**Real Property, Probate and Trust Law Section of The Florida Bar**

**White Paper**

**Proposed Amendments to**

**Section 222.21 (2)(c), Florida Statutes**

I. SUMMARY

The proposed legislation would amend Section 222.21(2)(c), Florida Statutes, to clarify that interests in an individual retirement account (“IRA”) received in a transfer incident to divorce described in Section 408(d)(6) of the Internal Revenue Code retain their creditor-exempt status after the transfer.

II. CURRENT SITUATION

Section 222.21(2)(c) provides that interests in IRAs are exempt from the claims of creditors of owners, beneficiaries, and participants. The statute provides that the exemption is not lost “by reason of a direct transfer or eligible rollover that is excluded from gross income under the Internal Revenue Code of 1986….”

In *In re: Lerbakken*, (Bankr. 8th Cir, 2018), the United States Bankruptcy Appellate Panel for the Eighth Circuit concluded that the interest in the debtor’s ex-wife’s IRA to be transferred to the debtor pursuant to the couples’ stipulated property settlement was not exempt from the claims of the debtor’s creditors in bankruptcy. The debtor claimed his interest in the IRA was exempt under the federal bankruptcy law exemptions. The court rejected the debtor’s argument, citing the United States Supreme Court’s decision in *Clark v. Rameker*, 134. S. Ct. 2242 (2014) for the proposition that the debtor’s interest in his ex-wife’s IRA were not the debtor’s retirement funds.

Florida is an “opt-out” state; thus, federal bankruptcy exemptions are not available to Florida debtors in bankruptcy. Instead, the exemptions available to a Florida debtor in bankruptcy for IRAs are governed by state law; in particular by Section 222.21, Florida Statutes. Section 222.21(2)(d) clearly exempts interests in a retirement plan subject to ERISA (e.g., a 401(k) plan) received by a non-participant ex-spouse from the claims of the non-participant ex-spouse’s creditors pursuant to a “qualified domestic relations order” described in Section 414(p) of the Internal Revenue Code. However, the Florida exemption statute is less precise about whether the interest received in an IRA received in a transfer incident to divorce is exempt from the claims of the non-participant spouse.

III. EFFECT OF PROPOSED CHANGES GENERALLY

The proposed change would clarify that the interest of an ex-spouse in an IRA received in a tax-qualified transfer incident to divorce is exempt from the claims of the transferee spouse’s creditors.

IV. ANALYSIS

The *Lerbakken* decision does not by itself require attention because it is based on federal bankruptcy law exemptions that are not available to Florida debtors. The decision is notable in Florida for the light it shines on our exemption statute, Section 222.21, Florida Statutes, and how clearly, or unclearly, the exemption for interests in IRAs applies to interests received by a transfer incident to divorce.

The proposed statute would clearly exempt interests in IRAs transferred incident to divorce within the meaning of Section 408(d)(6) of the Internal Revenue Code. That Section provides that a transfer of an interest in an IRA (including an interest in a Roth IRA or in an individual retirement annuity) pursuant to a “divorce or separation instrument” described in another Code Section[[1]](#endnote-2) are not subject to income tax. Section 408(d)(6) continues by noting that, after the transfer, the transferred interest is “to be treated as an individual retirement account” of the transferee ex-spouse, and not of the owner spouse, and that “[t]hereafter, the account or annuity for purposes of this subtitle [i.e., the federal income tax] is to be treated as maintained for the benefit of [the transferee ex-spouse].”

Section 222.21(2)(c) provides that “an interest in any fund or account that is exempt from claims of creditors of the owner, beneficiary, or participant…” (e.g., an IRA or an individual retirement annuity) “does not cease to be exempt after the owner’s death by reason of a direct transfer or eligible rollover that is excluded from gross income under the Internal Revenue Code of 1986…” The subsection does not address divorce. Section 222.21(c) is where practitioners, and citizens, will look to determine whether a debtor’s interest in an IRA originally established by someone else is exempt from the claims of the debtor’s creditors.

Because Code Section 408(d)(6) treats an interest in an IRA received in a transfer incident to divorce described in that Section as the transferee’s IRA, the subcommittee believes that such an interest would be exempt from the claims of the transferee’s creditors under Section 222.21(a), Florida Statutes, which exempts interests of an owner, participant or beneficiary in tax-qualified retirement plans; however, the subcommittee also believes that the clarity added by the proposed changes to subsection (2)(c) of Section 222.21, Florida Statutes, would be beneficial to Florida lawyers and citizens having to apply what is a very technical statute.

The proposed change would be retroactive to all transfers made incident to divorce within the meaning of the statute, whenever made. For the reason stated in the preceding paragraph, the subcommittee believes the proposed change clarifies, but does not modify, existing law.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS - None.

VI. DIRECT IMPACT ON PRIVATE SECTOR - None.

VII. CONSTITUTIONAL ISSUES - None apparent.

VIII. OTHER INTERESTED PARTIES - The Family Law, Elder Law and Business Law Sections of The Florida Bar, and the Florida Bankers Association.

1. 1 Code Section 71(b)(2) for instruments executed before December 31, 2018; clause (i) of Code Section 121(d)(3)(C) for instruments executed after. [↑](#endnote-ref-2)