

Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #162

Date: 14-Sep-10

From: Steve Leimberg's Asset Protection Planning Newsletter

Subject: [Forum Shopping For Favorable FLP and LLC Law: Part VII](#)

In August 2007, **LISI** published the first table regarding sole remedy and judicial foreclosure by **Mark Merric** and **Bill Comer**. See [LISI Asset Protection Planning Newsletter #112](#). This turned into a series on “Forum Shopping For Favorable FLP and LLC Legislation.” See [LISI Asset Protection Planning Newsletters #114](#), [#117](#), [#127](#) and [#154](#).

Over the past three years, states have continued to change their laws regarding charging orders, and **Marc Merric**, **Bill Comer** and **Mark Monasky** have joined together to provide members with their latest table updating the status of each state.

Mark Merric is special counsel working with **Holme, Roberts, and Owen**, one of Denver’s largest law firms in the areas of estate planning, international tax and business transactions, and asset protection planning. Mark is also co-author of CCH's treatise on asset protection –The Asset Protection Planning Guide (first edition), and the ABA's treatises on asset protection, Asset Protection Strategies Volume I, and Asset Protection Strategies Volume II. Mark has been quoted in the Wall Street Journal, Forbes, Investor’s News, Oil and Gas Investor, The Street, and several other publications. His articles have been feature in Trusts and Estates, Estate Planning Magazine, Journal of Practical Estate Planning, Lawyer’s Weekly – Heckerling Edition, Journal of Taxation as well as Leimberg LISI’s. Many of these articles have been multi-part series on discretionary dynasty trusts, Who Can Be a Trustee Without an Estate Inclusion Issue, Reciprocal Trusts, Spousal Access Trusts, and this series on Charging Order Protection.

William Comer is a financial consultant specializing in estate preservation, asset protection and privacy. He is a certified senior advisor, a long-time member of the Offshore Institute and has spoken on these issues throughout the U.S., Costa Rica and the Bahamas. He is the author of Freedom, Asset Protection & You <http://www.offshorepress.com/fapy.htm>, a complete encyclopedia of asset protection and estate preservation.

Mark Monasky is a board certified neurosurgeon and attorney with a legal practice limited to estate planning and asset protection. Mark graduated from Columbia University College of Physicians & Surgeons, trained at Mayo Clinic, and is a graduate of University of North Dakota School of Law. Mark is a member of Wealth Counsel, a fellow of the American College of Surgeons and American College of Legal Medicine, and belongs to the American Association of Neurological Surgeons, Congress of Neurological Surgeons, Christian Medical & Dental Society, and American Medical and Bar Associations. Mark is a past recipient of the Best Doctors Award, America Central Region.

Please join **Mark Merric** and **Michael Graham** in Las Vegas for one to five days of estate planning seminars, September 13-17, 2010. As always, it's a great speaker panel with great topics at a great price and great location! The following courses qualify for 8 hours of CLE: Estate and Gift Tax Boot Camp; Turbo Charging Estate Planning Tools; Modular Approach to Estate or Business ; Succession Planning; The Sizzle to Drafting Irrevocable Trusts. The final course Asset Protection Planning for High Net Worth Clients qualifies for 8 hours of CLE including 1 hour ethics. This program is being held in cooperation with the University of Denver's Graduate Tax Program. Linda Browning, Marketing Director Graduate Tax Program, University of Denver: 800-426-88002

<http://www.aes.du.edu/>

Now, here is their commentary:

EXECUTIVE SUMMARY:

The generally are four key areas regarding charging order protection:

- 1) Whether a creditor may petition the court for a judicial dissolution of an LLC;
- 2) Whether state law allows for the judicial foreclosure sale of the member's interest;
- 3) Whether a state law allows or prohibits a broad charging order; and
- 4) Whether a state law permits or prevents equitable remedies

Unlike the Uniform Limited Liability Company Act of 1996, the uniform limited partnership acts never allowed a creditor to petition for the judicial dissolution of a limited partnership. Therefore, this is not an asset protection issue reflected in the table below.

However, the Uniform Limited Liability Company Act ("ULLC 2006") as

well as the Uniform Limited Partnership Act of 2001 (“ULPA 2001”) allow for the judicial foreclosure sale of a member’s interest. As discussed in [LISI Estate Planning Newsletter #1637](#), the authors generally find the judicial foreclosure sale of a member’s interest to be an effective creditor remedy.

Many states seek to prevent the judicial foreclosure sale of a partner’s interest by providing that a charging order is the sole and exclusive remedy. Unfortunately, there is a division regarding what sole remedy means.^[i] For purposes of this article, if a statute states something similar to the following language the authors considered this to be a sole remedy (“SR”) that prevents the judicial foreclosure sale of the partner’s interest: On application to a court of competent jurisdiction by any judgment creditor of a member or assignee, the court may charge the interest of the member or assignee with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of financial rights. This section shall be the sole and exclusive remedy of a judgment creditor with respect to the judgment debtor's membership interest.”

In addition to whether a partnership interest may be sold at a judicial foreclosure sale, there is the further issue of whether a judge may issue a broad charging order that would restrict the activities of a Limited Partnership from engaging in the following actions without court and/or creditor approval:

- Making loans;
- Making capital acquisitions^[ii];
- Making distributions (for example, non-pro rata distributions);
- Selling any partnership interest; and
- Providing a full accounting of the partnership activities.

This commentary takes the position that absent specific statutory language that prevents a court from issuing a broad charging order, then such action by a court is permitted.

Finally, there is the issue of equitable remedies that are directed at the partnership itself and seek to reach the underlying assets of the partnership such as a constructive trust, resulting trust, alter ego, and reverse veil pierce.^[iii] A limited number of states have passed statutes that prevent all

equitable and legal remedies other than the sole remedy of a charging order. For purposes of this article, unless a state specifically has statutory language that prevents equitable remedies, it is deemed to permit them.

COMMENT:

Corrections to Prior Chart

As always, when preparing a chart on 50 states, occasionally there is an error or a legislative change that is missed. In our last chart that was included in [Asset Protection Planning Newsletter #154](#) it stated Delaware = JF allowed judicial foreclosure sale. This was a clerical error. It should have read SR. On another note, the authors thank **Christopher Riser** for pointing out the legislative change to Georgia's limited liability company statute. They now have adopted the Alaska prototype that prevents a judicial foreclosure sale as well as a broad charging order.

Please note that only limited partnership cases are listed in the footnotes below. The Uniform Partnership Act (i.e. General Partnerships) specifically allows for the judicial foreclosure sale of general partnership interest. In this respect, these general partnership cases following the UPA statute are irrelevant for analysis of a limited partnership statute that does not specifically allow for judicial foreclosure sale (i.e. RULPA 1976).

Limited Partnership State	Judicial Foreclosure = JF; Simple Sole Remedy = SR; or Silent	Broad Charging Order Permits; or Prohibits; or Silent	Equitable Remedies Permits; or Prohibits
Alabama	SR[iv]	Silent [v]	Permits
Alaska	SR[vi]	Prohibits [vii]	Permits
Arizona	SR[viii]	Silent	Permits
Arkansas	JF[ix]	Permits [x]	Permits
California	Statute [xi]	Permits [xii]	Prohibits [xiii]
Colorado	Probably [xiv]	Silent	Permits
Connecticut	Case Law [xv]	Silent	Permits
Delaware	SR[xvi]	Silent	Prohibits
District of Columbia	Silent [xvii]	Silent	Permits
Florida	SR[xviii]	Prohibits [xix]	Permits
Georgia	JF[xx]	Silent	Permits
Hawaii	JF[xxi]	Permits [xxii]	Permits
Idaho	Statute [xxiii]	Permits [xxiv]	Permits
Illinois	Statute [xxv]	Permits [xxvi]	Permits
Indiana	Silent [xxvii]	Silent	Permits

Iowa	JF[xxviii]	Permits[xxix]	Permits
Kansas	Silent[xxx]	Silent	Permits
Kentucky	JF[xxxii]	Silent	Permits
Louisiana	No charging order language	Silent	Permits
Maine	JF[xxxiii]	Permits[xxxiiii]	Permits
Maryland	JF[xxxiv]	Silent	Permits
Massachusetts	Silent[xxxv]	Silent	Permits
Michigan	Silent[xxxvi]	Silent	Permits
Minnesota	JF[xxxvii]	Permits[xxxviii]	Permits
Mississippi	Silent[xxxix]	Silent	Permits
Missouri	???[xl]	Silent	Permits
Montana	Silent[xli]	Silent	Permits
Nebraska	Silent[xlii]	Silent	Permits
Nevada –two statutes	JF[xliii] SR[xliv]	Permits[xlv] Silent	Permits Permits
New Hampshire	JF[xlvi]	Silent	Permits
New Jersey	Silent[xlvii]	Silent	Permits
New Mexico	JF[xlviii]	Permits[xlix]	Permits
New York	Probably[l]	Silent	Permits
North Carolina	Silent[li]	Silent	Permits
North Dakota	SR[lii]	Silent	Permits
Ohio	Possibly JF[liii]	Silent	Permits
Oklahoma	JF[liv]	Permits[lv]	Permits
Oregon	Silent[lvi]	Silent	Permits
Pennsylvania	JF[lvii]	Silent	Permits
Rhode Island	Silent[lviii]	Silent	Permits
South Carolina	Silent[lix]	Silent	Permits
South Dakota	JF[lx]	Silent	Prohibits
Tennessee	Silent[lxi]	Silent	Permits
Texas	SR[lxii]	Silent	Prohibits
Utah	Silent[lxiii]	Silent	Permits
Vermont	Silent[lxiv]	Silent	Permits
Virginia	SR[lxv]	Silent	Prohibits
Washington	JF[lxvi]	Permits[lxvii]	Permits
West Virginia	Silent[lxviii]	Silent	Permits
Wisconsin	Silent[lxix]	Silent	Permits
Wyoming	Silent[lxx]	Silent	Permits

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

Mark Merric

Bill Comer

Mark Monasky

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CITATIONS:

^[i] For a detailed discussion regarding various interpretations of the term “sole and exclusive remedy” see Merric, Comer, Worthington, *Charging Order – What Does Sole and Exclusive Remedy Mean?*, Trust and Estates, April 2010. This article may be downloaded at www.internationalcounselor.com.

^[ii] Comments to both the ULPA (2001) and ULLC (2006) state that a court should not issue a charging order that would restrict capital acquisitions. As the comments are not the statute passed by the legislature, there is always the question of whether a court is required to follow the comments.

^[iii] A reverse veil pierce is a new cause of action, and states are divided regarding whether they allow a reverse veil pierce action.

^[iv] Ala. Code § 10-9C-703

^[v] Ala. Code § 10-9C-703, a creditor may not request accountings, but it appears a court may issue other orders affecting the management of the partnership.

^[vi] Alaska Stat. § 32.11.340

^[vii] Alaska Stat. § 32.11.340, *also see Lumbermens Mutual Casualty Company*, 2005 WL 2340709 (D. Ala. 2005) upholding Alaska’s prohibition for a broad charging order.

- [\[viii\]](#) Ariz. Rev. Stat. § 29-341. This statute reversed a judicial foreclosure sale holding under the prior RULPA (1976) language. *Bohonus v. AMERCO*, 602 P.2d 469 (Ariz. 1979).
- [\[ix\]](#) Ark. Code § 4-47-703 adopting the ULPA (2001)
- [\[x\]](#) Ark. Code § 4-47-703 adopting the ULPA (2001)
- [\[xi\]](#) Cal. Corp. Code §15907.03 adapting ULPA 2001, previously judicial foreclosure sale was allowed by the following cases *Hellman v. Anderson*, 233 Cal. App. 3d 840 (1991); *Crocker Nat. Bank v Perroton*, 208 Cal. App. 3d 1 (1989). However, it should be noted that § 15907.03(f) specifically denies a creditor from directly attacking the partnership itself with equitable remedies.
- [\[xii\]](#) Cal. Corp. Code §15907.03 adapting ULPA 2001, previously judicial foreclosure sale was allowed by the following cases *Hellman v. Anderson*, 233 Cal. App. 3d 840 (1991); *Crocker Nat. Bank v Perroton*, 208 Cal. App. 3d 1 (1989).
- [\[xiii\]](#) Cal. Corp. Code §15907.03(f) specifically denies a creditor the right to directly attack the partnership itself with equitable remedies.
- [\[xiv\]](#) Colo. Rev. Stat. § 7-61-123 was amended in 2000 to specifically state that a charging order was not the sole remedy. In this respect, Colorado is similar to Georgia. When Georgia interpreted this type of provision, it allowed for the judicial foreclosure sale of the limited partnership interest.
- [\[xv\]](#) *Madison Hills Limited Partnership II v. Madison Hills, Inc.*, 644 A.2d 363 (Conn. App. Ct. 1994). Noting that the ULPA(1976) provides that the remedies of the UPA may be imported. The UPA provides for the judicial foreclosure sale of partnership interests
- [\[xvi\]](#) Del. Code 6 § 17-703
- [\[xvii\]](#) D.C. Code § 33-207.05
- [\[xviii\]](#) Fla. Stat. ch. 620.1703; also previously by case law *In re Stocks*, 110 B.R. 65 (Bankr. N.D. Fla. 1989); *Givens v. National Loan Investors, L.P.*, 724 So.2d 610 (Fla. App. 1998).
- [\[xix\]](#) Fla. Stat. ch. 620.1703 states that a court may not order an accounting or “other remedies.” Presumably, other remedies would include an order controlling the management of the partnership.
- [\[xx\]](#) Ga. Code Ann. §14-9-703, which specifically states a charging order is not a creditor’s exclusive remedy; *Stewart v. Lanier Medical Office Building, Ltd.* 578 S.E. 2d 572 (Ga. App. 2003). Also, prior to the current statute, when interpreting RULPA (1976) language, a Georgia Appellate Court held for the judicial foreclosure sale of the limited partnership interest, *Nigri v. Lotz*, 453 S.E.2d 780 (Ga. App. Ct. 1995). Conversely, in *In re Smith*, 17 B.R. 541 (Bkrcty MD Ga. 1982) held the RULPA (1976) language was the sole remedy.
- [\[xxi\]](#) Haw. Rev. Stat. § 425E-703
- [\[xxii\]](#) Haw. Rev. Stat. § 425E-703
- [\[xxiii\]](#) Idaho Code § 53-2-703, which adopted the ULPA (2001)
- [\[xxiv\]](#) Idaho Code § 53-2-703, which adopted the ULPA (2001)
- [\[xxv\]](#) 805 Ill. Comp. Stat. 215/703 which adopted the ULPA (2001)

- [\[xxvi\]](#) 805 Ill. Comp. Stat. 215/703 which adopted the ULPA (2001)
- [\[xxvii\]](#) Ind. Code § 23-16-8-3.
- [\[xxviii\]](#) Iowa Code § 488-703, which adopted the ULPA (2001)
- [\[xxix\]](#) Iowa Code § 488-703, which adopted the ULPA (2001)
- [\[xxx\]](#) Kan. Stat. § 56-1a403
- [\[xxxi\]](#) Ky. Rev. Stat. §362.2-703 (§362.1-504), which adopted the ULPA (2001). KY SB 210 adds sub-section 7 stating that the partnership is not a necessary party to issue a charging order.
- [\[xxxii\]](#) 31 Me. Rev. Stat. §1383, which adopted the ULPA (2001)
- [\[xxxiii\]](#) 31 M.R.S.A. §1383, which adopted the ULPA (2001)
- [\[xxxiv\]](#) Md. Code § 10-705. *Lauer Construction, Inc. v. Claude Schrift*, 716 A.2d 1096 (Md.App. 1998); *Gibson's Lodging v. Lauer*, 721 A.2d 989 (Md. 1989)
- [\[xxxv\]](#) Mass. Gen. Laws ch. 109 § 41
- [\[xxxvi\]](#) Mich. Comp. Laws § 449-1703
- [\[xxxvii\]](#) Minn. Stat. Ann. §322A.0703 adopting ULPA(2001) and reversing prior case law regarding sole remedy under *Chrysler Credit Corp. v. Peterson*, 342 N.W. 2d 170 (Minn. Ct. 1984).
- [\[xxxviii\]](#) Minn. Stat. Ann. §322A.0703 adopting ULPA(2001) and reversing prior case law regarding sole remedy under *Chrysler Credit Corp. v. Peterson*, 342 N.W. 2d 170 (Minn. Ct. 1984).
- [\[xxxix\]](#) Miss. Code § 79-14-703
- [\[xl\]](#) Mo. Rev. Stat. § 359.421. *Deutsch v. Wolf*, 7 S.W. 3d 460 (Mo. App. 1999). It is uncertain whether Missouri allows for the judicial foreclosure sale of a limited partnership interest. While the *Deutsch* Court states that the debtor/partner held “general and limited partnership interests,” this statement is incorrect. The authors discussed the issue with Brad Stevens who was a member of Spencer and Fane, the Plaintiff’s attorney. Brad confirmed that *Wolf* held only a general partnership interest and the court ordered a foreclosure of only his general partnership interest. Therefore, it is uncertain whether *Deutsch* provides authority for the judicial foreclosure sale of a limited partnership interest in Missouri. For a more detailed discussion of this issue between Steven Gorin and Mark Merric, please see Part II of this series.
- [\[xli\]](#) Mont. Code Ann. § 35-12-1103
- [\[xlii\]](#) Neb. Rev. Stat. § 67-273
- [\[xliii\]](#) Nev. Rev. Stat. §87.4342 adopted the ULPA (2001) and, for all limited partnerships formed after October 1, 2007 that do not elect out of the statute, N.R.S. §87.4342 provides for the judicial foreclosure sale of the limited partnership interest. Therefore, limited partnerships formed before October 1, 2007, and those that elect out of ULPA (2001) are subject to the previous statute that provides for sole remedy asset protection.
- [\[xliv\]](#) By electing out of the ULPA (2001), one may retain the sole remedy benefits of Nev. Rev.

Stat. § 88.535.

[\[xlvi\]](#) Nev. Rev. Stat. §87.4342 adopted the ULPA (2001).

[\[xlvii\]](#) *Baybank v. Catamount Construction, Inc.*, 693 A.2d 1163 (N.H. 1997) stating that a court may look to the UPA for remedies not mentioned in the ULPA (1976), including the judicial foreclosure sale of the limited partnership interest. However, a court may not order the dissolution of a limited partnership by virtue of a charging order.

[\[xlviii\]](#) N.J. Stat. § 42:2A-48

[\[xlix\]](#) N.M. Stat. § 54-2A-703. Codified prior law regarding the judicial foreclosure sale of a limited partnership interest. *In re Priestley*, 93 B.R. 253 (D.N.M. 1988).

[\[l\]](#) N.M. Stat. § 54-2A-703. Codified prior law regarding the judicial foreclosure sale of a limited partnership interest. *In re Priestley*, 93 B.R. 253 (D.N.M. 1988).

[\[li\]](#) N.Y. Partnership Chapter 39, Article 8, Section 111(3) specifically states that a charging order is not the exclusive remedy. When Georgia interpreted this type of provision, it allowed for the judicial foreclosure sale of the limited partnership interest.

[\[lii\]](#) N.C. Gen. Stat. § 59-703

[\[liii\]](#) N.D.Cent. Code § 45-10.2-64

[\[liiii\]](#) Ohio Rev. Code § 1775.27 originally adopted the ULPA (2001) allowing judicial foreclosure sale. However, it was subsequently amended, and the specific reference to judicial foreclosure sale was omitted. Now the statute is silent. Previously, under the RULPA (1976) language which is also silent a district court allowed for the judicial foreclosure sale. *Larson v. Larson*, 2000 WL 1566522 (Ohio App. 11. Dist.) unreported.

[\[liv\]](#) Oklahoma's sole remedy statute Okla. Stat. tit. 54, § 342, was reversed in 2010 when SB 1132 cleared the legislature adopting the ULPA 2001. Sent for governor's signature May 29, 2010.

[\[lv\]](#) *Id.*

[\[lvi\]](#) Or. Rev. Stat. § 70.295

[\[lvii\]](#) Pa. Stat. Title 15 § 8563

[\[lviii\]](#) RI Gen. Laws § 7-13-41.

[\[lix\]](#) SC Code Ann. § 33-42-1230

[\[lx\]](#) S.D. Codified Laws §48-7-703

[\[lxi\]](#) Tenn. Code § 61-2-703

[\[lxii\]](#) Texas Rev. Stat. § 153.256

[\[lxiii\]](#) Utah Code § 48-2a-703

[\[lxiv\]](#) Vt. Stat. Title 11 § 3463

[\[lxv\]](#) Va. Code § 50-73.46:1, also prior to statutory law, *In re Pischke*, 11 B.R. 913 (Bankr. E.D. Va. 1981) held that a charging order was the sole remedy.

[\[lxvi\]](#) Wash. Rev. Code § 25.10.410 (In April 2009, the Washington legislature passed HB 1067

adopting the ULPA 2001, which is effective July 1, 2010. At this point, a new code section has not been assigned.

[\[lxvii\]](#) *Id.*

[\[lxviii\]](#) W. Va. Code § 31B.

[\[lxix\]](#) Wis. Stat. § 179.63.

[\[lxx\]](#) Wyo. Stat. § 17-14-803.