

# THE TAX ADVISER

## Protection From Creditors for Retirement Plan Assets

### BANKRUPTCY & INSOLVENCY

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Published January 01, 2014

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#### EXECUTIVE SUMMARY

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- The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 clarified the rights of debtors and creditors to retirement assets in federal bankruptcy proceedings, but state attachment and garnishment of such assets outside bankruptcy is still a concern.
- Employer-sponsored individual retirement accounts (IRAs) are protected without dollar limit in bankruptcy proceedings, but other traditional and Roth IRAs are protected up to an inflation-adjusted \$1 million. Owner-only plans may be subject to attachment by creditors outside bankruptcy.
- Eligible rollover distributions from qualified retirement plans retain their protection, but required minimum distributions and hardship distributions may not.
- Courts have disagreed on whether an IRA inherited by an heir other than a surviving spouse is exempt from the new owner's bankruptcy estate.
- A prohibited transaction may cause an IRA to lose its status and become subject to attachment by creditors.



Most readers of *The Tax Adviser* perform at least sporadic services for their clients in the area of qualified retirement planning. Few, however, are fully aware of the unique intersection of the tax, bankruptcy, and ERISA (Employee Retirement Income Security Act of 1974, P.L. 93-406) laws in this practice area. This article will greatly help CPAs and tax lawyers come to grips with this vexing field of overlapping and, seemingly, conflicting laws.

Assets in qualified retirement plans and individual retirement accounts (IRAs) total more than \$20 trillion and represent 34% of U.S. household assets.<sup>1</sup> Clients and their advisers are rightfully concerned about insulating those assets from potential creditor claims both inside and outside a federal bankruptcy action.

The rights of debtors and creditors to retirement assets in federal bankruptcy proceedings were clarified by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, P.L. 109-8 (BAPCPA), which extended bankruptcy protection to debtors' retirement funds. However, the situation was not made any clearer for debtors subject to state attachment and garnishment proceedings outside bankruptcy.

This article reviews the applicable law and provides practice resources to assist clients in protecting qualified assets from creditor claims.

BAPCPA

#### Key Points for Retirement Plan Assets

BAPCPA made significant changes in bankruptcy rules and added specific protections for tax-qualified retirement plans (i.e., formal employer-sponsored plans such as Sec. 401(k), profit sharing, and pension plans) and IRAs. It is effective for bankruptcy petitions filed on or after Oct. 17, 2005.

BAPCPA exempts from a debtor's bankruptcy estate retirement plan assets held by a Sec. 401 (a) tax-qualified retirement plan, a Sec. 403(b) annuity plan, a Sec. 457(b) eligible deferred compensation plan (maintained by a governmental employer), or an IRA (including traditional IRAs, Roth IRAs, simplified employee pensions (SEPs), and simple retirement accounts (SIMPLE IRAs) under Sec. 408 or 408A).<sup>2</sup>

The exemption for IRAs was originally limited to \$1 million.<sup>3</sup> However, the limit does not apply to employer-sponsored IRAs under Secs. 408(k) and (p) (i.e., SEPs or SIMPLE IRAs). Additionally,

rollovers into IRAs from qualified plans are not subject to the limit. It appears that a rollover from a SEP or SIMPLE IRA would receive only \$1 million of protection, since a Sec. 408(d)(3) rollover is not one of the rollovers sanctioned under the bankruptcy law.<sup>4</sup>

To make sure that an individual receives the full \$1 million exemption on owner-established traditional and Roth IRAs and the unlimited exemption on IRA rollovers from tax-qualified retirement plans, it is good practice to establish separate IRA rollover and contributory IRA accounts. This will make it easier to track the separate pools of assets.

BAPCPA exempts assets in retirement plans that satisfy the applicable requirements for general tax qualification in the Code. As elaborated below, a retirement plan is generally deemed to be qualified under BAPCPA if it has received a favorable determination letter from the IRS. BAPCPA thereby increases the importance of obtaining an individual IRS determination letter for a qualified plan.

BAPCPA also exempts payroll deductions to repay plan loans from the bankruptcy automatic stay provisions. Retirement plan loan obligations are not discharged in bankruptcy. This is good for the debtor, in that plan loans will not necessarily go into default and be included in the debtor's taxable income.

#### Further Analysis

**Determination of the tax-qualified status of plan:** For bankruptcy law purposes, a fund or account is presumed exempt from tax if it has received a favorable ruling from the IRS (e.g., an IRS favorable determination letter issued to an employer-sponsored tax-qualified retirement plan).<sup>5</sup> Whether, and to what extent, an IRS prototype or volume submitter letter counts as a favorable IRS ruling for bankruptcy purposes is still not clear.

If the plan has not received a favorable determination letter, the debtor must demonstrate that (1) neither the IRS nor a court has determined that the plan is not qualified, and (2) the plan is in substantial compliance with the Code or, if not in substantial compliance, the debtor is not materially responsible for the failure.

**Power of court to examine plan's qualified status:** Whether a court can determine that a retirement plan's tax-qualified status should be revoked and, therefore, its bankruptcy protection, is also a concern.

**Retirement plan distributions:** Distributions of tax-qualified retirement plan assets to plan participants receive only limited post-bankruptcy protection under BAPCPA; however, "eligible rollover distributions" remain exempt after distribution.<sup>6</sup> Minimum age-required distributions and hardship distributions are not protected because they are not eligible rollover distributions.

**Owner-only plans are protected in bankruptcy:** Before the enactment of BAPCPA, under case law and Department of Labor regulations, a qualified retirement plan that benefited only the business owner (and/or the owner's spouse) did not qualify as an ERISA plan. Therefore the plan could not take advantage of ERISA anti-alienation protections (discussed below) in bankruptcy or outside the bankruptcy process. In federal bankruptcy proceedings, this is no longer a concern if the debtor has received a favorable IRS ruling or, as discussed above, is deemed to have a tax-exempt plan.

**Exception to "anti-stacking" rule:** Bankruptcy Code Section 522(b)(3)(C) provides an exception for retirement funds to the Bankruptcy Code Section 522(b)(1) "anti-stacking" provision under which a debtor is generally required to choose between federal bankruptcy and state law exemptions. However, under Section 522(b)(3)(C), even debtors who choose the state law exemptions can exempt from their bankruptcy estate any retirement assets under the BAPCPA exemptions for such assets noted earlier.

Thus, in enacting BAPCPA, Congress created a new class of exemptions for certain retirement funds regardless of whether the debtor's state of domicile has opted out of the federal scheme for other, nonretirement property. For example, this exemption applies for states such as Ohio that have chosen to opt out of the federal exemptions and create their own statutory exemptions.<sup>7</sup> BAPCPA provides this exemption for retirement funds to the extent that those funds are in a fund or account that is tax-exempt under Sec. 401, 403, 408, 408A, 414, 457, or 501(a).

The Ninth Circuit reviewed this issue and held,

As a result, debtors in opt-out states like Arizona are not limited to the IRA exemption provided by state law but may, independent of state law, claim the exemption under sec. 522(b)(3)(C), subject to any applicable dollar limitation in sec. 522(n). Congress' intent was to preempt conflicting state exemption laws and "to expand the protection for tax-favored

retirement plans or arrangements that may not be already protected under [Sec.] 541(c)(2) pursuant to *Patterson v. Shumate*, or other state or Federal law.”<sup>8</sup>

The exception to the anti-stacking rule for retirement plan assets actually provides a “stacking” of protection from creditors—it provides both the federal *and* the state exemptions for such assets. As shown in *Reinhart*,<sup>9</sup> if the state law exemptions provide greater protection for retirement plan assets than the federal exemptions, the state law exemptions apply. The Tenth Circuit thereby followed the decision of the Utah Supreme Court, that as long as a retirement plan “substantially complies” with the Sec. 401(a) requirements, the plan is covered by the Utah exemption statute. Further, a plan is in substantial compliance with Sec. 401(a) if its defects fall within the scope of the defects that could be corrected under the IRS Employee Plan Compliance Resolutions System.

Inherited IRAs

Courts have disagreed on whether an IRA inherited by someone other than a surviving spouse may be exempted from the new owner’s bankruptcy estate.

**Exempt in bankruptcy:** In *In re Nessa*,<sup>10</sup> an Eighth Circuit Bankruptcy Appellate Panel held that the BAPCPA exemption must meet two requirements: (1) The amount the debtor seeks to exempt must be retirement funds, and (2) those retirement funds must be in an account that is exempt from taxation under Sec. 401, 403, 408, 408A, 414, 457, or 501(a). The *Nessa* court affirmed the decision of the bankruptcy court that assets in a debtor’s inherited IRA were “retirement funds” and that the IRA was exempt under Sec. 408(e).

**Not exempt in bankruptcy:** In *In re Clark*,<sup>11</sup> the Seventh Circuit adopted a contrary view and held that the exemption under Bankruptcy Code Sections 522(b)(3)(C) and (d)(12) “provides that the exemption depends on the *conjunction* of tax deferral and assets’ status as ‘retirement funds’; that an inherited IRA provides tax benefits is not enough.” The Seventh Circuit determined that funds in the inherited IRA were not “retirement funds” within the meaning of the Bankruptcy Code provisions, and, therefore, the inherited IRA was not exempt from the debtor’s bankruptcy estate. The line of cases that deny exemptions in inherited IRAs commonly conclude that inherited IRAs are (1) fundamentally different from a traditional or Roth IRA under the Code and (2) lack a retirement purpose. These courts have determined that an inherited IRA is (1) subject to an entirely different set of rules upon the use, distribution, and taxation of the funds and (2) is no longer used for retirement purposes but is “a liquid asset which may be accessed by [the debtor] at his discretion without penalty, and which he must take as income within a relatively short period of time without regard for his retirement needs.”<sup>12</sup>

**Tax-qualified retirement plans:** The issue of creditor protection for an inherited account under a tax-qualified retirement plan should not arise since a debtor’s assets in a qualified plan are protected under the Bankruptcy Code *and* ERISA and the Code.

ERISA and Code Anti-Alienation Provisions

Distinct from the debtor protections for retirement assets in bankruptcy are the anti-alienation provisions of ERISA and the Code. Under ERISA, a pension plan must contain a contractual “anti-alienation” clause providing that plan benefits cannot be assigned or alienated.<sup>13</sup> Bolstering ERISA, the Code requires that “[a] trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated.”<sup>14</sup>

### Exceptions

The anti-alienation provisions have a number of exceptions:

- Sec. 414(p) qualified domestic relations orders can be exempted.<sup>15</sup>
- Up to 10% of any benefit in pay status may be voluntarily and revocably assigned or alienated unless the assignment is for the purpose, or has the effect, of defraying plan administration costs.<sup>16</sup>
- A participant may direct the plan to pay a benefit to a third party if the direction is revocable and the third party files acknowledgment of lack of enforceability.<sup>17</sup>
- Federal tax levies and judgments are exempted.<sup>18</sup>
- The IRS has issued a field service advice memorandum advising that a retirement plan does not have to honor an IRS levy for taxes to the extent that the taxpayer is not entitled to an immediate distribution of benefits from the plan.<sup>19</sup>
- If the plan is subject to spousal qualified joint and survivor annuity requirements, the only collection avenue available to the IRS is through joint and survivor annuity payments unless

the IRS can obtain the spouse's consent to receive a lump-sum distribution from the plan to satisfy the levy.<sup>20</sup>

- Criminal or civil judgments, consent decrees, and settlement agreements may permit a participant's benefits to be offset under a plan and may require the participant to pay the plan if the participant commits a fiduciary violation or crime against the plan.<sup>21</sup>
- Federal criminal penalties are excepted. In a private letter ruling, the IRS ruled that "the general anti-alienation rule of Code § 401(a)(13) does not preclude a court's garnishing the account balance of a fined participant in a qualified pension plan in order to collect a fine imposed in a federal criminal action."<sup>22</sup>

#### ERISA Preemption

ERISA's "preemption" provisions give force to ERISA's anti-alienation provisions. They provide that ERISA's provisions supersede state employee benefit plan laws.<sup>23</sup> Therefore, state attachment and garnishment laws do not apply to an individual's benefits under any ERISA-covered employee benefit plan.

In 1992, the U.S. Supreme Court in *Patterson v. Shumate*<sup>24</sup> resolved a circuit split by holding that ERISA's prohibition against the assignment or alienation of pension plan benefits is a restriction on the transfer of a debtor's beneficial interest in a trust that is enforceable under that nonbankruptcy law. Thus, a debtor's interest in an ERISA pension plan was excluded from the bankruptcy estate and not subject to attachment by creditors' claims. Note that *Patterson v. Shumate* was decided before the enactment of BAPCPA and excludes "ERISA plans" from bankruptcy. BAPCPA is not limited to ERISA plans but provides an exemption rather than an exclusion from bankruptcy.

#### General Creditors of the Sponsoring Employer

The general creditors of a corporation or other sponsoring employer cannot reach the assets contained in an employer's qualified retirement plan. The statutory rationale is that a qualified retirement plan is established for the exclusive benefit of the employees and their beneficiaries.<sup>25</sup> Furthermore, the terms of the trust must make it impossible, prior to the satisfaction of all liabilities to the employees and their beneficiaries, for any part of the funds to be diverted to purposes other than the exclusive benefit of the employees and their beneficiaries.<sup>26</sup>

Additional Analysis

#### Owner-Only Plans Are at Risk Outside Bankruptcy

BAPCPA draws no distinction between owner-only plans and other tax-qualified retirement plans with respect to bankruptcy exemption. Outside bankruptcy, however, it appears that owner-only plans may be subject to attachment by creditors.

Department of Labor regulations provide that a husband and wife who solely own a corporation are not employees for retirement plan purposes. The regulations further provide that a plan that covers only partners or only a sole proprietor is not covered under Title I of ERISA. However, a plan under which one or more common law employees (in addition to the owners) are participants is covered under Title I, and ERISA protections apply to all participants (not just the common law employees).<sup>27</sup> Thus, inclusion of one or more nonowner employees transforms a non-ERISA plan into an ERISA-qualified plan and thereby protects the plan assets from the claims of creditors.

Similarly, in *Yates v. Hendon*,<sup>28</sup> the U.S. Supreme Court noted that Department of Labor Advisory Opinion 99-04A interprets ERISA<sup>29</sup> to mean that the statutory term "employee benefit plan" does not include a plan whose only participants are the owner and his or her spouse but does include a plan that covers as participants one or more common law employees in addition to the self-employed individuals. The Supreme Court noted, "This agency view . . . merits the Judiciary's respectful consideration."<sup>30</sup>

#### No ERISA Protections After Distribution (Bankruptcy and State Law Protections May Apply)

Once the benefits have been distributed from the plan (and not rolled over to an IRA or another qualified plan), a creditor's rights are enforceable against the beneficiary but not against the plan

itself.<sup>31</sup> As discussed earlier, after they are distributed, “eligible rollover distributions” retain their bankruptcy exemption.<sup>32</sup> Additionally, state exemption laws may provide protection for assets distributed from retirement plans if such assets can be properly traced.<sup>33</sup>

Individual Retirement Accounts

#### IRAs in Bankruptcy: BAPCPA

As detailed earlier, traditional IRAs and Roth IRAs are exempt to up to \$1 million (\$1,245,475, as adjusted for inflation in 2013). SEPs and SIMPLE IRAs are exempt without a dollar limit. Rollovers into IRAs from tax-qualified retirement plans, Sec. 403(b) plans, or Sec. 457(b) plans are not subject to the \$1 million exemption limitation and thus are exempt without a dollar limitation.

#### IRAs in State Law (Nonbankruptcy) Creditor Actions

State law nonbankruptcy creditor actions potentially create an irreconcilable difference between traditional IRAs and Roth IRAs, on the one hand, and IRAs that are part of a SEP and SIMPLE IRAs, on the other. To understand this difference, it is necessary to understand certain ERISA complexities, as well as state law protections for IRAs.

A pension plan subject to ERISA is any “plan, fund, or program” that is “established or maintained by an employer” and “provides retirement income to employees.”<sup>34</sup> This definition encompasses typical pension, profit sharing, or Sec. 401(k) plans. Because employers are involved in them, SEPs and SIMPLE IRAs have also been considered to be ERISA pension plans.<sup>35</sup> On the other hand, because they have no employer involvement, traditional and Roth IRAs are not considered ERISA pension plans.

As discussed earlier, extensive anti-alienation creditor protection is given to ERISA pension plans, both inside and outside bankruptcy,<sup>36</sup> but these protections do not extend to any type of Sec. 408 IRA arrangement, even employer-sponsored SEPs or SIMPLE IRAs that qualify as an ERISA pension plan because they are established by an employer.<sup>37</sup>

As also discussed above, the preemption provisions in ERISA<sup>38</sup> supersede any state law that relates to ERISA pension plans, and any state law protections specifically afforded to ERISA pension plans are thus preempted and inoperative.

This puts the SEP or SIMPLE IRA in a quandary outside bankruptcy: It is deemed an ERISA pension plan, but it receives no anti-alienation protection under ERISA. And because it is an ERISA pension plan, it may be open to attachment proceedings under state law because any state law protecting its assets may be preempted by ERISA.

The Sixth Circuit case of *Lampkins v. Golden*<sup>39</sup> appears to have adopted this position when it ruled that a Michigan statute exempting SEPs and IRAs was preempted by ERISA and, therefore, a SEP IRA was subject to state law garnishment.

#### Traditional and Roth IRAs

Because a traditional or Roth IRA established and funded by an individual is not an ERISA pension plan, there is no ERISA preemption of the state laws that relate to such IRAs. In many states, IRA protection is based on the owner’s state of residency. For example, under Ohio law, traditional and Roth IRAs are specifically exempted, without any cap, from execution, garnishment, attachment, or sale to satisfy a judgment or order.<sup>40</sup> A list of state laws protecting IRAs is [available here](#).

Once assets are rolled over from a SEP or SIMPLE IRA into a rollover IRA, they are no longer subject to ERISA preemption because they are no longer parts of an ERISA pension plan. They should then be able to take advantage of state law IRA protections. This should afford such rolled-over IRAs unlimited protections in nonbankruptcy proceedings in states such as Ohio, and they should be allowed \$1 million worth of protection in a bankruptcy proceeding. In *Rousey v. Jacoway*,<sup>41</sup> a significant pre-BAPCPA U.S. Supreme Court decision, the Court determined that IRAs are a “similar plan or contract” to pension and profit sharing plans. This decision, although largely irrelevant under post-BAPCPA bankruptcy law, may be authoritative in those very few states that protect pension and profit sharing plans but do not specifically protect IRAs. In a nonbankruptcy proceeding in such a state involving traditional or Roth IRAs, the Court’s logic of equating IRAs to traditional retirement plans might be persuasive.

Treatment of IRAs With Prohibited Transactions

Sec. 4975(c)(1) states that “prohibited transaction” means any direct or indirect:

- Sale or exchange, or leasing, of any property between a plan and a disqualified person;
- Lending of money or other extension of credit between a plan and a disqualified person;
- Furnishing of goods, services, or facilities between a plan and a disqualified person;
- Transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;
- Act by a disqualified person who is a fiduciary who deals with the income or assets of a plan in his or her own interest or for his or her own account; or
- Receipt of any consideration for his or her own personal account by any disqualified person who is a fiduciary from any party dealing with the plan, in connection with a transaction involving the income or assets of the plan.

Disqualified persons include the person who established the IRA, members of his or her family, corporations, trusts or other entities owned or controlled by such individuals, and fiduciaries.<sup>42</sup> The term “plan” for purposes of applying the prohibited transaction rules includes an IRA.<sup>43</sup>

**IRA ceases to be an IRA if its owner engages in prohibited transaction:** If the owner (or beneficiary) of an IRA engages in any transaction prohibited under Sec. 4975, the IRA ceases to be an IRA as of the first day of the tax year in which the transaction occurs.<sup>44</sup> This means the special tax benefits accorded the IRA are lost. On this occurrence, the entire value of the IRA, determined as of the first day of the tax year for which the account or annuity ceases to be an IRA, is treated as distributed to the IRA owner (or beneficiary, in the case of an IRA for a deceased participant).<sup>45</sup>

Thus, an IRA may lose creditor protection for its assets for even one minor prohibited transaction. Creditors may analyze transactions of the IRAs of debtors to find prohibited transactions and to destroy an account’s status and thereby make its assets subject to attachment. In *Willis v. Menotte*,<sup>46</sup> the Eleventh Circuit affirmed the judgment of a bankruptcy court in Florida that, as a result of a prohibited transaction, an IRA lost its status and thereby lost its exemption in bankruptcy.

**Practice tip:** If a client wants to invest IRA assets in a nontraditional investment (e.g., real estate or a limited liability company), set up a separate IRA for that specific investment.

Conclusion

Under BAPCPA, practitioners have new qualified retirement planning opportunities. Protecting assets from potential creditor claims both inside and outside a federal bankruptcy action has changed because BAPCPA adds specific protections for tax-qualified retirement plans and IRAs.

Under pre-BAPCPA law, IRAs into which qualified retirement plan assets had been rolled over were frequently attacked. But now, in states providing strong IRA protection (such as Ohio), such an asset is protected and, under BAPCPA, is exempt in a bankruptcy proceeding.

With the number of personal bankruptcy filings increasing, protecting clients’ retirement assets, both in and outside federal bankruptcy procedures, is ever more important.

**Authors’ note:** This article updates and expands on earlier articles published in *The Practical Tax Lawyer* 33 (Winter 2008) and 201 *Journal of Accountancy* 36 (January 2006).

### Footnotes

<sup>1</sup> Investment Company Institute, “Quarterly Retirement Market Data, Second Quarter 2013” (9/30/13).

<sup>2</sup> 11 U.S.C. §522(d)(12).

<sup>3</sup> Periodically adjusted by a cost-of-living adjustment factor—it is \$1,245,475 in 2013.

<sup>4</sup> 11 U.S.C. §522(n).

<sup>5</sup> 11 U.S.C. §522(b)(4).

<sup>6</sup> 11 U.S.C. §522(b)(4)(D).

<sup>7</sup> For retirement funds, 11 U.S.C. §522(b)(3)(C) is applicable to opt-out states, and 11 U.S.C. §522(d)(12) applies in the federal exemption scheme.

<sup>8</sup> *In re Hamlin*, 465 B.R. 837 (B.A.P. 9th Cir. 2012), quoting H.R. Rep’t No. 109-31, 109th Cong., 1st Sess., part 1, at 63–64 (2005).

<sup>9</sup> *Gladwell v. Reinhart*, No. 09-4028 (10th Cir. 4/24/12).

- <sup>10</sup> *In re Nessa*, 426 B.R. 312 (B.A.P. 8th Cir. 2010).
- <sup>11</sup> *In re Clark*, 714 F.3d 559 (7th Cir. 2013), *cert. granted*, No. 13-299 (U.S. 11/26/13).
- <sup>12</sup> *In re Sims*, 241 B.R. 467, 470 (Bankr. N.D. Okla. 1999). See also *In re Clark*, 450 B.R. 858 (Bankr. W.D. Wisc. 2011), *aff'd* 714 F.3d 559 (7th Cir. 2013), *cert. granted*, No. 13-299 (U.S. 11/26/13).
- <sup>13</sup> See ERISA §206(d) and 29 U.S.C. §1056(d)(1).
- <sup>14</sup> Sec. 401(a)(13)(A).
- <sup>15</sup> Sec. 401(a)(13)(B) and ERISA §206(d)(3).
- <sup>16</sup> Sec. 401(a)(13)(A); Regs. Sec. 1.401(a)-13(d)(1); and ERISA §206(d)(2).
- <sup>17</sup> Regs. Sec. 1.401(a)-13(e).
- <sup>18</sup> Regs. Sec. 1.401(a)-13(b)(2).
- <sup>19</sup> FSA 199930039 (7/30/99).
- <sup>20</sup> *Toledo Plumbers & Pipefitters Retirement Plan & Trust*, No. 3:90CV7513 (N.D. Ohio, 6/21/91).
- <sup>21</sup> Sec. 401(a)(13)(C) and ERISA §206(d)(4).
- <sup>22</sup> IRS Letter Ruling 200342007 (10/17/03). See also 28 U.S.C. §3205; *Tyson*, 265 F. Supp. 2d 788 (E.D. Mich. 2003); *Clark*, No. 02-X-74872 (E.D. Mich. 6/11/03); and *Rice*, 196 F. Supp. 1196 (N.D. Okla. 2002).
- <sup>23</sup> ERISA §514(a).
- <sup>24</sup> *Patterson v. Shumate*, 504 U.S. 753 (1992).
- <sup>25</sup> Sec. 401(a)(1) and Regs. Sec. 1.401-1(b).
- <sup>26</sup> Sec. 401(a)(2); Regs. Sec. 1.401-2.
- <sup>27</sup> 29 C.F.R. §§2510.3-3(b) and (c)(1).
- <sup>28</sup> *Yates v. Hendon*, 541 U.S. 1 (2004).
- <sup>29</sup> 29 C.F.R. §2510.3-3.
- <sup>30</sup> *Yates v. Hendon*, 541 U.S. at 20–21.
- <sup>31</sup> *Hoult v. Hoult*, 373 F.3d 47 (1st Cir. 2004).
- <sup>32</sup> 11 U.S.C. §522(b)(4)(D).
- <sup>33</sup> See, e.g., Cal. Civ. Proc. Code §704.115(d).
- <sup>34</sup> ERISA §3(2)(A).
- <sup>35</sup> 29 C.F.R. §§2520.104-48 and -49; *Garratt v. Walker*, 164 F.3d 1249 (10th Cir. 1998).
- <sup>36</sup> ERISA §206(d).
- <sup>37</sup> ERISA §§4(b) and 201.
- <sup>38</sup> ERISA §514(a).
- <sup>39</sup> *Lampkins v. Golden*, 28 Fed. Appx. 409 (6th Cir. 2002).
- <sup>40</sup> Ohio Rev. Code §2329.66(A)(10).
- <sup>41</sup> *Rousey v. Jacoway*, 544 U.S. 320 (2005).
- <sup>42</sup> Sec. 4975(e)(2).
- <sup>43</sup> Sec. 4975(e)(1).
- <sup>44</sup> Sec. 408(e)(2)(A).
- <sup>45</sup> Sec. 408(e)(2)(B).
- <sup>46</sup> *Willis v. Menotte*, No. 10-11980 (11 Cir. 4/21/11).

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This chart accompanies “Protection From Creditors for Retirement Plan Assets,” in the January 2014 issue of *The Tax Adviser*.

### State-by-state analysis of IRAs as exempt property

State	State Statute	IRA Exempt	Roth IRA Exempt	Special Statutory Provisions
Alabama	Ala. Code §19-3B-508	Yes	Yes	
Alaska	Alaska Stat. §09.38.017	Yes	Yes	The exemption does not apply to amounts contributed within 120 days before the debtor files for bankruptcy.
Arizona	Ariz. Rev. Stat. §33-1126(B)	Yes	Yes	The exemption does not apply to a claim by an alternate payee under a qualified domestic relations order (QDRO). The interest of an alternate payee is exempt from claims by creditors of the alternate payee. The exemption does not apply to amounts contributed within 120 days before a debtor files for bankruptcy.
Arkansas	Ark. Code §16-66-220	Yes	Yes	A bankruptcy court held that the creditor exemption for IRAs violates the Arkansas Constitution—at least with respect to contract claims.
California	Cal. Code of Civ. Proc. §704.115	Partly	No	IRAs are exempt only to the extent necessary to provide for the support of the judgment debtor when the judgment debtor retires and for the support of the spouse and dependents of the judgment debtor, taking into account all resources that are likely to be available for the support of the judgment debtor when the judgment debtor retires.
Colorado	Colo. Rev. Stat. §13-54-102	Yes	Yes	Any retirement benefit or payment is subject to attachment or levy in satisfaction of a judgment taken for arrears in child support; any pension or retirement benefit is also subject to attachment or levy in satisfaction of a judgment awarded for a felonious killing.
Connecticut	Conn. Gen. Stat. §52-321a	Yes	Yes	
Delaware	Del. Code Ann. tit. 10, §4915	Yes	Yes	An IRA is not exempt from a claim made pursuant to Title 13 of the Delaware Code, the title that pertains to domestic relations orders.
Florida	Fla. Stat. §222.21	Yes	Yes	An IRA is not exempt from a claim of an alternate payee under a QDRO or claims of a surviving spouse pursuant to an order determining the amount of elective share and contribution. Florida provides a specific exemption for inherited IRAs.
Georgia	Ga. Code §44-13-100	Yes	No	Distributions from IRAs are exempt only to the extent necessary for the support of the debtor and any dependent.

## State-by-state analysis of IRAs as exempt property

State	State Statute	IRA Exempt	Roth IRA Exempt	Special Statutory Provisions
Hawaii	Haw. Rev. Stat. §651-124	Yes	Yes	The exemption does not apply to contributions made to a plan or arrangement within three years before the date of a bankruptcy or a civil action is initiated against the debtor.
Idaho	Idaho Code §55-1011	Yes	Yes	The exemption applies only for claims of judgment creditors of the beneficiary or participant arising out of a negligent or otherwise wrongful act or omission of the beneficiary or participant resulting in money damages to the judgment creditor.
Illinois	735 Ill. Comp. Stat. 5/12-1006	Yes	Yes	
Indiana	Ind. Code §34-55-10-2(6)	Yes	Yes	
Iowa	Iowa Code §627.6(8)	Yes	Yes	
Kansas	Kan. Stat. §60-2308	Yes	Yes	
Kentucky*	Ky. Rev. Stat. §427.150(2)(f)	Yes	Yes	The exemption does not apply to any amounts contributed to an IRA if the contribution occurred within 120 days before the debtor filed for bankruptcy. The exemption also does not apply to the right or interest of a person in an IRA to the extent that right or interest is subject to a court order for payment of maintenance or child support.
Louisiana	La. Rev. Stat. §§20-33(1) and 13-3881(D)	Yes	Yes	No contribution to an IRA is exempt if made less than one calendar year from the date of filing bankruptcy, whether voluntary or involuntary, or the date writs of seizure are filed against the account. The exemption also does not apply to liabilities for alimony and child support.
Maine	Me. Rev. Stat. tit. 14, §4422(13)(F)	Partly	No	IRAs are exempt only to the sum of \$15,000 or to the extent reasonably necessary for the support of the debtor and any dependent.
Maryland	Md. Code Cts. & Jud. Proc. §11-504(h)	Yes	Yes	IRAs are exempt from any and all claims of creditors of the beneficiary or participant other than claims by the Department of Health and Mental Hygiene.
Massachusetts	Mass. Gen. Laws ch. 235, §34A	Yes	Yes	The exemption does not apply to a court order concerning divorce, separate maintenance or child support, or a court order requiring an individual convicted of a crime to satisfy a monetary penalty or to make restitution, or sums deposited in a plan in excess of 7% of the total income of the individual within five years of the individual's declaration of bankruptcy or entry of judgment.

## State-by-state analysis of IRAs as exempt property

State	State Statute	IRA Exempt	Roth IRA Exempt	Special Statutory Provisions
Michigan*	Mich. Comp. Laws §600.6023(j)	Yes	Yes	The exemption does not apply to amounts contributed to an IRA or individual retirement annuity if the contribution occurs within 120 days before the debtor files for bankruptcy. The exemption also does not apply to an order of the domestic relations court or nondeductible contributions to an IRA.
Minnesota	Minn. Stat. §550.37(24)	Yes	Yes	Exempt to a present value of \$69,000 and additional amounts reasonably necessary to support the debtor, spouse, or dependents.
Mississippi	Miss. Code §85-3-1	Yes	No	
Missouri	Mo. Rev. Stat. §513.430.1	Yes	Yes	If proceedings under Title 11 of the U.S. Code are commenced by or against the debtor, no amount of funds shall be exempt in such proceedings under any plan or trust that is fraudulent as defined in Section 428.024 of the Missouri Revised Statutes, and for the period such person participated within three years prior to the commencement of such proceedings.
Montana	Mont. Code §31-2-106(3)	Yes	No	The exemption excludes that portion of contributions made by the individual within one year before the filing of the petition of bankruptcy that exceeds 15% of the gross income of the individual for that one-year period.
Nebraska	Neb. Rev. Stat. §25-1563.01	Partly	No	The debtor's right to receive IRAs and Roth IRAs is exempt to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.
Nevada	Nev. Rev. Stat. §21.090(1)(r)	Yes	Yes	The exemption is limited to \$500,000 in present value held in an IRA that conforms with Sec. 408 or 408A.
New Hampshire	N.H. Rev. Stat. 52 §511:2	Yes	Yes	Exemption applies only to extensions of credit and debts arising after Jan. 1, 1999.
New Jersey	N.J. Stat. 25:2-1(b)	Yes	Yes	
New Mexico	N.M. Stat. §§42-10-1, -2	Yes	Yes	A retirement fund of a person supporting himself/herself or another person is exempt from receivers or trustees in bankruptcy or other insolvency proceedings, fines, attachment, execution, or foreclosure by a judgment creditor.
New York	N.Y. C.P.L.R. 5205(c)	Yes	Yes	Additions to IRAs are not exempt from judgments if contributions were made after a date that is 90 days before the interposition of the claim on which the judgment was entered.
North Carolina	N.C. Gen. Stat. §1C-1601(a)(9)	Yes	Yes	Specific exemption for inherited IRAs.

## State-by-state analysis of IRAs as exempt property

State	State Statute	IRA Exempt	Roth IRA Exempt	Special Statutory Provisions
North Dakota	N.D. Cent. Code §28-22-03.1(7)	Yes	Yes	The account must have been in effect for a period of at least one year. Each individual account is exempt to a limit of up to \$100,000 per account, with an aggregate limitation of \$200,000 for all accounts. The dollar limit does not apply to the extent the debtor can prove the property is reasonably necessary for the support of the debtor, spouse, or dependents.
Ohio*	Ohio Rev. Code §2329.66(A)(10)	Yes	Yes	SEPs and SIMPLE IRAs are not exempt. Specific exemption for inherited IRAs.
Oklahoma	Okla. Stat. tit. 31, §1(A)(20)	Yes	Yes	
Oregon	Or. Rev. Stat. §18.358	Yes	Yes	
Pennsylvania	42 Pa. Cons. Stat. §8124(b)(1)(ix)	Yes	Yes	The exemption does not apply to amounts contributed to the retirement fund in excess of \$15,000 or within one year before the debtor filed for bankruptcy.
Rhode Island	R.I. Gen. Laws §9-26-4(11)	Yes	Yes	The exemption does not apply to a court order pursuant to a judgment of divorce or separate maintenance, or a court order concerning child support.
South Carolina	S.C. Code §15-41-30	Yes	Yes	Specific exemption for inherited IRAs.
South Dakota	S.D. Codified Laws 43-45-16; 43-45-17	Yes	Yes	Exempts "certain retirement benefits" up to \$1 million. Cites Sec. 401(a)(13). Subject to the right of the state of South Dakota and its political subdivisions to collect any amount owed to them.
Tennessee*	Tenn. Code §26-2-105	Yes	Yes	Not exempt from QDROs.
Texas	Tex. Prop. Code §42.0021	Yes	Yes	Specific exemption for inherited IRAs.
Utah	Utah Code §78-23-5(1)(a)(xiv)	Yes	Yes	The exemption does not apply to amounts contributed or benefits accrued by or on behalf of a debtor within one year before the debtor files for bankruptcy.
Vermont	Vt. Stat. tit. 12, §2740(16)	Yes	Yes	Nondeductible traditional IRA contributions plus earnings are not exempt.
Virginia	Va. Code §34-34	Yes	Yes	Exempt from creditor process to the same extent permitted under federal bankruptcy law. An IRA is not exempt from a claim of child or spousal support obligations.
Washington	Wash. Rev. Code §6.15.020	Yes	Yes	
West Virginia	W.Va. Code §38-10-4	Yes	No	

## State-by-state analysis of IRAs as exempt property

State	State Statute	IRA Exempt	Roth IRA Exempt	Special Statutory Provisions
Wisconsin	Wis. Stat. §815.18(3)(j)	Yes	Yes	The exemption does not apply to a court order concerning child support, family support, or maintenance, or any judgments of annulment, divorce, or legal separation.
Wyoming	Wyo. Stat. §1-20-110	Partly	Partly	Exempt to the extent payments are made to the fund while solvent.

\* Kentucky, Michigan, Ohio, and Tennessee: The Sixth Circuit ruled in *Lampkins v. Golden*, 28 Fed. Appx. 409 (6th Cir. 2002), that a Michigan statute exempting SEPs and IRAs from creditor claims was preempted by ERISA. The decision appears, however, to be limited to SEPs and SIMPLE IRAs.