# Bankruptcy, Creditor Protection and Fraudulent Transfers in the Context of Estate and Financial Planning

**Hampton Roads Estate Planning Council**

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By

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**What is bankruptcy?**

Bankruptcy is governed by federal law, specifically Title 11 of the United States Code. The unique thing about bankruptcy is the "automatic" stay that acts as an injunction against all collection activity and lawsuits.

Chapter 7 is the liquidation chapter. It is available to all persons and entities. In a chapter 7, a trustee is appointed who is responsible for liquidating assets and making distributions to creditors. A creditor must file a claim in a chapter 7 case in order to receive a distribution. Most chapter 7 cases are "no asset" cases. In other words, there are no distributions to creditors. Bankruptcy Official Form 10 is readily available on the internet, and claims may be filed electronically from the court's web site.

Chapter 11 is the reorganization chapter. It too is available to all persons and entities but is typically utilized by corporations or other business entities. In recent years, it has been used more by individuals with high debt amounts. A trustee is not automatically appointed but may be appointed in extraordinary circumstances, i.e. fraud or gross mismanagement. A creditor is not required to file a claim if the debtor has scheduled the creditor with an undisputed claim. Statistically, most chapter 11 cases end up in chapter 7.

Chapter 13 is the individual debt adjustment chapter. It is only available to individuals with a regular income with certain debt amounts. The chapter 13 trustee monitors all chapter 13 cases and makes the distributions to creditors. Chapter 13 is most commonly used to cure mortgage arrears or handle credit card debts. Many chapter 13 cases end up dismissed or converted to chapter 7. Many debtors file chapter 13 more than once.

Involuntary bankruptcy may be filed under chapter 7 or 11. An involuntary bankruptcy may be commenced by three creditors with relatively small undisputed claims (aggregating about

$15,000), and by a single creditor if the debtor has less than twelve creditors. To prove an involuntary, the petitioning creditors must prove that the debtor is not paying his or her debts generally as they become due. While non-payment of a single large debt will not always satisfy this test, courts are more likely to grant an involuntary petition where there are allegations of fraudulent transfers. Involuntary bankruptcy is a strategy sometimes employed to reach homestead property or other exempt property created with the intent to hinder, delay or defraud creditors. A debtor with a single large debt should consider having more than twelve creditors as a defense to an involuntary filing.

The filing of a bankruptcy "automatically" stays any collection action or any trial or proceedings in state or federal court. It does not matter that the participants in the trial do not have actual notice of the bankruptcy filing or that a suggestion of bankruptcy is filed. The stay is an injunction and "automatic." The filing of a suggestion of bankruptcy is recommended but not required. An action or proceeding in violation of the automatic stay is generally void – meaning that it never happened.

From an estate planning perspective, two important types of litigation can occur in a bankruptcy case - litigation over exemptions and fraudulent transfer litigation. In a bankruptcy case, this type of litigation is prosecuted by creditors, a creditors' committee or by the bankruptcy trustee.

**What is a fraudulent transfer?**

Fraudulent transfers are governed by Section 548 of the Bankruptcy Code (if within two years of the petition) and governed by Section 544 of the Bankruptcy Code and state law, i.e. the Uniform Fraudulent Transfer Act (UFTA) or the Uniform Voidable Transactions Act (UVTA),

(if after two years but before four years). Section 548(e) now provides for avoidance of transfers into a trust for the benefit of the debtor that were made within the ***10 years*** prior to the filing. Interestingly, Virginia is only one of eight jurisdictions that has not adopted one of the uniform acts. *See* McBeth and Davis, *Bulls, Bears, and Pigs: Revisiting the Legal Minefield of Virginia Fraudulent Transfer Law*, University of Richmond Law Review, Vol. 46, p. 273 (noting distinctions between Virginia law and the UFTA while at the same time noting that the UFTA is relevant to Virginia practitioners).

In general terms, there are two types of fraudulent transfers – ***actually*** fraudulent transfers and ***constructively*** fraudulent transfers. Actually fraudulent transfers – like where the debtor transfers property to a family member during collection – are usually proved circumstantially through the classic "badges of fraud." In a transaction with a family member or in the context of estate planning, many of the "badges of fraud" will be present. The pertinent portion of the UFTA is set forth below:

In determining actual intent, consideration may be given, among other factors, to whether:

(a) The transfer or obligation was to an *insider*.

(b) The debtor retained possession or *control* of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or *concealed*.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or *threatened with suit*.

(e) The transfer was of *substantially all* the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was *reasonably equivalent* to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was *insolvent or became insolvent* shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Under the UFTA, constructively fraudulent transfers require two elements: (1) *insolvency* and (2) less than *reasonably equivalent value* in exchange for the transfer. The Virginia fraudulent transfer statute (§55-81) uses the phrase "consideration deemed valuable in law." Constructively fraudulent transfers can apply in any context and don't require any wrongdoing or bad intent of any kind by the debtor or the transferee. Whenever dealing with an insolvent person or entity (element #1), *always* beware of the potential for a constructively fraudulent transfer. Always ask yourself, what did the debtor get in exchange for the transfer? For example, a corporate debtor grants a lien on its assets but the loan proceeds go directly to the individual shareholder. If the corporate debtor is rendered insolvent by the lien and received no value (because the shareholder got the money), the lien might be set aside as a fraudulent transfer. Again, always ask yourself, what did the *debtor* transfer and what did the *debtor* get in exchange?

**What is the consequence of a fraudulent transfer?**

The primary consequence of a fraudulent transfer under the UFTA is that the transfer is avoided or reversed. Under Virginia law, the transfer is "void." The simplest example being that the subject property is returned to the debtor/transferor for the benefit of the debtor's creditor (or bankruptcy trustee). An additional remedy under the UFTA or the Bankruptcy Code is that a judgment may be entered against the transferee for the value of the transfer. This remedy can be beneficial where the creditor really doesn't want the asset returned – it just wants money – or the assets can't be located. The practical consequence of an alleged fraudulent transfer is that it just doesn't look good. When a judge is provided information that strongly indicates that a fraudulent transfer occurred, the judge usually looks for a way to provide a remedy to the creditor (or the bankruptcy trustee).

From a bankruptcy perspective, one of the consequences of a fraudulent transfer is denial of the debtor's discharge. This is the worst of all consequences as it is permanent. If the discharge is denied, then ***all*** of the creditors may continue to chase the debtor indefinitely. A bankruptcy discharge will be denied if an individual debtor is found to have committed a fraudulent transfer *within one year* of the bankruptcy filing. Accordingly, any person contemplating a bankruptcy filing must be certain that no transaction or transfer that could be deemed a fraudulent transfer occurred during that one year period. When there is any doubt, the prospective debtor should wait until the one year period has expired. After the one year has expired, the debtor will be eligible for a discharge, but the transfer will still be subject to avoidance as a fraudulent transfer for a period of ***at least four (4) years*.**

In bankruptcy, it is important to note that there are special rules for homestead property. Outside of bankruptcy, the homestead exemption under Florida law is virtually "bullet proof."

Even if someone moves to Florida, for example, and uses all of their non-exempt property to purchase an exempt homestead property, the exemption stands under Florida state law. However, in bankruptcy, there is a ***ten-year lookback*** relating to fraudulent transfers into a homestead in Section 522(o) of the Bankruptcy Code. Involuntary bankruptcy can come into play where there is an alleged fraudulent transfer into a homestead.

There is also a ***ten-year lookback*** in Section 548(e) of the Bankruptcy Code relating to trusts if the debtor made a transfer with the intent to hinder, delay or defraud a creditor.

**Can estate planning be a fraudulent transfer?**

I can only give you the typical bad answer – "it depends." Absent financial issues or creditor demands, estate planning is just that – estate planning. But, estate planning is often characterized as and done in conjunction with "asset protection planning." Again, asset protection planning in the absence of financial issues or creditor demands is perfectly acceptable. But when financial issues or creditor demands exist, "estate planning" and "asset protection planning" can become dirty words.

In a perfect world, estate planning should be done *before* any financial issues or creditor demands are present. But we all know that the world isn't perfect and that people often procrastinate until there is a problem.

What can be done to minimize the risk of a fraudulent transfer in the context of estate planning? First, be cognizant of the solvency of the transferor. Remember, solvency is one of the two elements to a constructively fraudulent transfer. When in doubt, get a third party opinion of solvency or an affidavit of solvency, and do everything you can to document the solvency of the transferor. Second, be cognizant of the value being given to the potential debtor/transferor.

If reasonably equivalent value (or consideration deemed valuable in law) is lacking and insolvency is present, a constructively fraudulent transfer exists. When in doubt, get a third party opinion of value like an appraisal or business valuation, and do everything you can to document the reasonableness of the value or consideration given.

If a creditor demand has been made, it should be clear (as possible) that the "estate planning" is actually being done for estate planning purposes – and not to hinder, delay or defraud a creditor. Ask yourself – what does the planning look like to an outside third party that would scrutinize the transaction? Is there an independent reason for the estate planning – other than avoiding creditors? Independent reasons for the plan should be documented. Are there tax advantages to the planning? Are there probate advantages to the plan? Is the plan something that the client had been talking about and working on for years but procrastinated beyond an unexpected creditor demand? *See In re Mart*, 88 B.R. 436 (Bankr. S.D. Fla. 1988)(estate planning transfers involving irrevocable trust not fraudulent where transfers involved less than 10% of debtor's assets, were made when debtor was solvent, and were made at suggestion of estate planning specialist).

In the final analysis, if the client is asked "why did you do this?" - is there an answer other than the obvious implication that it was done to hinder, delay or defraud a creditor. The client should fully understand those answers. While answering "because my lawyer told me to" is an answer, it's not the preferred answer in the context of creditor collection action before a judge or jury. And, as noted below, the attorney-client privilege is not 100% effective where allegations of fraudulent transfer are made.

**What are the risks to the estate planning practitioner?**

If financial issues or creditor demands are present, there is always some risk to the estate planning practitioner. Many estate planning practitioners will not advise a client with creditor issues. Others are more open to giving that advice. In the bankruptcy world, the risks are greater. Primarily because the bankruptcy trustee can hold and waive the attorney-client privilege (definitely for corporations but not necessarily for individuals), and there is no accountant-client privilege in federal court as there is in state court. And, if actual intent to *defraud* a creditor is asserted, the crime-fraud exception to the attorney-client privilege can be asserted by a creditor or the trustee resulting in the discovery of otherwise confidential materials. *See In re Warner*, 87 B.R. 199 (Bankr. M.D. Fla. 1988)(fraud exception to attorney-client privilege applied to GRIT Trust created as part of an alleged estate plan); *In re Campbell*, 248 B.R. 435 (Bankr. M.D. Fla. 2000)(explaining two-part test for application of crime-fraud exception).

If you're relying on the protection of a privilege, only the attorney-client privilege is applicable in bankruptcy court. Non-lawyers, including CPA's, accountants, bankers and financial planners, should be not involved in estate planning if you wish for the advice to remain confidential and protected by the attorney-client privilege. Once confidential information is shared with persons not protected by a privilege, the privilege is effectively waived.

Practically, clients under financial pressures are also more likely to accuse their estate planning practitioner of committing malpractice so that malpractice insurance can be reached to satisfy creditor claims. You should assume that your client will look out for himself or herself; not you. And once an individual files bankruptcy, the bankruptcy trustee is the one who owns and controls that malpractice claim. Great caution should be taken when performing estate

planning services for persons in dire financial straits. As with most client matters, these problems can be avoided at client intake. If you're not comfortable with the client at the first meeting, you're definitely not going to be comfortable when things get tricky.

The risks under Virginia law are much greater than the risks in many other jurisdictions. Virginia Code §55-82.1 contains the following language:

> Upon a finding of fraudulent conveyance pursuant to § 55-80, the court may assess sanctions, including such attorney fees, against all parties over which it has jurisdiction who, with the intent to defraud and having knowledge of the judgment, ***participated*** in the conveyance (emphasis added).

According to the sponsor of the statute, Virginia Senator Petersen, "Anyone who touched the transaction now faces liability, whether they're lawyers, real estate agents, or accountants. If you touch it, you're dirty." *See* Mauler, *A New Tool for Creditors – and a New Warning for Attorneys*, Virginia Lawyer, Vol. 64, August 2015. This type of provision does not exist in the UFTA or the Bankruptcy Code. BEWARE in Virginia!

**How a Virginia decision helped me win a big victory in a Florida bankruptcy case.**

Several years ago I represented an individual debtor in an involuntary chapter 11 bankruptcy case in Tampa. One of the issues was the exemption of his jointly owned homestead property acquired when he relocated to Florida after an adverse judgment in Illinois. The jointly owned residence was protected by both the Florida homestead exemption and tenants by the entireties (TBE). Because the homestead exemption was adversely impacted by the Bankruptcy Code, the TBE exemption took center stage. Prior to the bankruptcy filing, the primary creditor had sued the debtor's spouse in fraudulent transfer litigation and obtained a separate judgment against her. The fraudulent transfer arose out of the transfer of cash into a joint TBE bank account that was then used to acquire the joint Florida homestead. The creditor took the position

that because it had a judgment against the debtor and a judgment against the debtor's spouse arising from the fraudulent transfer that it was a joint creditor that could reach TBE property. There was no Florida case on point, but the Virginia case of *Rogers v. Rogers*, 257 Va. 323, 512 S.E.2d 821 (1999) provided the answer holding that the creditor must have a "joint judgment" and not two separate judgments. *See In re Davis*, 403 B.R. 914 (Bankr. M.D. Fla. 2009). Thanks to the Virginia Supreme Court.

# Recent Case Law on
# Florida Exemptions and Estate Planning

## I. Fraudulent Transfers

*Husky International Electronic, Inc. v. Ritz,* 136 S.Ct. 1581 (2016) – "actual fraud" as used in Section 523 of the Bankruptcy Code includes fraudulent conveyance schemes that can be effected without a false representation

*Thacker v. Venn,* 2017 WL 393681 (11th Cir. 2017) – affirming bankruptcy court and district court (see below) on application of collateral estoppel to fraudulent transfer found by state court

*In re Sherwood Investments Overseas Limited,* 2016 WL 5719450 (M.D. Fla. 2016) – fraudulent transfer provisions in Bankruptcy Code do not apply extraterritorially; *but see* UVTA

*U.S. v. Major,* 551 B.R. 531 (M.D. Fla. 2016) – deed into TBE was fraudulent transfer; "love and affection" does not constitute reasonably equivalent value

*Letzer v. The Radiant Creations Group, Inc.,* 2016 WL 7388357 (S.D. Fla. 2016) – heightened pleading standard in Fed.R.Civ. P. 9(b) does not apply to fraudulent transfer claim – suggesting that fraudulent transfer is not "fraud"

*Burris v. Green,* 2016 WL 5844165 (N.D. Fla. 2016) – fraudulent transfer is not a tort

*In re Anderson,* 561 B.R. 230 (Bankr. M.D. Fla. 2016) – transfers from TBE are not fraudulent transfers; intra-trust transfers between accounts owned by trust were not fraudulent transfers

*In re Kipnis,* 555 B.R. 877 (Bankr. S.D. Fla. 2016) – trustee could select IRS as existing creditor to take advantage of 10-year lookback period

*In re Tabor,* 2016 WL 3462100 (Bankr. S.D. Fla. 2016) – recording in public record alone does not establish that creditor could have reasonably discovered a fraudulent transfer

*In re DIT, Inc.,* 561 B.R. 793 (Bankr. S.D. Fla. 2016) – notwithstanding reasonably equivalent value, payment of pre-existing debt can constitute a fraudulent transfer; relevant inquiry is intent to hinder, delay or defraud

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*Luis v. U.S.,* 2016 WL 1228690, -- S.Ct. -- (2016) – in a case involving alleged health care fraud, the United States Supreme Court held that a pretrial order freezing a defendant's "untainted" assets, and thereby precluding the defendant from hiring and paying for counsel, violates the Sixth Amendment right to counsel

*National Auto Service Centers, Inc. v. F/R 550, LLC*, 2016 WL 1238265 (Fla. 2nd DCA 2016) – Section 726.110(1) is a statute of repose; one-year discovery period begins on date that the transfer is discovered or could reasonable have been discovered, not when the fraudulent nature of the transfer was or could have been discovered (*Biel Rio* not argued)

*Wiand v. Dancing $, LLC,* 2016 WL 909369 (11th Cir. 2016) – prejudgment interest in fraudulent transfer action runs from date of fraudulent transfer

*Yarall v. American Reprographics Company, LLC,* 165 So.3d 785 (Fla. 4th DCA 2015) – former shareholder of closely held dissolved corporation was creditor with standing to maintain action for fraudulent transfer citing *Munim*

*McCalla v. E.C. Kenyon Construction Company,* 2016 WL 166732, 41 Fla. L. Weekly D185 (Fla. 1st DCA 2016) – UFTA and Florida Statute §726.108 authorizes money damages against both fraudulent transferor and transferee, jointly and severally; potential impact on TBE

*In re Thacker,* 2015 WL 2455539 (Bankr. N.D. Fla. 2015), *aff'd* 2016 WL 1271485 (N.D. Fla. 2016) – collateral estoppel applies in bankruptcy case to pre-petition state court determination in show cause order; spouse was only impleaded third party as co-trustee of trust and not individually

*RREF SNV-FL SSL, LLC v. Shamrock Storage, LLC,* 178 So.3d 90 (Fla. 1st DCA 2015) – judgment debtor and transferee spouse bear burden to prove that transfer of shares was NOT made to hinder, delay or defraud creditor

*Akin Bay Company, LLC v. Von Kahle,* 180 So.3d 1180 (Fla. 3rd DCA 2015) – assignee in ABC case bound by arbitration clause in underlying agreement; therefore, statutory fraudulent transfer claims were subject to arbitration as "arising out of or relating to" the underlying agreement

*In re McFarland,* 619 Fed.Appx. 962 (11th Cir. 2015) – under Georgia law of resulting and constructive trust, wife of forty-year marriage did not always have one-half interest in real property titled in husband's name; "love and affection" is not reasonably equivalent value and no value was given under Deed of Gift

*In re PSN USA, Inc.,* 615 Fed.Appx. 925 (11th Cir. 2015) – debtor received reasonably equivalent value for contract payments that it made on its parent company's behalf; appears to limit *TOUSA* decision on reasonably equivalent value to its specific facts

*Uniform Voidable Transactions Act (UVTA)* – adopted by the Uniform Law Commission as the successor to the UFTA; **NOT** yet effective in Florida or 40 other states

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*In re Bifani*, 580 Fed.Appx. 740 (11th Cir. 2014) – equitable lien imposed on homestead acquired with fraudulently transferred funds; exception to *Havoco*

*In re Allen*, 768 F.3d 274 (3rd Cir. 2014) – property fraudulently transferred by corporate bankruptcy debtor was not property of individual transferee's bankruptcy estate as the property had already been "recovered" by the corporate bankruptcy estate when judgment was entered in the corporate bankruptcy case

*In re Roberts*, 527 B.R. 461 (Bankr. N.D. Fla. 2015) – homestead exemption reduced under Section 522(o) of the Bankruptcy Code for actual intent to hinder, delay or defraud within ten-year lookback; misleading statements noted

*In re Charania*, 2015 WL 1208616 (Bankr. S.D. Fla. 2015) – debtor could not claim homestead (and avoid lien) on property he did not believe he owned on his petition date; unrecorded deed to son indicated that debtor did not intend to permanently reside at property; court refused to avoid judgment lien against debtor

*Edwards v. Airline Support Group, Inc.*, 138 So.3d 1209 (Fla. 4th DCA 2014) – fraudulent transfer is not a "tortious act" for purpose of long-arm statute; no personal jurisdiction

*Puleo v. Golan*, 2014 WL 2756524 (Fla. 3rd DCA 2014) – "unusual" post-nuptial agreement did not insulate spouse from fraudulent transfer claim

*TrustCo Bank v. Mathews*, 2015 WL 295373 (Del. Ch. 2015) – fraudulent transfer claims time-barred by statute of limitations and laches

## II. Homestead

*Navallier v. State of Florida,* 2016 WL 7010881 (11th Cir. 2016) – one-half acre homestead size does not violate equal protection

*JBK Associates, Inc. v. Sill Bros., Inc.,* 191 So.3d 879 (Fla. 2016) – proceeds from sale of homestead did not lose exempt status when placed into brokerage account and invested in various stocks and mutual funds

*U.S. v. Martell,* 2016 WL 3627329 (S.D. Fla. 2016) – criminal restitution lien trumps Florida homestead

*In re Medved,* 2016 WL 3574052 (Bankr. S.D. Fla. 2016) – entitlement to homestead exemption is determined as of petition date; allegation that debtor had acquired homestead through fraudulent transfer had not yet been determined

*In re Geiger,* 2016 WL 6833905 (Bankr. M.D. Fla. 2016) – uninhabitable residence did not qualify as homestead; actions speak louder than words on intent

*In re Cole,* 559 B.R. 919 (Bankr. M.D. Fla. 2016) – where lien and homestead status attach at same time, "tie" goes to homestead exemption; debtor inherited homestead with judgment lien already in place

*In re Fowler,* 2016 WL 1444195 (Bankr. M.D. Fla. 2016) – separate structure on contiguous homesteaded parcel where debtor's daughter lived did not qualify as debtor's homestead; homestead exemption is limited to "residence" of debtor

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*Mirzataheri v. FM East Developers, LLC*, 2016 WL 1039124 (Fla. 3rd DCA 2016) – homestead exemption does not protect property from claim for specific performance to sell property

*Endsley v. Broward County*, 2016 WL 1129757 (Fla. 4th DCA 2016) – in case involving homestead tax exemption, court denied Florida tax exemption to wife where husband in same family unit claimed homestead tax exemption in Indiana

*Lane v. Cunniffe,* 2016 WL 892358 (Fla. 4th DCA 2016) – homestead exemption applies to proceeds of homestead property to the extent of proceeds intended for reinvestment in substitute homestead based on debtor's intent "prior to and at the time of the sale"; notes keeping proceeds separate for that purpose

*United States v. Wright,* 621 Fed.Appx. 617 (11th Cir. 2015) – judgment for restitution and fines in a criminal action defeated Florida homestead exemption same as a federal tax lien

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*JBK Associates, Inc. v. Sill Bros, Inc*., 2015 WL 1040603 (Fla. 4th DCA 2015) – investment of homestead proceeds into securities did not destroy homestead protection

*Law v. Law*, 2015 WL 1449763 (Fla. 3rd DCA 2015) – language in attorney retention agreement could not waive homestead

*Brklacic v. Parrish*, 140 So.3d 85 (Fla. 4th DCA 2014) – husband and wife residing in separate homes were not "separated" and could not claim two homestead tax exemptions (but noting two homesteads is possible)

*Sepulveda v. Westport Recovery Corp.*, 145 So.3d 162 (Fla. 3rd DCA 2014) – Circuit Court has exclusive jurisdiction to determine homestead; County Court lacks subject matter jurisdiction

*Kelly v. Spain*, 2015 WL 774658 (Fla. 4th DCA 2015) – death of spouse claiming homestead on TBE property does not require new homestead tax exemption application by surviving spouse; Save Our Homes cap continues

**III. Tenants by the Entireties**

*Branch Banking and Trust v. Crystal Center, LLC,* 2016 WL 7650655 (M.D. Fla. 2016), *adopted in part and reversed in part*, 2017 WL 57345 (M.D. Fla. 2017) – magistrate judge denied TBE protection to LLC interests because secretary of state corporate filings did not reference wife as member; district court reversed without prejudice when corporate documents showed both names

*In re Benzaquen,* 555 B.R. 63 (Bankr. S.D. Fla. 2016) – funds in bank account were traceable to TBE property and therefore exempt as TBE notwithstanding whether account satisfied the six unities

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*In re Smith,* 2016 WL 675806 (Bankr. M.D. Fla. 2016) – in joint bankruptcy of husband and wife, federal income tax refund owned as TBE and exempt; filing of joint bankruptcy case did not destroy TBE

*Miller v. Washington Mutual Bank,* 2016 WL 72535 (Fla. 4th DCA 2016) – spouse is indispensable party to foreclosure action against jointly owned property

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*Rocketrider Pictures, LLC v. BankUnited,* 138 So.3d 1223 (Fla. 3rd DCA 2014) – foreclosure against one spouse ineffective against TBE property

*Brenner v. Scott*, 999 F.Supp.2d 1278 (N.D. Fla. 2014) – Florida's same sex marriage prohibition held unconstitutional (opening door to TBE for same sex couples)

*In re Capelli*, 518 B.R. 873 (Bankr. N.D.W.V. 2014) – TBE governed by situs of property

## IV. Chapter 222, Florida Statutes, and Statutory Exemptions

*Universal Physician Services, LLC v. Del Zotto,* 2016 WL 6902354 (M.D. Fla. 2016) – IRA proceeds lost exempt status when voluntarily liquidated and deposited into personal savings account

*Kane v. Stewart Tilghman Fox,* 197 So.3d 137 (Fla. 4th DCA 2016) – relevant inquiry on wage exemption is whether debtor's employment is a salaried job or in the nature of running a business; debtor had written employment contract but never received amount of money stated in contract

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*In re Tobkin,* 2015 WL 7144748 (11th Cir. 2015) – contingency fee proceeds from debtor's law practice are not exempt earnings under Fla.Stat. 222.11

*In re Mooney,* 2016 WL 537076 (11th Cir. 2016) – case under Georgia law acknowledging that Health Savings Accounts are exempt under Fla.Stat. 222.22(2); issue certified to Georgia Supreme Court

*In re Jans,* 2016 WL 741884 (Bankr. M.D. Fla. 2016) – real estate agents draws and office manager payments in fixed amounts were exempt as earnings; true test is whether the debtor's activities are a job or more in the nature of running a business

*Ministri Family, LLC v. Bell*, 2015 WL 6445954 (M.D. Fla. 2015) – debtor's periodic structured settlement payments were exempt as proceeds of annuity contract under Fla.Stat. 222.14; statute does not require that an annuity contract be issued to a Florida citizen or resident

*In re Rivera-Cintron*, 2015 WL 4749217 (Bankr. M.D. Fla. 2015) – proceeds of debtor's retirement account remained exempt under Fla.Stat. 222.21(2) notwithstanding that funds passed through her savings account before being transferred into IRA; notes that commingling does not *per se* defeat claim of exemption

*In re Jones*, 2016 WL 492439 (Bankr. M.D. Fla. 2016) – funds from debtor's "cashed out" pension plan deposited into general checking account were not exempt under Fla.Stat. 222.21(2); exemption only applies to funds "payable to" but not to funds already "received by" the beneficiary; AND debtor's discharge denied

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*In re Valone*, 2015 WL 1918138 (11th Cir. 2015) – debtor in chapter 7 or chapter 13 is entitled to "wildcard" personal property exemption in Fla.Stat. 222.25(4) because debtor loses benefit of homestead exemption by subjecting home to trustee's administration

*Ulisano v. Ulisano*, 154 So.3d 507 (Fla. 4th DCA 2015) – head of family garnishment exemption under Fla.Stat. 222.11 applies to Florida residents and non-residents alike

*Hart v. Wachovia Bank*, 2015 WL 798961 (Fla. 1st DCA 2015) – head of family garnishment exemption waived by contractual provision

*BB&T v. Ark Development/Oceanview, LLC*, 150 F.3d 817 (Fla. 4th DCA 2014) – bank account solely titled in spouse's name not subject to garnishment particularly where source of funds was TBE property

## V. Trusts

*In re Bertran,* 2016 WL 3411931 (Bankr. D. Alaska 2016) – Alaska asset protection trust failed because settlor failed to sign affidavit *before* transfer of assets into trust

*In re Ellison,* 2016 WL 5349715 (Bankr. C.D. Cal. 2016) – consultation with asset protection trust attorney reflected debtor's state of mind with an awareness and intent not to pay creditors

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*Wells v. Sacks,* 180 So.3d 1223 (Fla. 3rd DCA 2015) – proceedings supplementary properly dismissed for failure to establish prima facie case under Section 56.29(6)(a) that judgment debtor held title to personal property in trust, and that removal of judgment debtor as co-trustee constituted a transfer

*In re Eddy,* 2015 WL 1585513 (Bankr. M.D. Fla. 2015) – alter ego doctrine not extended to Florida trust based on express provisions of Florida Trust Code; focus is on terms of trust not on actions of the trustee or the beneficiary

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*In re Raymond*, 2014 WL 3534038 (Bankr. D. Mass. 2014) – trust is not an "entity" therefore it cannot be an alter ego

*Safanda v. Castellano*, 2015 WL 1911130 (N.D. Ill. 2015) – debtor's interest in spendthrift trust not reachable by bankruptcy trustee and could not be attacked under Section 548(e) of the Bankruptcy Code (reversing bankruptcy court); segregating a portion of the trust into a separate account earmarked for judgment debtor within ten-year lookback did not constitute a distribution or create a new trust

## VI. Proceedings Supplementary under Florida Statute §56.29

*MYD Marine Distributor, Inc. v. International Paint, Ltd.,* 201 So.3d 843 (Fla. 4th DCA 2016) – debtor's lawsuit against third party was chose in action subject to reach of proceeding supplementary

*Kozel v. Kozel,* 2016 WL 4163562 (M.D. Fla. 2016) – proceeding supplementary was "civil action" subject to removal to federal court where all parties to action were new

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*Senate Bill 1042 (attached)* – revises Chapter 56, including Fla.Stat. 56.29 governing proceedings supplementary; makes organizational changes to Chapter 56 while updating and clarifying several definitions for uniformity; **effective July 1, 2016**

*In re C.D. Jones & Company, Inc.,* 2015 WL 2260707 (Bankr. N.D. Fla. 2015) – bankruptcy court has subject matter jurisdiction over creditor's supplementary proceedings in state court; *Biel Rio* does not apply where judgment debtor files bankruptcy

*Hatfield v. A+ Nursetemps, Inc.,* 2015 WL 3618545 (M.D. Fla. 2015) – attorney fees can be taxed against impleaded parties because parties were alter egos of judgment debtor; query whether this case has been effectively overruled by 2016 amendments to 56.29

*Reiseck v. Universal Communications of Miami, Inc.,* 2015 WL 6561689 (S.D. Fla. 2015) – federal district court in Florida exercised ancillary jurisdiction over supplementary proceedings under 56.29 relating to New York judgment

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*Biel Reo, LLC v. Barefoot Cottages Development Company LLC*, 156 So. 3d 506 (Fla. 1st DCA 2014) – four-year statute of limitations in UFTA does not apply to supplementary proceeding to recover property held by "family member"

*National Maritime Services, Inc. v. Straub*, 776 F.3d 783 (11th Cir. 2015) – federal district court had ancillary jurisdiction over proceedings supplementary to recover property transferred (as opposed to action to impose liability for "entire" judgment)

## VII. Limited Liability Companies

*Abukasis v. MTM Finest, Ltd.,* 199 So.3d 421 (Fla. 3rd DCA 2016) – order transferring LLC membership interest reversed; process employed by judgment creditor failed to conform with Fla.Stat. §605.0503

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*Regions Bank v. Hyman,* 2015 WL 1912251 (M.D. Fla. 2015) – interest in LLC is personal property which is not subject to execution under Chapter 56; judgment lien certificate does not establish priority

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*Wells Fargo Bank v. Barber*, 2015 WL 470589 (M.D. Fla. 2015) – interest in LLC is intangible personal property and is located where the owner/debtor is located; law of situs (Florida; not Nevis) applied to LLC interest

*In re Dzierzawski*, 2015 WL 1612092 (Bankr. E.D. Mich. 2015) – bankruptcy law better than Michigan state law for creditor chasing LLC interest; therefore, bankruptcy case not dismissed

*Lefkowitz v. Quality Labor Management, LLC*, 159 So.3d 147 (Fla. 5th DCA 2014) – consensual creditor with pledge of LLC interest is entitled to intervene in charging order litigation by judgment creditor

*Young v. Levy*, 140 So.3d 1109 (Fla. 4th DCA 2014) – garnishment not applicable to profits or dividends from LLC; charging order is "sole and exclusive" remedy

## VIII. Discovery Issues and Crime-Fraud Exception

*TracFone Wireless, Inc. v. Hernandez,* 2016 WL 4131283 (S.D. Fla. 2016) – fact information sheet required by Fla.R.Civ.P. 1.977 required in federal court action

2017 WL 360757 (DOJ) – federal court authorized John Doe subpoenas seeking identities of U.S. taxpayers who used pre-paid Sovereign Gold Card issued by Sovereign Management & Legal LTD, a Panamanian entity

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*Pronman v. Styles*, 2016 WL 1156770 (S.D. Fla. 2016) – post-judgment discovery must seek information that is relevant to executing the judgment against the judgment debtor; subpoena to judgment debtor's father-in-law quashed because he only had dealings with his daughter, the judgment debtor's wife

*FDIC v. Kaplan,* 2015 WL 4744361 (M.D. Fla. 2015) – accountant-client privilege applied in case involving state law claims under Chapter 726 for fraudulent transfer and under Fla.Stat. 222.30 for fraudulent asset conversions

*Barba v. Shire US, Inc.,* 2015 WL 70155324 (S.D. Fla. 2015) – crime-fraud exception requires (a) prima facie showing that client was engaged in fraudulent conduct when

he sought advice of counsel, that client was planning such conduct, or that client committed fraud subsequent to receiving the benefit of counsel's advice; and (b) that attorney's assistance was closely related to fraudulent activity

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*In re McDonald*, 2014 WL 4365362 (Bankr. M.D.N.C. 2014) – protective order sought relating to asset protection communications with debtor's pre-petition counsel; court applied "middle approach" as to whether bankruptcy trustee could waive individual debtor's attorney-client privilege

*Winderting Investments, LLC v. Furnell*, 144 So.3d 598 (Fla. 2nd DCA 2014) – protective order granted as to wife's financial information as such information was not reasonably calculated to lead to recoverable assets

*In re Warner*, 87 B.R. 199 (Bankr. M.D. Fla. 1988) - fraud exception to attorney-client privilege applied to GRIT Trust created as part of an alleged estate plan

*In re Campbell*, 248 B.R. 435 (Bankr. M.D. Fla. 2000) - explaining two-part test for application of crime-fraud exception

## IX. Contempt

*Office of Attorney General v. Smart Savings Center, LLC,* 2016 WL 4505893 (Fla. Cir. Ct. 2016 – party found in civil contempt for failure to produce information about "asset protection trusts"

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*Dioguardi v. Giroski, LLC,* 2015 WL 3621402 (S.D. Fla. 2015) – incarceration and striking of all pleadings ordered as contempt sanction under 56.29 for judgment debtor's failure to appear at deposition

*SEC v. Greenberg,* 105 F.Supp.3d 1342 (S.D. Fla. 2015) – incarceration ordered where judgment debtor could have caused trusts to liquidate assets or make payments on disgorgement judgment

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*In re Tate*, 521 B.R. 427 (Bankr. S.D. Ga. 2014) – debtor remained in contempt for failure to comply with turnover order warranting incarceration

## X. Alter Ego

*In re Ortega,* 562 B.R. 538 (Bankr. S.D. Fla. 2016) – bankruptcy trustee for individual debtor had authority to bring alter ego claim to pierce corporate veil receding from prior decision

## XI. Uniform Voidable Transactions Act (UVTA)

*Key Equipment Finance, Inc. v. Overend,* 2016 WL 6933309 (11th Cir. 2016) – some of the changes resulting from the UVTA are arguably procedural that might ordinarily be given retroactive effect; but Georgia version specifically applied to transactions after a date certain

*Tessie Cleveland Community Services Corp. v. Loghmani,* 2016 WL 6947007 (Cal. Ct. App. 2nd 2016) – the UVTA did not change the substance of any prior provisions in the UFTA

*Tatung Company Ltd. v. Hsu,* 2016 WL 6683201 (C.D. Cal. 2016) – court is to liberally construe California's version of UVTA with a view toward recovering property beyond a creditor's reach

*KB Aircraft Acquisition, Inc. v. Berry,* 790 S.E.2d 559 (N.C. Ct. App. 2016) – as a matter of first impression, "transfer" within meaning of UVTA referred to actual date that underlying transfer occurred, and UVTA provision concerning extinguishment of claims was a statute of repose, and not a statute of limitations, and could not be equitably tolled; UVTA crafted a new civil cause of action

*In re Atomica Design Group, Inc.,* 556 B.R. 125 (Bankr. E.D. Pa. 2016) – defenses available to subsequent transferees are substantially similar under UVTA; UVTA clarifies that subsequent transferee has burden of proof on good faith exception

Ahern, MacLean and Puryear, 11 *West's Legal Forms*, Debtor & Creditor Non-Bankruptcy § 22:1 (4th ed.)(Nov. 2016) – nine states have adopted the UVTA (California, Georgia, Idaho, Iowa, Kentucky, Minnesota, New Mexico, North Carolina, and North Dakota); UVTA clarifies that "actual fraud" does not require fraudulent intent

Kettering, *The Uniform Voidable Transactions Act; Or, The 2014 Amendments to the Uniform Fraudulent Transfer Act*, 70 Bus. Law. 777, Summer 2015 - "the renaming should not be taken to imply that the UVTA is a new and different act, or that the amendments make major changes to the substance of the UFTA. Nothing could be further from the truth. The UVTA is not a new act; it is the UFTA, renamed and lightly amended"