IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-0599

JASON RETTERATH and
ANALIA RETTERATH,

Petitioners/Appellants,

v.

WELLS FARGO EQUIPMENT FINANCE, INC.,

Respondent/Appellee.

APPEAL FROM THE IOWA
DISTRICT COURT FOR CHICKASAW COUNTY
THE HONORABLE RICHARD D. STOCHL

APPELLANTS' FINAL REPLY BRIEF

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ARGUMENT

I. The District Court Erred in Dismissing Jason and Analia Retterath's Petition to Vacate the Charging Order.

Wells Fargo Equipment Finance, Inc. ("WFEFI") correctly notes at the outset of its arguments that the issues before this Court on this appeal "involve[] deciding choice of law and constitutional issues." (WFEFI Brief, p. 18). Unfortunately, WFEFI nonetheless begins its briefing with an irrelevant and inaccurate *ad hominem* attack on the Retteraths. To wit, WFEFI asserts, "the District Court found that the Retteraths filed a falsified pleading predicated on untrue sworn affidavits and testimony regarding the transfer of Jason Retterath's interest in HES membership shares to his wife, Analia Retterath, in effort to avoid collection on WFEFI's Florida judgments in Iowa." WFEFI cites the Court's February 9, 2018 Ruling on pages 2-3 for this proposition. (WFEFI Brief, p. 18). Importantly, a review of the district court's ruling reveals the district court made no such "finding."[1] As discussed below, the issues on appeal are: (1) what law to apply to the parties' dispute[2];

[1] WFEFI later references in argument what it characterizes as "the Retterath's fraudulent intent." Again, this attack is without basis. (Appx. p. 545).

[2] The district court's analysis begins by stating it is "unnecessary for it to decide which state's law applies" based on its (erroneous) assessment of Florida law. (Appx. p. 543). Implicitly recognizing this conclusion is in error, WFEFI beings its analysis by arguing in favor of application of Iowa

(2) was this law applied correctly; (3) whether jurisdiction had been properly obtained over the Retteraths; and (4) whether the manner of notice provided the Retteraths comports with due process.

A. The District Court Erred in Concluding Iowa Law Applied to the Parties' Dispute

As noted by WFEFI in its choice of law argument, the Retteraths rely on common law precedent governing the application of law to personal property in support of their position the district court erred in applying Iowa law to the parties' dispute. (WFEFI Brief, p. 19). To wit, Iowa has precedent regarding what law applies to personal property, and this case law requires application of the law of the domicile of the owner of the property. *See Lincoln's Estate v. Briggs*, 199 N.W.2d 337 (Iowa 1972); *Cook v. Todd's Estate*, 90 N.W.2d 23 (Iowa 1958); *Enfield v. Butler*, 221 Iowa 615, 264 N.W. 546 (1935); *In re Colburn's Estate*, 186 Iowa 590, 173 N.W. 35 (1919); *Judy v. Beckwith*, 137 Iowa 24, 114 N.W. 565 (1908); *City of Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56 (1874). Further, the General Assembly is presumed to have known of this law when it enacted the Iowa Code § 489.501 declaring the transferrable interest upon which WFEFI seeks to levy is personal property. *See State v. Jones*, 298 N.W.2d 296, 298 (Iowa 1980); *State v. Iowa*

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law. This Reply Brief will respond to the arguments made by WFEFI in the order raised by WFEFI.

Dist Court for Jones Cty., 902 N.W.2d 811, 818 (Iowa 2017). It was error for the district court to apply Iowa law in the face of the clear pronouncement by the General Assembly, within the context of Iowa precedent, that the law of the Retteraths' domicile, i.e. Florida, applies.

1. Common Law Rule has not been Abrogated by "National Trend" as Asserted by WFEFI.

Perhaps because it has no better argument, WFEFI declares, without citation to any authority, as follows: "the old common law rule regarding the location of intangible personal property is inapposite to charging orders…." (WFEFI Brief, p. 20). This argument ignores the fact Iowa courts are "slow to depart from stare decisis and only do so under the most cogent circumstances." *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013) (refusing to recognize the ICRA creates an "implicit" claim for punitive damages as no such claim had been recognized in prior case law, and no such claim was expressly provided for in the ICRA). Moreover, WFEFI predicates this argument on the misnomer that there is a "national trend" that somehow usurps Iowa's existing precedent. (WFEFI Brief, p. 22).

In reality, what WFEFI refers to as a "national trend" is nothing of the sort. For instance, WFEFI cites to only three total cases as support for this "trend". (WFEFI Brief, pp. 22). Moreover, courts have identified the true "trend" or "general rule" pertaining to what law to apply to intangible

property, which notably, is in line with the above cited Iowa precedent. For instance, the U.S. Court of Appeals for the Seventh Circuit noted as follows:

> The general rule is that intangible personal property is 'located' in its owner's domicile, although there are exceptions, such as where the documents of title are in a state that is not the owner's domicile. We have put "located" in scare quotes because intangibles, having no "body," have no spatial location. But creditors who want to file liens against intangible personal property have to file their liens in a place, or places, so the property has to be given a fictitious location. The owner's location is the sensible choice and the one made by the Uniform Commercial Code § 9–301(1).

GP Credit Co., LLC v. Orlando Residence, Ltd., 349 F.3d 976, 980 (7th Cir. 2003) (citations omitted) (emphasis added) (Analyzing what law to apply to intangible property in the form of a "chose in action" and holding as follows: "Looking beyond Wisconsin for cases bearing directly on our issue, we discover that most cases do hold in agreement with the Wisconsin supreme court that the location of the legal claim is the domicile of the claim's owner."). Similarly, the U.S. Bankruptcy Court for the Western District of New York indicated the "general line of cases" addressing what law to apply to intangible property is as follows:

> As stated by American Jurisprudence 2nd, '[t]he statement is sometimes made that intangible personal property, such as evidences of debt and other choses in action, follows the person, and, in conformity with the maxim 'mobilia sequuntur personam,' has its situs at the domicil of the owner.'

In re Iroquois Energy Mgmt., LLC, 284 B.R. 28, 32 (Bankr. W.D.N.Y. 2002) (emphasis added).

Further, the sister-state cases relied on by WFEFI provide no support for its proposition that there is a "national trend" wherein courts in cases involving charging orders are ignoring established precedent pertaining to intangible property. For instance, WFEFI primarily relies on *JPMorgan Chase Bank, N.A. v. McClure*, 393 P.3d 955 (Colo. 2017) as support for its proposition that longstanding Iowa precedent should be ignored in favor of a "national trend." However, the court in *McClure* goes out of its way to note there is no "national trend" on the issue, instead stating as follows: "Courts have divided…as to where this intangible property [a membership interest in an LLC] lies." *Id*. at 958-59. The *McClure* court further notes, "resolving this long-standing debate has yielded no easy answer." *Id*. at 959. Moreover, the *McClure* decision does not contain any analysis or discussion of Colorado precedent governing what law should be applied to intangible personal property. Put simply, the court in *McClure* was not governed by existing precedent and did not address the "old common law rule."

Similarly, the *Koh v. Inno-Pac. Holdings, Ltd*., 54 P.3d 1270, 1271 (Wash. Ct. App. 2002) decision cited by WFEFI provides no support for its proposition that the "old common law rule regarding the location of intangible

property is inapposite." To wit, the Washington Court of Appeals in *Koh* was tasked with a different issue than that before this Court. *See Koh*, 54 P.3d at 1271-72. *In Koh*, the challenge was to the Washington court's jurisdiction over a foreign company's transferrable interest in a Washington limited liability company, not with the question of what law applied to the rights attached to this transferrable interest. *Id*. at 1271–72. Further, the *Koh* court did not address, much less displace, the "old common law rule" pertaining to intangible personal property. Likewise, WFEFI's citation to *In re Blixseth*, 484 B.R. 360 (B.A.P. 9th. Cir. 2012), provides no support for its argument as this case concerned the issue of the appropriate venue for the proceeding, not which state law would apply to a membership interest in an LLC.

In contrast, the *Wells Fargo Bank, N.A. v. Barber*, 85 F.Supp.3d 1308 (M.D. Fla. 2015) decision cited in *McClure*, involves circumstances similar to those *sub judice*. To wit, in *Barber*, a judgment creditor was attempting to obtain a charging order against a debtor's membership interest in a limited liability company. *Barber*, 85 F.Supp.3d at 1312. The U.S. District Court was tasked with determining what law applied. *Id*. at 1316. The court provided the following analysis and conclusion of this choice of law issue:

> Here, the legal issue is best described as whether a membership interest in a limited liability company can be used to satisfy the judgment of a creditor of the member who owns that interest. As noted earlier, both the Florida LLC Act and the Nevis LLC

> Ordinance characterize membership interests in limited liability companies as personal property. **Therefore, the legal issue in this case sounds in property. In Florida, the law of the *situs* of the property controls.** As described more fully above, since [the debtor] resides in Florida, so does her membership interest in [the LLC]. Therefore, the *situs* of the property at issue in this case is Florida and Florida law applies.

Id. at 1316 (emphasis added) (citing *Quintana v. Ordono,* 195 So.2d 577, 579 (Fla.Dist.Ct.App.1967); *Beverly Beach Properties v. Nelson,* 68 So. 2d 604, 611 (Fla. 1953); *In re Hillsborough Holdings Corp.,* 207 B.R. 299, 302 (Bankr.M.D.Fla.1997); *Wells Fargo Bank, N.A. v. Scalercio,* No. 11–60498–CIV., 2011 WL 6840583, at *2 (S.D.Fla. July 1, 2011)). As emphasized, the Federal court recognized the legislature defined the issue as a property issue, recognized the common law of Florida determined what law applies to intangible personal property, and applied this law to a membership interests in an LLC. Otherwise stated, in deciding what law should apply to a charging order over a membership interest in an LLC, the *Barber* court noted and applied the very same "old common law rule" that WFEFI claims is "inapposite."

The logic applied in *Barber* is equally applicable to the current dispute. Specifically, the applicable ordinance provides the Retteraths' membership interest in HES is personal property. *See* Iowa Code § 489.501. Thus, the choice of law legal issue "sounds in property." Under existing Iowa law, the

law of the situs of the property controls, and the situs is where the owner resides. *See Lincoln's Estate,* 199 N.W.2d 337*; Cook*, 90 N.W.2d 23; *Enfield*, 264 N.W. 546*; In re Colburn's Estate,* 173 N.W. 35*; Judy*, 114 N.W. 565; *Illinois Cent. R. Co.*, 39 Iowa 56. The Retteraths reside in Florida, Florida law applies. In sum, this Court, like the court in *Barber*, and unlike the Colorado court in *McClure*, is not free cast aside the above logic or pick between competing rationales for determining what law should apply. The General Assembly's decision to define the Retteraths' transferrable interest as personal property, in the light of the common law of this state, decided the issue.

WFEFI further argues that the Retterath's arguments confuse ownership of stock certificates in a corporation with owning membership interests in a limited liability company. (WFEFI Brief, pp. 29-21). WFEFI fails to explain how this distinction makes a difference. To wit, the applicable analogy is to the fact both corporate shares and the transferrable interest made the subject of WFEFI's Charging Order are intangible personal property. The Iowa Supreme Court concluded in *Judy v. Beckwith*, as follows:

> While corporate shares possess some peculiar qualities and characteristics, we think that none have ever been discovered which take them out of the class ordinarily termed "personal property." True, it is a property which is somewhat intangible in character, but scarcely more so than are those other items of property embraced in the familiar general term "moneys and

> credits.". . . Whether the owner resides where the corporation is organized or takes them to another state, all of the essential incidents of personal property attach to them in his hands. If he is wrongfully deprived of them, he may maintain an action for their conversion, as he would for the conversion of a horse or a promissory note. If he dies intestate, their distribution to his heirs **is governed by the law of his domicile, and not by the law of the corporate domicile**.

114 N.W. at 567 (citations omitted) (emphasis added); *see also In re Calhoun*, 312 B.R. 380 (Bankr. N.D. Iowa 2004) ("Under Iowa law, a debtor's membership interest in an LLC is personal property. Such interest becomes property of the estate upon filing of the petition.")

2. Even if General Choice of Law Analysis were Available, the District Court Erred in Relying on the Choice of Law Clause in the HES Operating Agreement and Iowa Code 489.106.

WFEFI asserts the Retteraths' argument that the district court erred in considering the HES Operating Agreement "merely distract from the scope of the district court's analysis." (WFEFI p. 29). This statement assumes a scope of analysis that simply did not exist. To wit, the analysis provided by the district court consisted of reciting the factors in Restatement (Second) of Conflict of Laws § 222 (1971), a provision that has not been adopted in Iowa[3], and then immediately referencing the HES Operating choice of law clause and the choice of law contained in Iowa Code § 489.106 (Appx. 544). The only

[3] WFEFI does not argue the district court applied the correct section of the Restatement (Second) Conflicts of Laws. (WFEFI Brief, pp. 27-28).

other "factor" referenced by the district court is the fact the Retteraths file an Iowa Income Tax return. (Id.).

Notably, WFEFI does not assert the district court was correct in relying on these purported "choice of law" provisions. (WFEFI Brief, pp. 28-30). WFEFI instead argues other sections of the HES Operating Agreement should be considered as part of a general conflict of law analysis. WFEFI relies on *DuTrac Community Credit Union v. Hefel*, 893 N.W.2d 282 (Iowa 2017) for this proposition. Importantly, *Hefel* contains absolutely no choice of law issues or analysis. Further, the Iowa Supreme Court referenced and reviewed the Operating Agreement in *Hefel* because the debtor and LLC argued the terms of the Operating Agreement prevented the district court from entering a charging order. *Id*. at 292-93. Put simply, this case lends no support to the proposition advanced by WFEFI that the terms of an agreement to which WFEFI is not a part, should decide the choice of law concerning a dispute with WFEFI.

B. The District Court Erred in Concluding the Unity of Time was not Satisfied under Florida Law.

WFEFI advances the same two bankruptcy cases it advanced to the district court in support of its argument that the unity of time was not satisfied by the Retteraths. *See In re Caliri*, 347 B.R. 788, 798 (Bankr. M.D. Fla. 2006); *In re Aranda*, No. 08-26059-BKC-PGH, 2011 WL 87237 (Bandr. S.D.

Fla. Jan. 10, 2011). As established in the Retteraths opening appeal brief[4], these cases are inapposite to the Retteraths. Notably, even after these cases have been impugned or otherwise distinguished by the Retteraths both in the summary judgment proceedings and on appeal, WFEFI has failed to provide any additional cases supporting its position. This is because none exist. As established by the Retteraths in their initial appellate brief, the law of Florida, and for that matter nationally, is that the 2010 conveyance from Jason Retterath to Jason and Analia Retterath satisfied the unity of time. *Johnson v. Landefeld*, 189 So. 666 (Fla. 1939); *In re Klatal*, 110 N.E. 181 (N.Y. 1915); *Ebrite v. Brookhyser*, 244 S.W.2d 625 (Ark 1951).

Seemingly conceding this conclusion, WFEFI next argues that Florida recognizes that property is "subject to the laws of the state in which it is situated." (WFEFI Brief, p. 35). On this, the Retteraths can agree. However, what WFEFI fails to consider is where, under Florida law, personal property, such as the Retterath's "transferrable interest" is deemed to be "situated." Importantly, Florida's courts have steadfastly "h[e]ld to the rule that intangible personal property in contemplation of law, accompanies the person of the owner." *Beverly Beach Properties v. Nelson*, 68 So. 2d 604, 611 (Fla. 1953); *In re Siegel's Estate*, 350 So.2d 89, 90 (Fla. Dist. Ct. App. 1977) ("the

[4] These arguments will not be restated in this Reply brief.

rule, broadly speaking, with respect to intangible personal property is that the situs follows the owner or is at his domicile."); *Wells Fargo Bank, N.A. v. Barber*, 85 F. Supp. 3d 1308, 1315 (M.D. Fla. 2015) (applying Florida law and concluding because [the LLC member] resides in Florida, [the member's] membership interest in [the LLC] is located with her in Florida.") Therefore, under Florida law, the Retterath's personal property is situated in Florida, and their ownership thereof is governed by the laws of Florida.

C. The District Court Erred in Concluding the Foreign Judgments were Properly Registered and the Charging Order Properly Issued.

WFEFI does not argue the notice provisions of Iowa Code chapter 626A, which governs enforcement of foreign judgments, were followed in this case. (WFEFI Brief, pp 37-40). WFEFI instead takes the untenable positions that (1) the Retteraths were not entitled to due process notice because of the relief they sought; and (2) the Retteraths were not harmed by the failure to follow the strict procedures for extraordinary service. (Id.).

Specifically, WFEFI first asserts "whether Jason Retterath received notice of filing in Iowa of the Florida judgements is immaterial to the present proceeding" because the relief being sought by the Retteraths is the vacating of the order enforcing those judgments, not the vacating of the judgments themselves. (WFEFI Brief, p. 37). Thus, WFEFI's position is that the

statutorily required notice of filing a foreign judgment need not be provided to those judgment debtors who do not intend to challenge the foreign judgments, but rather intend to challenge the manner of execution or enforcement of said judgments. WFEFI's position ignores the requirements of procedural due process.

To wit, due process "has two fundamental requirements: notice and opportunity to be heard. *In re Estate of Adams*, 599 N.W.2d 707, 710 (Iowa 1999) (citing *In re K.L.C.*, 372 N.W.2d 223, 226 (Iowa 1985)). Importantly, "[a] person is entitled to procedural due process when state action threatens to deprive the person of a protected liberty or property interest." *New Midwest Rentals, LLC v. Iowa Dep't of Commerce, Alcoholic Beverages Div.*, 910 N.W.2d 643, 652 (Iowa Ct. App. 2018) (emphasis added). Stated otherwise, due process is violated where "the state did not afford…adequate procedural rights prior to depriving [a] property interest." *Stevenson v. Blytheville Sch. Dist. #£5*, 800 F.3d 955, 966 (8th Cir. 2015).

In the case *sub judice*, the proceeding in question is the Chickasaw County Case No. CVCV003569. This proceeding was initiated by WFEFI by the filing of the foreign judgments in question. Through the proceeding WFEFI sought, and obtained, a Charging Order depriving the Retteraths of their property. The Retteraths were entitled to statutory notice of the

proceeding, which they indisputably did not get; Iowa Code § 626A.3[5] was not followed.

Put simply, whether the Retteraths sought to challenge the foreign judgments, or the mechanism used to enforce the judgments, is irrelevant to whether they were entitled to notice of the proceeding. The proceeding resulted in a deprivation of their property; the Retteraths had a right to notice of the proceeding so they could be heard. The Retteraths filed affidavits indicating they were unaware of the proceeding until after the charging order taking their property was entered by the Court. This is consistent with the fact they did not appear or answer prior the entering of the charging order.

Further, WFEFI's jab that the Retteraths' argue "form over substance" demonstrates a complete misunderstanding of the effect of the denial of notice to the Retteraths. (WFEFI Brief, p. 39). To wit, as a result of their lack of notice, the Retteraths have been forced to vacate or void an order that has taken their property, rather than afforded the ability to contest the taking of their property in the first place. As a consequence, they have been without,

[5] As established in prior briefing, even had the requirements of Iowa Code section 626A.3 been followed, the Retteraths did not receive notice that comports with due process, as the notice provision of this statute requires only service through regular mail. *See War Eagle Vill. Apartments v. Plummer*, 775 N.W.2d 714, 719 (Iowa 2009)

and WFEFI has wrongfully been in possession of, their property, in this case, millions of dollars. As noted by our U.S. Supreme Court:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.'

Fuentes v. Shevin, 407 U.S. 67, 81–82, 92 S. Ct. 1983, 1994–95, 32 L. Ed. 2d 556 (1972) (emphasis added).

Additionally, WFEFI's assertion that the failure to provide statutory notice to the Retteraths resulted in "no harm" (WFEFI Brief, p. 38-39) because WFEFI purportedly mailed the Application for Charging Order, runs afoul of Iowa's precedent regarding extraordinary methods of service, and further ignores the requirements of due process. To wit, as established in the Retteraths' initial brief, under Iowa law, "where the method of service provided is extraordinary in character and is allowed only because specially authorized and is valid as a means of obtaining jurisdiction, the statutory procedure must be *strictly* followed." *Emery Transp. Co. v. Baker*, 254 Iowa 744, 750, 119 N.W.2d 272, 276 (1963) (emphasis in original).

Moreover, due process requires that "[n]otice must be reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Estate of Adams*, 599 N.W.2d at 710. The Iowa Supreme Court has concluded service by regular mail is insufficient. *War Eagle*, 775 N.W.2d at 721. Consequently, WFEFI's argument that "the District Court was entitled to rely upon proofs of service contained in the court filings, including the Application for the Charging Order" to establish sufficient notice is simply wrong. It was clear error for the district court to conclude the purported mailing of the Application for a Charging Order provided sufficient notice of the proceeding for enforcement of a foreign judgment. (Addendum to Ruling, p. 1). This mailing does not comport with the governing statute, or due process. *See* Iowa Code 626A.3; *War Eagle*, 775 N.W.2d at 721.

D. The District Court Erred in Concluding there was no Due Process Ground for Vacating the Charging Order

WFEFI begins its due process argument by again asserting the Retteraths are not entitled to notice of Chickasaw County Case No. CVCV003569 because they are not challenging the foreign judgments themselves and because they received "actual notice" of the charging order proceeding. (WFEFI Brief, p. 42). As established above, Iowa's Due Process Clause requires notice and an opportunity to be heard be provided whenever

state action is employed to take a citizen's property. *New Midwest Rentals, LLC*, 910 N.W.2d 643, 652 (Iowa Ct. App. 2018). Moreover, the Retteraths did not receive "actual notice" of the Charging Order Application, rather they were purportedly mailed notice via regular mail, which again, is insufficient to satisfy the requirements of due process. *See War Eagle*, 775 N.W.2d at 721.

WFEFI next argues this Court should conclude the notice provisions of Iowa Code section 626A.3, allowing for service by regular mail, are constitutional because a Colorado court concluded a similar Colorado statute was Constitutional. (WFEFI Brief, p. 43). First, this argument ignores the clear pronouncement of our Iowa Supreme Court in *War Eagle* that the manner of notice provided for in Iowa Code section 626A.3, i.e., service by mail, violated Iowa's Due Process clause because "dropping a letter in the mail is not notice….It is mere lip service to meaningful notice." *Id.* Second, in reaching its conclusion, the Colorado court adopted a rationale that has been rejected by numerous courts.

To wit, the Colorado court's rationale in *Gedeon v. Gedeon*, 630 P.2d 579 (Colorado 1981) is that judgment debtors are not entitled to notice of proceedings post-judgment because the received notice of the pre-judgment proceeding. *Id*. at 583. Based on this rational, WFEFI asserts the Retteraths

are not entitled to notice of Chickasaw County Case No. CVCV003569 because it was a proceeding to enforcement a prior foreign judgment, and the Retteraths received notice of foreign proceeding from which the judgment issued. (WFEFI Brief, pp. 43-45). This argument ignores decisions of other states that reject application of this rationale under circumstances analogous to those *sub judice*.

Specifically, as noted in *Gedeon*, "it is not entirely clear what precisely due process[6] requires by way of procedures for post-judgment filings such as this." *Gedeon*, 630 P.2d 583. As noted by the United States District Court for Hawaii the starting point for the rationale applied in *Gedeon* and espoused by WFEFI is the U.S. Supreme Court's decision in *Endicott Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285, 45 S.Ct. 61, 29 L.Ed. 288 (1924), wherein the Court reasoned, "notice of the original proceeding provided sufficient 'notice of what will follow.'" *Betts*, 431 F.Supp. at 1373 (discussing *Endicott*); *see also Betts v. Tom*, 431 F.Supp. 1369, 1373 (D. Hawaii 1977) (noting *Endicott* is the starting point for analyzing the issue of due process requirements for notice of post-judgment proceedings).

[6] As established above, there is not lack of clarity regarding what Iowa's Due Process clause requires by way of notice, and that service by regular mail is insufficient.

However, as noted in *Betts*, *Endicott* must be examined in the light of *Griffin v. Griffin*, wherein the Court held a judgment debtor was entitled "future notice of the time and place of such further proceedings, inasmuch as they undertook substantially to affect his rights in ways in which the [original judgment] did not." *See Griffin v. Griffin*, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635 (1946). As concluded in *Betts*, "The Court [in *Griffin*] seemed to have rejected the rationale which led to its holding in *Endicott*." *See Betts*, 431 F.Supp. at 1373. Importantly, other courts have questioned *Endicott's* continued vitality in light of more recent due process decisions. *See e.g. Finberg v. Sullivan*, 634 F.2d 50, 57 (3d Cir. 1980), *adhered to*, 658 F.2d 93 (3d Cir. 1980) (stating post *Endicott* decision adopted "a different line of reasoning" and "established that a debtor's interest in the continued possession and use of property must receive strong protection against the creditor's use of process…."); *Dionne v. Bouley*, 757 F.2d 1344, 1351 (1st Cir.1985); *Brown v. Liberty Loan Corp.*, 539 F.2d 1355, 1363–69 (5th Cir.1976); *Kirby v. Sprouls*, 722 F. Supp. 516, 520 (C.D. Ill. 1989); *Harris v. Bailey*, 574 F.Supp. 966, 969 (W.D.Va.1983); *Deary v. Guardian Loan Co., Inc.*, 534 F.Supp. 1178, 1185–86 (S.D.N.Y.1982). Significantly, "[a] common rationale given by courts for not following *Endicott* is that *Endicott* did not consider the possibility that garnishment might deprive the judgment

debtor of property exempt from attachment under State law if the debtor does not receive notice and an opportunity to be heard." *Kirby v. Sprouls*, 722 F. Supp. 516, 520 (C.D. Ill. 1989) (emphasis added).

Consequently, as noted by the U.S. Court of Appeals for the Second Circuit,

> The majority of courts that have recently considered the due process aspects of post-judgment remedies have adopted a balancing analysis derived from *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). As Justice Powell explained:
>
> > [R]esolution of ... whether ... procedures provided ... are constitutionally sufficient requires analysis of the governmental and private interests that are affected. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

McCahey v. L.P. Inv'rs, 774 F.2d 543, 548–49 (2d Cir. 1985)

Of these factors, the second factor, the risk of erroneous deprivation through the procedures used is particularly important in the case at bar. Specifically, as noted by the Iowa Supreme Court in *War Eagle*, "a statutory

scheme that deems service complete upon mailing of the notice is by its very terms not reasonably calculated to give adequate notice to [the opposing party] that a hearing [depriving them of a property interest] has been scheduled." *War Eagle*, 775 N.W.2d at 722. The right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656–57, 94 L.Ed. 865, 873 (1950). As noted in *Betts*, under a statutory scheme that has no meaningful provision for pre-seizure notice or a hearing "the judgment debtor faces a serious risk of being deprived, albeit 'temporarily,' of his interest in and ability to use [the property at issue]." *Betts*, 431 F.Supp. at 1377.

Ultimately, the court in *Betts* after analyzing all of the above factors concluded the statutory scheme for post-judgment enforcement of judgments violated due process. *Id*. at 1378. Numerous other courts have concluded due process principals require notice of post-judgment proceedings. *See e.g.*, *Finberg v. Sullivan*, 634 F.2d at 57 (holding Pennsylvania post-judgment garnishment procedures did not provide adequate notice to judgment debtor and violated due process);. *Kirby v. Sprouls*, 722 F. Supp. 516, 520 (C.D. Ill. 1989) (concluding Illinois garnishment statute governing wage deductions violated due process in part because it failed to provide notice of the

garnishment proceeding); *Luskey v. Steffron, Inc*., 336 A.2d 298 (Penn 1975) (concluding post judgment execution procedures violated due process because they did not provide personal notice to the judgment debtor).

CONCLUSION

The district court erred in concluding Iowa law applies to WFEFI's attempt to obtain a charging order against Jason and Analia's personal property situated with them in Florida. Further, the district court erred in concluding, in the alternative, that the unity of time necessary for tenants by the entirety ownership under Florida law was not satisfied by the December 2010 transfer of HES Units to Jason and Analia Retterath. Consequently, the district court erred in allowing WFEFI to obtain a charging order under Iowa Code 489.503 against property owned by Jason and Analia Retterath as tenants by the entirety to enforce a judgment solely against Jason Retterath. The charging order should be vacated on this ground. Moreover, even if WFEFI could obtain a charging order against Jason and Analia's HES Units, the procedures surrounding the obtaining of WFEFI's charging order failed to properly obtain jurisdiction over the Retteraths, and failed to comport with due process. Accordingly, the charging order is void.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies he electronically filed the foregoing Appellants' Final Reply Brief on September 11, 2018 via EDMS.

The undersigned hereby certifies on September 11, 2018, the foregoing Appellants' Final Reply Brief was served by e-mail via EDMS on all parties of record.

/s/ *Jason W. Miller* September 11, 2018
Signature Date

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