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## J.K.C. v. T.W.C.

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*New York Law School, 2015*

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RICHARD PEARSALL

*J.K.C. v. T.W.C.*

59 N.Y.L. SCH. L. REV. 775 (2014–2015)

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At the heart of every attorney-client relationship is a business contract.<sup>1</sup> Implicit in that contract is the expectation that an attorney provide a service to a client in exchange for a fee.<sup>2</sup> When a client fails to pay, courts allow redress through the use of a retaining<sup>3</sup> or charging lien<sup>4</sup> against the client's property.<sup>5</sup> While retaining liens are limited to "papers and property of the client which are in an attorney's possession and [are] extinguished when that possession terminates other than by court order,"<sup>6</sup> a charging lien "binds an award, judgment or settlement which has been obtained through the attorney's efforts and prevents a client from benefitting from the attorney's labor without compensating him."<sup>7</sup> In New York, section 475 of the N.Y. Judiciary Law provides for a charging lien, which serves to protect an attorney's right to compensation after performing services for a client.<sup>8</sup>

In *J.K.C. v. T.W.C.*, the Supreme Court of New York, refused to enforce an attorney's charging lien against a client's Individual Retirement Account (IRA)<sup>9</sup> that contained funds obtained as a result of the attorney's services in a divorce proceeding.<sup>10</sup> Faced with an issue of first impression—whether section 475 permits enforcing a charging lien against an IRA, which a separate statute seemingly immunizes from debts and claims of creditors<sup>11</sup>—the court misconstrued competing legislative statutes to favor the IRA holder over the attorney who is owed fees.<sup>12</sup>

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1. See LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 326 (3d ed. 2012).
  2. See L.A. Bradshaw, *Validity and Effect of Contract for Attorney's Compensation Made After Inception of Attorney-Client Relationship*, 13 A.L.R.3d 701, § 2(b) (1967).
  3. A "retaining lien" is defined by Black's Law Dictionary as "[a]n attorney's right to keep a client's papers until the client has paid for the attorney's services." BLACK'S LAW DICTIONARY (10th ed. 2014) (Westlaw).
  4. A "charging lien" is "[a]n attorney's lien on a claim that the attorney has helped the client perfect, as through a judgment or settlement." *Id.*
  5. See WILLIAM H. DANNE, JR. ET AL., 7 N.Y. JUR. 2D ATTORNEYS AT LAW § 278 (2015).
  6. *Kaplan v. Reuss*, 495 N.Y.S.2d 404, 406 (2d Dep't 1985) (citing *In re Cooper*, 291 N.Y. 255, 260 (1943)); see also *People v. Keeffe*, 50 N.Y.2d 149, 155–56 (1980); *In re Heinsheimer*, 214 N.Y. 361, 364 (1915).
  7. WILLIAM XENOPHON WEED, *WARREN'S WEED NEW YORK REAL PROPERTY* § 10.17 (5th ed. 2014) (citing *Kaplan*, 495 N.Y.S.2d at 406).
  8. N.Y. JUD. LAW § 475 (Consol. 2014); WEED, *supra* note 7; see also Wanda Ellen Wakefield, *Attorney's Charging Lien as Including Services Rendered or Disbursements Made in Other Than Instant Action or Proceeding*, 23 A.L.R.4th 336, § 2 (1983).
  9. There are different variations of individual retirement accounts. See TWILA SLESNICK & JOHN C. SUTTLE, *IRAs, 401(k)s & OTHER RETIREMENT PLANS: TAKING YOUR MONEY OUT 14–19* (11th ed. 2013). In its most basic form, an Individual Retirement Account (IRA) is an account set up through a bank or brokerage primarily with pre-taxed funds that will be used to help pay for expenses during retirement. See *id.* at 15.
  10. 966 N.Y.S.2d 812 (Sup. Ct. 2013).
  11. *Id.* at 814.
  12. See *id.* at 822 (reasoning that had the legislature wished to exclude attorney charging liens from the blanket exemption of IRAs in the statutes, "the legislature would have easily created that exception").

Narrowly interpreting section 475, the *J.K.C.* court created a sweeping precedent that pushes IRA funds outside the reach of an attorney-client fee contract.<sup>13</sup>

This case comment contends that the *J.K.C.* court erred in its decision in two ways. First, the court was wrong to interpret the meaning of the word “proceeds” in competing New York statutes to negate the rights of attorneys with charging liens in favor of IRA holders. Second, the court failed to recognize the long-standing precedent rooted in section 475 that protects an attorney’s work product by allowing an automatic lien to be placed on proceeds resulting from a client’s cause of action.

As a consequence, attorneys are potentially limited in recovering unpaid fees from matrimonial actions and may be less likely to take cases knowing that a court will not enforce a lien against a client’s retirement assets when a client is unable to pay for legal services. With fewer attorneys willing to represent clients in matrimonial actions that include retirement investment accounts, there is a significant risk that the division of marital property could become inequitable.

Attorney J.K.C. represented a woman, T.W.C., in a divorce proceeding against her ex-husband.<sup>14</sup> A judgment of divorce was entered and T.W.C. was awarded an equitable share of her ex-husband’s IRA.<sup>15</sup> Subsequently, J.K.C. sued T.W.C. to collect the unpaid legal fees from the divorce proceeding.<sup>16</sup> Specifically, J.K.C. requested that the court enforce a charging lien against T.W.C.’s IRA.<sup>17</sup>

Prior to the matrimonial action, J.K.C. had T.W.C. sign a retainer agreement<sup>18</sup> stipulating that, in the event fees were due, J.K.C. could seek a charging lien against the property “awarded to [T.W.C.] as a result of equitable distribution in the final order or judgment in the case.”<sup>19</sup> T.W.C. also signed a “statement of client’s rights and responsibilities” acknowledging the court’s ability to enforce a charging lien “entitl[ing] [J.K.C.] to payment for services already rendered at the end of the case out of the proceeds of the final order or judgment.”<sup>20</sup>

The divorce proceeding resulted in a determination that T.W.C. was entitled to a 38.6 percent marital interest in her ex-husband’s IRA.<sup>21</sup> J.K.C.’s legal services helped T.W.C. secure these funds through the use of a qualified domestic relations order

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13. *See id.* at 823–24.

14. *Id.* at 814.

15. *Id.* at 815.

16. *Id.*

17. *Id.*

18. A retainer agreement grants the lawyer “some protection against a client who becomes unwilling or unable to pay for services that the lawyer has already rendered.” LERMAN & SCHRAG, *supra* note 1, at 576–77.

19. *J.K.C.*, 966 N.Y.S.2d at 815.

20. *Id.*

21. *Id.* (“While the total amount transferred pursuant to the [qualified domestic relations order (QDRO)] is unknown, the wife, in May 2012, told her attorney that she had \$72,000 still held in her IRA account.”).

(QDRO) signed by the court.<sup>22</sup> The QDRO allowed T.W.C. to recover her equitable share from her ex-husband's IRA without triggering any adverse tax implications<sup>23</sup> and created a trustee-to-trustee funds transfer from the ex-husband's IRA into T.W.C.'s IRA.<sup>24</sup>

After the funds were transferred and the divorce was settled, T.W.C. owed her attorney a total of \$26,874.58 in legal fees.<sup>25</sup> It appeared to the *J.K.C.* court that the client had no assets other than her IRA funds with which to pay these fees.<sup>26</sup> The court acknowledged this dilemma and sympathized with J.K.C. regarding the unlikelihood that he would succeed in recovering his legal fees.<sup>27</sup>

In refusing to enforce the attorney's charging lien, the *J.K.C.* court relied on N.Y. Civil Practice Law and Rules (CPLR) section 5205, which seemed to conflict with the broad wording of the Judiciary Law.<sup>28</sup> Section 475 of the Judiciary Law provides the statutory basis for an attorney's lien, stating in part:

From the commencement of an action, . . . the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof *in whatever hands they may come* . . . . The court upon the petition of the client or attorney may determine and enforce the lien.<sup>29</sup>

To limit this section's apparent broad scope,<sup>30</sup> the court relied on CPLR section 5205,<sup>31</sup> which, as amended in 1994, seeks to exempt IRAs from creditor claims.

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22. *Id.* The Internal Revenue Code defines a "QDRO" as a "domestic relations order—which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan." I.R.C. § 414(p)(1)(A)(i) (2013).
  23. *See* I.R.C. § 408(d)(6) (2013) ("The transfer of an individual's interest in an individual retirement account or an individual retirement annuity to his spouse or former spouse under a divorce . . . is not to be considered a taxable transfer made by such individual notwithstanding any other provision of this subtitle, and such interest at the time of the transfer is to be treated as an individual retirement account of such spouse, and not of such individual. Thereafter such account or annuity for purposes of this subtitle is to be treated as maintained for the benefit of such spouse." (citations omitted)).
  24. *J.K.C.*, 966 N.Y.S.2d at 815; *see also* SLESNICK & SUTTLE, *supra* note 9, at 73 ("The custodian of the participant's IRA may transfer the IRA directly to the trustee of the spouse or former spouse's IRA.").
  25. *J.K.C.*, 966 N.Y.S.2d at 815.
  26. *Id.* at 816.
  27. *Id.* at 824 ("The funds transferred to the wife's IRA represent the last available corpus of funds from the marital dissolution to satisfy the attorney's fees.").
  28. *Id.* at 818–19.
  29. N.Y. JUD. LAW § 475 (Consol. 2013) (emphasis added).
  30. *Id.*
  31. N.Y. C.P.L.R. § 5205 (McKinney 2011).

The 1994 amendment created a presumption that IRAs are “spendthrift trusts,”<sup>32</sup> which exempts the trust’s assets from money judgments.<sup>33</sup> The *J.K.C.* court found that this amendment precluded enforcement of the attorney’s charging lien, which would otherwise be authorized under section 475.<sup>34</sup> Specifically, the court reasoned:

The Judiciary Law charging lien has existed, in large measure unchanged, since 1909. It was amended in 2012 to extend the lien to mediation and settlement negotiations. In contrast, [the Employment Retirement Income Security Act], which established IRAs as a matter of federal law, was enacted in 1974 and the amendments to the CPLR making IRAs exempt from creditor claims date from 1989 and 1994. Chronologically, the recent CPLR amendments involving claims against IRAs could have easily exempted attorney charging liens, but the legislature chose not to.<sup>35</sup>

The central question before the *J.K.C.* court was whether a charging lien is enforceable under the two competing legislative policies. New York had “two statutory commands, with competing legislative policy objectives” mandating different outcomes in *J.K.C.*, with neither statute referencing the other.<sup>36</sup> As the court explained, the “two New York statutes create a seeming conflict between the rights of IRA holders to be immune from claims of creditors, and the rights of attorneys to protect earned fees.”<sup>37</sup>

Imposing a charging lien that stems from an attorney’s services requires that “(1) the client . . . assert a claim, (2) which results in proceeds, (3) payable to or for the benefit of the client.”<sup>38</sup> For a charging lien to be valid subsequent to a divorce proceeding, there must be evidence that, upon an equitable distribution, the attorney created “a new fund . . . greater than the value of the interests already held by the client.”<sup>39</sup> The *J.K.C.* court provided several reasons why the attorney’s charging lien should not be enforced, which included: (1) the client not having cash proceeds pursuant to the QDRO transfer; (2) CPLR section 5205’s broad protective language exempting IRAs from creditor claims; (3) the potential tax penalties that federal law would impose on the client for

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32. *J.K.C.*, 966 N.Y.S.2d at 818.

33. N.Y. C.P.L.R. § 5205(c).

34. *J.K.C.*, 966 N.Y.S.2d at 824 n.13.

35. *Id.* The court dismissed several pre-1994 cases, which the attorney cited as examples of IRAs not being protected from monetary judgments. *Id.* at 818. Cases predating the 1994 amendments, the court reasoned, could not control the disposition of the attorney’s claim, which instead required reconciling CPLR section 5205 post-1994 with the broad language of Judiciary Law section 475. *Id.* at 818–19.

36. *Id.* at 814.

37. *Id.* at 817–18.

38. *Id.* at 819 (citing *Batista v. KLS-Kachroo Legal Servs., P.C.*, No. 104295, 2012 N.Y. Misc. LEXIS 3677, at \*8–9 (Sup. Ct. July 31, 2012); *City of Troy v. Capital Dist. Sports*, 759 N.Y.S.2d 795, 797 (3d Dep’t 2003)).

39. *Id.* at 820 (citing *Noble v. Noble*, No. 571-08, 2011 N.Y. Misc. LEXIS 1456 (Sup. Ct. Apr. 7, 2011); *Resnick v. Resnick*, 806 N.Y.S.2d 200 (1st Dep’t 2005)).

unqualified IRA withdrawals;<sup>40</sup> and (4) “the lack of express direction in Section 475 . . . to permit a charging lien against retirement funds.”<sup>41</sup>

First, the *J.K.C.* court erred in interpreting the legislative meaning of the word “proceeds” to exclude funds transferred pursuant to a QDRO in a divorce proceeding.<sup>42</sup> The court reasoned that “[u]nder equitable distribution in the Domestic Relations Law, the wife had a statutory ‘marital share’ of the husband’s IRA.”<sup>43</sup> Further, when the marital share was transferred using a QDRO, it did not constitute proceeds.<sup>44</sup> By viewing the QDRO transaction as a transfer of a marital share rather than proceeds or “a new fund,” the *J.K.C.* court avoided contending with the language of section 475.<sup>45</sup> The court’s conclusion that this type of transaction only involved transfer of a marital share is incorrect for two reasons. First, the court employed the term “marital share”<sup>46</sup> to imply that the wife’s marital interest was a fixed sum of money. Second, the court’s determination that the transfer did not qualify as “proceeds” restricts an attorney’s statutory right to assert a charging lien on a work product.<sup>47</sup>

Black’s Law Dictionary defines “proceeds” in two ways: “1. The value of land, goods, or investments when converted into money; the amount of money received from a sale <the proceeds are subject to attachment>. 2. Something received upon selling, exchanging, collecting, or otherwise disposing of collateral.”<sup>48</sup> As the IRA distribution process reveals, the funds received by the wife pursuant to the QDRO fall precisely within both definitions.<sup>49</sup>

When T.W.C. claimed her marital share from her ex-husband’s IRA, the calculated amount was rolled-over into her own IRA.<sup>50</sup> While the process appears simple, there are several intermediate steps and transactions that take place during

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40. Unlike a rollover, an unqualified withdrawal from a tax-deferred IRA is a reportable and taxable transaction. The court reasoned that granting the lien would be inequitable because it would subject the client to a ten percent early withdrawal tax penalty as well as income taxes on an assumed fifteen percent overall tax bracket. *See J.K.C.*, 966 N.Y.S.2d at 824 (“In short, the attorney, to collect his lien, would punish the wife by having her pay [twenty-five percent] in additional taxes on his fees. This court declines to authorize any such penalty, under the guise of granting her former attorney a charging lien against the IRA.”).

41. *Id.* at 825.

42. *See id.* at 821–22.

43. *Id.* at 822.

44. *Id.*

45. *See id.*

46. *Id.* “Marital share” refers to the portion of the marital property to which the wife was entitled upon divorce. In New York, “[m]arital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties.” N.Y. DOM. REL. LAW § 236 (McKinney 2010); *see also infra* notes 64–67 and accompanying text.

47. *See generally* N.Y. JUD. LAW § 475 (Consol. 2013).

48. BLACK’S LAW DICTIONARY (10th ed. 2014) (Westlaw).

49. *See id.*

50. *J.K.C.*, 966 N.Y.S.2d at 815 (“The QDRO permitted a roll-over of the wife’s marital share into an IRA in her name.”).

the distribution process that the court failed to consider. Because an IRA is an investment vehicle, the platform may provide investors with “hundreds of investment options” to hold inside their IRAs.<sup>51</sup> When a distribution request is processed, including a QDRO transfer, the individual investments held inside the IRA are converted into a cash value equal to the amount of the requested distribution.<sup>52</sup> This conversion from a holding or investment into distributable funds fits precisely within the legal definition of “proceeds.”<sup>53</sup> When the wife’s QDRO transfer was processed against her ex-husband’s IRA, the investment holdings in his account would have been converted to cash before being sent to the wife’s IRA.<sup>54</sup> Thus, the marital shares transferred to the wife’s IRA constituted proceeds.

Although the court relied on New York case law to support the argument that marital shares from IRAs are not proceeds,<sup>55</sup> a closer examination reveals that the

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51. Robert Preston, *The Dos and Don'ts of IRA Investing*, J. ACCOUNTANCY (Apr. 1, 2000), <http://www.journalofaccountancy.com/Issues/2000/Apr/TheDosAndDonTsOfIraInvesting.htm>.

52. See generally PRUDENTIAL, NOTIFICATION OF DIVORCE AND DIVISION INSTRUCTIONS FORM (Sept. 2013), available at [http://www.annuities.prudential.com/media/managed/documents/prupremier\\_investor/ORD\\_207226.pdf](http://www.annuities.prudential.com/media/managed/documents/prupremier_investor/ORD_207226.pdf). This form is necessary to facilitate the transfer, distribution, or ownership change of a Prudential annuity as a result of a divorce proceeding. The “Important Notices” section on page seven of the form discloses that withdrawals are taken on a pro rata basis from all of the sub-accounts (i.e., investments) or in accordance with the terms and conditions of the annuity contract. See *id.*

53. See BLACK’S LAW DICTIONARY (10th ed. 2014) (Westlaw).

54. While the court’s opinion in *J.K.C.* does not indicate the specific investment holdings in T.W.C.’s ex-husband’s IRA account, it is important to note that the cash value in the investment holdings are sent by the rollover—not the investment fund. See generally *How to Transfer an IRA from Another Institution*, WELLS FARGO, <https://www.wellsfargo.com/investing/retirement/rollover/transfer> (last visited Apr. 25, 2015) (“In some instances, your assets may need to be liquidated before they can be transferred.”); see also *Qualified Transfer Request Form*, METLIFE, <https://eforms.metlife.com/wcm8/PDFFiles/13389.pdf> (last visited Apr. 25, 2015) (“Authorization to transfer funds[:] This will serve as authorization to liquidate and transfer: [option to check full or a partial dollar amount of the account] Liquidate \$ \_\_\_\_\_ from specific funds of my account, as listed below, to the annuity I have established or am establishing through MetLife [requires the name of the fund, dollar amount or percentage to be indicated]”).

55. The court’s opinion states:

Based on extensive research, there is no other New York precedent on the question of whether a judgment of divorce, that awards a party their equitable share of tax-sheltered retirement funds qualifies as the “distribution of some proceeds” or “a new fund” under the charging lien statute. The majority of precedents on this question hold that, for want of a better term, some “available cash proceeds” must be created in order to provide a corpus to satisfy the lien.

*J.K.C.*, 966 N.Y.S.2d at 821 (citing *Moody v. Sorokina*, 856 N.Y.S.2d 755 (4th Dep’t 2008)). After finding that T.W.C.’s share of her husband’s IRA constituted a marital share, the court further supported its conclusion that such a marital share does not qualify as proceeds under the N.Y. Judiciary Law by relying on New York cases holding that a charging lien “does not attach to family support provisions in matrimonial settlements.” *Id.* at 822–23 (citing *Rosen v. Rosen*, 468 N.Y.S.2d 723 (2d Dep’t 1983) (awards of maintenance); *Haser v. Haser*, 707 N.Y.S.2d 47 (2d Dep’t 2000) (child support payments)). The court reasoned that because “[t]here is no suggestion in the Domestic Relations Law that an attorney has a charging lien on the marital interests in tax-sheltered retirement accounts[,] . . . [t]he absence of statutory guidance . . . is some evidence that the Legislature did not intend the charging lien to interfere with court-ordered transfers of retirement accounts.” *Id.* at 823.

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*J.K.C.* IRA rollover satisfies the “available cash proceeds” requirement.<sup>56</sup> In *Moody v. Sorokina*, an attorney requested that the court enforce a charging lien against a former client’s awarded equitable share in a motor vehicle, secured pursuant to a matrimonial action.<sup>57</sup> The New York State Appellate Division, Fourth Department, upheld the validity of the charging lien because the awarded value of the vehicle “represent[ed] proceeds created by [the attorney’s] efforts in the matrimonial action rather than the value of an interest ‘already held by [the client].’”<sup>58</sup> In other words, because the title of the vehicle was not in the client’s name, and the client’s interest in the value of the vehicle was only determined through the attorney’s services, a charging lien could be enforced against the awarded amount.<sup>59</sup>

Similar to the client in *Moody*, T.W.C. possessed a preexisting marital interest in her ex-husband’s IRA,<sup>60</sup> and the value of that interest was not determined until after she was awarded her equitable share.<sup>61</sup> IRAs are complex investment vehicles and their value often fluctuates based on market performance,<sup>62</sup> and thus the wife’s marital interest would most likely have fluctuated as well.<sup>63</sup>

In order to determine T.W.C.’s equitable marital interest in her husband’s IRA, a coverture fraction calculation was used<sup>64</sup> to determine “the portion of the pension which the law deems to have been acquired during the marriage.”<sup>65</sup> This calculation divides “the number of months prior to commencement of the action during which the parties were married” by the total period of time in the plan to determine the percentage of the total value that represents the equitable marital share.<sup>66</sup> The result is a percentage of marital interest that an ex-spouse is entitled to as marital property.<sup>67</sup> Considering

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56. *See id.*

57. 856 N.Y.S.2d 755, 757 (4th Dep’t 2008).

58. *Id.* (quoting *Zelman v. Zelman*, 833 N.Y.S.2d 375, 377 (Sup. Ct. 2007)).

59. *See id.*

60. *J.K.C.*, 966 N.Y.S.2d at 822.

61. The fact that the total amount transferred pursuant to the QDRO was unknown to the court at the time of decision is of little consequence to the analysis. *See id.* at 815.

62. Investors are often inundated with the required U.S. Securities and Exchange Commission disclaimer that “past performance does not necessarily predict future results” when discussing fund performance. *See Mutual Funds, Past Performance*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/answers/mperf.htm> (last visited Apr. 25, 2015).

63. *See* Rande Spiegelman, *Saving for Retirement: IRA vs. 401(k)*, CHARLES SCHWAB (Oct. 11, 2013), [http://www.schwab.com/public/schwab/resource\\_center/expert\\_insight/retirement\\_strategies/planning/saving\\_for\\_retirement\\_ira\\_vs\\_401k.html](http://www.schwab.com/public/schwab/resource_center/expert_insight/retirement_strategies/planning/saving_for_retirement_ira_vs_401k.html) (“Important Disclosures[:] . . . Investment return and principal value will fluctuate with changes in market conditions such that shares or annuity units may be worth more or less than original cost when redeemed or sold.”).

64. *J.K.C.*, 966 N.Y.S.2d at 815.

65. 2 BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* 149 (3d ed. 2005).

66. *Majauskas v. Majauskas*, 61 N.Y.2d 481, 494 (1984).

67. N.Y. DOM. REL. LAW § 236 (McKinney 2010) (“The term ‘marital property’ shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation

that the value of T.W.C.'s marital interest was not determined until *after* she was awarded her equitable share and, because the equitable distribution resulted from her attorney's work, the funds T.W.C received constitute proceeds under section 475 of the Judiciary Law.

The *J.K.C.* court emphasized that the weight of precedent in New York regarding charging liens requires "some 'available cash proceeds' [to] be created in order to provide a corpus to satisfy the lien."<sup>68</sup> According to the court, "the wife's marital share existed at the time of the commencement of the action, even though the IRA, in which her share was held, was titled solely in her husband's name. When the court, through the QDRO, rolled-over the IRA, it did not create 'proceeds' for the wife."<sup>69</sup>

Assuming that such a marital share does not qualify as proceeds if it remains in illiquid form, the marital share here was converted into proceeds when the wife's IRA share rolled-over into her IRA. The *J.K.C.* court tried to distinguish *Noble v. Noble*, which held that an attorney's charging lien could attach to proceeds from real estate investments if the client's one-half interest in the real property is converted into money, thereby creating a new fund.<sup>70</sup> In *Noble*, the wife had a marital share in the form of an interest in the marital residence.<sup>71</sup> However, it was only *after* the wife transferred and sold her marital interest for cash that the *Noble* court recognized the transaction as creating proceeds.<sup>72</sup>

The *J.K.C.* court distinguished *Noble* on the ground that the wife "never had access to 'available cash proceeds.'"<sup>73</sup> While the wife had a preexisting marital interest in her ex-husband's IRA account,<sup>74</sup> the *J.K.C.* court failed to recognize that the calculation process and subsequent conversion of the ex-husband's holdings to satisfy the matrimonial award did result in proceeds. Because those holdings likely fluctuated with the market, T.W.C.'s marital interest would only become a realized dollar amount after the QDRO was processed. Calculating the marital share in relation to the present IRA value using the coverture fraction is similar to calculating the marital interest in a vehicle or real property.<sup>75</sup> Additionally, an attorney's legal services were required to

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agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined.").

68. *J.K.C.*, 966 N.Y.S.2d at 821 (citing *Moody v. Sorokina*, 856 N.Y.S.2d 755 (4th Dep't 2008)). Black's Law Dictionary defines "corpus" as "[t]he property for which a trustee is responsible; the trust principal." BLACK'S LAW DICTIONARY (10th ed. 2014) (Westlaw).

69. *J.K.C.*, 966 N.Y.S.2d at 822.

70. *Noble v. Noble*, No. 571-08, 2011 N.Y. Misc. LEXIS 1456, at \*3-4 (Sup. Ct. 2011).

71. *Id.* at \*3.

72. *Id.* at \*4.

73. *J.K.C.*, 966 N.Y.S.2d at 822 (citing *Noble*, 2011 N.Y. Misc. LEXIS 1456, at \*3-4).

74. *Id.* at 815 ("After a trial of the divorce action, the referee directed that the husband's IRA account was marital property subject to equitable distribution.").

75. See *Moody v. Sorokina*, 856 N.Y.S.2d 755, 757 (4th Dep't 2008); see also *Noble*, 2011 N.Y. Misc. LEXIS 1456, at \*3 ("To the extent that the Judgment transferred Defendant's interest as a tenant by the entirety

convert the preexisting marital interest into an awarded dollar amount.<sup>76</sup> Because T.W.C.'s preexisting marital interest in her ex-husband's IRA was only calculated and realized after the QDRO was processed with the attorney's assistance, the matrimonial action actually created the proceeds that resulted in a new fund. Accordingly, as in *Noble*, the marital share was converted into proceeds on which a charging lien should have been deemed attachable.

Second, the *J.K.C.* court failed to interpret section 475 in accordance with a century of New York Court of Appeals holdings that allow for an attorney's work product to be protected by liens against the client's cause of action.<sup>77</sup> The *J.K.C.* court acknowledged the long-standing precedent and purpose of section 475, which, being remedial in nature, "should be construed liberally in aid of the object sought by the legislature, which was to furnish security to attorneys by giving them a lien upon the subject of the action."<sup>78</sup> Yet the *J.K.C.* court's holding frustrates the statute's remedial purpose.

Charging liens have fundamental and automatic powers, which the *J.K.C.* court failed to appreciate. Although they may only be enforceable against proceeds obtained from litigation that the attorney assisted with,<sup>79</sup> they have enormous automatic powers as a matter of law. As mentioned by the *J.K.C.* court, a charging lien under section 475 "automatically comes into existence, without notice or filing, upon commencement of the action, and is measured by the reasonable value of the attorney's services in the action, unless fixed by agreement."<sup>80</sup> Charging liens are an important device that protects an attorney's services because "the charging lien creates an 'equitable ownership interest' in the client's cause of action,"<sup>81</sup> and "an attorney's charging lien is a vested property right created by law and not a priority of payment."<sup>82</sup>

When *J.K.C.* represented T.W.C. in her matrimonial action, a charging lien should have automatically attached as a matter of law. All three prerequisites to create a charging lien were met: (1) T.W.C. asserted a claim to obtain her marital interest in her ex-husband's IRA; (2) the matrimonial action and QDRO converted an intangible marital interest in the ex-husband's IRA into a realized amount greater than the value

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in the marital residence to Plaintiff, less her separate property contribution and tenant by the entirety interest, such provision constituted the creation of a new fund." (footnote omitted)).

76. "In order for funds or property to qualify as proceeds attachable by the statutory lien, the corpus must be substantially created by the attorney's services." *WEED*, *supra* note 7, at 3 (citing *In re E.C. Ernst, Inc.*, 4 B.R. 317 (Bankr. S.D.N.Y. 1980)).

77. *See J.K.C.*, 966 N.Y.S.2d at 820–21.

78. *Id.* at 820 (quoting *Fischer-Hansen v. Brooklyn H.R. Co.*, 173 N.Y. 492, 499 (1903)).

79. *WEED*, *supra* note 7, at 2 (citing *Regan v. Marco M. Frisone, Inc.*, 388 N.Y.S.2d 798 (4th Dep't 1976)).

80. *J.K.C.*, 966 N.Y.S.2d at 819 (citing *N.K. v. M.K.*, 862 N.Y.S.2d 816 (Sup. Ct. 2008); *Resnick v. Resnick*, 806 N.Y.S.2d 200 (1st Dep't 2005); *Theroux v. Theroux*, 536 N.Y.S.2d 151 (2d Dep't 1989)).

81. *Id.* (quoting *Chadbourne & Parke, LLP v. AB Recur Finans*, 794 N.Y.S.2d 349, 350 (1st Dep't 2005)).

82. *Id.* (quoting *LMWT Realty Corp. v. Davis Agency Inc.*, 85 N.Y.2d 462, 467–68 (1995)).

of interest already held by the wife; and (3) the funds were transferred to T.W.C.'s IRA for her benefit.<sup>83</sup>

Additionally, the *J.K.C.* court erred by refusing to enforce the charging lien on the ground that “reading [section 475] to create a lien against the IRA roll-over would elevate the attorney’s claims for fees over all other creditors, secured or otherwise, and give him a right unknown to any other creditor under the CPLR.”<sup>84</sup> As the *J.K.C.* court recognized, however, “an attorney’s charging lien is a vested property right created by law and not a priority of payment.”<sup>85</sup> Had the court so treated the charging lien, CPLR section 5205(c)’s exemption of IRAs from money judgments would not have applied because the attorney would have been deemed to hold legal title to the transferred funds.<sup>86</sup> Therefore, because the charging lien establishes an “equitable ownership interest”<sup>87</sup> and a “vested property right,”<sup>88</sup> the attorney had a property right in the transferred IRA funds, rather than a priority of payment as a creditor.

The broad scope of section 475<sup>89</sup> further supports the argument that charging liens should be enforceable against IRA proceeds resulting from matrimonial actions. The *J.K.C.* court conceded that “[a] brief review of the elements of a charging lien under Section 475 of the Judiciary Law supports this broad reading of the statute’s reach and the Legislature’s use of the words ‘in whatever hands they may come.’”<sup>90</sup> This statutory language automatically attaches a charging lien against all proceeds at the commencement of an action,<sup>91</sup> providing attorneys with the right to be compensated for their services.<sup>92</sup>

Finally, the competing legislative policy interests between the rights of IRA holders to be immune from creditor claims and the rights of attorneys to protect earned fees should not have been resolved by relying on CPLR section 5205 and its recent amendments.<sup>93</sup> “A century of Court of Appeals holdings affirm th[e] wide dimension of the charging lien, even in its earlier statutory iteration[,]”<sup>94</sup> proving that the charging lien is not an antiquated concept. Section 475 was effectively amended

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83. *See id.* (citing *Batista v. KLS-Kachroo Legal Servs., P.C.*, No. 104295, 2012 N.Y. Misc. LEXIS 3677, at \*8–9 (Sup. Ct. July 31, 2012); *City of Troy v. Capital Dist. Sports*, 759 N.Y.S.2d 795, 797 (3d Dep’t 2003)).

84. *J.K.C.*, 966 N.Y.S.2d at 824.

85. *Id.* at 819 (citing *LMWT Realty Corp.*, 85 N.Y.2d at 467–68).

86. *See* N.Y. C.P.L.R. § 5205(c) (McKinney 2011).

87. *Chadbourne & Parke, LLP v. AB Recur Finans*, 794 N.Y.S.2d 349, 350 (1st Dep’t 2005).

88. *LMWT Realty Corp.*, 85 N.Y.2d at 467.

89. *J.K.C.*, 966 N.Y.S.2d at 819.

90. *Id.* at 819.

91. *Id.*

92. *See* N.Y. JUD. LAW § 475 (Consol. 2013).

93. *See supra* text accompanying notes 34–35.

94. *J.K.C.*, 966 N.Y.S.2d at 820.

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on January 1, 2013 and expands the reach of charging liens by permitting their use against settlement proceeds from alternative dispute resolutions and negotiations.<sup>95</sup>

In conclusion, the court erred in finding that the funds transferred from T.W.C.'s ex-husband's IRA did not constitute proceeds. The attorney's role in the matrimonial action resulted in a realized value from her ex-husband's IRA and, thus, the marital shares constituted proceeds. The court's reliance on the recent CPLR amendments, which immunize IRAs from creditor claims, was similarly misplaced. The long-standing precedent of the Judiciary Law and the understanding that charging liens are a vested property interest that protects an attorney's right to compensation after performing services for a client are engrained in the history of the legal profession.

In deciding *J.K.C.*, the court has potentially made matrimonial actions inequitable for both clients and attorneys. Attorneys may be less likely to take matrimonial cases knowing that the funds they obtain on behalf of their clients may not be used to pay their legal fees. Without the assistance of counsel, there is an increased risk that clients' interests may not be adequately protected and that the distribution of marital property could become inequitable. Similarly, by not permitting attorneys to use charging liens against certain funds, the court has stripped attorneys of the right to be compensated for their labor. The *J.K.C.* court should have recognized that, while clients have the right to contract with attorneys to obtain their equitable share of marital property, attorneys also have the right to receive compensation for their work.

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95. See DANNE ET AL., *supra* note 5, § 291. Before the January 2013 amendment, the Judiciary Law granted a charging lien:

[T]o an attorney who appears for a party, from the commencement of an action, special, or other proceeding in any court or before any state, municipal, or federal department, except a department of labor. An attorney's charging lien arises in actions or proceedings commenced in the municipal courts, the surrogate's court, and the federal courts. An attorney's charging lien has been held to arise out of the rendition of services in supplementary proceedings, condemnation proceedings, proceedings to ascertain the damages resulting from a change of grade in a street improvement, bankruptcy proceedings, proceedings before a federal contracting officer and contract advisory board, actions on foreign judgments, and wrongful death actions.

*Id.* (footnotes omitted).