

**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 1306

INTRODUCER: Senator Thurston

SUBJECT: Individual Retirement Accounts

DATE: January 27, 2020

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

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	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Palecki</u>	<u>Knudson</u>	<u>BI</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 1306 clarifies that any interest in an individual retirement account (IRA) or individual retirement annuity received during a transfer incident to divorce remains exempt from creditor claims after the transfer is complete.

Since 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**

Both the State Constitution and Florida Statutes 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> may only be modified through a constitutional amendment and a vote of the electorate; those contained in Florida Statutes may be modified by the Legislature. Chapter 222, F.S., outlines types of property statutorily exempted or immune 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 Art. X, s. 4, Fla. Const.

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. Such funds or accounts are commonly known as qualified, tax-exempt retirement accounts, and must be either:

- Maintained in accordance with a master plan, volume submitter plan, prototype plan, 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 such exemption was overturned in a final and nonappealable 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 and nonappealable 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> Such 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. The Legislature expressly provided that this paragraph 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 Swarup*, 521 B.R. 328 (Bankr. M.D. Fla. 2014).

<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 s. 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 IRC.<sup>17</sup> Florida law contains a number of exemptions included in the IRC, such as IRAs and other pension, 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>

Although there is no current controversy in Florida regarding the exemption for an IRA or an interest therein awarded incident to a divorce, a recent bankruptcy court decision in the United

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<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(c).

<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), specifically, 408, 408A, 414, 457(b), specifically, 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.

States Bankruptcy Appellate Panel for the 8<sup>th</sup> Circuit may indicate a need to clarify Florida's exemption.

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 *In re Lerbakken*, 590 B.R. 895 (B.A.P. 8<sup>th</sup> Cir. 2018), the Court held that funds held in a 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.

### 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)<sup>23</sup> of the Internal Revenue Code of 1986 (IRC), as amended, continues to be exempt after the transfer, regardless of the date the transfer was made.

To the extent s. 222.21(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.

**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.

<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> Section 408(d)(6) of the IRC provides that a transfer of an interest in an individual retirement account or an individual retirement annuity to a spouse or former spouse under a divorce separation instrument is effective upon the time of the transfer, and is not a taxable event.

## 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>24</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>25</sup>

If the legislation clearly expresses an intent that the law apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible.<sup>26</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>27</sup> or impairs an obligation of contract.<sup>28</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>29</sup>

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

None.

<sup>24</sup> *Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187 (Fla. 2011).

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

<sup>26</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>27</sup> *Id.*

<sup>28</sup> *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010).

<sup>29</sup> *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So. 2d 494 (Fla. 1999).

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill amends section 222.21 of the Florida Statutes.

**IX. 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.