as attorneys, the Hills "knew how to create a tenancy by the entirety in property" as evidenced by the posture of title to their realty, which was changed to tenants by the entirety after the Hills married.

As Appellees contend in their brief, the Tennessee statutes provide, in relevant part, that an "owner" of a vehicle is "a person who holds legal title[,]" Tenn. Code Ann. § 55-2-112, and "proof of registration" is "prima facie evident of ownership . . . by the person in whose name the vehicle is registered[.]" Tenn. Code Ann. § 55-10-312. However, "'[t]enancy by the entirety is a form of property ownership unique to married persons, and it is well-settled in Tennessee that personal property, as well as realty, may be owned by spouses by the entirety.'" ***Lamberth v. S & L Plumbing Co.***, 935 S.W.2d 411, 412 (Tenn. Ct. App. 1996) (quoting ***Catt v. Catt,*** 866 S.W.2d 570 at 573 (Tenn. App. 1993)). In a divorce action, whether property owned by one spouse prior to marriage has become marital property through transmutation is a question of intent to be determined in light of all the circumstances. ***Langschmidt v. Langschmidt***, 81 S.W.3d 741, 747 (Tenn. 2002) (citation omitted). Similarly, whether an estate by the entireties has been created "is a question of intent[]" that "may be inferred from the circumstances." ***Lamberth***, 935 S.W.2d at 412 (citing ***Oliphant v. McAmis***, 273 S.W.2d 151, 154 (Tenn. 1954)).

The issue in ***Oliphant*** was whether personal property that was titled and insured in the decedent husband's name —including an automobile and farm truck—was nevertheless owned by the widow as a tenant by the entirety. ***Oliphant v. McAmis***, 273 S.W.2d 151, 152 (Tenn. 1954) As the trial court in the current case noted, the ***Oliphant*** court "attach[ed] no importance to the fact that" the property was registered and insured in the husband's name. ***Id.*** at 153. Rather, the ***Oliphant*** court held that whether property titled in one spouse's name is nevertheless owned by both spouses as tenants by the entirety "should rest upon convincing evidence" and not upon "mere conjecture" of the parties' intent. ***Id.*** at 153-154.

The parties in ***Oliphant*** were a decedent's widow and his child from a previous marriage. ***Id.*** at 152. The wife in ***Oliphant*** owned a farm and farmhouse prior to the couple's marriage, and she conveyed an interest in the property to her husband after their marriage. ***Id.*** The couple lived in the farmhouse owned by wife prior to the marriage, and the expenses of the farm, vehicles and other property were paid from joint funds. ***Id.*** at 152-153. Although the wife did not operate the farm but "took care of the domestic end of it[,]" the couple discussed the business of the farm and their livelihood was "brought about by [their] joint efforts[.]" ***Id.*** The ***Oliphant*** court determined that the evidence demonstrated a "unity of purpose throughout [the couple's] entire married life, each having due regard for the welfare of the other[]" such that the personal property was held by tenants in the entirety. ***Id.*** at 153-154.

In this case, it is undisputed that the 2004 RV was titled in Mr. Hill's name only. It is also undisputed that Mr. Hill's insurance carrier purchased the RV and delivered it to

Mr. Hill in 2005 to replace an RV that was destroyed in a fire in 2004. Mr. Hill received the RV pursuant to the marital dissolution agreement executed by Mr. Hill and his former wife in September 2005. The Hills married in February 2006.

At trial, Ms. Hill testified that she "takes care of the insurance" on the RV, and both she and Mr. Hill are named as insured drivers. Ms. Hill testified that she redecorated the RV, and funds for the maintenance, repairs, and upkeep of the RV were paid out of marital funds. Ms. Hill testified that she and Mr. Hill were both employed at the law firm. She also testified that paychecks went into a joint account, and she paid the couple's bills out of that account. Ms. Hill testified that she and Mr. Hill used the RV together and that "once [they] were married, [Mr. Hill] never [went] anywhere in the RV without [her]." She testified that Mr. Hill did not treat the RV as his separate property and that he referred to it as "our RV" or "our motor home."

Appellees refer us to nothing in the record to refute Ms. Hill's testimony and, as noted, the trial court found that expenses related to the RV were paid out of the Hills' joint accounts since their marriage in February 2006—shortly after Mr. Hill acquired the RV in 2005. Mr. Hill asserts that he intended the RV to be marital property, and it undisputedly was used by the Hills jointly for family recreational purposes. We find the evidence preponderates against the trial court's finding that the RV was not held as a tenancy by the entirety. The judgment of the trial court is reversed on this issue, and we turn to whether Mr. Hill's qualified rollover IRA is exempt from execution.

C. The IRA

This issue requires us to construe the exemption from execution, attachment, and garnishment provisions in Tennessee Code Annotated section 26-2-105 together with the provisions contained in section 26-2-111(1)(D)(i) and (ii). An issue of statutory construction presents a question of law that we review de novo with no presumption of correctness for the conclusions of the trial court. ***Eastman Chem. Co. v. Johnson***, 151 S.W.3d 503, 506 (Tenn. 2004) (citations omitted).

When construing a statute, the court's duty "is to ascertain and give effect to the intention and purpose of the legislature" ***Id.*** (citations omitted). Our role "is to determine how a reasonable reader would have understood the text at the time it was enacted." ***Lawson v. Hawkins Cnty.***, 661 S.W.3d 54, 59 (Tenn. 2023) (citing ***State v. Deberry***, 651 S.W.3d 918, 924 (Tenn. 2022)). Accordingly, we "give terms their natural and ordinary meaning in their statutory context unless the statute defines them." ***Id.*** (citing ***Mills v. Fulmarque, Inc.***, 360 S.W.3d 362, 368 (Tenn. 2012)). If "a statute uses a common-law term without defining it, we assume the enacting legislature adopted the term's common-law meaning 'unless a different sense is apparent from the context, or from the general purpose of the statute.'" ***Id.*** (quoting ***In re Estate of Starkey***, 556 S.W.3d 811, 817 (Tenn. Ct. App. 2018) (quoting ***Lively v. Am. Zinc Co. of Tenn.***, 137 Tenn. 261, 191 S.W. 975,

978 (1917))).

However, "the language of a statute cannot be considered in a vacuum, but 'should be construed, if practicable, so that its component parts are consistent and reasonable.'" ***In re Estate of Tanner***, 295 S.W.3d 610, 614 (Tenn. 2009) (quoting ***Marsh v. Henderson***, 424 S.W.2d 193, 196 (1968)). Statutes related to the same subject and sharing a common purpose must be construed together, "and the construction of one such statute, if doubtful, may be aided by considering the words and legislative intent indicated by the language of another statute." ***Johnson v. Hopkins***, 432 S.W.3d 840, 848 (Tenn. 2013) (citations omitted). When separate statutes manifest an "unfortunate tension between two important policy considerations[,] . . . it is not our duty to re-weigh the[ ] competing concerns." ***Estate of Tanner***, 295 S.W.3d at 617. Rather, we must consider the statutes in context "to determine the balance that was struck by the General Assembly." ***Id.***

The courts must seek to resolve potential conflicts between statutes in a way that "'provide[s] for a harmonious operation of the laws.'" ***Coffman v. Armstrong Int'l, Inc.***, 615 S.W.3d 888, 894 (Tenn. 2021) (quoting ***State v. Frazier***, 558 S.W.3d 145, 153 (Tenn. 2018) (citing ***Lovlace v. Copley***, 418 S.W.3d 1, 20 (Tenn. 2013))). When statutes conflict, "'a more specific statutory provision takes precedence over a more general provision.'" ***Id.*** (quoting ***Frazier***, 558 S.W.3d at 153 (Tenn. 2018) (quoting ***Graham v. Caples***, 325 S.W.3d 578, 582 (Tenn. 2010))) (additional citations omitted). Additionally, "'[w]hen one statute contains a given provision, the omission of the same provision from a similar statute is significant to show that a different intention existed.'" ***Id.*** (quoting ***Frazier***, 558 S.W.3d at 153 (quoting ***State v. Lewis***, 958 S.W.2d 736, 739 (Tenn. 1997))).

As the trial court determined, the retirement account lost its status as an employer-provided account when Mr. Hill rolled his 401(k) into a qualified IRA. Thus, ERISA, which governs employer-provided pension and retirement plans, does not apply to Mr. Hill's IRA in this proceeding.[6] ***Massey v. Casals***, No. W2010-00284-COA-R3-JV, 2011 WL 1734066, at *8 (Tenn. Ct. App. 2011). However, retirement plans qualified under §§ 401(a), 403(a), 403(b), 408, and 408A of the Internal Revenue Code are protected—to varying degrees—from garnishment and execution by state law in every state and the

[6] Although Tennessee has opted out of the exemptions contained in the federal Bankruptcy Reform Act of 1978, *see* Tenn. Code Ann. § 26-2-112, we note that The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") provides an exemption for IRAs and other qualified plans from the property available to creditors in a bankruptcy proceeding. *See* 11 USCA § 522(d)(12); ***In re Brainard***, No. 13-22251 (AMN), – B.R. –, 2023 WL 3667420, at *4 (Bankr. D. Conn. May 25, 2023) ("Congress enacted § 522(d)(12) as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which provides an express exemption for an IRA (or other qualified plan) without a showing of age or necessity.")

District of Columbia.[7]

In Tennessee, Tennessee Code Annotated section 26-2-105 ("section 105") protects retirement plans that are qualified under §§ 401(a), 403(a), 403(b), 408 and 408A of the Internal Revenue Code from claims of creditors other than the state. Section 105(c) also excepts "the claims of an alternate payee under a qualified domestic relations order" from the exemption supplied by section 105(b). The exemption provided by section 105 is in addition to the personal property exemptions provided by Tennessee Code Annotated sections 26-2-103 and 104; the disposable earnings exemption provided by Tennessee Code Annotated section 26-2-106; the exemptions for dependent children provided by Tennessee Code Annotated section 26-2-107; the insurance benefits exemption provided by Tennessee Code Annotated section 26-2-110; and the "miscellaneous exemptions" provided by Tennessee Code Annotated section 26-2-111 ("section 111"). ***Massey***, 2011 WL 1734066, at *7.

It is undisputed that Mr. Hill's IRA was established with and funded by funds "rolled over" from the firm's ERISA-governed, profit-sharing plan and is a qualified IRA under section 408 of the Internal Revenue Code.[8] Accordingly, sections 105(b) and 105(c)

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[7] *See* Ala. Code § 19-3B-508; Alaska Stat. § 09.38.017; Ariz. Rev. Stat. Ann. § 33-1126(B); Ark. Code Ann. § 16-66-220; Cal. Civ. Proc. Code § 704.115; Colo. Rev. Stat. Ann. § 13-54-102; Conn. Gen. Stat. Ann. § 52-321a; Del. Code Ann. tit. 10, § 4915; Fla. Stat. Ann. § 222.21; Ga. Code Ann. § 44-13-100; Haw. Rev. Stat. Ann. § 651-124; Idaho Code § 55-1011; 735 Ill. Comp. Stat. Ann. 5/12-1006; Ind. Code Ann. § 34-55-10-2(6); Iowa Code Ann. § 627.6(8); Kan. Stat. Ann. § 60-2308; Ky. Rev. Stat. Ann. § 427.150(2)(f); La. Rev. Stat. Ann. §§ 20-33(1) and 13-3881(D); Me. Rev. Stat. tit. 14, § 4422(13)(E); Md. Code Ann. Cts. & Jud. Proc. § 11-504(h); Mass. Gen. Laws Ann. ch. 235, § 34A; Mich. Comp. Laws Ann. § 600.6023(j); Minn. Stat. Ann. § 550.37(24); Miss. Code Ann. § 85-3-1; Mo. Ann. Stat. § 513.430(1); Mont. Code Ann. § 25-13-608(1)(e); Neb. Rev. Stat. § 25-1563.01; Nev. Rev. Stat. Ann. § 21.090(1)(r); N.H. Rev. Stat. Ann. 511:2; N.J. Stat. Ann. 25-2-1(b); N.M. Stat. Ann. §§ 42-10-1(A); N.Y.C.P.L.R. § 5205(c); N.C. Gen. Stat. Ann. § 120-4-29; N.D. Cent. Code § 28-22-03.1(7); Ohio Rev. Code Ann. § 2329.66(A)(10); Okla. Stat. tit. 11 § 49-126; Or. Rev. Stat. § 18.358; 42 Pa. Cons. Stat. Ann. § 8124(b)(1); R.I. Gen. Laws § 9-26-4(11); S.C. Code Ann. § 15-41-30(A); S.D. Codified Laws § 43-45-16; Tenn. Code Ann. § 26-2-105; Tex. Prop. Code Ann. § 42.0021; Utah Code Ann. § 78-23-505(1); Vt. Stat. Ann. tit. 12, § 2740(16); Va. Code Ann. § 34-34; Wash. Rev. Code Ann. § 6.15.020; W.Va. Code §38-8-1; Wis. Stat. Ann. § 815.18(3)(j); Wyo. Stat. Ann. § 1-20-110; D.C. Code § 15-501.

[8] Section 408 of the Internal Revenue Code provides, in relevant part:

> (a) **Individual retirement account**.—For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:
>
> (1) Except in the case of a rollover contribution described in subsection (d)(3) or in section 402(c), 403(a)(4), 403(b)(8), or 457(e)(16), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year on behalf of any individual in excess of the amount in effect for such taxable year under section 219(b)(1)(A).

(2) The trustee is a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.

(3) No part of the trust funds will be invested in life insurance contracts.

(4) The interest of an individual in the balance in his account is nonforfeitable.

(5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

(6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

(b) **Individual retirement annuity.**--For purposes of this section, the term "individual retirement annuity" means an annuity contract, or an endowment contract (as determined under regulations prescribed by the Secretary), issued by an insurance company which meets the following requirements:

(1) The contract is not transferable by the owner.

(2) Under the contract--

(A) the premiums are not fixed,

(B) the annual premium on behalf of any individual will not exceed the dollar amount in effect under section 219(b)(1)(A), and

(C) any refund of premiums will be applied before the close of the calendar year following the year of the refund toward the payment of future premiums or the purchase of additional benefits.

(3) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of the owner.

(4) The entire interest of the owner is nonforfeitable.

Such term does not include such an annuity contract for any taxable year of the owner in which it is disqualified on the application of subsection (e) or for any subsequent taxable year. For purposes of this subsection, no contract shall be treated as an endowment contract if it matures later than the taxable year in which the individual in whose name such contract is purchased attains the applicable age (determined under section 401(a)(9)(C)(v) for the calendar year in which such taxable year begins); if it is not for the exclusive benefit of the individual in whose name it is purchased or his beneficiaries; or if the aggregate annual premiums under all such contracts purchased in the name of such individual for any taxable year exceed the dollar amount in effect under section 219(b)(1)(A).

are applicable to Mr. Hill's IRA. As in ***Massey***, the gravamen of the issue here is whether and to what extent section 111(1)(D) limits the exemption afforded by section 105(b).

Mr. Hill argues that section 105(b) completely shields all records concerning any plan governed by the section from the subpoena process, and section 111(1)(D)(ii) cannot be read to remove the protections provided by section 105 merely because the debtor is more than 59 ½ years of age and may access the IRA funds without penalty. He asserts that neither ***Massey*** nor section 111(1)(D) address the exception from subpoena provision of section 105(b). Mr. Hill also argues that the language of section 26-2-104 suggests that section 105(b) provides an absolute exemption, and to interpret section 111(1)(D) to limit the exemption thwarts the legislature's intent to encourage retirement savings. Mr. Hill further argues that terminating the protections provided by section 105(b) when the debtor reaches retirement age negates the legislative intent to encourage retirement saving by protecting retirement funds.

Appellees, on the other hand, argue that section 111(1)(D) limits the applicability of section 105(b). They contend that, under the holding in ***Massey***, retirement accounts are not exempt from garnishment and execution if the debtor may accelerate payment so as to receive payment in a lump sum or in periodic payments in 60 months or less, regardless of the debtor's age. They assert that the trial court correctly concluded that, under Tennessee Code Annotated section 56-7-203, the annuities held in Mr. Hill's IRA are not exempt from garnishment and execution. With these arguments in mind, we turn first to the applicable statutory sections.

1. The Statutes

As noted above, our primary objective when construing a statute is to effectuate the intent of the legislature without restricting or extending the statute beyond its intended scope. ***Eastman Chem. Co. v. Johnson***, 151 S.W.3d 503, 506 (Tenn. 2004) (citations omitted). When the statutory language is clear, "we apply the plain meaning without complicating the task." ***Lind v. Beaman Dodge, Inc.***, 356 S.W.3d 889, 895 (Tenn. 2011) (citing ***Eastman Chem.,*** 151 S.W.3d at 507 (Tenn. 2004)). When the statutory language is not clear, "we may reference the broader statutory scheme, the history of the legislation, or other sources." ***Id.*** (citing ***Parks v. Tenn. Mun. League Risk Mgmt. Pool,*** 974 S.W.2d 677, 679 (Tenn. 1998)). "We presume that the Legislature did not intend to enact a useless or absurd statute and that each word in a statute has a specific purpose and meaning." ***State v. Gevedon,*** No. M2020-00359-SC-R11-CD, – S.W.3d –, 2023 WL 3880366, at *2 (Tenn. June 8, 2023) (citing ***Arden v. Kozawa***, 466 S.W.3d 758, 764 (Tenn. 2015) (citing ***Cunningham v. Williamson Cnty. Hosp. Dist.***, 405 S.W.3d 41, 44 (Tenn. 2013)); ***Lee Med., Inc. v. Beecher***, 312 S.W.3d 515, 527 (Tenn. 2010) (citing ***State v. Jackson***, 60

26 U.S.C.A. § 408.

S.W.3d 738, 742 (Tenn. 2001); ***Fletcher v. State***, 951 S.W.2d 378, 382 (Tenn. 1997))). Further, we do not read statutory sections "in isolation[.]" ***Griffin v. Campbell Clinic, P.A.***, 439 S.W.3d 899, 903 (Tenn. 2014) (citation omitted). Rather, we "are required to construe them 'as a whole, read them in conjunction with their surrounding parts, and view them consistently with the legislative purpose.'" ***Id.*** (quoting ***Kradel v. Piper Indus., Inc.,*** 60 S.W.3d 744, 750 (Tenn. 2001) (quoting ***State v. Turner,*** 913 S.W.2d 158, 160 (Tenn.1995))).

When construing statutes that provide exemptions from garnishment, we must construe them "liberally . . . in favor of the debtor." ***Massey v. Casals***, No. W2010-00284-COA-R3JV, 2011 WL 1734066, at *7 (Tenn. Ct. App. May 3, 2011) (citing ***Wright v. Brooks,*** 49 S.W. 828 829 (Tenn.1899); ***Newark Ins. Co. v. Seyfert,*** 392 S.W .2d 336, 345 (Tenn. Ct. App. 1964)). We also note that, in the context of a bankruptcy proceeding, "[a] party objecting to a debtor's claim of exemptions 'has the burden of proving that the exemptions are not properly claimed.'" ***In re Chaudury***, 581 B.R. 279, 284 (Bankr. M.D. Tenn. 2018) (quoting Fed. R. Bankr. P. 4003(c); ***Menninger v. Schramm* (*In re Schramm*)**, 431 B.R. 397, 400 (6th Cir. BAP 2010)).

Section 105 provides:

> (a) All moneys received as pension from the state or a political subdivision as defined in § 4-58-102, before receipt, or while in the recipient's hands or upon deposit in the bank, shall be exempt from execution, attachment or garnishment other than an order for assignment of support issued under § 36-5-501 or a qualified domestic relations order as provided in subsection (c), whether such pensioner is the head of a family or not.
>
> (b) Except as provided in subsection (c), any funds or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under §§ 401(a), 403(a), 403(b), 408 and 408A, or an Archer medical savings account qualified under § 220 or a health savings account qualified under § 223 of the Internal Revenue Code of 1986, as amended, are exempt from any and all claims of creditors of the participant or beneficiary, except the state. All records of the debtor concerning such plan and of the plan concerning the debtor's participation in the plan, or interest in the plan, are exempt from the subpoena process.
>
> (c) Any plan or arrangement described in subsection (b), is not exempt from the claims of an alternate payee under a qualified domestic relations order. However, the interest of any and all alternate payees under a qualified domestic relations order are exempt from any and all claims of any creditor, other than the state. As used in this subsection (c), "alternate payee" and

> "qualified domestic relations order" have the meaning ascribed to them in § 414(p) of the Internal Revenue Code of 1986, as amended. Notwithstanding this subsection (c) to the contrary, an optional retirement program established pursuant to title 8, chapter 25, part 2 shall honor claims under a qualified domestic relations order that complies with § 8-25-210.

The protection provided by section 105 is clear. Funds or assets that are payable to a participant or beneficiary from a retirement plan that is qualified under the enumerated sections of the Internal Revenue Code—and "any interest" thereon—are exempt from all claims of creditors except the State of Tennessee and "claims of an alternate payee under a qualified domestic relations order[.]" Additionally, the debtor's records concerning the plan and the plan's records concerning the debtor's participation in the plan are exempt from the subpoena process. Because Mr. Hill's IRA undisputedly falls within section 408 of the Internal Revenue Code, it is exempt from the subpoena process, garnishment, and execution by judgment creditors, *i.e.* Appellees, under the plain language of section 105(b).

While somewhat unclear, section 111 provides some additional "miscellaneous exemptions" from execution. The section provides that, "[i]n addition to the property exempt under § 26-2-103," certain property that is "in the hands or possession of any person who is a bona fide citizen permanently residing in this state" is "exempt from execution, seizure or attachment."[9] This property includes, *inter alia* and with limitations: the debtor's right to receive social security benefits; unemployment compensation and benefits; veterans' benefits; disability benefits; alimony; child support; and "a pension that vests as a result of disability[.]"[10] Section 111 also provides limited exemptions for benefits

[9] Tennessee Code Annotated section 26-2-103 provides:

> (a) Personal property to the aggregate value of ten thousand dollars ($10,000) debtor's equity interest shall be exempt from execution, seizure or attachment in the hands or possession of any person who is a bona fide citizen permanently residing in Tennessee, and such person shall be entitled to this exemption without regard to the debtor's vocation or pursuit or to the ownership of the debtor's abode. Such person may select for exemption the items of the owned and possessed personal property, including money and funds on deposit with a bank or other financial institution, up to the aggregate value of ten thousand dollars ($10,000) debtor's equity interest.
>
> (b) An item shall not be eligible, in whole or in part, for the personal property exemption provided by this part, if the item has been purchased with or maintained by fraudulently obtained funds or if ownership of the item has been maintained using fraudulently obtained funds. A court shall be required to find by a preponderance of the evidence that an item was purchased with or maintained by funds obtained by defrauding another person or that ownership of an item was maintained by funds obtained by defrauding another person in order to disqualify the item from eligibility for the personal property exemption.

[10] Tennessee Code Annotated section 26-2-111 provides:

In addition to the property exempt under § 26-2-103, the following shall be exempt from execution, seizure or attachment in the hands or possession of any person who is a bona fide citizen permanently residing in this state:

(1) The debtor's right to receive:

(A) A social security benefit, unemployment compensation, a Families First program benefit or a local public assistance benefit;

(B) A veterans' benefit;

(C) A disability, illness, or unemployment benefit, or a pension that vests as a result of disability;

(D)(i) To the same extent that earnings are exempt pursuant to § 26-2-106, a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of death, age or length of service, unless:

(a) Such plan or contract was established by or under the auspices of an insider that employed the debtor at the time that the debtor's rights under such plan or contract arose;

(b) Such payment is on account of age or length of service; and

(c) Such plan or contract does not qualify under §§ 401(a), 403(a), 403(b), 408, 408A, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. §§ 401(a), 403(a), 403(b), 408, 408A or 409);

(ii) The assets of the fund or plan from which any such payments are made, or are to be made, are exempt only to the extent that the debtor has no right or option to receive them except as monthly or other periodic payments beginning at or after age fifty-eight (58). Assets of such funds or plans are not exempt if the debtor may, at the debtor's option, accelerate payment so as to receive payment in a lump sum or in periodic payments over a period of sixty (60) months or less;

(E) Alimony to the extent that payment becomes due more than thirty (30) days after the debtor asserts a claim to such exemption in any judicial proceeding; and

(F) Child support payments to the extent that payment becomes due more than thirty (30) days after the debtor asserts a claim to such exemption in any judicial proceeding;

(2) The debtor's right not to exceed in the aggregate fifteen thousand dollars ($15,000) to receive or property that is traceable to:

(A) An award not to exceed five thousand dollars ($5,000) under a crime victim's reparation law;

(B) A payment, not to exceed seven thousand five hundred dollars ($7,500) on account of personal bodily injury, not including pain and suffering or compensation for actual

received from crime victims' reparation awards; compensatory damages; and wrongful death damages. Further, in addition to pension payments resulting from disability under section 111(1)(C), section 111(1)(D)(i) provides an exemption for payments from a pension, profit-sharing, annuity, or other retirement plan "on account of death, age or length of service[.]" The exemption provided by section 111(1)(D)(i) is available "to the same extent that earnings are exempt pursuant to § 26-2-106 . . . unless:

> (a) Such plan or contract was established by or under the auspices of an insider that employed the debtor at the time that the debtor's rights under such plan or contract arose;
>
> (b) Such payment is on account of age or length of service; *and*
>
> (c) Such plan or contract does not qualify under §§ 401(a), 403(a), 403(b), 408, 408A, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. §§ 401(a), 403(a), 403(b), 408, 408A or 409)[.]"

Tenn. Code Ann. § 26-2-111(1)(D)(i)(emphasis added).

Thus, while section 105 pertains to assets held in qualified retirement accounts, section 111(1)(D) extends the exemption to the debtor's right to receive a payment under

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> pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or
>
> (C) A payment not to exceed ten thousand dollars ($10,000) on account of the wrongful death of an individual of whom the debtor was a dependent;
>
> (3) A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
>
> (4) The debtor's aggregate interest, not to exceed one thousand nine hundred dollars ($1,900) in value in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor;
>
> (5) Professionally prescribed health care aids for the debtor or a dependent of the debtor; and
>
> (6) Liquid assets, stocks or bonds, to the extent of the amount of any obligations owed by the debtor pursuant to any final court order or judgment for child support. The exemption shall be effective as of the date such exemption is claimed by the debtor or by an intervening representative of the child or children to whom such support is owed. Further, this exemption is only valid if such assets are immediately deposited into court by the debtor or immediately executed upon, seized or attached on behalf of the child or children for the partial or full satisfaction of child support obligations.

any annuity, profit-sharing or pension plan—"to the same extent that earnings are exempt under § 26-2-106"—unless the payment was on account of age or length of service from a non-qualified plan that was "established by or under the auspices of an insider that employed the debtor at the time that the debtor's rights under such plan or contract arose."[11] ***See In re Brainard***, No. 13-22251 (AMN), 2023 WL 3667420, at *4 (Bankr. D. Conn. May 25, 2023) (construing parallel provision of 11 U.S.C.A. § 522(d)(10)(E): "[I]f the payment is on account of age or length of service and the plan or contract was established by an insider employing the debtor, the plan or contract must also qualify under §§ 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code.").

As Appellees noted in their October 2020 response to Mr. Hill's motion to void garnishment of the annuities and to declare the IRA exempt under sections 105 and 111, "the interaction between T.C.A. §§ 26-2-105 and 26-2-111 is complex and requires careful analysis to correctly understand. It is not intuitive[.]" In the trial court, Appellees asserted that, notwithstanding this complexity, the "question . . . is simple: whether Hill can access his retirement accounts without a federal tax penalty. If he can access them without a federal tax penalty, then, according to Tenn. Code Ann. § 26-2-111(1)(D)(ii) and ***Massey***, Hill's retirement accounts are subject to garnishment." However, because assets of an IRA may be withdrawn at age 59½ without penalty, *see Retirement Plans FAQs regarding IRAs Distributions (Withdrawals)*, *available at* https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-iras (last visited July 19, 2023), Appellees' interpretation of section 111(1)(D)(ii) negates the exemption provided by section 105 for any debtor over age 59½.

When interpreting statutes, "'we are required to construe them as a whole, read them in conjunction with their surrounding parts, and view them consistently with the legislative purpose.'" ***Coffman v. Armstrong Int'l, Inc.***, 615 S.W.3d 888, 897 (Tenn. 2021) (quoting

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[11] Tennessee Code Annotated section 26-1-106 provides:

> (a) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed:
>
> (1) Twenty-five percent (25%) of the disposable earnings for that week; or
>
> (2) The amount by which the disposable earnings for that week exceed thirty (30) times the federal minimum hourly wage at the time the earnings for any pay period become due and payable, whichever is less.
>
> (b) In the case of earnings for any pay period other than a week, an equivalent amount shall be in effect.
>
> (c) The debtor shall pay the costs of any and all garnishments on each debt on which suit is brought.

Lind v. Beaman Dodge, Inc., 356 S.W.3d 889, 897 (Tenn. 2011) (quoting ***State v. Turner***, 913 S.W.2d 158, 160 (Tenn. 1995))). Accordingly, section 111 cannot be read in isolation from section 105. Section 105 protects qualified funds to the same extent as federal law. ***See In re Chaudury***, 581 B.R. 279, 285-86 (Bankr. M.D. Tenn. 2018) ("The Tennessee exemption statute references Section 408 of the Internal Revenue Code, as does Section 522(b)(4)(D)(ii) of the Bankruptcy Code. . . . It is clear from these references that distributions made pursuant to the 60–day rollover rule retain their status as exempt from the bankruptcy estate under both federal and state law.") On the other hand, section 111(1)(D)(ii) protects assets held in nonqualified funds "only to the extent that the debtor has no right or option to receive them except as monthly or other periodic payments beginning at or after age fifty-eight (58)." Under section 111(1)(D)(ii), the assets held in "such [nonqualified] funds or plans are not exempt if the debtor may, at the debtor's option, accelerate payment so as to receive payment in a lump sum or in periodic payments over a period of sixty (60) months or less[.]" ***See In re Lawless***, 591 F. App'x 415, 416-418 (6th Cir. 2014) (debtor's non-qualified deferred-compensation plan authorized by 26 U.S.C. § 409A is not exempt under Tennessee Code Annotated section 26-2-111(1)(D) because the debtor had the option of accelerating the payment as a lump sum).

This construction is consistent with the "well-settled canon of statutory construction [that] resolves any contradiction between provisions: '[W]here a conflict is presented between two statutes, a more specific statutory provision takes precedence over a more general provision.'" ***Lawson v. Hawkins Cnty.***, 661 S.W.3d 54, 66 (Tenn. 2023) (quoting ***Coffman v. Armstrong Int'l, Inc.***, 615 S.W.3d 888, 894 (Tenn. 2021) (alteration in original) (quoting ***State v. Frazier***, 558 S.W.3d 145, 153 (Tenn. 2018))). It is also consistent with the historical context giving rise to the statutory exemptions.

Historically, the "poor laws . . . secure[d] the poor in the possession and use of the means necessary for their subsistence" by exempting certain property from execution. ***Jones v. Williams***, 32 Tenn. 105, 106 (1852). In 1978, the legislature enacted The Personal Property Owner's Rights and Garnishment Act, codified at Tennessee Code Annotated section 26-2-101 *et seq.*, which allowed the debtor to claim exemptions including property valued in the aggregate up to $4,000, certain personal items such as clothing and a family Bible, and state pension funds. ***Storey v. Bradford Furniture Co.***, Inc. 910 S.W.2d 857, 859 (Tenn. 1995). Enacted in 1980, section 111 contains various "miscellaneous exemptions," including exemptions from plans "on account of death, age or length of service" subject to the above-noted exceptions.

On the other hand, section 105 specifically defines the exemptions available for "retirement and pensions" that are state pension plans and private qualified pension plans. The courts and the Tennessee Attorney General have "identified two primary goals in the legislative history of § 26-2-105. ***In re Vandeberg***, 276 B.R. 581, 586 (Bankr. E.D. Tenn. 2001) (citing Tenn. Atty Gen. Op. 98–184, at *1087). First, the legislature intended to protect private retirement plans in order to "benefit and encourage people who are saving

money for their retirement." ***Id.*** (citing ***id.***) Second, "the legislature intended for this protection to extend to those private plans protected by federal law."[12] ***Id.*** (citing *see* ***Id.***) When considering whether the exemption as formerly codified at Tennessee Code Annotated section 26-2-104 included Roth IRAs, the Tennessee Attorney General opined:

> The legislative history of Tenn. Code Ann. § 26-2-104(b) does provide some guidance as to this issue. Specifically, the legislative discussions regarding the proposed bill demonstrate that two goals existed. First, the statute was intended to place private retirement plans on the same footing as public plans. House Floor, April 20, 1988, House Bill 1881 (Tape H-78). In fact, Representative Bill Purcell, the House sponsor of the bill, emphasized that this was the most important part of the bill. ***Id.*** Thus, in adding Tenn. Code Ann. § 26-2-104(b), the legislature intended private retirement plans to get as much protection from creditors as public plans. In so doing, the legislature clearly intended to benefit and encourage people who are saving money for their retirement.
>
> In addition to extending the exemption to private retirement plans, the legislature also indicated a desire to tie the exemption to federal law. Senate Floor, February 1, 1988, Senate Bill 1364 (Tape S-10). Senator Douglas Henry, a sponsor of the bill, stated that the bill would conform to federal law in making qualified retirement plans exempt from claims of creditors under Tennessee law. ***Id.*** Thus, like many states that have chosen to opt out of the federal exemption scheme, in the realm of individual retirement plans Tennessee lawmakers have demonstrated an intent to allow at least as much protection as does the federal scheme.
>
> Thus, in light of the applicable legislative history, it appears that the purpose

[12] Tennessee Code Annotated section 26-2-112 provides:

> The personal property exemptions as provided for in this part, and the other exemptions as provided in other sections of the Tennessee Code Annotated for the citizens of Tennessee, are hereby declared adequate and the citizens of Tennessee, pursuant to section 522(b)(1), Public Law 95-598 known as the Bankruptcy Reform Act of 1978 (11 U.S.C., § 522(b)(1)), are not authorized to claim as exempt the property described in the Bankruptcy Reform Act of 1978 (11 U.S.C. § 522(d)).

However, "[a]lthough Tennessee has opted out of the federal exemptions provided by Section 522(d) of the Bankruptcy Code, Section 522(b)(3)(C) provides exemption rights in retirement funds for debtors in opt-out states. The net effect is that, regardless of whether a state opts in or out of the rest of the federal exemptions, retirement funds have a special exempt status under the Bankruptcy Code." ***In re Chaudury***, 581 B.R. 279, 284–85 (Bankr. M.D. Tenn. 2018).

> and intent of Tenn. Code Ann. § 26-2-104 is best accomplished by including Roth IRAs within its scope. Tenn. Code Ann. § 26-2-104 clearly was intended to reward those people who invest for their retirement. All plans qualifying under I.R.C. § 408 are entitled to the exemption. Federal law obviously perceived that Roth IRAs were inherently connected with § 408 plans, given the numbering and placement of § 408A and the fact that I.R.C. § 408A(a) incorporates § 408 by reference. Further, the Tennessee legislature did not restrict I.R.C. § 408 to certain subsections as it did for §§ 401 and 403. Essentially, a Roth IRA is a qualified retirement plan under I.R.C. § 408 with some additional tax features that make it attractive to certain individuals who qualify. However, these tax features do not alter the basic nature of the IRA. Thus, it is the opinion of this Office that Roth IRAs qualify for the exemption from the claims of creditors under Tenn. Code Ann. § 26-2-104.

Tenn. Op. Att'y Gen. No. 98-184 (Sept. 9, 1998). The footnote contained in the above passage states:

> Perhaps indicative of the legislature's general intent to protect retirement plans is Tenn. Code Ann. § 67-2-104, which exempts IRAs from the Hall Income Tax. And also relevant is the action of the recent legislature in amending Tenn. Code Ann. § 67-2-104 expressly to exempt Roth IRAs. Chapter 1013, 1998 Public Acts, *effective July 1, 1998*.

To the extent, if any, that the general miscellaneous provisions contained in section 111 conflict with the specific provisions of section 105 applicable to enumerated retirement plans qualified under the Internal Revenue Code, section 105 must prevail.[13]

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[13]We observe that this construction of the interplay between Tennessee Code Annotated sections 105 and 111 is consistent with the exemptions provided by federal bankruptcy law. Like Tennessee Code Annotated section 26-2-111, 11 U.S.C. § 522(d)(10)(E) provides an exemption for:

> (E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless-
>
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
>
> (ii) such payment is on account of age or length of service; and
>
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

Like Tennessee Code Annotated section 26-2-105, 11 U.S.C.A. § 522(d)(12) exempts "[r]etirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403,

2. Case Law

Appellees submit that, under ***Massey v. Casals***, Mr. Hill's IRA is not exempt from execution because he may access the funds without a penalty because he is above age 59½. Mr. Hill submits that, because the IRA is qualified under § 408 and he could not accelerate payment or access the IRA without penalty before age 59½, it is exempt under both sections 105 and 111. Thus, we turn to the holding in ***Massey***.

In dicta, the ***Massey*** court noted that if a "debtor may, without a penalty prescribed by law, receive the assets as a lump-sum payment, in periodic payments over a period of 60 months or less, or before 58 years of age, the pension or retirement plan is not exempt." As an initial matter, we note that ***Massey*** is an unreported opinion, and unreported opinions are persuasive but not controlling authority. ***State ex rel. Nichols v. Songstad***, 563 S.W.3d 868, 875 n. 6 (Tenn. Ct. App. 2018); Tenn. Sup. Ct. R. 4. We also note that the issue in ***Massey*** was whether the judgment debtor's IRA was exempt under the section where the debtor had full control of the investments held by the IRA and was under age 59½.

In ***Rousey v. Jacoway***, 544 U.S. 320 (2005),[14] the United State Supreme Court addressed the applicability of the exemption provided by 11 U.S.C. § 522(d)(10)(E), which is substantially similar to section 111(1)(D). The debtors in ***Rousey*** were required to take lump-sum distributions from employer-provided pension plans when their employment terminated. ***Rousey***, 544 U.S. at 322. They deposited the sums into IRAs that were qualified under § 408(a). ***Id.*** Several years later, they filed a petition for bankruptcy and claimed the IRAs as exempt under § 522(d)(10)(E). ***Id.*** at 323. The Bankruptcy Court sustained the Trustee's objection to the exemption, and the Bankruptcy Appellate Panel ("BAP") agreed. ***Id.*** at 324. The BAP concluded that the IRAs were not "'similar plan[s] or contract[s] to stock bonus, pension, profitsharing, or annuity plans' because, by contrast to the limited access permitted in such plans, the [debtors] had 'unlimited access' to the funds held in their IRAs. . . . 'subject only to a ten percent tax penalty.'" ***Id.*** The Court of Appeals for the Eighth Circuit affirmed, concluding that, even if the IRAs were similar to the plans enumerated in the section, the debtors' "right to payment was conditioned neither

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408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986."

[14] The Bankruptcy Court has noted that the exemption provided by Tennessee Code Annotated section 26-2-111(1)(D) is broader than the similar exemption provided by 11 U.S.C. § 522(d)(10)(E) "in that it does not limit the exemption to the extent that the payments are necessary for the support of the debtor and/or dependents of the debtor, and it contains the additional protection of the underlying assets from which the periodic payments are made." ***In re Vickers***, 408 B.R. 131, 139 (Bankr. E.D. Tenn. 2009).

on age nor on any of the other statutory factors. Their IRAs were instead 'readily accessible savings accounts of which the debtors may easily avail themselves (albeit with some discouraging tax consequences) at any time for any purpose.'" ***Id.*** However, the Supreme Court reversed and concluded that the IRAs fell within the definition of "similar plans" as contemplated by the section because the requirements and tax treatment of IRAs demonstrate that "IRA income substitutes for wages lost upon retirement[.]" ***Id.*** at 332. The Court also noted that, although debtors had a "nonforfeitable rights to the balance held in" the IRA under § 408(a), the right was restricted by a tax penalty that applies to withdrawals made by the accountholder before age 59½. ***Id.*** at 328. The ***Rousey*** Court held that the tax penalty limited the debtors' "right to 'payment' of the balance of their IRAs." The Court held: "And because this condition is removed when the accountholder turns age 59½, the [debtors'] right to the balance of their IRAs is a right to payment 'on account of' age." ***Id.***

The ***Massey*** Court reached the same conclusion, holding that "the ability to encroach upon an IRA only by incurring a substantial tax penalty" does not "amount[] to a 'right' to receive funds." ***Massey***, 2011 WL 173066, at *9. The ***Massey*** court further stated:

> Construing sections 2-26-105(b) and 2-26-111(1)(D)(ii) together in light of the purpose of the statutory exemption scheme, we agree with the Attorney General that the legislature intended to encourage the citizens of Tennessee to save for their retirement and to protect retirement plans that qualify under the enumerated sections of the Internal Revenue Code. We believe the legislature also intended to limit the exemption to retirement plans that cannot, at the option of the debtor and without an involuntary penalty, such as a federally mandated tax penalty, be accessed by the debtor before 58– years of age, as a lump sum, or accelerated such that payments may be received over a period of 60 months or fewer.

Id. We do not read ***Massey*** as standing for the proposition that the exemption for qualified funds provided by section 105 is extinguished when a debtor attains age 59½. Rather, the legislature limited the exemption provided by section 111 with respect to unqualified plans.

In ***Rousey***, the Supreme Court observed:

> As a general matter, it makes little sense to exclude from the exemption plans that fail to qualify under § 408, unless all plans that do qualify under § 408, including IRAs, are generally within the exemption. If IRAs were not within 11 U.S.C. § 522(d)(10)(E), Congress would not have referred to them in its exception.

Rousey, 544 U.S. at 334. The same logic applies to Tennessee Code Annotated section

26-2-111.

The Bankruptcy Court has addressed the interplay between section 111 and other exemptions provided in chapter 2 of Title 26 of the Tennessee Code. The issue in ***In re Thompkins*** was whether the $7,500 exemption on personal-injury proceeds contained in section 111(2)(B) limits the exemption for insurance proceeds provided by Tennessee Code Annotated section 26-2-110(a). ***In re Thompkins***, 263 B.R. 223 (Bankr. W.D. Tenn. 2001). The Bankruptcy Court observed that section 26-2-110(a) contained a distinct exemption and declined to limit the exemption to that contained in section 111(2). ***Id.*** at 225. In ***In re Lawrence***, the Bankruptcy Court noted that the exemptions contained in the Tennessee statutes are not limited to bankruptcy proceedings, but "provide for particular items of a debtor's property to be completely exempt from all judicial process initiated by creditors to collect debts." ***In re Lawrence***, 219 B.R. 786, 792 (E.D. Tenn. 1998). The court observed:

> Whenever the Tennessee Legislature has sought to create a bankruptcy exemption, it has inserted key language into the Tennessee statutes stating that the property shall either be "exempt from execution, seizure or attachment" (§§ 26-2-102, 26-2-103, 26-2-111) or, if the property may be in the possession of a third person, "exempt from execution, attachment or garnishment" (§§ 26-2-104 [current 105], 26-2-110). This broad language expressly prohibits creditors from ever subjecting the debtor's exempted property to any judicial process for the collection of debts.

Id. Additionally, the Bankruptcy Court has observed that section 111(1)(D) is broader than its federal counterpart and "contains . . . protection of the underlying assets from which the periodic payments are made." ***In re Vickers***, 408 B.R. 131, 139 (Bankr. E.D. Tenn. 2009).

With the noted limitations, under section 26-2-111(1)(D)(i), payments from a non-qualified plan are exempt to the same extent that earnings are exempt under section 26-2-106. Section 26-2-111(1)(D)(ii) protects the assets of those non-qualified plans, subject to the subsection's limitations. Under section 26-2-105(b), the "funds or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary" in a plan that is qualified under the enumerated sections of the Internal Revenue Code is "exempt from any and all claims of creditors of the participant or beneficiary" other than the state and as set-forth in section 105(c). Section 26-2-105(c) contains the sole exception to the exemption for the enumerated qualified funds.

D. Tennessee Code Annotated sections 56-7-203 and 26-2-106

As noted above, in its August 2021 order, the trial court also determined that the annuities held in Mr. Hill's IRA are not exempt under Tennessee Code Annotated sections

56-7-203 or 26-2-106. In the Argument section of his appellate brief, Mr. Hill asserts that the trial court erred in holding that the annuities are not exempt from the claims of creditors under section 56-7-203. However, Mr. Hill failed to raise this issue in his Statement of the Issues. It is well-settled that an issue not raised in the Statement of the Issues is waived, even if the issue is argued in the appellate brief. ***Childress v. Union Realty Co.***, 97 S.W.3d 573, 578 (Tenn. Ct. App. 2002) (citation omitted).

Additionally, our holding with respect to the exemption provided by section 105 makes it is unnecessary for us to construe the exemption provided by section 56-7-203. Section 105 does not except particular assets from those that may be held in a qualified IRA, and section 408 of the Internal Revenue Code allows IRAs to own annuities such as those held by Mr. Hill. *See* 26 U.S.C.A. § 408; Bob Carlson, *Here's The Full Story On Owning Annuities In IRAs*, available at https://www.forbes.com/sites/bobcarlson/2023/06/18 (last visited July 19, 2023).

V. CONCLUSION

For the foregoing reasons, we reverse the trial court's judgment concerning both the RV and the IRA. The RV is held as a tenancy by the entirety, and the annuities and other funds held in Mr. Hill's qualified IRA are protected by Tennessee Code Annotated section 26-2-105 and are not subject to execution by creditors. Mr. Hill's request that all records regarding his qualified IRA be returned to him and that copies retained by opposing counsel or the court be destroyed is granted. Any issue presented that is not addressed herein is pretermitted as unnecessary in light of our disposition of this matter. The case is remanded to the trial court for any further proceedings that may be necessary and are consistent with this opinion. Costs on appeal are taxed to the Appellees, Jeffrey P. Boyd and Ricky Lee Boren, for all of which execution may issue if necessary.

S/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE