

**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.)

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Prepared By: The Professional Staff of the Committee on Banking and Insurance

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BILL: SB 968

INTRODUCER: Senator Polsky

SUBJECT: Individual Retirement Accounts

DATE: January 12, 2022

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Schrader	Knudson	BI	<b>Favorable</b>
2.	_____	_____	JU	_____
3.	_____	_____	RC	_____

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**I. Summary:**

SB 968 clarifies that any interest in an individual retirement account (IRA) or individual retirement annuity received in a transfer incident to divorce remains exempt from creditor claims after the transfer is complete. As the bill clarifies, but does not modify, existing law or practice, the bill is remedial in nature and applies retroactively to all transfers made incident to divorce.

The bill is effective upon becoming a law.

**II. Present Situation:**

**Asset Protections Available in Florida**

A creditor can collect money owed by filing an action for a judgment in state court. A judgment is an order of the court creating an obligation, such as a debt. The creditor may then use that judgment to collect from the debtor, i.e., executing the judgement, using certain legal tools such as garnishing of wages and bank accounts and attaching liens to personal and real property. The Florida Constitution and Florida Statutes both contain exemptions to protect certain real and personal property of natural persons from forced sale by creditors. State constitutional exemptions, such as those for homestead property,<sup>1</sup> can only be modified through a proposed constitutional amendment that is subsequently approved by the electorate. Exemptions provided in Florida Statutes may be modified through the regular legislative process. Chapter 222, F.S., specifies the types of property that is exempt from the claims of creditors.

Section 222.21, F.S., provides that pension money and certain tax-exempt funds or accounts are exempt from legal processes, such as forced sale. Subsection (1) protects certain money received by any debtor as a pensioner of the United States. Subsection (2) protects any money or other

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<sup>1</sup> See FLA. CONST. art. X, s. 4.

assets payable to an owner, a participant, or a beneficiary from, and any interest<sup>2</sup> therein of any owner, beneficiary, or participant if the fund or account meets certain qualifications. These funds or accounts are commonly known as qualified, tax-exempt retirement accounts, and must be:

- Maintained in accordance with a master plan, volume submitter plan, prototype plan, or any other plan or other governing instrument preapproved by the Internal Revenue Service (IRS) as exempt from taxation under certain sections of the Internal Revenue Code of 1986 (IRC), as amended, regarding qualified retirement plans,<sup>3</sup> unless the exemption was overturned in a final, non-appealable, proceeding;
- Maintained in accordance with a plan or governing instrument determined by the IRS to be exempt from taxation under certain sections of the IRC regarding qualified retirement plans,<sup>4</sup> unless such exemption was overturned in a final, non-appealable, proceeding; or
- Not maintained in accordance with one of the above-described plans or governing instruments, if the person claiming the exemption proves by a preponderance of the evidence that the fund or account is maintained in substantial compliance with the applicable sections regarding tax-exempt retirement accounts, or would have been in substantial compliance with the applicable requirements for exemption under those sections, but for the negligent or wrongful conduct of another person.

The fund or account need not be maintained in accordance with a plan or governing instrument covered by any part of the Employee Retirement Income Security Act (ERISA) to be exempt.<sup>5</sup> The funds or accounts are only protected to the extent they are not otherwise subject to claims of an alternate payee under a qualified domestic relations order, or claims of a surviving spouse pursuant to an order determining elective share and contribution in accordance with ch. 732, F.S.

Paragraph (2)(c) of s. 222.21, F.S., provides that the exemption for such money, other assets, or interest in these qualified, tax-exempt retirement accounts survives the owner's death upon a direct transfer or other eligible rollover excluded from gross income under the IRC,<sup>6</sup> such as, but not limited to, the direct transfer or eligible rollover to an inherited individual retirement account (IRA).<sup>7</sup> This allows a beneficiary to enjoy the exemption upon transfer. Paragraph (2)(c) expressly states that it is intended to clarify existing law, be remedial in nature, and to apply retroactively to all inherited individual retirement accounts without regard to the date the account was created.

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<sup>2</sup> Under Florida law, the word "interest," as used in statute providing exemption from creditors' claims for any interest of owner, beneficiary, or participant in enumerated tax-preferred funds or accounts, is a broad term encompassing many rights of a party, tangible, intangible, legal, and equitable. *In re Maddox*, 713 F.2d 1526, 1530 (11th Cir. 1983).

<sup>3</sup> 26 U.S.C. ss. 401(a) (stock bonus, pension, and profit sharing plans), 403(a) and 403(b) (annuity plans), 408 (individual retirement accounts (IRAs)), 408A (Roth IRAs), 409 (tax credit employee stock ownership plans), 414 (provides definitions and special rules for certain plans, such as retirement plans for government and church employees), 457(b) (deferred compensation plans), or 501(a) (defining organizations exempt from taxation, including those defined in 401(a)).

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

<sup>5</sup> Section 222.21(2)(b), F.S.

<sup>6</sup> Section 222.21(2)(c), F.S.

<sup>7</sup> See 26 U.S.C. s. 408(d)(3); pursuant to s. 222.21(2), F.S., individual retirement accounts, and interests therein, maintained in accordance with 26 U.S.C. s. 408 are exempted from legal processes, such as forced sale by creditors.

The specified tax-exempt retirement plans enumerated in subsection (2) are exempt from all legal proceedings, including bankruptcy, even though bankruptcy is a federal proceeding governed by the United States Bankruptcy Code (Bankruptcy Code).<sup>8</sup>

### **Transfer of Section 408 Retirement Accounts Incident to Divorce**

Retirement accounts exempted from taxation by s. 408 of the IRC are exempted from legal processes, such as forced sale, by Florida law.<sup>9</sup> Section 408 of the IRC contemplates individual retirement accounts (IRAs) and individual retirement annuities.<sup>10</sup> An individual retirement account is a trust created or organized in the United States for the exclusive benefit of an individual, or his beneficiaries, of which the governing document meets certain requirements.<sup>11</sup> An individual retirement annuity is an annuity contract, or an endowment contract, issued by an insurance company which meets certain requirements.<sup>12</sup> An interest in an individual retirement account or individual retirement annuity may be transferred, but only upon the death or divorce of the original owner.<sup>13</sup> The transfer of an interest in an individual retirement account or individual retirement annuity incident to divorce is not a taxable event.<sup>14</sup> Effective upon such transfer, the interest in the individual retirement account or individual retirement annuity is treated as the account of the spouse.<sup>15</sup>

### **Exempted Property in Bankruptcy Proceedings**

The Bankruptcy Code expressly recognizes exemptions provided under the state or local law of the domicile of the debtor.<sup>16</sup> Florida is an opt-out state, meaning that when a Florida resident files for bankruptcy, Florida law provides the exemptions available to the debtor—not the Bankruptcy Code.<sup>17</sup> Florida law contains a number of exemptions included in the Bankruptcy Code, such as IRAs and pensions, profit sharing, and retirement benefits.<sup>18</sup> Florida also exempts all inherited IRA accounts from creditor claims.<sup>19</sup> Likewise, the Bankruptcy Code exempts retirement funds in a fund or account exempt from taxation under most of the same sections of the IRC, such as those applicable to stock bonus, pension, and profit sharing plans, annuity plans, IRAs, and deferred compensation plans.<sup>20</sup>

<sup>8</sup> 11 U.S.C. s. 101, *et. seq.*; 11 U.S.C. s. 522(b)(3)(A).

<sup>9</sup> Section 222.21(2), F.S.

<sup>10</sup> 26 U.S.C. s. 408(a)-(c).

<sup>11</sup> *See* 26 U.S.C. s. 408(a), *et. seq.*

<sup>12</sup> 26 U.S.C. s. 408(b).

<sup>13</sup> 26 U.S.C. s. 408(d).

<sup>14</sup> 26 U.S.C. s. 408(d)(6).

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

<sup>16</sup> 11 U.S.C. s. 522(b)(3)(A).

<sup>17</sup> Section 222.20, F.S.

<sup>18</sup> Section 222.21(2), F.S.

<sup>19</sup> Section 222.21(2)(c), F.S.

<sup>20</sup> 11 U.S.C. s. 522(d)(12) exempts “retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under sections 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.” Section 222.21(2), F.S., exempts qualified plans exempt from taxation under ss. 401(a), 403(a) and 403(b), 408, 408A, 414, 457(b), and 501(a) of the IRC. Unlike the Bankruptcy Code, Florida additionally exempts qualified tax credit employee stock ownership plans exempted from taxation under section 409 of the IRC.

Regarding the exemption for an IRA or an interest therein where such was awarded incident to a divorce, a 2018 bankruptcy court decision in the United States Bankruptcy Appellate Panel for the 8th Circuit, *In re Lerbakken*, 590 B.R. 895 (B.A.P. 8th Cir. 2018), may indicate a need to clarify Florida's exemption.

In *Lerbakken*, the 8th Circuit Bankruptcy Appellate Panel stated that two requirements must be satisfied in order for a debtor to claim funds as exempt retirement funds pursuant to the Bankruptcy Code:

- The amount must be retirement funds; and
- The retirement funds must be in an account that is exempt from taxation under one of the provisions of the IRC.<sup>21</sup>

The Bankruptcy Code does not define the term “retirement funds,” so the term is applied within its ordinary meaning: “sums of money set aside for the day an individual stops working.”<sup>22</sup> In *Lerbakken*, the 8th Circuit Bankruptcy Appellate Panel held that funds held in 401K and IRA accounts awarded to a Chapter 7 debtor as part of a stipulated property settlement in a divorce proceeding were not “retirement funds” because while the debtor’s former spouse had saved funds in those accounts for a joint retirement, any interest the debtor held in those accounts resulted from a property settlement. However, it is notable that the ruling was an 8th Federal Circuit opinion on appeal from the United States Bankruptcy Court for the District of Minnesota. Thus, the *Lerbakken* Court’s ruling interpreting the meaning of “retirement funds” in would not be controlling in the 11th Circuit (of which Florida is a part).

The issue of whether an IRA is exempt from bankruptcy proceedings when awarded incident to a divorce proceeding has arisen in the 11th Circuit recently.<sup>23</sup> During the course of the proceedings, the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, acknowledged that, although the authority to make the certification for appeal had shifted from Bankruptcy Court to the district court during the pendency of ruling on a motion for appeal, there did exist a “matter of public importance” on the IRA issue and “no controlling decision of the Eleventh Circuit or the Supreme Court exists.”<sup>24</sup> Further, the Bankruptcy Court acknowledges that “conflicting opinions from other jurisdictions arguably exist.”<sup>25</sup> Thus, the Bankruptcy Court had intended to certify the issue for appellate review.<sup>26</sup>

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<sup>21</sup> 11 U.S.C. s. 522(d)(12).

<sup>22</sup> *Clark v. Rameker*, 573 U.S. 122, 127 (2014).

<sup>23</sup> This case was dismissed without prejudice on upon the parties reaching settlement in the matter. *Carapella v. Glass*, No. 8:19-cv-3050-T-02 (M.D. Fla. Jan. 8, 2021). Thus, the Court did not reach a decision on the IRA issue.

<sup>24</sup> *In re Glass*, 613 B.R. 33, 41 (Bankr. M.D. Fla. 2020).

<sup>25</sup> *Id.* at 41.

<sup>26</sup> *Id.* at 34. Under 28 U.S.C. s. 158(d)(2)(A), the grounds for certification for direct review in a court of appeals are: (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of Supreme Court of the United States, or involves a matter of public importance; (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or (iii) an immediate appeal from the judgment, order, or decree may materially advance the progression of the case or proceeding in which the appeal is taken.

### III. Effect of Proposed Changes:

**Section 1** amends paragraph (2)(c) of s. 222.21, F.S., to clarify that any interest in any IRA or individual retirement annuity received in a transfer incident to divorce as described in s. 408(d)(6) of the Internal Revenue Code of 1986 (IRC), as amended, continues to be exempt from creditor claims after the transfer, regardless of the date the transfer was made.

To the extent s. 222.21(2)(a), F.S., exempts a transferee's interest in an IRA or individual retirement annuity upon a transfer incident to divorce pursuant to s. 408(d)(6) of the IRC, the bill clarifies current law, which exempts such interests from the claims of the transferee's creditors.

Existing law provides that s. 222.21(2)(c), F.S., is intended to clarify existing law, is remedial in nature, and shall have retroactive application. As a result, the provision of the bill will apply retroactively as well.

**Section 2** provides that the act shall take 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. State Tax or Fee Increases:

None.

#### E. Other Constitutional Issues:

#### **Retroactive Application**

Once a bill becomes law, it is presumed to apply only prospectively. The presumption against retroactive application may be rebutted by clear evidence of legislative intent.<sup>27</sup>

To determine if the terms of a statute and the purpose of the enactment indicate retroactive application, a court may consider the language, structure, purpose, and legislative history of the enactment.<sup>28</sup>

<sup>27</sup> *Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187 (Fla. 2011).

<sup>28</sup> *Id.*

If the legislation clearly expresses an intent that the law apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible.<sup>29</sup> Even when the Legislature has clearly expressed its intention that the statute be given a retroactive application, courts must refuse to do so if it impairs vested rights, creates new obligations, imposes new penalties,<sup>30</sup> or impairs an obligation of contract.<sup>31</sup> For example, ex post facto legislation, i.e., a law that expands criminal liability retroactively by either creating a new crime for past conduct or by increasing the penalty for past conduct, is forbidden by both the Florida Constitution and the United States Constitution. Statutes that do not alter vested rights but relate only to remedies or procedure may be applied retroactively.<sup>32</sup>

**V. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

**VI. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

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<sup>29</sup> *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995).

<sup>30</sup> *Id.*

<sup>31</sup> *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010).

<sup>32</sup> *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So. 2d 494 (Fla. 1999).

C. Government Sector Impact:

None.

**VII. Technical Deficiencies:**

None.

**VIII. Related Issues:**

None.

**IX. Statutes Affected:**

This bill substantially amends section 222.21, Florida Statutes.

**X. Additional Information:**

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.