

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 978

INTRODUCER: Senator Flores

SUBJECT: Individual Retirement Accounts

DATE: March 25, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matiyow</u>	<u>Burgess</u>	<u>BI</u>	Favorable
2.	<u>O'Connor</u>	<u>Maclure</u>	<u>JU</u>	Pre-meeting
3.	_____	_____	<u>BC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill provides that an Individual Retirement Account (IRA), exempt from creditors under current statute, would continue to be exempt if the original IRA were transferred into an inherited IRA. The bill provides that the amendments it makes are clarifying and apply retroactively.

The bill substantially amends section 222.21, Florida Statutes.

II. Present Situation:

Individual Retirement Accounts

An Individual Retirement Account (IRA) is a retirement savings account that provides tax benefits to the owner.¹ An IRA is defined as "... a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries."² The tax advantages of an IRA are that the contributions made to the IRA may be fully or partially deductible, and amounts in the IRA are either not taxed until distributed or not taxed at all.³ There are two different types of IRAs: the traditional IRA and the Roth IRA. The traditional IRA allows the owner of the account to make tax deductible contributions to the account and defer paying taxes on the income until withdrawals are made from the IRA after retirement.⁴ The Roth IRA allows an

¹ See Internal Revenue Service Publication 590: *Individual Retirement Arrangements (IRAs)* at 3 (2010), available at <http://www.irs.gov/pub/irs-pdf/p590.pdf> (last visited Mar. 24, 2011).

² 26 U.S.C. s. 408(a).

³ *IRS Publication 59*, *supra* note 1, at 3.

⁴ *Id.* at 7.

owner of the account to make non-tax deductible contributions into the account and make tax-free withdrawals from the account upon retirement.⁵

When the owner of an IRA dies, the IRA may be transferred to a named beneficiary.⁶ If the beneficiary is the owner's spouse, the IRA is treated the same as the original account. However, if the beneficiary is someone other than the owner's spouse, the account is considered an Inherited IRA.⁷ The benefactor has two options when inheriting an IRA: withdraw all of the funds from the original IRA within five years of the original owner's death; or transfer the funds to an inherited IRA and receive annual distributions over the remaining lifespan of the beneficiary.⁸ The beneficiary of an Inherited IRA may not make contributions to the account, must make minimum withdrawals regardless of his or her age, and, unlike the original IRA, there is no penalty for making early withdrawals from the account.⁹

IRA Asset Protection

Although IRAs and other types of tax-deferred plans are established in accordance with the federal tax code, state laws may still affect these accounts.¹⁰ State laws can affect IRAs, for example, in cases such as those involving trusts, real estate, or bankruptcy exemption.¹¹ The decision as to which state's law applies depends on the specific issue and whether it is based on the domicile of the IRA owner, the IRA beneficiary, or state law specified in the IRA agreement.¹²

Section 222.21(2)(a), F.S., provides protection from creditors for various assets, including IRAs. These protections also extend to bankruptcy proceedings. The applicable portion of the statute provides:

(2)(a) Except as provided in paragraph (d), any money or other assets payable to an owner, a participant, or a beneficiary from, or any interest of any owner, participant, or beneficiary in, a fund or account is exempt from all claims of creditors of the owner, beneficiary, or participant if the fund or account is:

1. Maintained in accordance with a master plan, volume submitter plan, prototype plan, or any other plan or governing instrument that has been preapproved by the Internal Revenue Service as exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable;

⁵ *Id.* at 57.

⁶ 26 U.S.C. s. 408(d)(3)(C)(ii).

⁷ *Id.*

⁸ 26 U.S.C. s. 401(a)(9).

⁹ *IRS Publication 590, supra* note 1.

¹⁰ Kristen M. Lynch and Linda Suzzanne Griffin, *The Robertson Case: A Beneficiary by Any Other Name is Still a Beneficiary*, *The Florida Bar Journal*, April 2010, Vol. 84, No. 4.

¹¹ *Id.*

¹² *Id.*

2. Maintained in accordance with a plan or governing instrument that has been determined by the Internal Revenue Service to be exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable;...

As discussed in detail below, the Second District Court of Appeal recently held that the protections provided in s. 222.21(2)(a), F.S., do not extend to inherited IRAs.

Robertson v. Deeb

In 2009, the Second District Court of Appeal held in *Robertson v. Deeb* that an inherited IRA was a separate account from the original IRA and was thus not exempt from garnishment by a judgment creditor.¹³

In *Robertson*, a creditor had obtained a judgment against Robertson and served a writ of garnishment on the trustee of Robertson's inherited IRA, as he was the named beneficiary of his late father's IRA. Upon his father's death, Robertson was given the option of keeping the IRA in his father's name and withdrawing all the proceeds over the next five years, or transferring the funds into an inherited IRA and taking mandatory annual withdrawals for the remainder of his life expectancy. Robertson chose the latter. Robertson claimed that his beneficial interest in the IRA was exempt from garnishment pursuant to s. 222.21(2)(a), F.S., "because he is a 'beneficiary' of the 'fund or account' that qualified as an IRA when his father was alive."¹⁴ The court ruled that section 222.21(2)(a), F.S., does not apply to inherited IRAs:

...because the plain language of that section references only the original 'fund or account' and the tax consequences of inherited IRAs render them completely separate funds or accounts.¹⁵

The court reasoned that since the inherited IRA was a brand new account different from the original IRA and an inherited IRA's tax status and structure is different from a traditional IRA, the exceptions in s. 222.21(2)(a), F.S., did not apply.

The decision in *Robertson* has been further applied in federal bankruptcy court in *In re: Ard*.¹⁶ In the *Ard* case, the debtor had an inherited IRA similar to that in *Robertson*. The court noted that the outcomes involving inherited IRAs "turned on the particular language of each state's law applicable to the exemption of IRAs."¹⁷ The bankruptcy court, pursuant to the decision in *Robertson*, ruled that s. 222.21(2)(a), F.S., did not apply to an inherited IRA and thus the inherited IRA was not exempt in federal bankruptcy proceedings.¹⁸ The debtor was therefore required to turn the IRA over to the bankruptcy trustee.

¹³ *Robertson v. Deeb*, 16 So. 3d 936 (Fla. 2nd DCA 2009).

¹⁴ *Id.* at 938.

¹⁵ *Id.*

¹⁶ *In re: Ard*, 435 B.R. 719 (M.D. Fla. 2010).

¹⁷ *Id.* at 722.

¹⁸ *Id.* at 722.

III. Effect of Proposed Changes:

The bill contains “whereas” clauses to express the Legislature's intent that an inherited IRA, as defined in Internal Revenue Code of 1986, was intended to be exempt from the claims of creditors and that the decisions in *Robertson* and *In re: Ard* are contrary to the Legislature's intent in 2005.¹⁹

The bill amends s. 222.21(2)(c), F.S., to provide that an IRA exempt from creditors under s. 222.21(2)(a), F.S., would continue to be exempt if the original IRA were transferred into an inherited IRA. Under the proposed changes, when an owner of an IRA passes away, his or her named beneficiary would continue to enjoy the protection from creditors that the original owner enjoyed under s. 222.21(2)(a), F.S. This protection would most likely extend to protection in bankruptcy proceedings as well.

The bill contains language indicating the provisions are clarifying and shall apply retroactively to all inherited IRAs regardless of when an inherited IRA was created.

The bill provides that it takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill provides that it is intended to be clarifying and remedial in nature and shall apply retroactively. Retroactive application of legislation can implicate the due process provisions of the constitution.²⁰ As a general matter, statutes that do not alter vested rights but relate only to remedies or procedure can be applied retroactively.²¹

¹⁹ In 2005, the Legislature amended s. 222.21, F.S., to add provisions exempting certain accounts and funds from claims of creditors. Chapter 2005-101, s. 1, Laws of Fla.

²⁰ See *State Department of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981).

²¹ See *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So. 2d. 494 (Fla. 1999). See also *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986) (citations omitted) (“If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes.”).

The Florida Supreme Court has ruled that statutes enacted soon after a controversy over the meaning of legislation may be considered a legislative interpretation of the original law and not substantive change:

When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute.²²

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill removes a source for creditors to collect to satisfy a debt owed.

C. Government Sector Impact:

None

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²² *Lowry v. Parole and Probation Commission*, 473 So. 2d 1248, 1250 (Fla. 1985) (internal citations omitted).