NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 01/21/2010
PHILIP G. URRY,CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PATRICK FORYS and KIM FORYS, husband and wife, and as the parents of B.F., their minor child, Plaintiffs/Judgment Creditors/ Appellees, v. THOMAS FORYS, a single man, Defendant/Judgment Debtor/ Appellant.	1 CA-CV 08-0839 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-053290

The Honorable Gerald Porter, Commissioner

AFFIRMED

G. David Delozier, PC — Cave Creek
By G. David Delozier
Attorney for Plaintiffs/Judgment Creditors/Appellees

Thomas Forys — Florence
Defendant/Judgment Debtor/Appellant *In Propria Persona*

B R O W N, Judge

¶1 Thomas Forys appeals from the superior court's denial of his objection to the garnishment of his credit union account. For the following reasons, we affirm.

BACKGROUND

¶2 After Thomas Forys ("Defendant") was convicted of sexual exploitation of a minor, the parents of the child ("Plaintiffs") filed this tort claim against him on behalf of themselves and the minor. On January 31, 2008, Plaintiffs filed an application for entry of default. On March 13, 2008, the court set a default judgment hearing for April 1, 2008.

¶3 On March 28, 2008, Defendant, who was incarcerated, filed a motion to vacate the April 1 hearing and to extend the hearing time for forty-five days to allow the parties to reach a settlement. On March 31, he filed his answer to the complaint.

¶4 On April 1, the court entered a default judgment against Defendant in the amounts of $1,000,000 for the minor's pain and suffering, $90,000 for the minor's projected counseling costs, and $3,374.81 in costs.

¶5 Plaintiffs applied for and received a garnishment judgment against the Defendant's Desert Schools Federal Credit Union account ("the account") in the amount of $13,968.86. Defendant filed an objection to the garnishment arguing that the funds in the account were state retirement funds and that retirement funds were exempt from garnishment. Plaintiffs

countered that even if the funds in the account were retirement funds, under the Employee Retirement Income Security Act of 1974 ("ERISA"), once such funds had been distributed to the beneficiary, they were no longer protected by ERISA, and therefore subject to garnishment.

¶6 The superior court held a hearing on the objection at which Defendant appeared telephonically. The court denied Defendant's objection in a signed order on October 22, 2008. Defendant appealed from the order denying the objection.[1] We have jurisdiction over the trial court's refusal to dissolve the garnishment pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(F)(3) (2003).[2]

DISCUSSION

¶7 Defendant argues that, as a matter of law, the account could not be garnished. This court reviews issues of law de novo. *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992).

---

[1] Defendant also asks this court to vacate the default judgment, although he presents no legal argument in support of that request. Even if such an argument been presented, this court does not consider appeals from a default judgment until the defaulting party has moved to set aside the default pursuant to Rule 55(c) or Rule 60(c), Arizona Rules of Civil Procedure. *Soltes v. Jarzynka*, 127 Ariz. 427, 429, 621 P.2d 933, 935 (App. 1980).

[2] We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

¶8 Defendant asserts that the funds in the account are state retirement funds, and as such are exempt.[3] Defendant does not refer to a statute or other legal basis for the exemption, but notes that the garnishment documents indicated that retirement benefits were exempt. The "Notice to Judgment Debtor" stated that certain monies "may" be exempt, including "[c]ertain pension benefits and retirement funds."[4]

¶9 Defendant's claim may be based on the anti-alienation provision of ERISA, which states that a pension plan "shall provide that benefits provided under the plan may not be assigned or alienated."[5] 29 U.S.C. § 1056(d). Courts have held, however, that ERISA does not protect funds once they have been

---

[3] Defendant also argues that all funds except $25.00 were withdrawn from the account and that by law $150.00 was exempt. *See* A.R.S. §§ 12-1578(B) (2003), 12-1593(B) (2003), and 33-1126(A)(9) (2007). The answer of the garnishee in the record indicates that it withheld certain funds pursuant to the writ, but released $150.00 because of the exemption. The garnishee requested a fee in the amount of $25.00 for preparing its answer. It appears from this record that the garnishee did, in fact, exempt the $150.00 from garnishment.

[4] The content of this notice is directed by statute. A.R.S. § 12-1596(C) (2003).

[5] Pursuant to A.R.S. § 33-1126(B) (2007), "[a]ny money or other assets payable to a participant in or beneficiary of . . . a retirement plan" under certain provisions of the tax code "shall be exempt from any and all claims of creditors of the beneficiary or participant." This section has been recognized as applying to ERISA-qualified plans and has been interpreted as being pre-empted by ERISA "in a state court proceeding wherein creditors seek to enforce their claims against an ERISA pension plan." *In re Hirsch*, 98 B.R. 1, 2 (Bankr. D. Ariz. 1988) (citation omitted).

distributed from the retirement plan to the plan participant. *Cent. States, Se. & Sw. Areas Pension Fund v. Howell*, 227 F.3d 672, 678-79 (6th Cir. 2000) (disbursed benefits no longer protected under ERISA and subject to constructive trust); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078, 1083 (10th Cir. 1994) (ERISA anti-alienation provision "protects ERISA-qualified pension benefits from garnishment only until paid to and received by plan participants or beneficiaries"); *NCNB Fin. Servs., Inc. v. Shumate*, 829 F. Supp. 178, 180 (W.D. Va. 1993) (once funds actually received by employee, ERISA no longer protects them); *In re Edward J. Toone*, 140 B.R. 605, 607 (Bankr. D. Mass. 1992) (cashier's checks representing lump sum distribution from ERISA-qualified account not protected by ERISA anti-alienation provision); *Cmty. Bank Henderson v. Noble*, 552 N.W.2d 37, 40 (Minn. Ct. App. 1996) (funds disbursed from plan by uncashed cashier's check no longer protected by ERISA and so subject to attachment); *Hawxhurst v. Hawxhurst*, 723 A.2d 58, 66 (N.J. Super. Ct. App. Div. 1998) (once plan asset is distributed, it is beyond anti-alienation protections of ERISA); *Pardee v. Pers. Representative for Estate of Pardee*, 112 P.3d 308, 315-16, ¶ 27 (Okla. Civ. App. 2004) (pension funds no longer entitled to ERISA protection once disbursed). After reviewing related regulations, the court in *Guidry* reasoned:

> The terms "alienation" and "assignment" are meant only to cover those arrangements that generate a *right enforceable against a plan*. Therefore, "benefits" are protected by the anti-alienation provision . . . only so long as they are within the fiduciary responsibility of private plan managers. Following distribution of benefits to the plan participant or beneficiary, a creditor no longer has a right *against the plan*. Instead, the creditor must collect directly from the participant or beneficiary or . . . initiate an enforceable garnishment procedure[.]

39 F.3d at 1082-83.

¶10 In this case, Defendant received state retirement income, which was deposited into a credit union account. The funds, having been disbursed, were no longer protected from garnishment under ERISA.

¶11 Defendant also argues that Plaintiffs have improperly taken possession of two vehicles he gave to his sister as a gift. He asserts the vehicles were legally registered in his sister's name in Texas three days before the civil suit was filed. He argues that since he gave the vehicles to his sister, they could not be used to satisfy the judgment against him. Plaintiffs counter that Defendant's gift to his sister was in anticipation of this litigation, and that it constituted a fraudulent conveyance under A.R.S. § 44-1004(A) (2003). If the transfer was fraudulent, it can be set aside and the property used to satisfy the judgment. *See Zellerbach Paper Co. v.*

Valley Nat'l Bank, 13 Ariz. App. 431, 433, 477 P.2d 550, 552 (1970).

¶12 We do not address this issue in this appeal. The record contains no objection by Defendant to the taking of the vehicles and neither the order from which defendant appeals nor his notice of appeal refers to the taking of this property. We do not address on appeal issues not first raised in the trial court. *Scottsdale Princess P'ship v. Maricopa County,* 185 Ariz. 368, 378, 916 P.2d 1084, 1094 (App. 1995).

¶13 Moreover, had Defendant raised this issue in the superior court, we would find that he lacked standing to raise it on appeal. Only those aggrieved by a decision may appeal from it. ARCAP 1 ("An appeal may be taken by any party aggrieved by the judgment."). If, as Defendant claims, the vehicles are the property of his sister, then his sister has been injured by the taking of that property, not him. In fact, Defendant would benefit from the taking because the value of the vehicles is being credited to his debt. He therefore would not be aggrieved by any decision of the court denying an objection to the taking of the vehicles. *Id.*

CONCLUSION

¶14 Based on the foregoing, we affirm the superior court's order.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

ANN A. SCOTT TIMMER, Chief Judge