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Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #156

Date: 28-Jun-10
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: FLASH - Olmstead - Florida LLC Charging Order Protection Case.

FLASH - Olmstead - Florida LLC Charging Order Protection Case

In a very important new asset protection planning case, the Florida Supremes Tell a LLC Debtor to "Stop! In the Name of Law" and to Surrender His Single-Member LLC Membership Interest.

They also discuss that Multiple-Member LLC interests may not have charging order protection either! [i]

Alan S. Gassman and **Christopher J. Denicolo** give us the first commentary. It's such big news, we'll follow up with thoughts from **Chris Riser**, **Jeff Baskies**, and others.

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EXECUTIVE SUMMARY:

On June 24, 2010, the Florida Supreme Court issued its long-awaited opinion in the case of *Shaun Olmstead*, *et. al.*, *v. The Federal Trade Commission* [iii] and threw open the question as to whether multiple-member Florida limited liability companies will have charging order protection. As a result of this decision, many practitioners will recommend conversion of Florida LLCs to limited partnerships and other entities, or the use of voting and non voting interests to take "control" away from members who might have their interests pursued by a creditor.

FACTS:

The debtors, according to the Court, "operated an advanced-fee credit card scam" and were sued by the Federal Trade Commission (F.T.C.) for unfair or deceptive trade practices. The debtors' assets, which included several single-member Florida LLCs, were frozen and placed in receivership.

The F.T.C. ultimately obtained a judgment against the debtors and then

obtained an order compelling them to endorse and surrender to the receiver all of their "right, title, and interest in their LLCs." It may be of interest for those who are aware of the SEC v. Solow case that was reviewed in [iv] **LISI Asset Protection Newsletter #153** that the F.T.C. was apparently not considered a "super creditor" for purposes of being able to ignore state law creditor protection provisions.

The Majority Opinion

The majority opinion, written by Judge Charles Canady, held that a court may order a judgement debtor to surrender all right, title, and interest in a debtor's single-member LLC to satisfy an outstanding judgement. The majority primarily based its conclusion on "the uncontested right of the owner of a single-member LLC to transfer the owner's full interest in the LLC and the absence of any provisions in the Florida Limited Liability Company Act for abrogating in this context the long-standing creditor's remedy of levy and sale under execution."

In its analysis, the Court addressed the statutory provisions with respect to the assignability of a membership interest in a Florida LLC, and with respect to the right of an assignee of an LLC membership interest to become a member.

Florida Statute Section 608.432 and 608.433 provide rules which prevent LLC membership interests from being assigned except where there is approval by all other members, with an assignee to not be admitted as an LLC member without such approval. The above rules can be altered by provisions [v] in the articles of organization or operating agreement.

Specifically, Section 608.433 (4) provides that a judgment creditor of a member may charge the LLC membership interest of the member with payment of the unsatisfied amount of the creditor's judgment, and to the extent so charged, the judgment creditor has only the rights of an assignee of such interest. Based on this statute, a creditor of a debtor-member of an LLC holding a charging order cannot reach the assets of the LLC or participate in the LLC's business, but will only be entitled to any profits, distributions, and tax attributes to which the debtor-member was entitled.

The Supreme Court explored the question of whether a charging order is the exclusive remedy for a judgment creditor against a debtor-member of a Florida LLC. As noted by the Court, the statutory language of Section 608.433 does not expressly provide that a charging order is the exclusive remedy of a creditor, which the Court noted to be in contrast to the charging order provisions under the Florida Revised Uniform Partnership Act and the Florida Revised Uniform Limited Partnership Act. Both Partnership statutes expressly provide that a charging order is the exclusive remedy by which a judgment creditor of a partner or partner's transferee can satisfy a judgment of the judgment debtor's membership interest in the partnership.

Practitioners should understand, however, that the Florida charging order rules that apply to general partnerships and limited liability partnerships actually allow a foreclosure on the partnership interest that is subject to the charging order, unlike the charging order provisions that apply to limited partnerships and limited liability limited partnerships. The Court did not [vi] mention this.

This distinction between the Florida LLC charging order statute and the Florida partnership and limited partnership charging order statutes was of great significance to the Court, which used the distinction to conclude that the

legislature did not intend for a charging order to be the exclusive remedy of a judgment creditor with respect to a debtor's membership interest in a limited liability company.

In concluding that the charging order is not the exclusive remedy for judgment creditors as to a Florida LLC member interest, the Court specifically stated the following:

> *In this regard, the charging order provision in the LLC Act stands in stark contrast to the charging order provisions in both the Florida Revised Uniform Partnership Act, §§ 620.81001−.9902, Fla. Stat. (2008), and the Florida Revised Uniform Limited Partnership Act, §§ 620.1101−.2205, Fla. Stat. (2008). Although the core language of the charging order provisions in each of the three statutes is strikingly similar, the absence of an exclusive remedy provision sets the LLC Act apart from the other two statutes. With respect to partnership interests, the charging order remedy is established in section 620.8504, which states that it "provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership." § 620.8504(5), Fla. Stat. (2008) (emphasis added). With respect to limited partnership interests, the charging order remedy is established in section 620.1703, which states that it "provides the exclusive remedy which a judgment creditor of a partner or transferee may use to satisfy a judgment out of the judgment debtor's interest in the limited partnership or transferable interest." § 620.1703(3), Fla. Stat. (2008) (emphasis added).*
>
> *"[W]here the legislature has inserted a provision in only one of two statutes that deal with closely related subject matter, it is reasonable to infer that the failure to include that provision in the other statute was deliberate rather than inadvertent." 2B Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 51:2 (7th ed. 2008). "In the past, we have pointed to language in other statutes to show that the legislature 'knows how to' accomplish what it has omitted in the statute [we were interpreting]." Cason v. Fla. Dep't of Mgmt. Services, 944 So. 2d 306, 315 (Fla. 2006); see also Horowitz v. Plantation Gen. Hosp. Ltd. P'ship, 959 So. 2d 176, 185 (Fla. 2007); Rollins v. Pizzarelli, 761 So. 2d 294, 298 (Fla. 2000).*
>
> *The same reasoning applies here. The Legislature has shown −− in both the partnership statute and the limited partnership statute −− that it knows how to make clear that a charging order remedy is an exclusive remedy. The existence of the express exclusive−remedy provisions in the partnership and limited partnership statutes therefore decisively undermines the appellants' argument that the charging order provision of the LLC Act −− which does not contain such an exclusive remedy provision −− should be read to displace the remedy available under section 56.061.*

Florida Statute Section 56.061 provides that various categories of real and personal property of a debtor are subject to levy and sale under execution. The Court acknowledged that Florida law has long provided that corporate stock of a debtor is property that is subject to levy or sale under execution by a judgment creditor to satisfy the creditor's judgement. The Court further analogizes a membership interest in an LLC to stock in a corporation, stating

that "an LLC is a type of corporate entity, and an ownership interest in an LLC is personal property that is reasonably understood to fall within the scope of 'corporate stock.'"

The Court therefore concluded that the remedy of levy and sale under execution pursuant to Florida Statute Section 56.061 is available to a judgment creditor with respect to a debtor's membership interest in a single-member LLC, and such remedy is not displaced by the charging order remedy that is available to a judgement creditor under Florida Statute Section 608.433(4).

The Dissent

A stirring dissent was written by Judge Lewis, in which he attacks a number of points in the majority's opinion. Of great importance to the dissent is the fact that the majority did not answer the question as certified by the Eleventh Circuit, and the fact that the majority rephrased the certified question to "frame the result." The dissent further states:

> *Nevertheless, the certified question before us is not the discretionary nature of this remedy but whether a court should even apply the charging order remedy to single-member LLCs. The majority rephrases the question certified to this Court as not considering whether an exception to the charging order provision should be implied for single-member LLCs. In doing so, the majority unjustifiably alters and recasts the question posited by the federal appellate court to fit the majority's result. The convoluted alternative presented by the majority is premised on a limited application of a charging order without express language in the statutory scheme to support this assertion.*

Judge Lewis also attacked the majority's failure to address the critical issue of whether the LLC charging order provision applies uniformly to all LLCs, regardless of the number of members of the company. Because the Florida LLC Act (and more specifically, the charging order statute) does not contain an exception for single-member LLCs or refer to the number of members of the LLC as having any bearing on the applicability of the statutory provisions, the dissent argued that the provisions of the Florida LLC Act apply uniformly to all Florida LLCs, regardless whether the LLC is a single-member LLC or a multiple-member LLC. Judge Lewis supported this conclusion by citing the doctrine of legislative reenactment to determine that it was the intent of the Florida Legislature to have all provisions of the Florida LLC Act apply uniformly to all Florida LLC. Specifically, Judge Lewis wrote:

> *Further, when the Legislature amended the LLC requirements for formation to allow single-member LLCs, it did not enact other changes to the provisions in the LLC Act relating to an involuntary assignment or transfer of a membership interest to a judgment creditor of a member or to the remedies afforded to a judgment creditor. Moreover, no other amendments were made to the statute to demonstrate any different application of the provisions of the LLC Act to single-member and multimember LLCs. For example, the LLC Act generally does not refer to the number of members in an LLC within the separate statutory provisions. The Legislature is presumed to have known of the charging order statute and other remedies when it introduced the single-member LLC statute. Accordingly, by choosing not to make any further changes to the statute in response to this addition, the Legislature indicated its intent for the charging order provision and other statutory remedies to apply uniformly to all LLCs. This Court should not disregard the clear and plain language of the statute.*

Based on the lack of a statutory provision that creates an exception to the applicability of any part of the Florida LLC Act for single-member LLCs, the dissent concluded that the majority's result is not provided for under the plain language of the LLC Act "without judicially writing an exception into the statute." This provides for the frightening realization that the majority opinion may have opened the door for a judgment creditor to successfully argue that the charging order remedy is not the creditor's exclusive remedy in the context of multiple-member LLCs , as indicated by the dissent in the following language:

> *By relying on an inapplicable statute, the majority ignores the plain language of the LLC Act and the other restrictions of the statute, which universally apply the use of a charging order to judgment creditors of all LLCs, regardless of the composition of the membership. The majority opinion now eliminates the charging order remedy for multimember LLCs under its theory of "nonexclusivity" which is a disaster for those entities.*

The dissent also had a problem with the majority ignoring the "separation between the particular separate assets of an LLC and a member's separate membership interest in the LLC" by allowing the trial court to order the judgement debtors to involuntarily surrender their membership interests in the LLCs and to authorize a receiver to liquidate the specific assets of the LLC to satisfy the judgment. In the view of the dissent, "in stripping the statutory protections designed to protect an LLC as an entity distinct from its owners, the majority obliterates the distinction between economic and governance rights by allowing a judgment creditor to seize both from the member and to liquidate the separate assets of the entity."

Accordingly, Judge Lewis wrote that he would answer the certified question in the negative because, under Florida law, a court does not have the authority to order an LLC member to surrender and transfer all right, title, and interest in an LLC without first going through the statutory requirements that were created by the Florida Legislature.

COMMENT:

ABOUT THE DECISION:

The decision was written in response to the following certified question from the Eleventh Circuit Court of Appeals:

"Whether, pursuant to Florida Statute Section 608.433(4), a court may order a judgment-debtor to surrender 'right, title, and interest' in the debtor's single-member limited liability company to satisfy an outstanding judgment."

The Florida Supreme Court concluded that the statutory charging order law does not preclude a creditor from foreclosing on the debtor's interest in a single-member limited liability company. In its analysis, the Florida Supreme Court rephrased the certified question ("Whether Florida law permits a court to order a judgment debtor to surrender all right, title, and interest in the debtor's single-member limited liability company to satisfy an outstanding judgment.") and answered this in the affirmative, notwithstanding a spirited dissenting opinion that was written by Judge Fred Lewis and concurred by Judge Ricky Polston.

While it was expected that the Florida Supreme Court would conclude that a charging order is not the sole and exclusive remedy for a creditor with respect to a debtor's membership interest in a single-member LLC, in light of [vii] cases in other jurisdictions that have addressed similar issues, it is surprising that the Supreme Court's analysis and dicta in its majority opinion

was, in great part, based upon the conclusion that the charging order is not the exclusive remedy for a creditor in the context of a multiple-member Florida limited liability company. The Court clearly believes that LLC member interests are subject to levy, which is a remedy that most creditors would prefer over charging order status.

WHY THE HOLDING IS TROUBLING:

This shot over the bow of multiple-member Florida LLCs is especially troubling where three longstanding Florida District Court of Appeal decisions [viii] have construed a charging order statute with identical language to provide that a charging order is the exclusive remedy, and Florida Bar publications have confirmed that the language of the present LLC statute provides for the charging order to be the exclusive remedy of a judgment creditor against a debtor's LLC membership interest. [ix]

Further, the Court somewhat mysteriously, or accidentally, held that the legislative intent of the LLC charging order statute that was originally passed in 1993 is somehow revealed by more specific general and limited partnership statutes passed in 1995 and 2005, respectively, when the legislative history is clear that the drafting committees of the two subsequent partnership statutes simply did not address the LLC statute because it was not within their drafting committee area.

How could legislative enactments regarding general partnerships in 1995 and limited partnerships in 2005 reveal the legislative intent of the statute that was enacted in 1993? We believe that the Supreme Court simply confused or was not aware of the order of drafting and implementation of these statutes. [x]

As stated in the dissenting opinion that is described below:

> *This Court does not possess the authority to judicially rewrite those operative statutes through a speculative inference not reflected in the legislation. The Legislature has the authority to amend chapter 608 to provide any additional remedies or exceptions for judgment creditors, such as an exception to the application of the charging order provision to single-member LLCs, if that is the desired result. However, by basing its premise on principles of law with regard to voluntary transfers, the majority suggests a result that can only be achieved by rewriting the clear statutory provisions. In effect, the majority accomplishes its result by judicially legislating section 608.433(4) out of Florida law.*

As a result of the above many practitioners will be concerned that multiple-member LLC arrangements to do not provide charging order protection, although that is not exactly what the Supreme Court held. As discussed below, there is a good chance that there will be legislative clarification on this questionable viewpoint in 2011, and in the meantime advisors might consider bifurcating LLC membership interests into voting and non-voting interests, converting LLCs to limited partnerships or limited liability limited partnerships, moving LLCs to jurisdictions that have a more stable charging order protection law, or implementing other strategies as described in the Comment section of this newsletter.

While commentators [xi] have anticipated that the Supreme Court would permit a judgement creditor to reach the assets of a debtor's single-member LLC, the legal community could not have predicted this questionable Court

analysis, or the present environment of uncertainty as to charging order protection for multiple-member LLCs that will hopefully be clarified by the Florida Legislature in 2011.

Well respected bankruptcy and debtor-creditor lawyers have commented that the Supreme Court will be severely criticized for this "non-business law savvy" decision. The vast majority of experts in this area have concluded that Florida multiple-member LLCs offer charging order protection. Specifically, the 2008 Florida Bar-published "Asset Protection in Florida" treatise provides [xii] at Section 4.30 that "[a] creditor's right against a member's interest in an LLC is limited to a charging order. See F.S.608.433(4).....An interest in an LLC is not assignable in whole or in part unless all of the non−assigning members approve the assignment. See FS 608.432.(1)(a)."

The 2003 Bankruptcy Court decision, *In re Albright*, allowed the bankruptcy trustee to become a "substituted member" of a Colorado single-member LLC. The *Albright* Court, applying Colorado law, reasoned that the restriction of a creditor to only a charging order remedy is designed to protect the non-debtor members of the LLC. The court also reasoned that because there were no non-debtor members to protect in the context of single-member LLCs, restricting a creditor to a charging order remedy serves no purpose. Thus, the bankruptcy trustee could receive all of the debtor's rights in the single-member LLC.

However, the *Albright* Court specifically provided that the result would be different if there were other legitimate non-debtor members in the LLC, and in which event the bankruptcy trustee would only be entitled to the distributions, profits, and tax attributes to which a majority member would have otherwise have been entitled.

The majority opinion's analysis that a charging order is not the exclusive remedy for judgment creditors with respect to a judgment debtor's membership interest in a Florida LLC may be flawed in light of several Florida District [xiii] Court of Appeals cases that have found that a charging order is the appropriate remedy for a creditor of partner in a limited partnership, notwithstanding that the limited partnership charging order statute at the time of each opinion did not expressly provide that a charging order is the exclusive remedy of a judgment creditor.

The dissent points out that the plain language of the Florida LLC Act does not provide for the judicial foreclosure of a debtor's membership interest in a Florida LLC . The dissent also notes that the Florida LLC Act does not provide that a charging order is the exclusive remedy of a judgment creditor, but that "the plain language of the charging order provision only provides one remedy that a judgment creditor may choose to request from a court and that the court may, in its discretion, choose to impose." Based on this analysis, the lack of an express mention of a charging order as the exclusive remedy in the context of LLCs appears to be irrelevant, because the language of the LLC Act only provides for one remedy for a judgment creditor with respect to a debtor's LLC membership interest.

As further indicated by the dissent, there is nothing in the Florida LLC Act or in Florida case law that creates an exception to the applicability of any of the Florida LLC Act to single-member LLCs, and therefore, the charging order statute should apply with equal force to both single-member and multiple-member LLCs. Significant uncertainty is created because the majority does not make a distinction between the applicability of its opinion to single-member LLCs versus multiple-member LLCs.

The majority opinion further complicates matters by not addressing the

effect that articles of organization or operating agreement provisions will have on the remedies available to a judgment creditor, if such provisions restrict the voluntary and/or involuntary assignment of an LLC membership interest, the admission of additional members, and the voting of membership interests in a multiple-member LLC.

Nevertheless, practitioners now have a good degree of uncertainty as to what trial court and bankruptcy court judges will do in multiple-member LLC situations before the legislative clarification takes place.

PLANNING ALTERNATIVES:

Because of this uncertainty, clients with LLCs may consider converting the LLCs into limited partnerships or limited liability limited partnerships [xiv]. Alternatively, clients might want to recapitalize the LLC so that the membership interests are bifurcated into voting and non-voting membership interests. The client could then issue a majority of the voting membership interests to persons and/or entities other than the client, or issue a majority of the voting membership interests to an irrevocable trust that is a "grantor trust," which is treated as a disregarded entity under federal income tax law but is respected as a separate entity under state law. The LLC operating agreement could provide that the LLC cannot make a distribution, be dissolved or carry out other specified tasks without a vote of a majority of the voting interests. This would ensure that, if a creditor of the client that receives all "right, title and interest" to the client's LLC membership interest, the creditor would not be able to force a distribution from the LLC or the liquidation of the LLC.

Clients and their advisors may additionally explore alternative asset protection strategies with respect to future business entity planning, including forming LLCs in offshore jurisdictions such as Nevis, or in other domestic jurisdictions that have well-settled charging order law with respect to multiple-member LLCs, such as Colorado or Nevada.

Moreover, clients and their advisors may be more inclined to consider alternative asset protection vehicles, such as offshore trusts and offshore insurance and annuity products. Nevertheless, Florida law may well apply where the "conflict of law" analysis shows that the LLC is owned by Floridians, managed by Floridians, and primarily holds Florida based assets. [xv]

The above referenced alternative asset protection strategies to Florida LLCs are not bulletproof, and may face other issues and/or limitations. For example, if a Florida LLC is converted to a foreign entity, it cannot be taxed as an S corporation. The converted foreign LLC may provide additional asset protection features in that it may be impossible for the creditor to force the manager or account sponsor of the LLC to present assets to the creditor unless or until the law of the foreign jurisdiction where the assets are held is satisfied. If, for example, a Nevis LLC holds a Swiss brokerage account, then the Swiss institution holding the account would be expected to not make the account available to the creditor until both Swiss and Nevis law are satisfied that an asset turnover is appropriate. Nevertheless, a U.S. court might determine it appropriate to put a U.S. debtor in jail on contempt if it finds that the debtor has established and/or funded the foreign LLC arrangement in order to make it "impossible" for imminently expected creditors to have access to the assets [xvi] being held.

Furthermore, if a Florida LLC that is taxed as a S corporation is converted to a limited partnership, the entity could lose its S corporation status if the general partner and limited partner interests are considered to be "separate classes of stock" under the applicable S corporation tax law. The

authors know of no well-respected authority that advocates the use of a state law limited partnership structure to house an S corporation. The change in federal tax classification of an S corporation to classification as a partnership or disregarded entity for income tax purposes is equivalent to a constructive liquidization for income tax purposes, which can trigger income tax if the entity has assets (including any goodwill) that are worth more than its tax basis in those assets.

To avoid this, a client that owns a single-member LLC that is taxed as an S corporation could fund an irrevocable "grantor trust" for the benefit of his or her descendants. The LLC can be converted to a limited liability limited partnership (LLLP), and the irrevocable trust can become a general and limited partner of the LLLP, with the 1% general partnership interest being owned .51% by the irrevocable trust and .49% by the Grantor, and the 99% limited partnership interest being owned 95% by the client and 4% by the irrevocable trust. Because the irrevocable trust should be respected for state law purposes as a separate entity even though it is disregarded for federal income tax purposes, the LLLP meets the state law requirement of an LLLP having at least two partners. The LLLP can then preserve its S corporation election because, for income tax purposes, the client is considered to own all of the stock of the S corporation, so there can be no second class of stock. This assumes that the client holds powers over the trust that causes it to be disregarded for income tax purposes, which would enable it to be a permitted S corporation shareholder. It is not clearly established what the income tax consequences of this strategy would be after the death of the client, if at that time the irrevocable trust would become a complex trust for federal income tax purposes.

BOTTOM LINE(S):

The bottom line is that the Florida Supreme Court has thrown a wave of uncertainty at the estate and business planning community that will probably be resolved by the Florida Legislature before court cases make their way back to the appellate courts, and many existing LLCs that do not now provide for separate voting and non-voting rights may be converted into voting and non-voting structures, or into limited partnerships, limited liability limited partnerships and/or be moved to other jurisdictions by reason of this decision. Such judicial and legislative unpredictability helps to explain why U.S. citizens so often choose to place assets and legal structures outside of the jurisdiction of their own state and national government legal systems.

We are all reminded that no one creditor protection strategy should ever be relied upon to protect a client's assets when multiple strategies are available, and that the law can shift unexpectedly, giving clients good reason to wonder whether they are best served by subjecting all of their assets to any one jurisdiction or asset class.

Nevertheless, the authors believe that courts will be reluctant to allow a judgment creditor to reach the assets of a multiple-member LLC in which a debtor is a member.

In any event, Florida LLCs are not a safe as they once were for use as asset protection vehicles, and clients and their advisors should strongly consider alternatives to simple Florida multiple-member LLCs for business and investment entity planning.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE:

Alan Gassman Christopher Denicolo

DUNCAN OSBORNE - TECHNICAL EDITOR

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CITES:

Shaun Olmstead, et. al., vs. The Federal Trade Commission, Supreme Court of Florida. Case No. SC08−1009. (June 24, 2010); In re Albright, 291 B.R. 538, 540 (D. Colo. 2003); *In re Modanlo*, 412 B.R. 715, 727−31 (D. Md. 2006); *In re A−Z Electronics, LLC*, 350 B.R. 886 (D. Idaho 2006); F.S. §608.4.32; F.S. §608.433; F.S. §620.8504; F.S. §620.1703; *Myrick v. Second Nat'l. Bank of Clearwater*, 335 So.2d 343 (Fla. 2d DCA 1976); *Atlantic Mobile Homes, Inc. v. LeFever*, 481 So. 2d 1002 (Fla. 2d DCA 1986); *Givens v. Nat'l. Loan Investors L.P.*, 724 So.2d 610 (Fla 5th DCA 1998). Thomas O. Wells, *Asset Protection Provided with Florida Business Entities*, in Asset Protection in Florida __ 4.30, 4.32 (Florida Bar Real Property, Probate, and Trust Law Section ed., 2008); LISI Asset Protection Planning Newsletter #153 (May 3, 2010) at http://www.leimbergservices.com Copyright 2010 Leimberg Information Services, Inc. (LISI); *In re Lawrence*, 279 F.3d 1294, 1297 (11th Cir. 2002); *F.T.C. v. Affordable Media, LLC,* 179 F.3d 1228, 1239 (9th Cir. 1999).

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[i] "Stop in the Name of Love" was written in 1965 by Lamont Dozier, Brian Holland, and Edward Holland, Jr., and recorded by the Supremes in 1965 as their fourth number one record and the number one Billboard single from March 21, 1965 to April 3, 1965.

[ii] The Authors would like to thank **Kenneth J. Crotty**, a partner at the firm of **Gassman, Bates & Associates, P.A.**, and **Suzanne Palms**, a law student at the **University of Florida** and a law clerk at the firm of Gassman, Bates & Associates, P.A for their help in drafting this article.

[iii] Supreme Court of Florida. Case No. SC08−1009 (June 24, 2010).

[iv] LISI Asset Protection Planning Newsletter #153 (May 3, 2010) at http://www.leimbergservices.com Copyright 2010 Leimberg Information Services, Inc. (LISI).

[v] Florida Statute §608.432 provides that unless otherwise provided in the articles of organization or the operating agreement, an LLC membership interest is assignable in whole or in part, and an assignee of such limited liability company interest has no right to participate in the management of the business and affairs of the LLC, unless such assignee is admitted as a member of the LLC by all of the members of the LLC other than the transferring member or as otherwise provided in the articles of organization and/or the operating agreement of the LLC.

It is therefore well settled under the applicable Florida Statutes and case law that the assignment of a membership interest in a Florida LLC will not necessarily transfer the right to participate in the LLC's business and management, but will only entitle the assignee to share in the profits and losses, to receive any distributions, and to receive any allocation of income, gain, loss, deduction, or credit or similar item to which the assignor was entitled, to the extent assigned. Furthermore, Florida Statute §608.433 provides that, unless otherwise

provided in the articles of organization or the operating agreement, an assignee of an LLC membership interest may become a member only if all other members of the LLC consent to the transferring member assigning his or her membership interest.

[vi]
F.S. §620.8504; F.S. §620.1703. Interestingly, the Court does not address that Florida Statute §620.8504, the applicable charging order statute for general partnerships and limited liability partnerships, does allow for the foreclosure and sale of a partner's interest in the partnership to satisfy a creditor's judgment against the partner. See F.S. §620.8504(2) ("A charging order constitutes a lien on the judgment debtor's transferable interest in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee."). Further, F.S. §620.8601(4) provides that a charging order causes a partner is disassociate from a general partnership or limited liability partnership, which triggers a dissociation distribution from the GP or LLP to redeem the partner's interest. See Thomas O. Wells, *Asset Protection Provided with Florida Business Entities*, in Asset Protection in Florida _4.32 (Florida Bar Real Property, Probate, and Trust Law Section ed., 2008).

[vii]
In re Albright, 291 B.R. 538, 540 (D. Colo. 2003); *In re Modanlo*, 412 B.R. 715, 727−31 (D. Md. 2006);
In re A−Z Electronics, LLC, 350 B.R. 886 (D. Idaho 2006).

[viii]
Myrick v. Second Nat'l. Bank of Clearwater, 335 So.2d 343 (Fla. 2d DCA 1976); *Atlantic Mobile Homes, Inc. v. LeFever*, 481 So. 2d 1002 (Fla. 2d DCA 1986); *Givens v. Nat'l. Loan Investors L.P.*, 724 So.2d 610 (Fla 5th DCA 1998).

[ix]
Thomas O. Wells, *Asset Protection Provided with Florida Business Entities*, in Asset Protection in Florida _4.30 (Florida Bar Real Property, Probate, and Trust Law Section ed., 2008).

[x]
Initially a charging order was mentioned as a creditor's remedy with respect to a debtor's partnership interest in a partnership under Florida Statute §620.695 in 1973 ("On application to a court having jurisdiction by any judgment creditor of a partner, the court may charge the interest of the debtor partner with payment of the unsatisfied amount of the judgment with interest..."). After Florida District Court of Appeals opinions found that the charging order was the exclusive remedy under the 1973 partnership statute, the legislature adapted the exact above-referenced charging order language in its drafting of the1993 limited partnership charging order statute (F.S. §620.153) and the 1993 LLC charging order statute (F.S. §608.433), thus clearly intending that LLC charging order protection would be equivalent to partnership charging order protection. When the limited partnership statutes were updated in 2005, the language was made even more clear as to charging orders being the exclusive remedy of a judgment creditor, but this should not be viewed to have altered the historical language that is still found in the LLC statute.

[xi]
Thomas O. Wells, *Asset Protection Provided with Florida Business Entities*, in Asset Protection in Florida _4.30 (Florida Bar Real Property, Probate, and Trust Law Section ed., 2008).

[xii]
Supra, FN 6.

[xiii]
Myrick, 335 So.2d 343; *Atlantic Mobile Homes, Inc.*, 481 So. 2d 1002; *Givens*, 724 So.2d 610.

[xiv]
As noted above at footnote 10, general partnerships and limited liability partnerships do not enjoy the same charging order protection as limited partnerships and limited liability limited partnerships.

[xv]
It is unsettled as to whether Florida law will continue to apply with respect to LLCs that have been moved to other jurisdictions, if the LLC continues to have significant contacts in the State of Florida. For a detailed discussion regarding conflict of law analysis in the context of trusts see LISI Estate Planning Newsletter # 1391 (January 6, 2009) at http://www.leimbergservices.com/ Copyright 2009 Leimberg Information Services, Inc. (LISI); "A Few Bad Apples Should Not Spoil the Bunch", Gideon Rothschild, Daniel S. Rubin, Johnathan G. Blattmachr (32 Vand. L. Rev. 763, (1999)).

[xvi] *In re Lawrence*, 279 F.3d 1294, 1297 (11th Cir. 2002); *F.T.C. v. Affordable Media, LLC,* 179 F.3d 1228, 1239 (9th Cir. 1999).

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