# PROTECTING RETIREMENT ASSETS FROM CREDITORS

KEITH A. HERMAN & JEFFREY A. HERMAN[1]

WHEN INFAMOUS CRIMINAL WILLIE SUTTON WAS ASKED WHY HE ROBBED BANKS, HE ALLEGEDLY REPLIED: "BECAUSE THAT'S WHERE THE MONEY IS."[2] THESE DAYS, WILLIE MIGHT HAVE JUST ROBBED YOUR RETIREMENT ACCOUNT INSTEAD OF YOUR BANK ACCOUNT. IN 2018, U.S. RETIREMENT ACCOUNTS HELD ALMOST $30 TRILLION, ROUGHLY ONE-THIRD OF ALL HOUSEHOLD FINANCIAL ASSETS.[3]

Like Willie, modern creditors will not hesitate to go where the money is, including your retirement account, unless your account is protected.

Some of the law in this area is settled, some of it is evolving, and all of it is complicated. For example, the Supreme Court decided in 2014 that inherited IRAs are not "retirement funds" protected by the federal Bankruptcy Code (the Bankruptcy Code is herein referred to as "BR"), and the repercussions are still being felt.[4] Bankruptcy courts have now extended the Supreme Court's reasoning to find that retirement accounts received through divorce proceedings are not "retirement funds," and state courts are wrestling with whether their exemption statutes similarly expose inherited IRAs to creditors. With these new developments, attorneys should be counseling clients on ways to protect retirement assets from their own creditors, as well as their beneficiaries' creditors.

In the following sections, we discuss (1) creditor protection under federal law, (2) creditor protection under Missouri law, (3) exceptions that allow creditors to reach retirement assets, (4) how the rules change in bankruptcy, and (5) our conclusions.

**ERISA and Other Federal Laws**

If the Employee Retirement Income Security Act of 1974 (ERISA) protects retirement assets from creditors, then there is no need to analyze state law. ERISA is a federal law governing employee benefits, including retirement plans, and contains an "anti-alienation" clause in § 206(d) stating that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." In 1992, the U.S. Supreme Court held in *Patterson v. Shumate* that the anti-alienation clause protects a participant's retirement account from being subject to his or her creditors, both inside and outside of bankruptcy.[5]

Many types of plans and accounts are not protected by ERISA, however. First, certain retirement plans are not subject to ERISA at all. These include governmental plans,[6] church plans,[7] traditional and Roth IRAs, plans that cover only the sole owner of a trade or business (or only the owner and his or her spouse),[8] plans that cover only partners in a partnership (or the partners and their spouses),[9] and certain voluntary IRAs and Code § 403(b) plans where the employer lets a third party provide the program to employees.[10]

Second, other plans, while generally subject to ERISA, are

exempt from Part 2 thereof, which contains the anti-alienation clause. These plans and accounts include SEPs, SIMPLE IRAs, and unfunded "top hat" plans providing nonqualified deferred compensation (NQDC) to "a select group of management or highly compensated employees."[11] The anti-alienation clause does not apply to these plans. Oddly, it is also unclear if state creditor protection laws apply to these plans, or if such laws are preempted by ERISA.[12] Given the uncertainty, a debtor with a SEP or a SIMPLE IRA could better protect the assets therein (1) by rolling them into a separate employer-sponsored plan protected by ERISA, (2) by rolling them into a traditional IRA that is subject to state law protections, or (3) as a last resort, by filing for bankruptcy, where the Bankruptcy Code would protect the assets.[13]

In addition to ERISA, specific federal laws protect many types of benefits.[14] If one of these laws is applicable to your benefits, then relying on state law may be unnecessary.

## Missouri Creditor Protection Laws

*Choice of Law*

It is important to understand when the Missouri laws discussed later in this article will apply. With respect to non-bankruptcy actions in a Missouri court, the Missouri exemption laws will apply to Missouri residents.[15] For non-resident debtors, Missouri courts will apply the exemption laws of the debtor's state of residence, provided the general policies of the two states are the same.[16] A court will not refuse to apply the exemption laws of the debtor's residence simply because the amount of the exemption is different in the states.[17]

If a Missouri debtor is sued in a non-Missouri court, then the state choice-of-law rule of the forum court will determine which state's exemption law applies. Under § 132 of the Second Restatement of Conflict of Laws, a court is to apply the law of its own state when determining "what property of a debtor within the state is exempt from execution," unless another state has the dominant interest in the question of exemption due to the debtor and creditor being domiciled in such other state.[18] In that event, the local law of the state where the debtor and creditor are domiciled will be applied.

However, if the retirement plan at issue is structured as a trust, then it may be argued that the law designated in the trust document applies. The Missouri Uniform Trust Code (MUTC) provides that the "meaning and effect" of the terms of a trust are determined by "the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue."[19] Whether the interest of a trust beneficiary can be reached by creditors is arguably a question of the legal "effect" of the terms of the trust, allowing a trust's choice-of-law clause to govern.[20]

*Missouri Retirement Account Exemption Statutes*

Here, we discuss (1) § 513.430.1(10)(f), RSMo ("§ 10(f)"), which provides complete creditor protection to a variety of plans and accounts, including inherited IRAs; (2) § 456.014, RSMo ("§ 456.014"), which provides complete protection to certain trusts, but does not provide much protection beyond § 10(f), and the MUTC; (3) § 513.430.1(10)(e), RSMo ("§ 10(e)"), which provides only limited protection to amounts necessary for support; and (4) certain governmental plan protections.

**Section 10(f).** This section protects qualified plans under Internal Revenue Code ("Code") § 401 (including but not limited to 401(k) plans, profit-sharing plans, and defined benefit plans), qualified annuity plans under Code § 403(a), certain retirement plans of tax-exempt organizations and public school systems under Code § 403(b),[21] employee stock ownership plans (ESOPs) under Code §§ 401 and 409, and all types of IRAs (traditional, Roth, inherited, SEPs, and SIMPLE IRAs) under Code §§ 408 and 408A.[22] There is no dollar limit on the amount of retirement assets subject to creditor protection.

Section 10(f) is a very broad, debtor-friendly statute. Missouri even added language in 2013 to specifically protect inherited IRAs from creditors ("including an *inherited* account or plan").[23] Missouri is one of just a handful of states that expressly protects inherited IRAs.[24] Section 10(f) also explicitly provides protection for ex-spouses who received a retirement plan upon divorce pursuant to a qualified domestic relations order (QDRO).[25] This is important, as two bankruptcy cases have held that retirement accounts received upon divorce are not "retirement funds" for purposes of BR §§ 522(b)(3)(C) and 522(d)(12).[26]

**Trusts: Section 456.014 and the MUTC.** Section 456.014 (originally enacted as § 456.072) protects a participant's interest – prior to payment or delivery of benefits – in certain retirement trusts containing a spendthrift provision.[27] If a retirement plan or account is not funded with a trust, then this section does not apply. There are also some grey areas with respect to this section's applicability. First, it may not apply to inherited retirement accounts, as it only protects a "participant's" interests prior to payment to the "participant." Second, it may not apply to NQDC plans funded through Rabbi Trusts, as the assets held in a Rabbi Trust are subject to the employer's creditors.[28] Third, the statute references "nonpublic pension plans," which may indicate an intent to exclude governmental retirement plans.[29] Finally, it may not protect certain owner-only or partner-only plans. A trust that benefits owners or partners may not be for the exclusive benefit of "*employees*."[30] If an owner-only or partner-only plan seeks to rely on the protections of § 456.014, the owners should be working owners who also receive compensation from the business in their capacity as common law employees. Case law on this section has not answered any of these open questions.

Similar to § 456.014, the MUTC protects trusts with "spendthrift" restraints on involuntary transfers.[31] For several reasons, the MUTC will not protect most retirement accounts from creditors. First, many retirement accounts are not held in trusts. Second, the MUTC is primarily intended to apply to trusts in an estate planning or other donative context and may not apply to retirement plan trusts, as § 456.014 specifically applies to retirement plans and trusts.[32] Third, even if the MUTC applies, such trusts may simply fail to meet the MUTC's requirements for creditor protection.[33] Finally, protection under the MUTC would not apply once the participant can withdraw assets from the trust without anyone's consent.[34]

**Section 10(c).** Section 10(e) only protects a person's interest in a retirement plan to the extent necessary for support of the person or his or her dependent.[35] Courts have looked at the following factors: (1) present and anticipated living expenses; (2) present and anticipated income; (3) age of the debtor and

his or her dependents; (4) health; (5) ability to work and earn a living; (6) job training and skills; (7) other assets; (8) asset liquidity; (9) ability to save for retirement; (10) special needs; and (11) other financial obligations.[36] For example, a 2018 decision held that § 10(e) protected the first $1,285.06 of monthly retirement payments as necessary for the debtors' support, but did not protect the last $1,000, focusing on the debtors' excessive monthly expenses, such as $1,060 for three vehicles.[37]

Similar to other creditor protection statutes discussed herein, § 10(e) only protects a right to future payments, not payments that have been received by the debtor.[38] Section 10(e) potentially covers more types of retirement plans than § 10(f). For example, while § 10(f) does not cover NQDC plans, § 10(e) does (at least in bankruptcy),[39] and though the beginning of § 10(e) appears intended to exclude governmental plans (as it only mentions "nonpublic retirement plan[s]"), the statute's specific reference to certain governmental "deferred compensation program[s]" at least covers governmental NQDC plans. To be protected by § 10(e), all payments must be "on account of illness, disability, death, age or length of service," which most retirement plans will satisfy.[40] Finally, unlike § 456.014, which only purports to protect payments to participants, § 10(e) appears to protect payments to any "person" on account of "death" when needed for the support of that "person" or his or her dependent. As a result, § 10(e) should apply to inherited retirement accounts.

Ultimately, very few retirement plans or accounts will require the limited protection of § 10(e), because most retirement plans will be completely exempt under ERISA, § 10(f), or § 456.014. Benefits under some NQDC plans, however, may have no protection other than the limited protection of § 10(e), although even that limited protection may be unavailable to top hat plans outside of bankruptcy as a result of ERISA preemption.[41]

**Social Security and Missouri Governmental Plans.** Benefits under many government retirement benefits are exempt from creditors under Missouri law, including:[42] (1) Social Security;[43] (2) the Missouri Local Government Employees Retirement System (MOLAGERS);[44] (3) the Missouri State Employees' Retirement System;[45] (4) municipal pension plans;[46] (5) police retirement systems;[47] (6) firefighters retirement systems;[48] (7) the Missouri Department of Transportation and Highway Patrol Employees' Retirement System;[49] and (8) the Public School Retirement System of Missouri.[50]

## Exceptions to Creditor Protection

Despite the protections above, there are instances when certain creditors can reach the assets in a retirement plan or account.

*Exceptions Under ERISA*

Creditor protection under ERISA is not absolute. There are four specific exceptions to the anti-alienation clause set forth in § 206(d) of ERISA: (1) a voluntary and revocable assignment not to exceed 10 percent of any benefit payment, if permitted by a plan and if elected by a participant;[51] (2) payments pursuant to a QDRO, which allows benefits to be transferred as a result of a domestic relations proceeding related to the disposition of property in a divorce or related to spousal or child support; (3) offsets taken from the account of a participant who has been convicted of a crime involving the plan; or (4) offsets taken from the account of a participant who is also a plan fiduciary and is subject to a civil judgment or regulatory settlement regarding a breach of fiduciary duty.[52]

*Exceptions Under Missouri Law*

Each state creditor protection statute – §§ 10(e), 10(f), and 456.014 – contains one or more specific exceptions. For example, like ERISA, each statute allows retirement assets to be reached to enforce a QDRO or other claim for child support or spousal maintenance.[53] In addition, § 452.140, RSMo, contains a catch-all exception that says any property can be reached to enforce "a decree for alimony or for the support and maintenance of children."[54] Section 10(e) does not protect payments under certain NQDC plans established by "insiders." Section 10(f) explicitly does not protect certain fraudulent transfers in bankruptcy proceedings; however, none of the statutes discussed herein will protect a fraudulent transfer to a retirement account.[55] Finally, §§ 10(e) and 10(f) do not protect plans against claims for state and local taxes, or if a debtor is about to "leave" (*i.e.*, permanently depart) Missouri.[56]

*Tax Liens and Restitution Orders*

These two federal exceptions are important, as they supersede all of the creditor protection statutes discussed herein. First, if a taxpayer fails to pay any tax after demand by the IRS, the U.S. has a statutory lien on all of the taxpayer's property.[57] The Tax Code has its own list of property that is exempt from this lien, but no private retirement plans are included.[58] Tax liens supersede all other federal and state laws, including ERISA and the state law exemptions described above.[59] The tax lien attaches to a participant's vested interest in a retirement plan and future payments from the plan, even if the participant cannot withdraw the funds until a later date.[60]

Second, the Mandatory Victims Restitution Act (MVRA) requires that, for certain crimes, a defendant must pay restitution to the victim or the victim's estate.[61] An MVRA order of restitution imposes "a lien in favor of the United States on all property . . . as if the liability . . . were a liability for a tax assessed under the [Code]."[62] As no private retirement accounts are exempt from an IRS tax levy, they are also not exempt from a MVRA restitution claim.[63]

## Bankruptcy

The rules discussed above generally apply to any attempt to execute on or attach retirement assets in order to satisfy a judgment against a participant. In contrast, if a debtor applies for bankruptcy protection (or is forced into bankruptcy by his or her creditors), there are two potential sources of protection under the Bankruptcy Code: BR §§ 541(c)(2) and 522.

*BR Section 541(c)(2)*

Section 541 describes what assets are generally included in a bankruptcy estate. It also identifies a number of assets that are categorically excluded from the bankruptcy estate. That includes BR § 541(c)(2), which excludes assets held in a trust containing a restriction on transfer that is "enforceable under applicable non-bankruptcy law." For our purposes, there are two such restrictions to consider: ERISA plans subject to the anti-alienation clause, which is enforceable under ERISA;[64] and non-ERISA plans subject to § 456.014, which is enforceable under Missouri

law. If either of these protections applies, a retirement plan or account will be excluded from the bankruptcy estate.

However, if a plan or account is fully subject to ERISA, but the assets are held outside of a trust, a participant's account may not qualify for creditor protection under BR § 541(c)(2).[65] Plans that are subject to ERISA but do not require a trust include Code § 403(b) annuity contracts and custodial accounts.[66] Some courts, however, are not so strict and still allow assets held in a 403(b) annuity contract to qualify as being held in a "trust" under BR § 541(c)(2).[67]

*BR Section 522*

If BR § 541(c)(2) does not apply, then a retirement account is included in the bankruptcy estate, but may still be exempt from creditors. BR § 522 includes several exemptions for retirement plans and accounts.[68] However, states have the option of ignoring most federal exemptions and supplying their own.[69] Missouri, like most states, is an opt-out state.[70] As a result, there are three sources of protection for Missouri debtors: (1) BR § 522(b)(3)(C), which applies even in opt-out states like Missouri; (2) § 10(f); and (3) § 10(e).[71]

Under BR § 522(b)(3)(C), "retirement funds" exempt from tax under Code §§ "401, 403, 408, 408A, 414, 457, or 501(a)" are exempt from the bankruptcy estate.[72] Qualified plans under Code § 401, qualified annuity plans under Code § 403(a), certain retirement plans of tax-exempt organizations and public school systems under Code § 403(b), governmental and tax-exempt NQDC plans under Code § 457, and all types of IRAs (traditional, Roth, SEPs, and SIMPLE IRAs) under Code §§ 408 and 408A are all protected. In addition, although not specifically referenced, it also protects ESOPs, a type of qualified plan under Code § 401.

BR § 522(b)(3)(C) has its limitations. In 2014, the U.S. Supreme Court held in *Clark v. Rameker* that assets in an inherited IRA are not protected, as such assets are no longer "retirement funds" after the original participant dies.[73] The Court pointed to the following reasons: (1) the beneficiary/owner cannot contribute his or her own funds to the retirement account; (2) the beneficiary/owner must withdraw funds prior to retirement age, at times completely unrelated to retirement; and (3) the beneficiary/owner may withdraw all of the retirement funds at any time and for any purpose without penalty.

Since *Clark v. Rameker*, at least two bankruptcy cases have now held that a retirement account received from a spouse in a divorce proceeding also does not constitute a "retirement fund."[74] It is unclear if the results would have changed had the spouses rolled over the retirement accounts into their own IRAs or employer-sponsored retirement plans. Some state courts have also applied the Supreme Court's reasoning when interpreting state bankruptcy statutes in a limited manner.[75]

Under BR § 522(n), the amount of a traditional or Roth IRA that can be protected is subject to a statutory maximum, currently set at $1,362,800; however, no maximum applies to amounts rolled over from a qualified plan, a qualified annuity plan, or a 403(b) plan.[76]

If BR § 522(b)(3)(C) is inapplicable, a Missouri debtor must look to state exemptions.[77] Section 10(f) is strikingly similar to BR § 522(b)(3)(C),[78] but there are six important differences, highlighted in the following table:

CONTINUED ON PAGE 204

# Protecting Retirement Assets from Creditors

Continued from page 175

**Table 1: BR § 522(b)(3)(C) versus Section 10(f)**

| Does it Protect . . . | BR § 522(b)(3)(C) | Section 10(f) |
|---|---|---|
| Assets in Non-Bankruptcy Proceedings? | No | Yes |
| An Inherited IRA? | No | Yes |
| Traditional and Roth IRAs Without Monetary Limits? | No<br>Limited under § 522(n), except for certain rollovers | Yes<br>Unlimited in non-bankruptcy proceedings, unclear if limited by § 522(n) in bankruptcy proceedings[79] |
| NQDC Plans of State and Local Governments and Tax-Exempt Entities Under Code § 457? | Yes | No |
| Assets During a 60-Day Eligible Rollover Distribution Window? | Yes[80] | No |
| Assets Received Pursuant to a QDRO? | Maybe Not[81] | Yes |

In a bankruptcy proceeding, a Missouri debtor can rely on either § 522(b)(3)(C) or § 10(f), whichever is more favorable.

## Conclusions

We want to emphasize several important points. First, during a participant's life, ERISA provides the only guaranteed protection, subject to any applicable exceptions. For plans not protected by ERISA, a person can potentially be sued anywhere and be subject to any state's creditor protection laws (or potentially *no* state's laws in the case of SEPs, SIMPLE IRAs, and top hat plans).[82] State protections vary widely. Most states, for example, do not expressly protect inherited IRAs, and some barely protect retirement plans.[83]

Second, if creditor protection is important for the *beneficiaries* of a retirement account (which it always should be), then the account owner should name an irrevocable trust as the beneficiary of the retirement plan, as the law is much more settled – and debtor-friendly – in the trust area.[84] However, great care must be taken in drafting trusts to own retirement benefits to ensure favorable income tax consequences to the trust and its beneficiaries.[85]

Third, NQDC plans face the biggest challenges. In bankruptcy: (1) the right to payments from Code § 457 plans are fully protected by BR § 522(b)(3)(C) of the Bankruptcy Code; and (2) § 10(e) protects payments to the extent necessary for support. Outside of bankruptcy, it's not even clear that the limited protection of § 10(e) would apply to top hat plans, as § 10(e) might be preempted by ERISA.[86] To obtain complete protection (whether under ERISA or § 456.014), a NQDC plan would have to be funded by a trust.[87] While unusual, it is not unheard of.[88] This is a complex area that can lead to costly mistakes, however.[89]

Lastly, for individuals, the choice of what retirement plans or accounts to fund, or whether or where to rollover an account, should be carefully evaluated to determine the greatest potential to protect assets from creditors.

## Endnotes

**Keith A. Herman**

**Jeffrey A. Herman**

1 Keith A. Herman is an officer in the Trusts & Estates Practice Group at Greensfelder, Hemker & Gale, P.C. in St. Louis and is a Fellow of the American College of Trust and Estate Counsel (ACTEC). Mr. Herman graduated from the University of Missouri-Columbia School of Law in 1999. Jeffrey A. Herman is an associate in the Employee Benefits Practice Group at Greensfelder, Hemker & Gale, P.C. He graduated from the Saint Louis University School of Law in 2010.

2 *Willie Sutton,* FBI.gov, https://www.fbi.gov/history/famous-cases/willie-sutton (last visited June 4, 2019).

3 ICI, Release: Quarterly Market Retirement Data – 4th Quarter 2018, https://www.ici.org/research/stats/retirement/ret_18_q4 (last visited June 17, 2019).

4 *See* page 175.

5 112 S. Ct. 2242 (1992).

6 29 U.S.C. § 1002(32).

7 *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017).

8 29 C.F.R. § 2510.3-3(b), (c). (It is not clear if a plan that covers only *joint owners* of a business [*e.g.*, physician shareholders in a professional medical corporation] is subject to ERISA or not. A majority of courts and the Department of Labor believe such plans *are* subject to ERISA. *See, e.g.*, Dep't of Labor Op. 76-67; *Melluish v. Provident Life & Acc. Ins. Co.*, No. 4:99-CV-144, 2001 WL 311243, at *3-4 (W.D. Mich. Feb. 26, 2001)).

9 29 C.F.R. § 2510.3-3(b), (c).

10 29 C.F.R. § 2510.3-2(d), (f).

11 *See* 29 U.S.C. § 1051.

12 Part 5 of ERISA contains the preemption clause, which provides that ERISA supersedes any state laws that relate to employee benefit plans subject to ERISA. *See* 29 U.S.C. § 1144. While the 6th Circuit has held that state creditor protection laws *were* preempted with respect to SEPs or SIMPLE IRAs, a district court held that such laws were *not* preempted. *See Lampkins v. Golden*, 28 F. App'x 409, 415 (6th Cir. 2002); *VFS Fin., Inc. v. Elias-Savion-Fox LLC*, 73 F. Supp. 3d 329, 341-48 (S.D. N.Y. 2014).

13 *See* page 175. There is no ERISA preemption of state creditor protection laws in bankruptcy, as the Bankruptcy Code requires the application of Missouri law, and ERISA does not preempt federal laws. *See* 29 U.S.C. § 1144(d).

14 *See, e.g.*, 5 U.S.C. § 8346 (civil service retirement); 22 U.S.C. § 4060(c) (foreign service retirement and disability); 38 U.S.C. § 1562(c) (veterans' benefits); 38 U.S.C. § 3101 (special pensions paid to winners of the Congressional Medal of Honor); 42 U.S.C. § 407 (Social Security); 45 U.S.C. § 231m(a) (Railroad Retirement Act).

15 *See, e.g.*, *Ferneau v. Armour & Co.*, 303 S.W.2d 161, 167 (Mo. App. E.D. 1957) ("the laws of Nebraska have no extraterritorial effect"); *Beneficial Fin. Co. of Houston, Tex. v. Yellow Transit Freight Lines, Inc.*, 450 S.W.2d 222, 227 (Mo. App. W.D. 1969).

16 *Beneficial Fin. Co. of Houston, Tex. v. Yellow Transit Freight Lines, Inc.*, 450 S.W.2d 222, 227 (Mo. App. W.D. 1969).

17 *Id.*

18 Note that § 273 of the Second Restatement of Conflict of Laws provides a different rule regarding whether creditors of a beneficiary can reach the beneficiary's interest in a trust of "movables" (*i.e.*, anything other than land). However, that rule only applies "to trusts created by way of gift . . . [and] does not deal with the use of trusts in business transactions, or with trusts created under a contract, such as in the case of a compromise or a contractual settlement on divorce or marriage." Restatement (Second) of Conflict of Laws 10 Intro. Note (1971).

19 Section 456.1-107, RSMo.

20 *See Commerce Bank, N.A. v. Bolander*, 239 P.3d 83, 95 (Kan. 2007) (holding that a choice-of-law clause pursuant to the UTC and/or the "most significant relationship" test support application of Kansas law, including exemptions to attachment).

21 403(b) plans are sometimes referred to as "tax-sheltered annuities" or "tax-deferred annuities," even though the assets can be held in annuity contracts, custodial accounts, or retirement income accounts. *See* Daniel J. Schwartz and Jeffrey A. Herman, *Funds, Fees, and Annuities –A Guide to 403(B) Investment Options*, 29 Tax'n Exempts 23, (2018) WL 1064716 (discussing 403(b) investment options and their differences).

22 Section 10(f) protects a person's right to receive "[a]ny money or assets, payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan, profit-sharing plan, health savings plan, or similar plan, including an inherited account or plan, that is qualified under §§ 401(a), 403(a), 403(b), 408, 408A or 409 of the Internal Revenue Code of 1986, as amended, whether such participant's or beneficiary's interest arises by inheritance, designation, appointment, or otherwise."

23 S.B. 100, 2013, 97th Gen. Assemb., Reg. Sess. (Mo. 2013).

24 *See*, *e.g*, Alaska Stat. § 09.39.017(a) (2018); Ariz. Rev. Stat. Ann. § 33–1126(B) (2019); Fla. Stat. § 222.21(c) (2019); Idaho Code Ann. § 55-1011 (2019); N.C. Gen. Stat. § 1C–1601(a)(9) (2018); Ohio Rev. Code. Ann. § 2329.66(A)(10)(e) (2019); S.C. Code Ann. § 15-41-30(A)(13) (2019); Tex. Prop. Code. Ann. § 42.0021(a) (2019). *See also* The American College of Trust and Estate Counsel, 50 State Inherited IRA Chart (Sep. 2018), *available at* https://www.actec.org/assets/1/6/50_STATE_INHERITED_IRA_CHART.pdf.

25 *See* § 513.430.1(10)(f), RSMo ("the interest of any and all alternate payees under a qualified domestic relations order shall be exempt from any and all claims of any creditor, other than the state of Missouri through its division of social services").

26 *See Lerbakken v. Sieloff and Associates, P.A.*, 590 B.R. 895 (B.A.P. 8th Cir. 2018); *In re Kizer*, 539 B.R. 316 (Bankr. E.D. Mich. 2015). *See also* Sandra D. Glazier, *Lerbakken v. Sieloff and Associates, P.A. – A Rose by Any Other Name May Not Smell As Sweet, Retirement Benefits Received Pursuant to a QDRO Are Not Entitled to Federal Bankruptcy Treatment,* LISI Asset Protection Plan. Newsl. #378 (Leimberg Information Services Inc.) January 2, 2019.

27 Section 456.014 reads: "A trust created as part of a stock bonus plan, nonpublic pension plan, disability or death benefit plan, profit-sharing plan, or retirement plan, for the exclusive benefit of employees to which contributions are made by an employer, or participant, or both, for the purpose of distributing to such participant the earnings or the principal, or both earnings and principal of the fund so held in trust, shall be deemed to be a spendthrift trust if the plan or trust includes a provision restraining the assignment, alienation, or other voluntary or involuntary transfer of the interest of a participant in the trust."

28 A Rabbi Trust holds assets only to pay benefits to participants (or their beneficiaries), but *subject to the claims of the employer's creditors*. *See* P.L.R. 8113107. As a result, it may not be "for the exclusive benefit of employees," as required by § 456.014 and similar rules elsewhere in ERISA and the Tax Code. *See, e.g*, 26 U.S.C. §§ 401(a), 457(g); Treas. Reg. 1.403(b)-8(d)(2)(iii); 29 U.S.C. §§ 1104(a)(1), 1103(c)(1). Unfunded NQDC plans under Code §§ 409A and 457 (except for governmental 457 plans, which are held in traditional trusts) may not qualify for protection.

29 *See, e.g*, §§ 105.662, RSMo (referring to "public pension funds"), 105.663, RSMo (referring to "each public retirement plan"), and 513.430.1(10)(e), RSMo ("nonpublic retirement plan").

30 Section 456.014's exclusive benefit rule raises another issue: whether a trust exclusively benefits employees if assets can be used to benefit an employee's *beneficiaries*. The answer must be yes. Otherwise, § 456.014 would provide virtually no protection at all, as nearly every retirement plan provides benefits to beneficiaries in the event of a participant's death.

31 *See* § 456.5-502.3, RSMo; Keith A. Herman, *Asset Protection Under the New Missouri Uniform Trust Code*, 62 J. Mo. B. 196 (2006).

32 The official comment to the Uniform Trust Code states that "[c]ommercial trusts . . . such as to pay a pension . . . are often subject to special-purpose legislation and case law, which in some respects displace the usual rules stated in this Code." Scope., Unif. Trust Code § 102 (citing John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165 (1997)).

33 For example, if a beneficiary contributes his or her own money to a trust (i.e., a "self-settled" trust), then there is no creditor protection if, at the time the trust became irrevocable, "[t]he settlor was one of a class of beneficiaries and retained a right to receive a specific portion of the income or principal of the trust that was determinable solely from the provisions of the trust instrument." Section 456.5-505.3, RSMo. *See also* Herman, *Asset Protection*, *supra* note 33.

34 Sections 456.1-103(16), 456.5-505.1, 456.5-505.6(1), RSMo.

35 Section 10(e) protects a person's right to receive "[a]ny payment under a stock bonus plan, pension plan, disability or death benefit plan, profit-sharing plan, nonpublic retirement plan or any plan described, defined, or established pursuant to section 456.014, … the person's right to a participant account in any deferred compensation program offered by the state of Missouri or any of its political subdivisions, or annuity or similar plan or contract on account of illness, disability, death, age or length of service, to the extent reasonably necessary for the support of such person and any dependent of such person."

36 *In re Guentert*, 206 B.R. 958 (Bankr. W.D. Mo. 1997).

37 *In re Wallace Howard Shields & Deborah Jo Shields*, No. 17-30321, 2018 WL 1363451, at *6 (Bankr. W.D. Mo. Mar. 15, 2018).

38 *See In re McCollum*, 287 B.R. 750 (Bankr. E.D. Mo. 2002).

39 *See* discussion at notes 10, 11, *supra*; *In re Wallace Howard Shields & Deborah Jo Shields*, No. 17-30321, 2018 WL 1363451, at *3 (Bankr. W.D. Mo. Mar. 15, 2018) (applying the provision to a NQDC plan governed by Code § 409A). Outside of bankruptcy, preemption remains a concern for top hat plans.

40 *See In re Wallace*, 2018 WL 1363451 at *3-5 ("The SERP required Wallace to work for SMB for a specified number of years and reach one of the several specified retirement ages before becoming eligible to receive the SERP payments. . . . The SERP satisfies the second requirement because it entitles Wallace to receive payments because of both his age and length of service").

41 *See* discussion at notes 10, 11, *supra*.

42 *See* Missouri Bankruptcy Practice (MoBar), § 3.55.

43 Section § 513.430.1(10)(a), RSMo.

44 Section 70.695, RSMo.

45 Sections 104.540, 104.1054, RSMo.

46 Section 71.207, RSMo.

47 Sections 86.190, 86.353, 86.1040, 86.1430, RSMo.

48 Sections 87.090, 87.365, 87.485, RSMo.

49 Sections 104.250, 104.1054, RSMo.

50 Sections 169.090, 169.587, RSMo.

51 *See also* Treas. Reg. 1.401(a)-13(d)(1).

52 29 U.S.C. § 1056(d).

53 Sections 456.014, 513.430.1(10)(e), 513.430.1(10)(f), 513.430.2, RSMo.

54 Section 452.140 RSMo; *see also Pugh v. St. Louis Police Relief Ass'n*, 179 S.W.2d 927 (Mo. Ct. App. 1944) (Police Retirement System); *Davis v. Thompson*, 619 S.W.2d 754 (Mo. Ct. App. W.D. 1981) (Firefighters Pension System); *Patton v. Patton*, 573 S.W.2d 71 (Mo. Ct. App. S.D. 1978) (workers' compensation); *Rusk v. Rusk*, 859 S.W.2d 751, 753 (Mo. Ct. App. E.D. 1993) (Public School Retirement System). Although seemingly consistent in their favorable treatment of QDROs, § 452.140 may conflict with Sections 10(e) and 456.014, as those exceptions only apply to QDROs issued in a proceeding for divorce, legal separation, or the disposition of property following a divorce; the statutes do not reference orders for child support issued in other proceedings. Those more specific statutes may supersede the language of § 452.140 and prevent certain child support orders from being enforced against retirement plans or accounts. *See Smith v. Missouri Local Gov't Employees Ret. Sys.*, 235 S.W.3d 578, 582 (Mo. Ct. App. W.D. 2007) (claim for spousal support under § 452.140 was not permitted pursuant to § 70.695, which only permits child support claims – not maintenance – under MOLAGERS).

55 *See* § 428.024, RSMo.

56 Sections 513.425, 513.465, RSMo; *State ex rel. & to Use of Macke v. Randolph*, 186 S.W. 590, 592 (Mo. Ct. App. S.D. 1916).

57 26 U.S.C. § 6321; *United States v. National Bank of Commerce*, 472 U.S. 713 (1985).

58 26 U.S.C. § 6334; *In re Jacobs*, 147 B.R. 106 (Bankr. W.D. Pa. 1992).

59 *See In re Barbier*, 896 F.2d 377 (9th Cir. 1990); *United States v. Rodgers*, 461 U.S. 677 (1983); 29 U.S.C. § 1144(d); Treas. Reg. 1.401(a)-13(b)(2).

60 *In re Connor*, 27 F.3d 365 (9th Cir. 1994); *In re Wesche*, 193 BR 76 (Bankr. M.D. Fla. 1996).

61 18 U.S.C. §§ 3663A(a)(1), (c)(1)(A), (c)(1)(B).

62 Section 3613(c).

63 *See United States v. DeCay*, 620 F.3d 534 (5th Cir. 2010); *United States v. Irving*, 452 F.3d 110, 126 (2d Cir .2003); *United States v. Lazorwitz*, 411 F.Supp.2d 634, 637 (E.D. N.C. 2005) (holding that "neither ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), nor the anti-alienation provision in the Internal Revenue Code, 26 U.S.C. § 401(a)(13), provide a bar to the garnishment of a qualified pension plan").

64 This area of law is complex, and even federal courts can get it wrong. The U.S. Bankruptcy Court for the Eastern District of Missouri, for example, held that ERISA prevented a SEP IRA from becoming part of the bankruptcy estate, which is incorrect. The court completely missed the fact that SEP IRAs are exempt from ERISA's anti-alienation clause. *In re Mehra*, 166 B.R. 393, 396 (Bankr. E.D. Mo. 1994). *Mehra* is critically flawed on this point and should not be relied on.

65 *See, e.g*, *In re Adams*, 302 BR 535 (6th Cir. BAP 2003); *Orr v. Yuhas (In re Yuhas)*, 104 F.3d 612 (3rd Cir. 1997).

66 *See* 29 U.S.C. § 1103(b); 29 C.F.R. § 2550.403b-1; *see also* note 23, *supra*.

67 *See, e.g*, *In re Laher*, 496 F.3d 279 (3d Cir. 2007) (403(b) annuity was a trust under New York law); *In re Quinn*, 327 B.R. 818, 829 (Bankr. W.D. Mich. 2005) (403(b) annuity "functionally indistinguishable from a spendthrift trust"); *In re Gould*, 322 B.R. 741 (Bankr. W.D. Pa. 2005) (403(b) annuity).

68 *See* 11 U.S.C. §§ 522(d)(10)(E), 522(d)(12).

69 Section 522(b)(1).

70 Section 513.427, RSMo.

71 To determine if Missouri's exemptions apply, bankruptcy courts use the "730 day rule." Under this rule, a debtor can use Missouri's state law exemptions if he or she was domiciled in Missouri for the 730 days before the bankruptcy petition was filed or, otherwise, if the debtor was domiciled in Missouri for the 180 days before the 730-day period or "for a longer portion of such 180-day period than in any other place." 11 U.S.C. § 522(b)(3)(A). If this rule results in a debtor ineligible for any exemption, the debtor may elect to exempt property under § 522(d) of the Bankruptcy Code. § 522(b)(3).

72 *See also* 11 U.S.C. § 522(b)(4) (describing when retirement plans are deemed to satisfy such Code sections). The references to Code §§ 414 and 501(a) in § 522(b)(3)(C) are odd, as there are no "414 plans" or "501(a)" plans. Section 414 sets forth definitions and special rules but does not authorize the creation of plans. Likewise, § 501(a) simply describes tax-exempt entities and does not generally authorize the creation of plans. *But see* 26 U.S.C. § 501(c)(11) (local teachers' retirement fund associations).

73 *See Clark v. Rameker*, 134 S. Ct. 2242 (2014). It is not clear if *Rameker* would also apply to a surviving spouse who rolls the assets over into his or her own IRA.

74 *See supra* n. 28.

75 *See, e.g*., *In re Todd*, 585 B.R. 297 (Bankr. N.D. N.Y. 2018), aff'd sub nom. *Todd v. Endurance Am. Ins. Co.*, 596 B.R. 79 (N.D. N.Y. 2019); *In re Hamm*, 586 B.R. 745, 752 (Bankr. N.D. Ill. 2018).

76 11 U.S.C. § 522(n). An argument can be made that this also applies to rollovers from a governmental 457(b) plan pursuant to Treas. Reg. 1.457-7(b)(2).

77 As discussed in note 11, *supra*, state exemptions may still be applied to a SEP, a SIMPLE IRA, or a top hat plan in bankruptcy.

78 Section 522(b)(3)(C) is identical to § 522(d)(12), which is applicable in states that have not opted out of the federal bankruptcy exemptions.

79 *See also* H.B. 422, 99th Gen. Assemb., Reg. Sess. (Mo. 2017) (unsigned bill that would have added to Section 10(f): "The exemption amount for individual retirement arrangements shall be unlimited if allowed by federal law and otherwise limited to the maximum exemption allowed under federal law").

80 11 U.S.C. § 522(b)(4)(D)(i).

81 *See* note 28, *supra*.

82 *See* note 11, *supra*.

83 *See* note 26, *supra*.

84 *See* Herman, Asset Protection, *supra* note 33.

85 *See* Keith A. Herman, *How to Draft Trusts to Own Retirement Benefits*, 39 ACTEC L.J. 207 (2013).

86 *See* discussion at notes 10, 11, *supra*.

87 Funding a NQDC plan takes it out of the "top hat" plan exemption to Part 2 of ERISA.

88 *See, e.g*., P.L.R. 9548014; P.L.R. 9548015; P.L.R. 9031031.

89 In P.L.R. 9212019, for example, a poorly-designed plan and trust were potentially subject to the following taxes: (1) highly compensated participants were taxed on their vested accrued benefits; (2) non-highly compensated participants were taxed on the employer's contributions to the trust; (3) the trust was taxed separately on its income; (4) distributions from the trust were taxable in the year paid or made available, including amounts advanced to participants to pay taxes; and (5) distributions could be subject to an additional 10 percent tax penalty under Code § 72(q).

## Are Your Trust Accounting Procedures Up to Speed? (A Checklist for Trust Accounting Practices)

Ever wonder if you are keeping your trust account in accordance with every provision of the Rules of Professional Conduct? The Office of Chief Disciplinary Counsel (OCDC) wants to help you protect your clients, reduce risks and avoid (often accidental) overdrafts by providing a self-audit. It is intended to help any firm or solo practitioner set up – and review – trust accounting policies and procedures. This 26-point checklist contains references to Supreme Court rules and comments, and may be downloaded for your law firm's use.

Questions in the checklist include:

**4(a)** Before any disbursements are made from my trust account, I confirm that:

A. I have reasonable cause to believe the funds deposited are both "collected" and "good funds." *Rule 4-1.15(a)(6) and Rule 1.15, Comment 5.*

B. I have talked with my banker and I understand the difference between "good funds," "cleared funds" and "available funds." *Rule 4-1.15, Comment 5.*

C. I have allowed a reasonable time to pass for the deposited funds to be actually collected and "good funds." *Rule 4-1.15(a)(6).*

D. I have verified the balance in the trust account.

**6(c).** All partners in my firm understand that each may be held responsible for ensuring the availability of trust accounting records. *Rule 4-1.15, Comment 12.*

***7(a).***As soon as my routine bank statements are received, I reconcile my trust account by carefully comparing these records:

- bank statements;
- related checks and deposit slips;
- all transactions in my account journal;
- transactions in each client's ledger; and
- explanations of transactions noted in correspondence, settlement sheets, etc. *Rule 4-1.15(a)(7); Comment 18.*

**To obtain the self-audit, go to the websites for the OCDC or The Missouri Bar: www.mochiefcounsel.org/articles *or* www.mobar.org/lpmonline/practice**