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## 2010 Developments in Asset Protection Planning

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### HAWAII ENACTS SELF-SETTLED SPENDTHRIFT TRUST LEGISLATION

#### Introduction

With the enactment of the “Permitted Transfers in Trust Act” on June 30, 2010, the State of Hawaii has become the 11th domestic jurisdiction to provide for self-settled spendthrift trust protections,<sup>1</sup> continuing the trend toward permitting domestic asset protection trusts that began with the enactment of the Alaska Trust Act on April 2, 1997,<sup>2</sup> and shortly thereafter the

enactment of the Delaware Qualified Dispositions in Trust Act on July 7, 1997.<sup>3</sup>

Citing the fact that “Hawaii relies heavily on the travel industry as an economic engine,” and due to “instabilities in that industry,” the Hawaii legislature determined that:

Hawaii can build on proven domestic and international estate and financial planning methodologies to amend its laws for the purpose of attracting foreign source capital.

The intent of [the Permitted Transfers in Trust] Act is to offer incentives to high-net-worth individuals throughout the United States and throughout the world to transfer a portion of their liquid net worth into this State for asset and trust management. [The Permitted Transfers in Trust] Act is designed to increase the assets under management by Hawaii’s private financial sector, increase state tax revenues, and position the State as a world-class financial management jurisdiction.<sup>4</sup>

The cited incentives are (i) as indicated, the ability to create self-settled spendthrift trusts under the Permitted Transfers in Trust Act, and (ii) an exclusion from the statutory rule against perpetuities for trusts created under the Permitted Transfers in Trust Act,<sup>5</sup> presumably whether or not structured as a self-settled spendthrift trust.

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<sup>1</sup> The 10 other states are Alaska, Delaware, Missouri, Nevada, New Hampshire, Rhode Island, South Dakota, Tennessee, Utah and Wyoming. A 12th state, Oklahoma, permits an individual to create a trust with up to \$1 million for the benefit of his or her spouse, descendants and any one or more qualified charities, and to retain the right to revoke the trust without causing the trust to thereby be available to creditors; such a trust is not, however, technically self-settled because the settlor is not a permissible beneficiary thereof.

<sup>2</sup> 1997 Alaska Sess. Laws Ch. 6 (effective Apr. 2, 1997).

<sup>3</sup> 1997 Del. Laws Ch. 159 (H.B. 356).

<sup>4</sup> §1, Hawaii Act 182 (10).

<sup>5</sup> Hawaii Rev. Stat., §525-4.

## The Hawaii Statutory Scheme

The crux of Hawaii's Permitted Transfers in Trust Act (hereinafter the "Act") provides for the enforceability of a provision in a trust instrument to the effect that the interest of a beneficiary of the trust including, most significantly, a beneficiary who is also the transferor of the trust, may not be transferred, assigned, pledged, or mortgaged, whether voluntarily or involuntarily, before the actual distribution of the property or income to the beneficiary by the trustee.<sup>6</sup> In addition, in an attempt to provide for the enforceability of such a spendthrift clause under federal bankruptcy law, the Act provides that "[a]ny provision of this type contained in the trust instrument shall be deemed to be a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of 11 United States Code §541(c)(2) of the Bankruptcy Code. . ."<sup>7</sup>

For such a self-settled spendthrift trust provision to be enforceable, however, the transfer is required to be to a "permitted trustee" of only "permitted property" pursuant to a trust instrument.<sup>8</sup> Such a transfer is called a "permitted transfer" under the Act.<sup>9</sup>

### "Permitted Trustee"

The concept of a permitted trustee under the Act generally follows the domestic self-settled spendthrift trust legislation of predecessor domestic self-settled spendthrift trust jurisdictions, and provides that a "permitted trustee" is ". . . a person, other than the transferor, who is a resident of [Hawaii], or a bank or trust company authorized to do business in [Hawaii] that possesses and exercises trust powers and has its principal place of business in [Hawaii]."<sup>10</sup>

In the event that the permitted trustee ceases to be a permitted trustee, and there is no other trustee that is a permitted trustee, the formerly permitted trustee shall be deemed to have resigned.<sup>11</sup> At that time, a successor permitted trustee provided for in the trust instrument shall become the permitted trustee of the trust, or absent a successor permitted trustee provided for in the trust instrument, a trust advisor or protector provided for in the trust instrument shall appoint a successor permitted trustee, or absent an appointed trust advisor or protector, a Hawaii court of competent

jurisdiction shall, upon application of any interested party, appoint a successor permitted trustee.<sup>12</sup>

Moreover, in the event that an action is brought against a trustee of a trust resulting from a permitted transfer, and a court declines to apply the law of Hawaii in determining the validity, construction or administration of the trust, the trustee, immediately upon the court's action and without the further order of any court, shall cease to be trustee of the trust (and shall have no power or authority other than to convey the trust property to a successor trustee), and a successor trustee shall thereupon be appointed as a trustee in accordance with the terms of the trust instrument, or if the trust instrument does not provide for a successor trustee, or does not provide for an advisor or protector with power to appoint successor trustees, a Hawaii court of competent jurisdiction shall appoint a successor permitted trustee upon the application of any beneficiary of the trust.<sup>13</sup>

### "Permitted Property"

Unlike the concept of a "permitted trustee," the concept of "permitted property" under the Act is unique to Hawaii's Act. The Act defines "permitted property" as "cash, marketable securities, life insurance contracts, and non-private annuities."<sup>14</sup> "Cash" is further defined as meaning only "United States currency."<sup>15</sup> "Marketable securities" is further defined as meaning only securities that are "exchanged on a governmentally regulated exchange within the United States" and "does not include real estate or any interest in corporations, partnerships, and limited liability companies that are not publicly traded."<sup>16</sup> Moreover, although a permitted trustee can later diversify the trust fund, the permitted trustee is still authorized to invest only in permitted property.<sup>17</sup>

The Act contains a provision that states that the transfer of permitted property shall be deemed completed (and, presumably, thereby only effective) upon the completion of all of the following:

1. The delivery of permitted property by the transferor to the permitted trustee and the written acceptance of the permitted property by the permitted trustee;
2. The delivery by the transferor to the permitted trustee of a signed and notarized certificate of solvency that states that the amount of the transfer is equal to or less than 25% of the transferor's net

<sup>6</sup> Hawaii Rev. Stat., §\_\_-5(d).

<sup>7</sup> *Id.*

<sup>8</sup> Hawaii Rev. Stat., §\_\_-2.

<sup>9</sup> *Id.*

<sup>10</sup> Hawaii Rev. Stat., §§\_\_-2, \_\_-4(a).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Hawaii Rev. Stat., §\_\_-5(h).

<sup>14</sup> Hawaii Rev. Stat., §\_\_-2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Hawaii Rev. Stat., §\_\_-6.

worth and that the transfer will not result in delay, defrauding, or hindrance of a creditor who is known or knowable to the transferor at the time of the permitted transfer with a claim against the property that is subject to the transfer; and

3. The filing of the appropriate form by the transferor with the department of taxation and payment of the attendant transfer tax (as discussed in further detail below).<sup>18</sup>

### The Trust Instrument

For a transfer to constitute a permitted transfer under the Act, the trust instrument must be irrevocable and must expressly incorporate the laws of the State of Hawaii as governing the validity, construction, and administration of the trust.<sup>19</sup> A trust instrument will not be deemed to be revocable, however, on account of the inclusion of:

1. The transferor's power to veto distributions from the trust;
2. The transferor's testamentary power of appointment, provided that the transferor cannot appoint the trust property to himself, his creditors, his estate, or the creditors of his estate;
3. The transferor's potential or actual receipt of income, including rights to income retained in the trust instrument;
4. The transferor's annual receipt of a percentage not to exceed 5% of the initial value of the trust assets or its value determined from time to time pursuant to the trust instrument or of a fixed amount that on an annual basis does not exceed 5% of the initial value of the trust assets;
5. The transferor's potential or actual receipt or use of the trust's principal due to the discretionary action of a permitted trustee or to a provision in the trust instrument that governs the distribution of principal; provided that any included provision shall not confer upon the transferor a substantially unfettered right to the receipt or use of the principal;
6. The transferor's right to remove a permitted trustee or advisor and to appoint a new permitted trustee or advisor;
7. The transferor's potential or actual receipt of income or principal to pay income taxes due on income of the trust if the trust instrument includes a provision allowing or directing the use of trust funds to pay income taxes due, or if the permitted

trustee acts in the trustee's discretion to allow payment of income taxes due on the trust income; or

8. A permitted trustee's authority pursuant to discretion, direction, or the transferor's exercise of a testamentary power of appointment to pay all or any part of the transferor's debts outstanding at the time of the transferor's death, the expenses of administering the transferor's estate, or any estate or inheritance tax imposed on or with respect to the transferor's estate.<sup>20</sup>

The Act further expressly provides for the appointment by the transferor, through the trust instrument, of one or more advisors or protectors, who may be given authority (i) to remove and appoint permitted trustees, advisors or protectors; (ii) to direct, consent to, or disapprove of distributions from the trust; and (iii) to serve as investment advisors to the trust.<sup>21</sup> Furthermore, the transferor may direct that in the event of a dispute, deadlock or difference of opinion between a permitted trustee and an advisor, the determination of the advisor shall control — and in such case the permitted trustee shall bear no liability or accountability for any act or transaction, provided only that the permitted trustee expresses its dissent in writing.<sup>22</sup>

### Creditors' Rights Against a Permitted Transfer in Trust

The Act provides that a claim or judgment by a creditor that arises after a permitted transfer, or to avoid a permitted transfer, shall not be brought unless the permitted transfer was found to have been made with actual intent to defraud, hinder, or delay the creditor.<sup>23</sup> Even then, an otherwise allowable claim shall be extinguished unless the creditor's claim arose before the permitted transfer was made and the action is brought before the date of the permitted transfer, or the creditor's claim arose concurrent with or subsequent to the permitted transfer and the action is brought within two years thereafter.<sup>24</sup> In each such case, the burden of proof, which is upon the creditor,

<sup>20</sup> Hawaii Rev. Stat., §\_\_-5(c).

<sup>21</sup> Hawaii Rev. Stat., §\_\_-5(e).

<sup>22</sup> Hawaii Rev. Stat., §\_\_-5(f).

<sup>23</sup> Hawaii Rev. Stat., §\_\_-8(a).

<sup>24</sup> Hawaii Rev. Stat., §\_\_-8(b). Note that the statute of limitations on a claim arising before a permitted transfer is made could, therefore, nominally be as little as one day. Seemingly, this represents a drafting error. In addition, as previously noted, in order for the transfer of property to the permitted trustee to be deemed completed, the transferor must deliver to the permitted trustee a notarized certificate of solvency stating that the transfer will not result in delay, defrauding, or hindrance of a creditor who is known or knowable to the transferor at the time of the permitted transfer with a claim against the property that is subject to the transfer.

<sup>18</sup> Hawaii Rev. Stat., §\_\_-3.

<sup>19</sup> Hawaii Rev. Stat., §\_\_-5(a).

is set at the standard of clear and convincing evidence.<sup>25</sup>

Where the transferor of the permitted transfer is the trustee of a trust, the permitted transfer is deemed made as of the date that the property was originally transferred via trust instrument that meets the requirements of the Act.<sup>26</sup> Presumably, this provision is intended to allow the “tacking” of statute of limitations periods from earlier self-settled spendthrift trusts that are “decanted” into new trusts pursuant to the Act, including, most importantly for Hawaii, self-settled spendthrift trusts that were created earlier in other jurisdictions, although the likelihood of a trust instrument from another jurisdiction meeting the significantly more restrictive requirements of Hawaii’s Act seems unlikely.

As in other domestic self-settled spendthrift trust jurisdictions, Hawaii’s new domestic self-settled spendthrift trust law provides that a claim cannot be brought against a person involved in drafting, preparing, executing or funding a trust or who counseled the parties to a trust that is the subject of a permitted transfer, but only if, as of the date of the action, the action would be time-barred as against the trustee under the Act.<sup>27</sup>

Again, as is the case in other domestic self-settled spendthrift trust jurisdictions, Hawaii’s new domestic self-settled spendthrift trust law provides for a class of exception creditors who may avoid permitted transfers. Hawaii’s stated class of exception creditors, however, is relatively broad, and includes:

- (i) any person to whom the transferor is indebted on account of a family court-supervised agreement or family court order for the payment of support or alimony to the transferor’s spouse, former spouse, or children, or for a division or distribution of property to the transferor’s spouse or former spouse, but not for any claim for forced heirship, legitime, or elective share;
- (ii) any person who suffers death, personal injury, or property damage on or before the date of a permitted transfer by reason of the tortious act or omission of the transferor or another person for whom the transferor is or was vicariously liable;
- (iii) a lender who extended a secured or collateralized loan to the transferor based upon the transf-

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Therefore, if such certificate of solvency were inaccurate, the transfer would presumably not be a permitted transfer and would not receive any of the protections provided by the Act — including any truncated statute of limitations period.

<sup>25</sup> Hawaii Rev. Stat., §\_\_-8(c).

<sup>26</sup> Hawaii Rev. Stat., §\_\_-8(d).

<sup>27</sup> Hawaii Rev. Stat., §\_\_-8(f).

eror’s representation that the assets transferred to the trust would be available as security; or

- (iv) the State of Hawaii in connection with the transferor’s tax liabilities.<sup>28</sup>

### **Excise Tax in Connection with Permitted Transfers**

Finally, unique to Hawaii’s self-settled spendthrift trust legislation, a one-time 1% excise tax is imposed on the fair market value of all permitted transfers.<sup>29</sup>

### **Issues Under the Permitted Transfer in Trust Act**

The Hawaii legislature’s stated desire to position Hawaii as a world-class financial management jurisdiction through the enactment of the Permitted Transfers in Trust Act is unlikely to succeed.

As Hawaii is now the 11th state to enact self-settled spendthrift trust legislation, the most significant question prospective trust settlors will need to ask is why use Hawaii in lieu of another domestic self-settled spendthrift trust jurisdiction. Based upon a review of Hawaii’s legislation, very few if any prospective trust settlors will be able to come up with a justification to use Hawaii in lieu of another domestic self-settled spendthrift trust jurisdiction.

As noted previously, “permitted property” is a much more limited class of property under the Act than under the law of other domestic self-settled spendthrift trust jurisdictions. In addition, the class of exception creditors under the Act is relatively broad when compared to more established domestic self-settled spendthrift trust jurisdictions such as Alaska

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<sup>28</sup> Hawaii Rev. Stat., §\_\_-9. In contrast, both the Alaska Trust Act and the Delaware Qualified Dispositions in Trusts Act provide for more limited classes of exception creditors. For example, the Alaska Trust Act provides that a spendthrift provision will be ineffective only “. . .where the transfer to the trust was made when the settlor was in default 30 or more days in making child support payments,” and the Delaware Qualified Dispositions in Trusts Act provides that a spendthrift provision will not apply:

- (1) [t]o any person to whom the transferor is indebted on account of an agreement or order of court for the payment of support or alimony in favor of such transferor’s spouse, former spouse or children, or for a division or distribution of property in favor of such transferor’s spouse or former spouse, to the extent of such debt; or (2) [t]o any person who suffers death, personal injury or property damage on or before the date of a qualified disposition by a transferor, which death, personal injury or property damage is at any time determined to have been caused in whole or in part by the act or omission of either such transferor or by another person for whom such transferor is or was vicariously liable.

Alaska Stat. §34.40.110(b)(4) (2003); Del. Code Ann. tit. 12, §3573 (2003).

<sup>29</sup> Hawaii Rev. Stat., §\_\_-12.

and Delaware. The most likely consequence of a relatively broad class of exception creditors is the increased likelihood that a permitted transfer will not be removed from the transferor's estate for federal estate tax purposes where the trust is, in fact, structured for such a result.<sup>30</sup>

Most significantly, the 1% excise tax that will be imposed on the fair market value of all permitted transfers will almost assuredly be the highest hurdle to any trust being established pursuant to the Act. In light of this excise tax, and the fact that 10 other domestic jurisdictions permit the creation of essentially the same type of trust without the imposition of any tax whatsoever, it is highly unlikely that many trusts will be created under the Act. In fact, in light of this excise tax, it seems likely that even Hawaii residents will choose to create their domestic self-settled spendthrift trusts elsewhere.

The only situation in which a prospective trust settlor might choose to utilize Hawaii's Act is where the prospective trust settlor's primary concern lies in avoiding spousal elective share rights; in this regard, Hawaii may very well be the jurisdiction of choice because under the Act a claim by the transferor's spouse or former spouse for forced heirship, legitime, or *elective share* rights is specifically excluded from the status it might otherwise be afforded as an exception creditor claim. Of course, the true effectiveness of a permitted transfer to avoid elective share, legitime or forced heirship rights will, as a practical matter, likely be limited by reason of (i) the fact that "permitted property" includes only liquid assets, and (ii) the transferor cannot fund the trust with an amount in excess of 25% of his or her net worth. Aside from the foregoing reason, the only other reason that a prospective trust settlor might select Hawaii for the creation of a domestic self-settled spendthrift trust, as opposed to one of the other 10 states that permit such trusts, would be the possible presence of a friend or family member who is resident within Hawaii to act as the permitted trustee (under the assumption that such a permitted trustee would not charge a fee for acting in such capacity).

## Conclusion

Although it seems likely that few, if any, trusts will ever be established under the Act, unless and until the excise tax is repealed, Hawaii's Permitted Transfers in Trust Act adds yet another state to the rolls of those states whose laws permit the creation of self-settled

<sup>30</sup> While this tax issue is beyond the scope of this article, see the analysis contained in Rothschild, Blattmachr, Gans & Blattmachr, "IRS Rules Self-Settled Alaska Trust Will Not Be in Grantor's Estate," 37 *Estate Planning* 3 (2010).

spendthrift trusts. The effect of this trend is to counter the argument raised in cases such as *In re Portnoy*<sup>31</sup> and *In re Brooks*,<sup>32</sup> which suggest that the existence of a "strong public policy" against the validity of self-settled spendthrift trusts in a forum state would permit a forum state court to disregard the validity of a self-settled spendthrift trust validly established under the law of another jurisdiction.<sup>33</sup> However, as more and more states sign on to the validity of self-settled spendthrift trusts under their own laws, it would seem to become less and less likely that a creditor will be able to successfully argue that giving respect to such a trust, even in a jurisdiction that has yet to enact its own self-settled spendthrift trust legislation, offends anyone's strong public policy.

## INHERITED IRAs MAY BE EXEMPT UNDER FEDERAL (IF NOT NECESSARILY STATE) LAW

### Introduction

Since its introduction in 1974 under the Employee Retirement Income Security Act (ERISA), the Individual Retirement Account (often referred to as an IRA) has become an extremely popular retirement planning tool. Coincident to its retirement planning purpose, the IRA also has important asset protection planning features. Specifically, due to the fact that financial security in retirement meets an important public policy purpose, the law is well settled that an IRA (to be distinguished, however, from an "inherited" IRA) is generally exempt from the creditors of the IRA owner.

It remains uncertain, however, whether any IRA assets that remain undistributed at the account owner's death, and might thus pass to an inherited IRA for a designated beneficiary, will be similarly exempt from the beneficiary's creditors. The following is a summary of the case law, including some very recent cases bucking a prior trend denying an exemption for inherited IRAs, followed by a discussion regarding the use of spendthrift trusts to ensure creditor protection to inherited IRAs irrespective of the exemption question.

### IRAs and Inherited IRAs

Inasmuch as the case law concerning the creditor protection of inherited IRAs focuses, in large part,

<sup>31</sup> 201 B.R. 685 (Bankr. S.D.N.Y. 1996).

<sup>32</sup> 217 B.R. 98 (Bankr. D. Conn. 1998).

<sup>33</sup> See, e.g., Rothschild, Rubin & Blattmachr, "Self-Settled Spendthrift Trusts: Should a Few Bad Apples Spoil the Bunch?" 32 *Vand. J. Trans'l L.* 3, 763.

upon the tax attributes of IRAs, it is useful, as an introductory matter, to briefly review and contrast the tax treatment of IRAs and inherited IRAs.<sup>34</sup>

An IRA is a trust or custodial account created for the benefit of an individual and/or his or her beneficiaries in accordance with the requirements of §408 of the Internal Revenue Code (the “Code”), contributions to which account are generally deductible up to a certain amount each year,<sup>35</sup> and the income and gains of which are generally not taxed until they are distributed.<sup>36</sup> As a retirement savings device, the IRA owner generally must begin taking minimum distributions from the IRA by April 1 of the year following the year in which he or she attains age 70½,<sup>37</sup> or be subject to a penalty,<sup>38</sup> and will generally be subject to a penalty for withdrawing funds from the IRA before having attained age 59½.<sup>39</sup> The initial owner of an IRA can also “roll over” the IRA into another IRA, tax-free.<sup>40</sup>

Once the IRA owner dies, the designated beneficiary of the account will receive the assets of the IRA in the form of an inherited IRA.<sup>41</sup> The beneficiary of an inherited IRA may not make contributions to the inherited IRA,<sup>42</sup> and may not roll the inherited IRA over into his or her own IRA,<sup>43</sup> nor roll his or her own IRA into the inherited IRA.<sup>44</sup> As with an IRA, the income and gains on an inherited IRA are also not taxed

until distribution;<sup>45</sup> however, the beneficiary of an inherited IRA is required to either withdraw the entire amount of the IRA by the end of the fifth year following the IRA owner’s death, or, irrespective of the beneficiary’s age, begin taking minimum distributions from the inherited IRA based on the beneficiary’s life expectancy.<sup>46</sup>

## Creditor Protection of IRAs and Inherited IRAs

There is no question that an IRA is generally protected from the IRA owner’s creditors under federal law. Bankruptcy law specifically exempts from a debtor’s bankruptcy estate “retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, or 501(a) of the [Code].”<sup>47</sup> The use of the phrase “retirement funds” under the federal bankruptcy exemption, however, raises a significant question as to whether an inherited IRA is similarly exempt under federal bankruptcy law because it is arguable whether an inherited IRA consists of “retirement funds.”

A debtor in bankruptcy may, of course, also elect to use the exemptions provided by state law in lieu of the federal exemptions and, in those states that have “opted out” of the federal exemptions, in fact must use the exemptions provided by state law.<sup>48</sup> Similarly, the exemption question may very well arise outside of the bankruptcy context in which case state law will also almost certainly control. Thus, whether an inherited IRA (or even a non-inherited IRA) is exempt may depend on the interpretation of an exemption provided by state law, which will likely vary on a state-by-state basis.

established to receive such distribution. *See* §402(c)(11). Additionally, the beneficiary of an inherited IRA may transfer the assets in the inherited IRA to another inherited IRA established for his or her benefit in the name of the same owner, as this technically is not a “rollover,” but rather is a plan-to-plan transfer. *See* PLR 200528031.

<sup>45</sup> §408(e)(1).

<sup>46</sup> *See* §401(a)(9)(B); *see also* Pub. 590. Note, however, that if the initial owner of the IRA died after the date on which he or she was required to begin taking distributions from the IRA, the beneficiary will be required to take distributions from the IRA based on the initial owner’s life expectancy if longer than the beneficiary’s life expectancy.

<sup>47</sup> 11 USC §§522(b)(2), 522(b)(3)(C), and 522(d)(12). The provisions exempting IRAs from the federal bankruptcy estate were added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (P.L. 109-8). It should be noted, however, that such exemption is limited to \$1,000,000 (adjusted for inflation and currently \$1,171,650), excluding, however, amounts attributed to rollover contributions. *See* 11 USC §522(n).

<sup>48</sup> *See* 11 USC §§522(b)(1), 522(b)(2), and 522(b)(3)(C).

<sup>34</sup> This discussion focuses on traditional IRAs, rather than Roth IRAs, as the cases discussed herein speak to the tax treatment of traditional IRAs in considering whether inherited IRAs are exempt from creditors.

<sup>35</sup> §219.

<sup>36</sup> §408(e)(1); *see also* Pub. 590, *Individual Retirement Arrangements*.

<sup>37</sup> §401(a)(9)(C); Regs. §1.408-8 (Q-3 & A-3).

<sup>38</sup> §4974(a).

<sup>39</sup> §72(t).

<sup>40</sup> §§402(c) and 408(d)(3).

<sup>41</sup> Section 408(d)(3)(C)(ii) defines an “inherited IRA” as one in which “the individual for whose benefit the [IRA] is maintained acquired such account by reason of the death of another individual, and . . . such individual was not the surviving spouse of such other individual.” The tax treatment of an IRA designating the surviving spouse as the beneficiary is significantly different from the treatment of an inherited IRA, and is beyond the scope of this discussion. The current case law relating to the protection of IRAs relates only to inherited IRAs and does not consider the creditor protection of an IRA of which the surviving spouse is the designated beneficiary. In general, and assuming that the surviving spouse has been named as the designated beneficiary of the deceased spouse’s IRA, the surviving spouse may roll over the deceased spouse’s IRA into his or her own IRA, which would then generally be exempt.

<sup>42</sup> *See* §§219(d)(4) and 408(o)(2)(B).

<sup>43</sup> §408(d)(3)(C).

<sup>44</sup> *Id.* A beneficiary of an inherited IRA may, however, transfer the inherited account by direct rollover to a separate inherited IRA in the name of the deceased participant which is specifically es-

In any event, the case law generally denies creditor protection to inherited IRAs under state law,<sup>49</sup> and certain themes permeate those decisions. The three broad categories of reasoning for refusing to extend to inherited IRAs the exemption generally afforded to IRAs are:

- (1) The beneficiary of an inherited IRA is permitted, and, in fact, is required, to withdraw assets from the IRA account without reference to the beneficiary's age or retirement status;<sup>50</sup>
- (2) For tax purposes, an inherited IRA is otherwise generally treated differently from an IRA;<sup>51</sup> and
- (3) Inherited IRAs do not fulfill the public policy objective of providing an individual with a secure retirement fund.<sup>52</sup>

For example, in *In re Kirchen*,<sup>53</sup> the relevant Wisconsin statute provided that included among the property to be exempt from the claims of creditors was an “. . . individual retirement account . . . or similar plan or contract providing benefits by reason of age, illness, disability, death or length of service and payments made to the debtor therefrom.”<sup>54</sup> The *Kirchen* court, in interpreting the statute to exclude an inherited IRA from the exemption, stated that the inherited IRA “. . . had transformed into a source of immediately payable income to the Debtor, regardless of his age or retirement status,” and therefore did not meet the requirements of the statute.<sup>55</sup>

In *In re Greenfield*,<sup>56</sup> the court held that inherited IRAs are not exempt from creditors' claims because they are not “aimed to enable working taxpayers to accumulate assets during their productive years so that they might draw upon them during retirement,” and were therefore unlike the “stock bonus, pension, profit sharing, [and] annuity plan[s]” specifically ex-

empted by California statute, which the Ninth Circuit had previously held were similar enough to IRAs to exempt IRAs from the creditors of their initial owners.<sup>57</sup>

The state statutes at issue in a majority of the cases provide that retirement plans are exempt from the claims of creditors if they are qualified or exempt under certain provisions of the Code and the courts considering whether inherited IRAs are protected from creditors' claims based on these statutes have emphasized the different tax treatment of inherited IRAs and IRAs. For example, in *In re Sims*,<sup>58</sup> the relevant Oklahoma statute provided that a “retirement plan” is exempt from the debtor's bankruptcy estate if it is “qualified for tax exemption purposes under present or future Acts of Congress.”<sup>59</sup> In holding that the inherited IRA at issue in that case was not protected from the claims of creditors pursuant to the Oklahoma statute, the court emphasized that, once the account is classified as an inherited IRA, the Code “. . . places an entirely different set of rules upon the use, distribution and taxation of the funds in the . . . account,” and that “fundamental changes in the nature of the IRA occurred upon the death of [the initial owner of the IRA].”<sup>60</sup>

Similarly, the court in *Robertson v. Deeb*<sup>61</sup> stated that the tax consequences with respect to inherited IRAs differ so significantly from the tax consequences of the IRAs from which they originated as to, in fact, render them “completely separate funds or accounts.”<sup>62</sup>

The sole exception, in which a court held that an inherited IRA was exempt under state law, is *In re McClelland*.<sup>63</sup> In *McClelland*, the Idaho exemption statute was worded more broadly than the other state statutes that had been considered in this context, and provided that any right “. . . accruing to any citizen of the state of Idaho under any employee benefit plan . . . shall be exempt from execution, attachment, garnishment, seizure, or any other levy by or under any legal process whatever . . .,” and defined the term “employee benefit plan” to include “[a]ny plan or arrangement . . . that is described in [section] 408 of the [Code].”<sup>64</sup> In holding that an inherited IRA was exempt from the claims of creditors, the court emphasized that the statute exempted the rights of “any citi-

<sup>49</sup> See *In re Klipsch*, 2010 WL 2293957 (S.D. Ind. 2010); *Robertson v. Deeb*, 16 So.3d 936 (Fla. 2d 2009); *In re Jarboe*, 365 B.R. 717 (Bankr. S.D. Texas 2007); *In re Kirchen*, 344 B.R. 908 (Bankr. E.D. Wis. 2006); *In re Taylor*, 2006 WL 1275400 (Bankr. C.D. Ill. 2006); *In re Navarre*, 332 B.R. 24 (Bankr. M.D. Ala. 2004); *In re Greenfield*, 289 B.R. 146 (Bankr. S.D. Cal. 2003); *In re Sims*, 241 B.R. 467 (Bankr. N.D. Okla. 1999); *contra In re McClelland*, 2008 WL 89901 (Bankr. D. Idaho 2008).

<sup>50</sup> See *Jarboe*, above at fn. 49, at 725; *Kirchen*, above at fn. 49, at 914.

<sup>51</sup> See *Taylor*, above at fn. 49, at 2; *Navarre*, above at fn. 49, at 30; *Jarboe*, above at fn. 49, at 725; *Robertson*, above at fn. 49, at 940.

<sup>52</sup> See *Greenfield*, 289 B.R. at 150; *Sims*, 241 B.R. at 471–472; *Klipsch*, above at fn. 49, at 2.

<sup>53</sup> Above at fn. 49.

<sup>54</sup> Wis. Stat. §815.18(3)(j).

<sup>55</sup> *Kirchen*, 344 B.R. at 914.

<sup>56</sup> Above at fn. 49.

<sup>57</sup> *Id.* at 149–150 (quoting CCP §703.140(b)(10)(E) and *In re McKown*, 203 F.3d 1188, 1190 (9th Cir. 2000)).

<sup>58</sup> Above at fn. 49.

<sup>59</sup> *Id.* at 468 (quoting Okla. Stat. Ann. Tit. 31 §1(A)(20)).

<sup>60</sup> *Id.* at 469–470.

<sup>61</sup> Above at fn. 49.

<sup>62</sup> *Id.* at 938.

<sup>63</sup> Above at fn. 49.

<sup>64</sup> *Id.* at 2–3.

zen of the state of Idaho” under “any employee benefit plan,” rather than just the initial owner of the retirement plan.<sup>65</sup> In reaching its decision, the *McClelland* court recognized that the Idaho statute was “much broader than the statutes at issue in [the aforementioned] cases, and thus each case can be distinguished.”<sup>66</sup>

Very recently, a spate of cases has considered the issue of whether inherited IRAs are exempt under federal bankruptcy law.<sup>67</sup> In *In re Chilton*,<sup>68</sup> the Bankruptcy Court for the Eastern District of Texas held that inherited IRAs are not protected from the claims of creditors under federal bankruptcy law, stating that “[t]he funds contained in an inherited IRA are not funds intended for retirement purposes but, instead, are distributed to the beneficiary of the account without regard to age or retirement status.”<sup>69</sup> However, shortly after *Chilton*, the Eighth Circuit reached the opposite conclusion in *In re Nessa*,<sup>70</sup> holding that an inherited IRA still contained “retirement funds” within the meaning of federal bankruptcy law, even though they were not the debtor’s own retirement funds, and stating that the *Chilton* court’s conclusion was “erroneous.”<sup>71</sup> Approximately two months later, the Bankruptcy Court for the Middle District of Pennsylvania, in *In re Tabor*,<sup>72</sup> agreed with the decision in *Nessa*, concluding that the exemptions provided by federal bankruptcy law protect “retirement funds” without specifying that they must be the debtor’s retirement funds.<sup>73</sup> Finally, shortly after the decision in *Tabor*, the Southern District of California, in *In re Weilhammer*,<sup>74</sup> agreed with the *Nessa* and *Tabor* courts’ decisions, stating that “funds in an inherited IRA are, in fact, retirement funds . . . albeit that they are retirement funds of a non-debtor,” and “that it is the *Chilton* court that fails to enforce the [federal bankruptcy] statute’s plain language as it reads the statute as meaning the ‘debtor’s retirement funds’ ” [emphasis added].<sup>75</sup>

To summarize, the majority of courts that have considered the issue of whether an inherited IRA should

have the same exemption as an IRA have determined that inherited IRAs should not have the same exemption. Only one court has interpreted a state exemption statute to provide for an exemption, and the statute at issue in that case was worded more broadly than many other state exemption statutes.<sup>76</sup> Under federal bankruptcy law, however, the trend now seems to be in favor of an exemption for inherited IRAs based upon the reasoning that inherited IRAs still contain “retirement funds” within the meaning of the federal bankruptcy law exemption, even though they are not the debtor’s own retirement funds. It is not clear, however, what effect, if any, the recent cases interpreting federal bankruptcy law will have on those debtors that will rely (and in some cases, must rely), upon state exemptions.

## Planning to Protect Inherited IRAs

As it remains unclear whether an inherited IRA will be exempt from creditors, an IRA owner concerned about providing creditor protection to his or her children or other designated beneficiaries should consider the advantages of designating a trust as the beneficiary of the IRA. A trust that is designated as the beneficiary of an IRA, and provides spendthrift protection to the beneficiaries of the trust — whether pursuant to the terms of the trust instrument or pursuant to state law — can provide significant protection to the funds held in the inherited IRA until distribution.

The trust that is designated as the beneficiary of the inherited IRA might, most simply, be structured as a “conduit trust.” A conduit trust is a trust that, as its name suggests, acts as a conduit for the distributions from the inherited IRA, by receiving the required distributions from the inherited IRA as owner of the inherited IRA and then passing those distributions out from the trust to the beneficiary of the trust. Although the distributions from the inherited IRA will, of course, no longer be protected from creditors following their payment to the trust beneficiary, the advantage of a conduit trust is that, if drafted properly, it is clear that the life expectancy used to determine the amount and timing of the mandatory distributions from the inherited IRA will be that of the beneficiary receiving the distributions from the trust.

In contrast, while a purely discretionary trust will garner greater asset protection, because the beneficiary’s interest under such a trust is sufficiently tenuous so as to avoid constituting a property right subject to attachment, where the trust is a purely discretionary trust: (i) all of beneficiaries of the trust must be taken into consideration in calculating mandatory required

<sup>65</sup> *Id.* at 4.

<sup>66</sup> *Id.*

<sup>67</sup> See *In re Nessa*, 426 B.R. 312 (8th Cir. Apr. 9, 2010); *In re Tabor*, 105 A.F.T.R.2d 2010-2964 (Bankr. M.D. Pa. June 18, 2010, as amended July 30, 2010); *In re Chilton*, 426 B.R. 612 (Bankr. E.D. Tex. Mar. 5, 2010); *In re Weilhammer*, 2010 WL 3431465 (Bankr. S.D. Cal. Aug. 30, 2010).

<sup>68</sup> Above at fn. 67.

<sup>69</sup> *Id.* at 618.

<sup>70</sup> Above at fn. 67.

<sup>71</sup> *Nessa*, 426 B.R. at 315.

<sup>72</sup> Above at fn. 67.

<sup>73</sup> *Id.* at 5.

<sup>74</sup> Above at fn. 67.

<sup>75</sup> *Id.* at 5.

<sup>76</sup> See *McClelland*, 2008 WL 89901.

distributions, even if such beneficiaries are merely contingent, or are mere permissible appointees under a special power of appointment given to the primary beneficiary;<sup>77</sup> and (ii) non-individual beneficiaries (such as charities) may not be permissible beneficiaries of such distributions.<sup>78</sup>

## Conclusion

The law regarding the potential creditor exemption of inherited IRAs is still developing. The most recent cases provide some authority for an exemption for inherited IRAs; however, the majority of the cases in which this issue has been considered have held that inherited IRAs are not protected from the beneficiary's creditors. It is yet to be seen to what extent the most recent cases, in which such protection was afforded under federal bankruptcy law, will be followed, whether inside or outside of the bankruptcy context. In light of this uncertainty, the IRA account owner should consider providing creditor protection to the beneficiaries of his or her IRA upon the account owner's death through the use of a trust as the designated beneficiary of the IRA.

## SECURITIES AND EXCHANGE COMMISSION v. JAMIE L. SOLOW

### Background

The U.S. Securities and Exchange Commission (the "SEC") brought suit in November 2006 against Jamie L. Solow alleging that the defendant engaged in a fraudulent trading scheme involving inverse floating rate collateralized mortgage obligations (later described by the court as "...a highly complex, risky and volatile type of mortgage-backed security derivative"). The jury verdict and final judgment found the defendant liable for violating the antifraud provisions of §10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), Exchange Act Rule 10b-5, and §17(a) of the Securities Act of 1933 (the "Securities Act"), and for aiding and abetting violations of the net capital, books and records, and reporting provisions by one of the defendant's former firms, Archer Alexander Securities Corp. The result was a judgment of disgorgement, including interest and a civil penalty, in an amount in excess of \$6 million.

With the judgment remaining unsatisfied, on June 4, 2009, the SEC moved for an Order to Show Cause why the defendant should not be held in contempt of court in light of his having depleted his net worth

through a "purposeful campaign of asset dissipation."<sup>79</sup> Specifically, between January 2008 (the month in which the jury trial commenced) and April 2008 (after the jury's adverse verdict), the defendant and his wife liquidated securities accounts totaling over \$1.5 million.<sup>80</sup> Some of those funds were used to pay "asset protection attorneys" retained by the defendant's wife a mere four days after the jury verdict was entered against the defendant.<sup>81</sup> In addition, in March 2008, the defendant signed a \$5.2 million mortgage on his residence in Hillsboro Beach, Florida, the proceeds of which were used to fund a certificate of deposit held by a Cook Islands trust for the benefit of the defendant's wife.<sup>82</sup>

The defendant's argument as to why he should not be held in contempt of court noted that the assets the SEC sought to reach were properties formerly held by the defendant together with his wife as tenants by the entirety and, therefore, would not have been reachable by the defendant's creditors under Florida law even if they had not been transferred to the defendant's wife.<sup>83</sup>

The district court, in a decision dated January 22, 2010, dismissed the defendant's argument, found the defendant to have engaged in a "purposeful campaign of asset dissipation" by transferring his assets to his wife, and held the defendant in contempt of court.<sup>84</sup>

### Otherwise Exempt Assets Nevertheless Reachable via Disgorgement Order

Distinguishing a disgorgement order from a judgment, the district court held that "[d]isgorgement is not precisely restitution; it wrests ill-gotten gains from the hands of a wrongdoer,"<sup>85</sup> and that "[i]t is this feature, the similarity to an injunction, that allows disgorgement orders, unlike judgments, to be enforced by civil contempt."<sup>86</sup>

The district court noted that in the case of a disgorgement order it possessed remedies that were not limited by state law exemptions:

This Court has broad equitable powers to reach assets otherwise protected by state law

<sup>79</sup> *SEC v. Solow*, 682 F. Supp. 2d 1312, 1314 (S.D. Fla., Jan. 22, 2010).

<sup>80</sup> *See id.*

<sup>81</sup> *Id.* at 1322.

<sup>82</sup> *Id.* at 1323.

<sup>83</sup> *Id.* at 1317.

<sup>84</sup> *Id.* at 1314, 1334.

<sup>85</sup> *Id.* at 1325 (citing *SEC v. Huffman*, 996 F.2d 800 at 802 (5th Cir. 1993)).

<sup>86</sup> *Id.* (citing *SEC v. Huffman*, 996 F.2d at 802-803).

<sup>77</sup> *See* Regs. §1.401(a)(9)-5 (Q-7 & A-7).

<sup>78</sup> *See* §401(a)(9)(E) and Regs. §1.401(a)(9)-4.

to satisfy a disgorgement. For example, a district court can ignore state law exemptions as well as other state law limitations on the ability to collect a judgment in fashioning a disgorgement order. *See Huffman*, 996 F.2d at 803 (holding that disgorgement is not a “debt” under the Federal Debt Collection Procedures Act, and defendants could not avail themselves of the state law exemption under the Act); *SEC v. AMX, Int’l, Inc.*, 872 F. Supp. 1541, 1544-45 (N.D. Tex. 1994) (homestead exemption not taken into account); *SEC v. Musella*, 818 F. Supp. 600 (S.D. N.Y. 1993) (holding exemptions from attachment under New York law did not alter a person’s duty to pay under a disgorgement order); *see also Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 711 F.2d 1085, 1093 (1st Cir. 1983) (ignoring state law limitations on alter ego theory in ERISA context).<sup>87</sup>

... this ability to ignore state law limitations and exemptions exists so that state law cannot defeat or limit the scope of remedial orders under federal law.<sup>88</sup>

## FLORIDA SUPREME COURT DENIES CHARGING ORDER PROTECTION TO OWNERS OF SINGLE-MEMBER LIMITED LIABILITY COMPANIES

### Introduction

Whether the charging order remedy should be regarded as an exclusive remedy where the entity at is-

<sup>87</sup> *Id.* at 1325-1326. *See also Federal Trade Commission v. Neiswonger, et al.*, 580 F.3d 769, 777 (8th Cir. 2009) (“...a district court is not constrained by state law exemptions in fashioning disgorgement orders,” citing to *Steffen v. Gray, Harris & Robinson, P.A.*, 283 F. Supp. 2d 1272, 1282 (M.D. Fla. 2003) (“A district court has broad discretion in fashioning a disgorgement order. For example, a district court can ignore state law exemptions as well as other state law limitations on the ability to collect a judgment in fashioning a disgorgement order.” (internal citations omitted))).

<sup>88</sup> *Id.* at 1326. Although *Solow* and the cases cited to therein by the district court seem to suggest that a disgorgement should be treated differently from a judgment due to the priority of federal law over state law, an interesting question remains as to whether there is a basis for a state law disgorgement order to trump state law exemptions. For example, since as noted in *SEC v. AMX Int’l, Inc.* “...the purpose of disgorgement is not to compensate a victim, but to divest a wrong-doer of ‘ill-gotten gain,’ ” a debtor subject even to a state law disgorgement should not be able to take advantage of state law exemptions because the property subject to the disgorgement was never actually the debtor’s property.

sue is a single-member limited liability company has long been an open question. Prior to 2010, the limited authority on point was a decision of the Bankruptcy Court in *In re Ashley Albright*,<sup>89</sup> together with a single other case that followed the reasoning contained therein.<sup>90</sup> In *Albright*, the Bankruptcy Court held that “. . .[b]ecause there are no other members in the LLC, the entire membership interest passed to the bankruptcy estate and the trustee became a ‘substituted member.’ ”<sup>91</sup> The court also stated that, “upon the debtor’s bankruptcy filing, the Trustee now controls, directly or indirectly all governance of the entity, including decisions regarding liquidation of the entity’s assets.”<sup>92</sup>

On June 24, 2010, in *Olmstead, et al. v. Federal Trade Commission*,<sup>93</sup> the Supreme Court of the State of Florida ruled on the same question; to wit, whether “. . .a court may order a judgment-debtor to surrender all right, title, and interest in the debtor’s single-member limited liability company to satisfy an outstanding judgment.”<sup>94</sup> The Florida Supreme Court concluded that the charging order remedy authorized by Fla. Stat. §608.433(4) does not preclude application of a creditor’s remedy of execution on an interest in a single-member limited liability company because, as was determined to be the crux of the matter in *Albright*, the owner of a single-member limited liability company has an uncontested right to transfer the owner’s full interest in the limited liability company.<sup>95</sup> Equally significant, at least within Florida, is the fact

<sup>89</sup> 291 B.R. 538 (D. Colo. 2003).

<sup>90</sup> *See In re Modanlo*, 412 B.R. 715, 727-31 (D. Md. 2006).

<sup>91</sup> 291 B.R. at 540.

<sup>92</sup> *Id.* at 541. The court recognized that “[a] harder question would involve an LLC . . . that also involves a passive member with a minimal interest. If the dominant member files bankruptcy, would a trustee obtain the right to govern the LLC? Pursuant to Colo. Rev. Stat. §7-80-702, if the non-debtor member did not consent even if she held only an infinitesimal interest, the answer would be no. The Trustee would only be entitled to a share of distributions, and would have no role in the voting or governance of the company.” *Id.* Colo. Rev. Stat. §7-80-702(1) provides that “[t]he interest of each member in a limited liability company constitutes the personal property of the member and may be transferred or assigned. However, if all of the other members of the limited liability company other than the member proposing to dispose of his or its interest do not approve of the proposed transfer or assignment by unanimous written consent, the transferee of the member’s interest shall have no right to participate in the management of the business and affairs of the limited liability company or to become a member. The transferee shall only be entitled to receive the share of profits or other compensation by way of income and the return of contributions to which that member would otherwise be entitled.”

<sup>93</sup> 2010 WL 2518106 (June 24, 2010).

<sup>94</sup> *See id.* (quoting *Federal Trade Commission v. Olmstead*, 528 F.3d 1310, 1314 (11th Cir. 2008)).

<sup>95</sup> Section 608.433(4) provides that: “On application to a court

that the Florida Supreme Court also concluded in *Olmstead* that the charging order remedy under Fla. Stat. §608.433(4) is not an exclusive remedy generally, irrespective of whether or not the limited liability company is a single-member limited liability company.

## Single-Member Entities Subject To Generally Available Creditor's Remedies

Key to the decision in *Olmstead* was the fact that Fla. Stat. §56.061 provides that various categories of real and personal property, including stock in corporations, are subject to levy and sale under execution. Inasmuch as (according to the Florida Supreme Court in *Olmstead*), “[a]n LLC is a type of corporate entity, and an ownership interest in an LLC is personal property that is reasonably understood to fall within the scope of corporate stock,”<sup>96</sup> the Florida Supreme Court determined that the question at issue was whether §608.433(4) establishes the exclusive judgment creditor’s remedy, and thus displaces §56.061 with respect to a judgment debtor’s ownership interest in a single-member limited liability company.

The Florida Supreme Court held that §608.433(4)’s provision that a judgment creditor has only the rights of an assignee of [a limited liability company] interest simply acknowledges that a judgment creditor cannot defeat the rights of nondebtor members of the limited liability company to withhold consent to the transfer of management rights. Citing *Albright*, the Florida Supreme Court stated that “[t]he provision does not, however, support an interpretation which gives a judgment creditor of the sole owner of an LLC less extensive rights than the rights that are freely assignable by the judgment debtor.”<sup>97</sup>

## Charging Order Not an Exclusive Remedy Under Florida Law in Any Event

Notwithstanding the fact that the Florida Supreme Court had determined a basis for finding in favor of the Federal Trade Commission as judgment creditor due to the nature of the limited liability companies at

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of competent jurisdiction by any judgment creditor of a member, the court may charge the limited liability company membership interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of such interest. This chapter does not deprive any member of the benefit of any exemption laws applicable to the member’s interest.”

<sup>96</sup> *Olmstead*, above, at 3.

<sup>97</sup> *Olmstead* at 4.

issue as single-member limited liability companies, the Florida Supreme Court went on to determine that Fla. Stat. §608.433(4) did not provide for an exclusive remedy in any event. Specifically, the Florida Supreme Court stated that:

Our understanding of section 608.433(4) flows from the language of the subsection which limits the rights of a judgment creditor to the rights of an assignee but which does not expressly establish the charging order remedy as an exclusive remedy. The relevant question is not whether the purpose of the charging order provision — i.e., to authorize a special remedy designed to reach no further than the rights of the nondebtor members of the LLC will permit — provides a basis for implying an exception from the operation of that provision for single-member LLCs. Instead, the question is whether it is justified to infer that the LLC charging order mechanism is an exclusive remedy. On its face, the charging order provision establishes a nonexclusive remedial mechanism. There is no express provision in the statutory text providing that the charging order remedy is the only remedy that can be utilized with respect to a judgment debtor’s membership interest in an LLC. The operative language of section 608.433(4) — the court may charge the [LLC] membership interest of the member with payment of the unsatisfied amount of the judgment with interest — does not in any way suggest that the charging order is an exclusive remedy.<sup>98</sup>

## Conclusion

Following the Florida Supreme Court’s decision in *Olmstead, et al. v. Federal Trade Commission*, charging order protections represent a non-exclusive remedy in Florida, irrespective of whether or not the limited liability company at issue is a multiple member entity. In addition, and with import extending beyond the state lines of Florida, however, *Olmstead* evidences the likelihood that courts will not respect charging order protections at all where the limited liability company at issue is a single-member entity.

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<sup>98</sup> *Olmstead* at 5. The Court noted that this is in contrast to the charging order provisions in both the Florida Revised Uniform Partnership Act (Fla. Stat. §§620.81001–9902), and the Florida Revised Uniform Limited Partnership Act (Fla. Stat. §§620.1101–.2205), each of which provides the exclusive remedy by which a judgment creditor of a partner or partner’s transferee may satisfy a judgment out of the judgment debtor’s transferable interest in the partnership or limited partnership.

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